International Family Law, Policy and Practice

Some Post Brexit Themes in International Family Law

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Contents

General Editor's Message

This issue of the journal for 2021 is guest edited by a team of practitioners, led by Katherine Res Pritchard, Senior Director and Head of the Children department, the international Family Law firm, Vardags, and as General Editor of *International Family Law, Policy and Practice* since its foundation in 2013, I have therefore handed over to her the task of introducing her issue herself, as its Editor for this issue, which focuses on some legal and practical opportunities and impacts which between them Brexit and Covid have created for International Family Law.

Sadly, the Centre has been unable to plan to hold our usual triennial conference on our normal three yearly cycle in July 2022, at the time when our regular delegates working in the wide field of Family Law have for over a decade found it convenient to gather in London from both the Northern and Southern Hemispheres, so as to share information, views and opinions, and also experience gained in both civil and commercial jurisdictions worldwide. We do hope to be able to consider a commitment to restartng face to face conferences again within the next couple of years, which other such international organisations also consider offers similar potential for our preferred in person conference model to return into our calendars. However as nothing has been able to be certain in present circumstances, including prediction of a more certain future, but in the absence of our usual conference we can at least therefore still offer the alternative of an issue of the journal featuring a completely new collection of topics and authors which we hope our readers will enjoy as much as it seems our guest team has enjoyed putting the current issue together.

Together this issue's commentaries highlight some topics of key international interest which Katherine will introduce to you.

Frances Burton

Dr Frances Burton
General Editor, *International Family Law, Policy and Practice*

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Guest Editor's Message

It has been a huge honour and privilege to be asked to guest edit the International Family Law, Policy and Practice journal 2021. I have long been a follower of the work of the International Centre for Family Law, Policy and Practice, and when Ayesha Vardag told me that one of the Co-Directors had been in touch with her and asked whether we would be interested in guest editing an issue this summer, I was immensely excited and very keen to see how I could become more involved with the organisation. This opportunity was also something I was keen to participate in for more personal reasons, having trained and worked for some years with the late, great, Anne-Marie Hutchinson QC OBE, a former member of the editorial board of the journal, whose light and legacy those of us who were fortunate to learn from her will carry with us always.

In this issue, my team at Vardags and I, kindly assisted by our colleagues in the UK including at the English Bar, and from other jurisdictions, take a look at various topics that we have found have been coming up again and again in the world of Children Law at the moment. The articles we have produced are very much weighted towards issues regularly faced by practitioners in this field, and I hope will be of interest and assistance to Child Law practitioners everywhere.

It is fair to say that the global pandemic has shaped and directed the way in which we have been practising for the last year or so, and that, coupled with Brexit, has thrown out many new and interesting challenges for us all, particularly in relation the international movement of children across borders. There have also been significant developments in our domestic law, particularly in respect of how domestic abuse cases are to be approached.

The UK's departure from the European Union, and the consequent departure from Brussels II bis, has naturally had implications for all those working in the field of child abduction. One of our articles examines the use of the 1996 Hague Convention which will of course now become all the more prevalent in such work as we move further away from the legacy of EU law.

We at Vardags have also noticed both a rise in applications for international relocation, as well as of child abduction, since the pandemic , and all the changes it has brought with it to our daily lives, has made parents rethink their future plans and living arrangements, whether in England or in other jurisdictions. On that topic, we include two articles written in collaboration with foreign lawyers, with whom we have recently worked, one which focuses on child abduction between England and Scotland, and another which focuses on a comparison between how the Swiss and English Courts approach matters relating to children.

Within the theme of international relocation, and the implications of the same, another of our articles takes as its particular focus, the impact of technological advances on parent/child relationships. This is of course an issue that we have all faced throughout the pandemic, as we have all become ever more reliant on technology so as to go about our work and daily lives.

Another of our articles provides a very useful update and comparison of surrogacy between England and the US, and the challenges brought by the pandemic to practitioners in that field. With intended parents in England and Wales looking abroad more and more to jurisdictions where commercial surrogacy is legal, restrictions put in place by national governments have naturally had an impact on assisted fertility processes in both jurisdictions.

Looking now towards our domestic law, a further article focuses on the all-important topic of Parental Responsibility, and how the Courts of England and Wales have interpreted the rights of those with parental responsibility to make decisions about their children. Our final article is also focused on domestic law, and provides an evaluation of the decision in the recent case of *Re HN*, assessing both where that decision takes us as practitioners, and the historical evolution of the court's approach to cases of domestic abuse.

Huge thanks go to Emma Williams and Sacha Lee of Vardags, for all of their invaluable assistance in pulling this issue together.

Katherine Res Pritchard

Senior Director, Vardags
Guest Editor, *International Family Law, Policy and Practice*, Summer 2021

Editorial Board of *International Family Law, Policy and Practice*

The 1996 Hague Convention: what is it useful for? A guide for practitioners in international Child Law cases in the post-Brexit era

Sacha Lee and Edward Bennett QC*

The UK left the European Union on 31 January 2020, incorporating a post-Brexit transition period from 31 January 2020 to 31 December 2020, following ratification by the UK and the EU of the withdrawal agreement[1] . The effects of Brexit on Family Law have been numerous and wide-reaching, particularly in light of the fact that Brussels II Revised[2] has been revoked (although it is still operational for the remaining EU member states), meaning that issues of jurisdiction, forum and recognition/enforcement in divorce and financial proceedings commenced from 1 January 2021 must now be covered by other legislation. In the private Child Law sphere however, although Brussels II Revised has been revoked and practitioners now need to rely on other instruments, arguably this is less a 'loss' of Brussels II Revised, but more a return to the framework of the Family Law Act 1986, the 1980 Hague Convention and the 1996 Hague Convention which existed before it.

This article will focus on Brussels II Revised as an EU instrument applicable to the Member States of the EU and therefore narrower in scope, contrasting it with the wider-reaching multinational Hague Convention treaties and our own domestic legislation. It will consider the position for the UK prior to the end of the transition period on 31 December 2020 with that of today. We shall propose that instead of previous instruments being drawn upon due to the lack of socio-political and economic legislative framework provided by Brussels II Revised, these pre-existing multinational treaties and the Family Law Act 1986 remain fit for purpose. We suggest that there are many areas of similarity between these two different regimes: the EU legislative framework and these multinational treaties and our domestic legislation, which we shall comment upon. However, we shall also discuss areas where gaps arise and the resulting limitations.

Pre-31 December 2020

Brussels II Revised

Article 59 of Brussels II Revised states that it supersedes conventions related to the matters it covers which existed between Member States and between Member States and non-Member States. Articles 60 and 61 clearly state that Brussels II Revised takes precedence over both the 1980 Hague Convention and the 1996 Hague Convention.

Furthermore, while Article 52(1) of the 1996 Hague Convention provides that: 'This Convention does not affect any international instrument to which Contracting States are Parties and which contains provisions on matters governed by the Convention, unless a contrary declaration is made by the States Parties to such instrument' which would leave the jurisdiction regime of Brussels II Revised untouched as between Member States, Article 61(a) of Brussels II Revised specifies that, as between the two instruments, Brussels II Revised shall apply: 'where the child concerned has his or her habitual residence on the territory of a Member State'. In such circumstances, which will be most cases, it is the jurisdiction rules of Brussels II Revised which have to be applied.[3]

This is because Brussels II Revised aims to be a single and all-embracing directly-effective EU instrument[4], designed to create smooth legal cohesion between its Member States without needing to utilise or be subject to provisions from other instruments where possible.

The case of *Re B* demonstrated the precedence of Brussels II Revised over the Hague Conventions in particular, as Mostyn J confirmed that the Article 13(b) defence under the 1980 Hague Convention would become unavailable if, under Article 11(4) of Brussels II Revised, he was satisfied that there would be sufficient safeguards in place on the return of the child. [5]

Brussels II Revised primarily deals with jurisdiction,

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[1] European Union (Withdrawal Agreement) Act 2020, which received Royal Assent on 23 January 2020.

[2] Brussels II Revised (2201/2003/EC), found at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32003R2201.

[3] Ministry of Justice Practice Guide *The 1996 Hague Convention Practice Guide*, p7.

[4] Everall, M., Lowe, N., Nicholls, M. (2016) *International Movement of Children: Law Practice and Procedure* (2nd edition), chapter 3.9.

[5] *B v B (Abduction: BIIR)* [2014] EWHC 1804 (Fam), at [23]

recognition and enforcement in respect of all civil matters relating to the dissolution of marriage, legal separation and annulment of marriage. It does not apply to the grounds for divorce or matrimonial property. In respect of private Child Law, Recital 5 states that it also applies to all matters relating to parental responsibility. It created a common judicial area which required that any orders dealing with parental responsibility (defined widely to include orders relating to 'custody or access') issued by the court of one Member State shall be recognised and enforced in other Member States without needing to be registered.

In international child abduction proceedings, it gives a continuing jurisdiction for the state from which the child was taken to deal with the matter and to make orders, for example for a mandatory return of the child. It also contains a mechanism for the courts of one Member State to request a transfer of jurisdiction to the courts of another Member State.

This was supported in domestic legislation at Section 2(1) of the Family Law Act 1986 which stated:

> 1. 'A court in England and Wales shall not make a section 1(1)(a) order with respect to a child unless—
>
> (a) it has jurisdiction under the Council Regulation or the Hague Convention or
>
> (b) neither the Council Regulation nor the Hague Convention applies but
>
> (i) the question of making the order arises in or in connection with matrimonial or civil partnership proceedings and the condition in section 2A of this Act is satisfied, or
>
> (ii) the condition in section 3 of this Act is satisfied'.

Section 1(1)(a) orders here refer to section 8 orders made by a court in England and Wales under the Children Act 1989. This means that without the broad scope of jurisdiction provided by Brussels II Revised or the Hague Conventions or Brussels II Recast [6] which is not yet in force[7], English and Welsh courts cannot currently make orders for a child who is being retained in another country.

In such cases, it would give rise to a 1980 Hague Convention case, complemented by the provisions of Brussels II Revised. The court would first determine whether there had been a 'wrongful removal or retention' of a child, i.e. whether there has been a removal or retention of a child in breach of custody rights under the law of the Member State where the child was habitually resident immediately before the abduction. If there had been a wrongful removal, then the court would always order the return of the child if he or she could be protected in the Member State of origin.

Therefore, while Brussels II Revised has broad jurisdictional scope, it is not global in scope and the Hague Conventions or the Family Law Act 1986 step in where Brussels II Revised cannot be applied.

Baroness Hale in *A v A* summarised a step by step approach to determine which instrument should have jurisdiction as follows: 'If the order in question is a Part 1 order the first port of call is the revised Brussels II Regulation but even it is not a Part 1 order but is an order relating to parental responsibility within the meaning of the Regulation, the first port of call remains the Regulation because that is directly applicable in United Kingdom law.'[8]

If the Regulation is inapplicable, the second port of call is the 1996 Hague Protection Convention. This situation can arise where the child is habitually resident in a State to which the 1996 Convention applies ('1996 State') but not in any EU Member State. For the 1996 Hague Convention to apply, the order in question must be a 'protective measure' within the meaning of the Convention. Protective measures have a similar meaning to orders relating to parental responsibility under the Regulation. It is only where neither of these instruments apply that the jurisdictional scheme under the 1986 Act comes into play. As we have said, that will occur principally when dealing with inter-UK jurisdiction issues, but it will also apply in a case where the order in question is a Part 1 order but falls outside the scope of either the Regulation or the Hague Protection Convention.[9]

Brussels II Revised was created after the Hague Conventions to create a genuine area of freedom, security and justice[10] and therefore it drew upon its counterparts in its drafting. There are a number of comparable rules between the 1996 Hague Convention and Brussels II Revised. To give just one example, Article 5 of the 1996 Hague Convention states that the Contracting State in which the child has habitual residence has jurisdiction. Article 8(1) of Brussels II Revised similarly states that the Courts of a Member State shall have jurisdiction in matters of parental responsibility over a child who is habitually

[6] Recast Brussels II Revised: Council Regulation (EU) 2019/1111

[7] It will come into force on 1 August 2022, with the exception of Articles 92, 93 and 103, which have applied since 22 July 2019.

[8] *A v A (Children) (Habitual Residence)* [2013] UKSC 60, at [20].

[9] Everall, M., Lowe, N., Nicholls, M. (2016) *International Movement of Children: Law Practice and Procedure* (2nd edition), chapter 6.7

[10] Ibid, chapter 3.9

resident in that Member State at the time that the court is seised. Although the latter relates to the establishment of jurisdiction over the child rather than habitual residence, the similarities between the wording are apparent.

The 1980 Hague Convention's main objectives, set out in Article 1, are to ensure the return of a child wrongfully removed from his country of habitual residence and to ensure the rights of access and custody in one Contracting State are respected in other Contracting States.

Article 4 states that the Convention applies to children under the age of 16, who are resident in a country which has signed up to the Convention (a 'Contracting State'), immediately before any breach of custody or access rights[11]. There are currently 101 Contracting States to the 1980 Convention, so its scope is far more multinational by way of sheer number of signatories than Brussels II Revised, which is restricted to EU States in that respect.[12]

In respect of the 1996 Hague Convention, all State Members are entitled to ratify, and all Contracting States must accept any ratification.[13] Any State not entitled to ratify can accede to the Convention. However, in contrast, in terms of the 1980 Hague Convention, all Contracting States are obliged to accept all ratifying States, but have a choice as to whether to accept an acceding State.[14]

Article 3 sets out the key power contained within the Convention, namely that:

'the removal or retention of child will be considered wrongful where: it is in breach of rights of custody attributed to a person….under the law of the State in which the child was habitually resident immediately before the removal or retention; and at the time of the removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.'[15]

This means that if a child, habitually resident in the jurisdiction of England and Wales or another Contracting State, were abducted to another country (whether they are a signatory or not) or travelled there with permission of the other parent but the travelling parent then decided not to return home in accordance with the agreement, then proceedings could be brought in the Contracting State for the child's return. These would be enforced in the country where the child is being retained.

The former scenario would be a breach of the aforementioned 'rights of custody'. In the jurisdiction of England and Wales, parental responsibility, as set out in at section 3(1) of the Children Act 1989 as 'all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property' bestows the requisite 'rights of custody' upon the left behind parent. This is because parental responsibility enables a person to determine the child's place of residence.

Article 12 of the 1980 Convention makes it mandatory for a child to be returned to his state of habitual residence if proceedings are commenced within one year of the child's abduction or retention.[16]

However, there are defences which the abducting parent can raise under Article 13:

1. The person now requesting the child's return consented or subsequently acquiesced to the removal and retention of the child; or
2. There is a grave risk that the child's return would expose him or her to physical or psychological harm or otherwise place the child in an intolerable situation.
3. The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of his or her views.[17]

As discussed above, Brussels II Revised provided a mechanism for rendering the second defence unavailable if the judge were satisfied that there were sufficient safeguards for the child upon their return. Furthermore, the judge could impose such safeguards using Article 11 of the 1996 Hague Convention to ensure the swift and safe return of the child.

The 1996 Hague Convention

The 1980 Hague Convention, as detailed above, primarily provides a mechanism for the summary return of a child wrongfully removed to, or retained in, another Contracting State to that Convention, to the country of their habitual residence immediately before wrongful removal or retention.

[11] https://www.hcch.net/en/instruments/conventions/full-text/?cid=24.
[12] See *I (A Child)* [2009] UKSC 10. In short, Lady Hale held that nothing in Article 12 limits jurisdiction to children who reside in an EU Member State. This means that Article 12 B11a does apply to a child who is lawfully resident outside the EU.
[13] Articles 57(1) and 58(3) of the 1996 Hague Convention.
[14] Article 37 and 38 of the 1980 Hague Convention.
[15] https://www.hcch.net/en/instruments/conventions/full-text/?cid=24.
[16] https://www.hcch.net/en/instruments/conventions/full-text/?cid=24.
[17] https://www.hcch.net/en/instruments/conventions/full-text/?cid=24.

The 1996 Hague Convention complements, but does not in any way replace, the operation of the 1980 Hague Convention, for example with its Article 11 protective measures. It aims to improve the protection of children in international situations and permits additional measures to be taken to protect children. This means that a Contracting State may take action to protect a child at risk of immediate harm even if the child is usually resident in another Contracting State. There are currently 52 Contracting States to the 1996 Hague Convention, so although it is not as wide reaching as its 1980 counterpart, it is still highly multinational in its reach.

It governs the law on jurisdiction, applicable law, recognition, enforcement and cooperation in respect of parental responsibility and measures for the protection of children. It also governs the jurisdiction to take measures to protect a child and his property and addresses questions of applicable law concerning parental responsibility for a child where there is no specific intervention by authorities (such as by a court order).

Its scope is set out in detail in Article 3:[18]

1. The attribution, exercise, delegation, restriction or termination of parental responsibility.
2. Rights of custody and rights of access.
3. Guardianship, curatorship and similar institutions.
4. Designation and functions of a person or body having charge of a child's person or property, representing or assisting the child.
5. Placement in foster or institutional care or the provision of care by *kafala* or an analogous institution.
6. Supervision by a public authority of the care of a child by any person having charge of the child.
7. Measures for the protection of the child relating to the administration, conservation or disposal of the child's property.

Post-Brexit: what has changed and what are the limitations of the 1996 Hague Convention in respect of those changes?

Brussels II Revised has been revoked and therefore practitioners in England and Wales need to rely on the Hague Conventions and the Family Law Act 1986 to fulfil the same purposes. Although the courts of England and Wales are no longer subject to Brussels II Revised, the automatic reciprocal recognition of children orders does continue.

The 1996 Hague Convention introduces a recognition and enforcement regime which is a modified, less rigid version of the standard Brussels II Revised model, where the obligations to recognise and enforce are heavily predicated on the universal application of the same jurisdictional rules by Regulation States. The increased flexibility and discretion afforded to Contracting States lies in the fact that this is a global instrument whose States Parties are not unified by the same political and legal ties which exist as between Member States of the European Union, and so the same level of mutual trust cannot be imposed.[19] This means that 1996 Hague Convention signatories have a regime for recognition and enforcement of orders and therefore, as all Brussels II Revised signatories are also 1996 Hague Convention signatories, the mechanisms are not lost.

However, something that practitioners should bear in mind is that the 1996 Hague Convention only applies to children from birth until they reach the age of 18, whereas Brussels II Revised left the scope to national law.

Without Brussels II Revised, there is the loss of Article 11 which set out provisions for the return of children. Article 11(2) set out a positive obligation to give the child an opportunity to be heard but there is no equivalent to this in the 1980 Hague Convention. Furthermore, Article 11(3) set out a requirement that a judgment must be given in 6 weeks, but the Hague Conventions do not have the same. The closest equivalent is Article 11 of the 1980 Hague Convention which specifies that judicial and administrative authorities shall 'act expeditiously'. Although encouraging, the lack of hard time limit could result in delays in proceedings.

As discussed above, Article 11(4) of Brussels II Revised was a useful measure which meant that the court could not refuse to return a child on the basis of Article 13b, if it is established that adequate arrangements have been made to secure the protection of the child.[20] There is no other direct mechanism in either Hague Convention which offers a safeguarding response to Article 13b, save for arguably Articles 11 and 12 of the 1996 Hague Convention.

Article 11(6)-(8) of Brussels II Revised also enabled

[18] https://www.hcch.net/en/instruments/conventions/full-text/?cid=70.
[19] Ministry of Justice Practice Guide The 1996 *Hague Convention Practice Guide,* p36.
[20] https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32003R2201&from=FR.

the 'home' country an opportunity to order the return of the child even if the requested country refused to do so. Neither of the Hague Conventions provide for this outcome, which means that the only option is a slightly clumsy workaround whereby an application may be made for a return order in the home country, which is then enforced under the 1996 Hague Convention, but there is still no mechanism for a quick enforcement of that order.

However, there are still a number of continuities for practitioners as the 1996 Hague Convention pre-dated and informed the drafting of Brussels II Revised. Article 5 of the 1996 Hague Convention covering general jurisdiction based on habitual residence was reflected in Article 8 of Brussels II Revised. Article 6 of the 1996 Hague Convention which determines jurisdiction over refugee or displaced children and where children's habitual residence cannot be established was incorporated into Article 13 of Brussels II Revised. This pattern is mirrored in a number of other provisions.

Article 7 of 1996 Hague Convention covers the retained jurisdiction in cases of child abduction which Article 10 of Brussels II Revised likewise covered. Article 8 of the 1996 Hague Convention provides a mechanism for the transfer of cases between Contracting States, like Article 15 of Brussels II Revised. Articles 11 and 12 of the 1996 Hague Convention provide protective and urgent measures, which Article 20 of Brussels II Revised also did. Furthermore, the scheme for recognition and enforcement of orders under Part IV show clear similarities between the grounds for non-recognition under Article 23.

There is also the added dynamic of Brussels II Recast, which will come into force on 1 August 2022. Currently the UK is a signatory to the Hague Conventions, but not to Brussels II Revised, putting it in an unusual 'third state' position. Should proceedings be issued in a Member State under Brussels II Revised, it is unclear how jurisdiction may be transferred to England and Wales (if it is permissible) and whether the Hague Convention 1996 can take over, until the introduction of Brussels II Recast.

Currently, Brussels II Revised takes precedence and therefore, EU Member States are not empowered to transfer proceedings to non-Member States where the child is habitually resident in a Member State. That said, given that there are no time limits for transfer under the 1996 Hague Convention, this could give rise to delays if there are no requirements for expedition. This is partially resolved in domestic legislation in the UK. Section 5(3)(a) of the Family Law Act 1986 caters for the court to continue to exercise jurisdiction if there is no response within a particular time period[21], but it is not perfect.

Another change is that in private law, there will no longer be *perpetuatio fori*, meaning that the court will lose jurisdiction if the child's habitual residence changes during proceedings (save in abduction cases). Article 13 of the 1996 Hague Convention appears to confirm this position, meaning that arguably the English court should decline jurisdiction in favour of the new Convention State.

Furthermore, this problem extends to relocation cases. Under Article 9 of Brussels II Revised, there was provision for the original State to retain jurisdiction for three months to deal with any issues arising from the relocation such as logistics or contact. There are no such provisions in the 1996 Hague Convention, meaning that should problems arise, unless the relocation order has been recognised in the new State under Article 24, an application will need to be made in the new State, which will inevitably increase the left behind parent's costs and probably cause delay.

There is also the loss of free-standing prorogation under Article 12(3) of Brussels II Revised. Whereas previously it was possible to prorogue jurisdiction within matrimonial proceedings if a matter relating to parental responsibility arose, or where, without matrimonial proceedings a child had a substantial connection with the Member State because one of the parental responsibility holders was habitually resident there, now it is only possible to prorogue if the proceedings are connected to a divorce case and even in those cases, the conditions are stricter.[22]

Another issue for practitioners is that the inherent jurisdiction is unavailable where the 1996 Hague Convention is engaged. In the case of *Re I-L (Children)*, the Court of Appeal found that it was not open to the High Court to invoke the inherent jurisdiction in circumstances where Russia is a signatory to the 1996 Convention and Russian courts were seised of proceedings. Lord Justice Moylan stated that this must be the case otherwise 'the whole purpose of the 1996 Convention (which) is to

[21] Wright, Maria, 'Brexit and the 1996 Hague Convention –the good news and the bad news for child protection practice in England and Wales' *IFL* [2021] p118.

[22] Article 10, 1996 Hague Convention, https://assets.hcch.net/docs/f16ebd3d-f398-4891-bf47-110866e171d4.pdf.

determine, as between Contracting States, the state whose authorities have jurisdiction to take measures directed to the protection of the person or property of the child … would be defeated if, notwithstanding an absence of jurisdiction under the Convention, a Contracting State were to be able to assume jurisdiction by virtue of a domestic rule'[23].

This was also confirmed in the recent case of *GC v AS* in which Mostyn J, considering the limits of the *parens patriae* jurisdiction, applied *Re B*[24] and stated that 'where the court is exercising this exorbitant extra-territorial jurisdiction, it has to make first and foremost an assessment of the likelihood of reciprocal enforcement of its order in an overseas court.'[25] Where this is not found, then the inherent jurisdiction cannot be invoked.

However, this is counterbalanced by the fact that unless a child is abroad or an order is sought to in relation to an abduction, seeking a Wardship Order is ill-advised in any event. Lord Wilson in the Supreme Court recently clarified that such orders should only be sought in the following circumstances: urgency, complexity, or the need for particular judicial expertise in relation to cross border issues.[26] In *Re J (A Child)(Custody Rights: Jurisdiction)* Baroness Hale held that the degree of connection between child and country, the length of time in each country, the law in the foreign jurisdiction and the effect on primary carer should all be considered when seeking such an order.[27]

Furthermore, given that the 1996 Hague Convention lacks a provision preserving the application of domestic rules of jurisdiction in cases where no Contracting State has jurisdiction, Wardship Orders are therefore not likely to be possible in circumstances where the child concerned is not habitually resident or present in the jurisdiction of England and Wales.

Another element is that Brussels II Revised contained provisions for the automatic enforcement of contact orders (termed 'rights of access') without the need to seek recognition first. Although Articles 23 and 24 of the 1996 Hague Convention provide helpful measures for the automatic recognition and enforcement of measures taken in child abduction proceedings, there are no such equivalent provisions for the enforcement of contact orders. Practitioners should prepare for the fact that enforcing contact orders may take longer.

How can the 1996 Hague Convention be utilised going forward?

The Private International Law (Implementation of Agreements) Bill [HL] 2019-21 states that the 1996 Hague Convention is to have the force of law. This means that Article 5 of the 1996 Convention will govern jurisdiction going forward, namely that the judicial or administrative authorities of the Contracting State of the habitual residence of the child have jurisdiction to take measures directed to the protection of the child's person or property. In respect of forum, unless there are distinctive circumstances, it will be based on the habitual residence of the child. It is not quite the same as Brussels II Revised, but it is law nonetheless, with reach to 52 signatories globally and an established procedure applicable to all.

Parental Responsibility

Articles 15 to 22 of the 1996 Hague Convention generally apply domestic law but may exceptionally apply or take into consideration the law of another state which the situation has a substantial connection (even if not a Convention state).

Article 16 of the 1996 Hague Convention states that the attribution or extinction of parental responsibility is governed by the law of the State of the child's habitual residence, including where this is done by an agreement or unilateral act. Where parental responsibility exists under one country's law, it remains in force/effect even if the child changes habitual residence and cannot be taken away if the child moves yet again, even if that parent would not have parental responsibility by operation of the law in the new country.[28] This is a wide-reaching provision, which demonstrates the extra-territorial effect of the 1996 Hague Convention.

However, under Article 17, the English courts do have the ability to control the exercise of this parental responsibility preventing Article 16 from having unlimited reach.

What is lacking from the 1996 Hague Convention is an

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[23] [2019] EWCA Civ 1956, at [83.]
[24] *Re B (A Child) (Habitual Residence) (Inherent Jurisdiction)* [2015] EWCA Civ 886.
[25] *GC v AS* [2021] EWHC 14 (Fam), at [74].
[26] *Re NY* [2019] UKSC 49, at [44].
[27] [2006] 1 AC 80, [33-34], at [40].
[28] https://www.hcch.net/en/instruments/conventions/full-text/?cid=70.

equivalent to Article 12(3) of Brussels II Revised, which gives a Member State jurisdiction in relation to parental responsibility where the child has a substantial connection with that Member State. Although the 1996 Hague Convention recognises parental responsibility granted in other jurisdictions, the scope for bringing proceedings is narrower than in Brussels II Revised as one party cannot simply elect a Member State of their choice provided that they are habitually resident there or the child is a national there.

Habitual residence

Brussels II Revised states that where a child's habitual residence cannot be established and jurisdiction cannot be determined on the basis of Article 12 (prorogation), then the courts of the Member State where the child is present shall have jurisdiction.

In contrast, Article 5 of the 1996 Hague Convention states that the judicial or administrative authorities of the Contracting State of the habitual residence of the child have jurisdiction to take measures directed to the protection of the child's person or property. Subject to Article 7, in case of a change of the child's habitual residence to another Contracting State, the authorities of the State of the new habitual residence have jurisdiction.[29]

This is because whereas under the 1980 Hague Convention, the determination that a child is habitually resident in the requesting State is part of a larger enquiry as to whether there has been a wrongful removal or retention, under the 1996 Hague Convention the role of habitual residence is to assess which Contracting States have jurisdiction to take measures of protection and whether their decisions should be recognised and enforced on other Contracting States.[30]

In cases where refugee children have been internationally displaced as a result of disturbances occurring in their country and children whose habitual residence cannot be established, the authorities of the state where the children are present have jurisdiction (Article 6).[31]

Thankfully, cases in which a child's habitual residence cannot be established are exceptional (*Mercredi v Chaffe* [32] and *Re A (Area of Freedom Security and Justice)*[33]. However, there has been a great deal of recent case law on the matter of habitual residence, which have been colloquially termed the 'HR wars'. The aforementioned cases established a broad test that habitual residence 'corresponds to the place which reflects some degree of integration by the child in a social and family environment'.

The approach in England and Wales endorsed this approach in *A v A*.[34] More recently, in the case of *Re B*, at paragraph [45], Lord Wilson concluded that:

> 'the modern concept of a child's habitual residence operates in such a way as to make it highly unlikely, albeit conceivable, that a child will be in the limbo in which the courts below have placed B. The concept operates in the expectation that, when a child gains a new habitual residence, he loses his old one.'[35]

Therefore, children are less likely to be found to have no habitual residence or for it to be terminated by a parent's unilateral actions. The impact of this in the context of the 1996 Hague Convention is that it bestows clearer authority on the courts where the child is habitually resident to take the necessary steps to ensure the child's protection in proceedings.[36]

The flipside of this, however, is that residual jurisdiction is much harder to claim. Compared to Article 14 of Brussels II Revised which stated that if no court of a Member State has jurisdiction, the jurisdiction can be exercised according to domestic law rules, the 1996 Hague Convention has no equivalent provision.

The effect of this was clear in the recent case of *TK v ML*[37]. Mostyn J held that where the criteria for habitual residence are not met, the court's residual jurisdiction under Section 2(1)(b)(i)-Section 2A(1)(a)(i) Family Law Act 1986 was not available either. He stated that residual jurisdiction only applies where neither Brussels II Revised nor the 1996 Hague Convention applied and only where the question of making the order arises in or in connection with matrimonial proceedings or civil partnership proceedings, ie: where there is a clear causal link.[38]

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[29] https://www.hcch.net/en/instruments/conventions/full-text/?cid=70.
[30] Everall, M., Lowe, N., Nicholls, M. (2016) *International Movement of Children: Law Practice and Procedure* (2nd edition), chapter 5.56.
[31] https://www.hcch.net/en/instruments/conventions/full-text/?cid=70.
[32] (Case C-497/10 PPU) [2012] Fam 22.
[33] (C-523/07) [2009] 2 FLR 1.
[34] *A v A (Children: Habitual Residence) (Reunite International Child Abduction Centre Intervening)* [2013] UKSC 60.
[35] [2016] UKSC 4.
[36] David Williams QC, Michael Gration and Maria Wright, 'Habitual residence and the '*parens patriae*' jurisdiction after *Re B*' [2016] UKSC 4 – [2016] IFL 239.
[37] [2021] EWFC 8.
[38] Ibid at [42].

Transfer of proceedings

Article 8 enables a Contracting State with jurisdiction to take steps to effect a transfer of proceedings to another Contracting State if it considers the other Contracting State would be better placed to assess the best interests of the child. It is also possible for a Contracting State to make a request for proceedings to be transferred to it (Article 9).[39] This is directly reflected in Article 15 of Brussels II Revised.

Furthermore, under Article 10 the courts of a Member State dealing with matrimonial proceedings for the parents of a child habitually resident in another Contracting State may take measures directed to the person or property of such child if:

1. At the time the proceedings are commenced one of the parents is habitually resident in that state and one of them has parental responsibility.
2. Jurisdiction has been accepted by the parents and all holders of parental responsibility and is in the best interests of the child.

Under Article 10(2) this jurisdiction ceases when the matrimonial proceedings come to an end.[40]

As set out above, it is unclear how jurisdiction may be transferred to England and Wales until the introduction of Brussels II Recast. Currently, Brussels II Revised takes precedence and therefore, EU Member States are not empowered to transfer proceedings to a non-Member State (here the UK) where the child is habitually resident in a Member State.

Child abduction

The 1996 Hague Convention can complement the 1980 Hague Convention by imposing a duty on the central authority in the state to which a child has been abducted to provide assistance in discovering the whereabouts of the child if it is unknown.

Furthermore, where a child is present in England, having been removed from a Member State that is a signatory to the 1996 Hague Convention, an English return order can only be made if Article 11 applies. However, it is notable that the 1996 Hague Convention does not provide any gateway to exercise the inherent jurisdiction to make a return order, like the residual jurisdiction under Article 14 of Brussels II Revised.

Article 7 makes clear that jurisdiction in wrongful removal cases remains with the authorities of the Contracting State where the child was habitually resident immediately before the removal.[41]

An advantage of using the 1996 Hague Convention for child abduction proceedings is that it is advantageous for the left behind parent as there is no Article 13 defence. Article 18 of the 1980 Hague Convention also states that the power of a judicial or administrative authority to order the return of the child at any time is unlimited, which is an invaluable provision.

In *RJ v Tigipko,* Mostyn J made clear that the court does not criticise a party for choosing to engage the 1996 Hague Convention over the 1980 Hague Convention, stating that a party 'is not to be criticised for choosing a path under the more modern treaty to seek to enforce my substantive order. I would go so far as to say that the criticism is absurd'.[42]

This is clear in the legislation too. Article 50 in the 1996 Hague Convention states that it does not affect the operation of the 1980 Convention. Importantly, it adds that nothing precludes the provisions in the 1996 Convention from being invoked to secure a child's return. As outlined above, the 1996 Convention could therefore be used to assist with urgent protective measures under Article 11 as part of a return order or agreement to return under the 1980 Convention (i.e. in place of undertakings used at present), or to assist with interim contact during 1980 Convention proceedings.

In addition to the provision for jurisdiction under Article 7, Article 11 provides an additional power of protection which applies extra-territorially and therefore extremely wide-ranging:

1. In all cases of urgency, the authorities of any Contracting State in whose territory the child or property belonging to the child is present have jurisdiction to take any necessary measures of protection (Article 11(1)).
2. In the case of a child habitually resident in another Contracting State, such measures lapse as soon as the authorities with jurisdiction under Articles 5 to 10 have taken the measures required by the situation ((Article 11(2).)
3. In the case of a child habitually resident in a non-Contracting State such measures lapse as soon as measures required by the situation are taken in another state and recognised in the Contracting State in question (Article 11(3)).[43]

[39] https://www.hcch.net/en/instruments/conventions/full-text/?cid=70.
[40] https://www.hcch.net/en/instruments/conventions/full-text/?cid=70.
[41] https://www.hcch.net/en/instruments/conventions/full-text/?cid=70.
[42] [2019] EWHC 105 (Fam), at [30].
[43] https://www.hcch.net/en/instruments/conventions/full-text/?cid=70.

This also means that the scope of the 1996 Hague Convention under Article 11 has far wider application than just child abduction proceedings. Through its function to take measures to protect children, proceedings may be brought under the Convention domestically to determine where for example a child should live or matters of parental responsibility.

In the case of *Re J (A Child)*,[44] the Supreme Court clarified the scope of Article 11 as follows:

> '[27] Article 11 bears a striking resemblance to Article 20 of Council Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility, otherwise known as the Brussels II revised Regulation ("the Regulation"). Article 20, however, merely allows one Member State to "take provisional, including protective measures in respect of persons or assets in that State as may be available under the law of that member state", even if, under the Regulation, the court of another member state has jurisdiction. Article 11, in contrast, confers an additional jurisdiction upon the State where the child or the property is. An order made under Article 20 is not enforceable in another member state: *Purrucker v Valles Perez (No 1)*.[45] In contrast, an order made under Article 11 is enforceable in the other Contracting States in accordance with Ch IV of the 1996 Convention. The order can thus have extra-territorial effect, although it will lapse in accordance with Article 11(2) once the authorities in the State of primary jurisdiction have taken the measures required by the situation.'
>
> '[34] It is obviously consistent with the overall purposes of the Convention that measures of protection which the child needs now should not be delayed while the jurisdiction of the country of habitual residence is invoked. On the other hand, the Article 11 jurisdiction should not be used so as to interfere in issues that are more properly dealt with in the home country. It is a secondary, and not the primary, jurisdiction.'

Therefore, as the legal framework currently stands, the 1996 Hague Convention provides for a much wider application of provisional and protective measures, with extra-territorial effect than the scope of Article 20 if Brussels II Revised.

Protective measures under Article 20 are not currently enforceable other than in member states, however, we anticipate that Brussels II Recast will change that. That said, the effect of that remains to be seen, given that all of the Member States are also Contracting States and therefore, legally, there may be no need for arguably 'duplicate legislation'. What it will do is continue to promote close ties within the socio-economic dynamics of the Member States, as Brussels II Revised did. This highlights the importance of the 1996 Hague Convention as a piece of legislation with global application because the European Union seeks to bring very similar, if not identical, provisions into its legal framework, to build further ties between its Member States.

Enforcement

The 1996 Hague Convention does set out measures for the automatic recognition/enforceability of children orders made by Member States. As stated above in *B v B*, Article 11 permits the reinforcement of a child's return ordered under 1980 Hague Convention by allowing undertakings to be given by the parties 'as are necessary for the protection of the person or property of the child' that constitute urgent measures under its provisions. These must be recognised and enforced under Chapter IV of the Convention and remain effective until the court of origin has taken 'the measures required by the situation'.

This resolves the predicament that 1980 Convention proceedings often show, that without this enforcement obligation, undertakings and protective measures will often not be respected and remain ineffective.[46]

However, this is not a perfect workaround. The Supreme Court in *Re J* commented that 'an abduction case governed solely by the 1996 Hague Convention is not invariably one of 'urgency' but that the Supreme Court considered it difficult to envisage a case in which the court should not consider it to be so and then go on to consider

[44] *Re J (A child)* [2015] UKSC 70.
[45] Case C-256/09) [2011] Fam 254.
[46] Van Loon, Hans: 'The Brussels IIa Regulations: towards a review?', paragraph 3.1.3.

whether it is appropriate to exercise Article 11 jurisdiction. The courts of the country where the child is present are often better placed to make orders about the child's return. They can take steps to locate the child and exert any necessary coercive powers. Obtaining and then enforcing orders made by the home country may be cumbersome and slow. The child's interests may be compromised if the country where he or she is present is not able to take effective action in support of their return.'[47]

Furthermore, the Ministry of Justice Practice Guide warns that whether in the form of a court order or voluntary undertakings, the efficacy of the measures of protection will depend on whether and under what conditions they may be rendered enforceable in the State of habitual residence of the child. Voluntary undertakings are not easily enforceable and therefore many not be effective in many cases. The Ministry of Justice also advised that they should be used with caution.[48]

Articles 23 and 24 have much more scope here. Article 23(1) states that 'the measures taken by the authorities of a Contracting State shall be recognised by operation of law in all other Contracting States'.[49] However, recognition may be refused in select circumstances, set out in Article 23(2)(a)-(f) and include the request of any person claiming that the measure infringes his or her parental responsibility if such a measure was taken, except in a case of urgency, without such person having been given an opportunity to be heard.

Nonetheless, Article 24 can assist here as 'any interested person may request from the competent authorities of a Contracting State that they decide on the recognition or non-recognition of a measure taken in another Contracting State'.[50] This means that, in accordance with the Explanatory Report to the 1996 Hague Convention[51], the interested person does not need to wait until there is a dispute as to whether the order will be recognised. This Article is a vital safety net to ensure that issues of recognition or enforcement are dealt with expediently as this enables pre-emptive action to be taken.

This is also a useful measure for relocation cases where, should the relocating parent anticipate problems with the logistics of moving or the left behind parent worry about contact, the order may be pre-emptively recognised in the new Contracting State.

Recitals 1, 2 and 4 of Brussels II Revised state that recognition and enforcement of judgments given in Member States are based on the principle of mutual trust, and that grounds for non-recognition are kept to a minimum. In comparison, the grounds for refusal in Article 23 place the best interests of the child at the forefront of the court's mind in the Contracting State's. Ground (b) states that recognition of a measure may be refused if the measure was taken (excepting urgency) without the chid having been provided the opportunity to be heard in violation of fundamental principles of the requested State and Ground (d) does not permit recognition if such recognition is manifestly contrary to public policy of the requested State, taking into account the best interests of the child. Therefore, as the 1996 Hague Convention will be the backdrop for most international children proceedings going forward, practitioners should be mindful that the court will expect demonstration that their proposed course of action is in the child's best interests.

Importantly, Article 28 ensures that measures taken in one Contracting State and declared enforceable, or registered for the purpose of enforcement, in another Contracting State shall be enforced in the latter, in accordance with the law of that State.[52] This complements Articles 23 and 24 to ensure that recognition and enforcement of orders can take place expediently. A measure may be taken in one Contracting State, an interested person may pre-empt a dispute about whether it should be enforced by requesting a decision and then any measure declared enforceable shall be enforced, ensuring that there are steps available at every stage.

Conclusion

Although the loss of Brussels II Revised seems significant, the 1996 Hague Convention which pre-existed it, does in fact continue to serve its purpose and the differences between the two instruments are smaller than one might assume at first blush. It contains broad powers in one instrument, similarly to Brussels II Revised and it complements the 1980 Hague Convention well in child

[47] *Re J (A child)* [2015] UKSC 70, at [39].
[48] Ministry of Justice, *The 1996 Hague Convention Practice Guide,* downloadable via Family Law Week, p35.
[49] https://assets.hcch.net/docs/f16ebd3d-f398-4891-bf47-110866e171d4.pdf.
[50] https://assets.hcch.net/docs/f16ebd3d-f398-4891-bf47-110866e171d4.pdf.
[51] Paul Lagarde, 'Explanatory Report on the 1996 HCCH Child Protection Convention' (1996).
[52] https://assets.hcch.net/docs/f16ebd3d-f398-4891-bf47-110866e171d4.pdf.

abduction proceedings, as well as providing invaluable enforcement legislation. Importantly, it contains wider-reaching powers in relation to a child's welfare than Brussels II Revised as they may be applied extra-territorially and there are a far greater number of signatories.

It is the increased flexibility and discretion afforded to Contracting States due to the fact that this is a global instrument is, in our opinion, the 1996 Hague Convention's greatest advantage. whose States Parties are not unified by the same political and legal ties which exist as between Member States of the European Union, and so the same level of mutual trust cannot be imposed.[53] This means that 1996 Hague Convention signatories have a regime for recognition and enforcement of orders and therefore, as all Brussels II Revised signatories are also 1996 Hague Convention signatories, the mechanisms for jurisdiction and enforcement in abduction proceedings in particular are not lost.

Rather than focusing on the socio-political, economic and legal unity of a smaller geographical area, the 1996 Hague Convention is multi-national in intention and drafting and may be applied domestically or internationally. As discussed above, the fact that all Brussels II Revised signatories are also 1996 Hague Convention signatories means that the mechanisms are not lost Without the CJEU, interpretations of the Conventions may be varied between Contracting States, as discussed above in the habitual residence cases, however hopefully these will narrow as the UK settles into its post-Brexit era.

The 1996 Hague Convention contains crucial and explicit provision throughout for the best interests of the child, particularly at Articles 8, 9, 10, 22, 23, 24 and 28. The child's welfare is at its heart and centre, exemplified by Article 28, which states that 'measures taken in one Contracting State and declared enforceable, or registered for the purpose of enforcement, in another Contracting State shall be enforced … taking into consideration the best interests of the child.' [54]

Going forward, practitioners will need to dig a little deeper to seek out similar powers to Brussels II Revised within the 1996 Hague Convention as no legislation is perfect and there are undoubtedly several limitations associated with it.

For example, as highlighted earlier, there is now no direct provision setting out a longstop date for judgment to be given in abduction proceedings, which, particularly in light of the delays to judicial systems as a result of the Covid-19 pandemic, could give rise to concerning levels of delay to proceedings. Furthermore, as discussed, the measure provided by BIIR preventing the court's refusal to return a child on the basis of Article 13b, if it is established that adequate arrangements have been made to secure the protection of the child has now been lost, meaning that practitioners could expect to see further delays in the return of children if this defence is raised. This is compounded by the loss of Article 11(6)-(8) of Brussels II Revised as there is no now backstop measure to ensure the return of the child if the requested country refuses to do so as neither of the Hague Conventions provide for this outcome.

Brussels II Recast will be a new development in 2022 and hopefully, it will enable smoother transfers of proceedings between Member States and third states. This will hopefully smooth over the workarounds to the limitations discussed above. Taking the example above, in which the workaround whereby an application may be made for a return order in the home country, which is then enforced under the 1996 Hague Convention, this is a scenario which shall hopefully be legislated for.

Notwithstanding the issues above, in our view, the scope of the Convention is broad, explicitly child focused and contains valuable extra-territorial powers. It is this which ensures that it remains a vital and powerful international treaty going forward, which can be supported by future legislation such as Brussels II Recast.

[53] Ministry of Justice Practice Guide *The 1996 Hague Convention Practice Guide,* p36.
[54] https://www.hcch.net/en/instruments/conventions/full-text/?cid=70.

Child abduction and wrongful retention from England to Scotland: enforcement of English orders in Scotland

Sacha Lee and Catriona Laidlaw*

Introduction

In 2021, whether due to the pandemic, Brexit, or any other factors, English practitioners have seen a significant increase in cases of child abduction and wrongful retention. To add to the emotional distress that these events naturally cause for the left behind parent, parents are often confused about the procedure for getting their child returned to England and how any order made in England may be enforced in the country where the child is being retained.

In a very recent wrongful retention case, in which one parent removed the child from the south of England to an island in Scotland, the writers needed to engage proceedings in Scotland to enforce the English order for peremptory return. Our client wanted to understand what steps needed to be taken in England (and then necessarily in Scotland) to have their child returned and from the writers' perspective, Scottish proceedings were needed to be up and running as soon as possible once it became clear that the English order would need to be enforced. The situation faced with meant that it was necessary to apply under the Children Act 1989 rather than engaging the inherent jurisdiction of the High Court or either of the Hague Conventions.

Our article sets out what the parent and solicitor should do from an English perspective, and from the Scottish perspective discusses below the smooth, timely and efficient cohesion between English and Scottish proceedings, and how this can be achieved.

The article draws upon both of our perspectives: experience with the English law and procedure, and that of the Scottish law in Scotland. It will set out in detail the procedure for peremptory return where the child has been abducted from one part of the UK to another (i.e. from England to Scotland), or wrongfully retained in Scotland, to provide practitioners with a comprehensive guide from start to finish, so that solicitors on either side of the border have a clear understanding of the other's process; it will set out ways to ensure that this happens as expediently as possible. The article is concerned only with intra-UK abduction, rather than cases engaging the Hague Convention on the Civil Aspects of International Child Abduction.

The English perspective

In cases where a child has been removed from one part of the UK to another, the main aim for both the left behind parent and their solicitor is for the child to be returned as soon as possible.

The Court of Appeal confirmed in *Re R (Children: Peremptory return)*[1], that 'seemingly unlawful removal of a child from a primary carer without consultation or consent and without apparent justification ordinarily calls for a peremptory order for return. In every such case an application must be issued at once to a court with the facility to offer a 24-hour service, or at least a service on every court sitting day, seeking both an immediate peremptory return order on a without notice basis, and in appropriate circumstances, with short notice and accommodation of the necessary *inter partes* hearing within days thereafter.'

In respect of whether to give notice, there are more recent authorities. Mostyn J in *Re N (A Child)*[2], in 2020, reiterated the judgment of Lord Wilson in *Re NY (A Child)*[3] that 'the respondent must be given sufficient notice of the application to seek a return order'. Mostyn J also stated that '[the respondent] has a right to a fair trial of the father's application. For it to have been dealt with without her having filed any formal evidence…would have been a travesty of justice.'

Therefore, in cases where the client comes to a practitioner very soon after the abduction/wrongful retention has occurred intra-UK, pursuant to *Re R*, the process is to apply to the Family Court (ensuring that it is a court which sits every day) for a specific issue order for the peremptory return of the child[4], however also providing short notice to the abducting parent in line with *Re N* and *Re NY*. This differs from 1980 Hague Convention abduction proceedings where an application should be made to the High Court.

It is crucial to act quickly as, if there is a delay between

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1 [2011] EWCA Civ 558, at [22].
2 [2020] EWFC 35, at [4(iii)],
3 [2019] EWCA Civ 1065, at [54],
4 Children Act 1989, section 8.

the abduction/wrongful retention and the application, the ordinary rule set out in *Re R* is unlikely to be equally applicable. The correct forms for this application are a C100 form and a C1A (due to abduction). These should be lodged with the Family Court, with short notice to the abducting parent that the application has been lodged and that a hearing has been requested to take place 48 hours later. This is to ensure that the other side has time to engage counsel and to prepare, so that they cannot use the first hearing to request an 'on notice' hearing at a later date, but not too much time as an application for peremptory return is clearly very urgent.

Statement

Writing a short statement to accompany the application, which sets out the background and chronology, is essential, so that the court is fully apprised of the situation and the steps the left behind parent has taken to try to have the child returned.

Section 41 of the Family Law Act 1986 states that where a child who is under the age of 16 and is habitually resident in a part of the United Kingdom becomes habitually resident in another part of the United Kingdom without the agreement of all persons having the right to decide where the child should live or in contravention of an order made by a court in any part of the United Kingdom, the child's habitual residence shall remain in the first part of the United Kingdom for one year[5]. Therefore, it is very important to state that your client seeks a declaration of habitual residence in England in respect of the child, to ensure that it does not change to the place where they have been abducted/wrongfully retained. Although proceedings should conclude within the one-year timeframe, in the event that the abducting parent takes the child to another part of the UK or leaves the UK altogether, this is a necessary safeguard to protect the left behind parent's likelihood of success in obtaining an order for the child's return.

There is a second and very important element to the statement. Should the order for peremptory return be made, it needs to be sent to Scotland for registration there, so that the Scottish courts can enforce it if the other side do not facilitate the return in the time ordered by the court. If the child had been abducted or wrongfully retained in Ireland, the procedure is the same. The only difference is that the court in Northern Ireland shall not make an order in the exercise of its inherent jurisdiction unless it has jurisdiction under the Council Regulation or the Hague Convention or (if neither apply), section 20 of the Family Law Act 1986 is satisfied (habitual residence) or the child is present in Northern Ireland on the relevant date and the court considers that immediate exercise of its powers is necessary for its protection[6].

As all future cases will take place after 1 January 2021, for the avoidance of doubt, BIIR will not be engaged and in any event, in the case of R*e W-B (A Child) (Family Proceedings: Appropriate Jurisdiction Within the UK)*[7], Thorpe, L.J makes clear that reference to BIIR is of no relevance to issues of jurisdiction between England and Wales, and Scotland. Therefore, the Family Law Act 1986 ('FLA 1986') is the relevant legislation and governs the determination of matters of jurisdiction between Scotland and England and Wales.

The FLA 1986 also deals with the recognition and enforcement of orders relating to children throughout the United Kingdom. Provision is further made for the imposition, effect and enforcement of restrictions on the removal of children from the United Kingdom or from any part of the United Kingdom. The orders ('Part 1 Orders') covered by FLA 1986 are defined within Part 1, which in brief covers orders with regard to the custody of children (residence, contact and special guardianship).

When a child is removed from one part of the United Kingdom (i.e. England & Wales, Scotland or Northern Ireland), such as here from England, to another (Scotland in this case), Chapter 5 of FLA 1986 provides for the recognition of a Part 1 Order in the second constituent part of the UK, the receiving part of the United Kingdom. However, a Part 1 Order is not capable of enforcement until it is registered in that part of the United Kingdom to which the child has been removed, ie: the receiving constituent, here Scotland.

The Family Law Act 1986 sets out the law for registering Part 1 orders in other jurisdictions in the United Kingdom[8]:

> (1) Any person on whom any rights are conferred by a Part 1 order may apply to the court which made it for the order to be registered in another part of the United Kingdom under this section.
>
> (2) An application under this section shall be made in the prescribed manner and shall contain the prescribed information and be accompanied by such documents as may be prescribed.

[5] Family Law Act 1986, sections 41(1) and (2).
[6] Family Law Act 1986, section 19.
[7] [2012] EWCA Civ 592, [2013] 1 FLR 394.
[8] Family Law Act 1986, section 27.

(3) On receiving an application under this section, the court which made the Part 1 order shall, unless it appears to the court that the order is no longer in force, cause the following documents to be sent to the appropriate court in the part of the United Kingdom specified in the application, namely—

a. a certified copy of the order, and

b. where the order has been varied, prescribed particulars of any variation which is in force, and

c. a copy of the application and of any accompanying documents.

(4) Where the prescribed officer of the appropriate court receives a certified copy of a Part I order under subsection (3) above, he shall forthwith cause the order, together with particulars of any variation, to be registered in that court in the prescribed manner.

(5) An order shall not be registered under this section in respect of a child who has attained the age of sixteen, and the registration of an order in respect of a child who has not attained the age of sixteen shall cease to have effect on the attainment by the child of that age.

However, the precise process for registration is set out in the Family Procedure Rules 2010[9]:

1. An application under section 27 of the 1986 Act for the registration of an order made in the High Court or a county court may be made by sending to a court officer at the court which made the order—

a.a certified copy of the order;

b. a copy of any order which has varied the terms of the original order;

c.a statement which—

i. contains the name and address of the applicant and the applicant's interest under the order;

ii. contains—

(aa) the name and date of birth of the child in respect of whom the order was made;

(bb) the whereabouts or suspected whereabouts of the child; and

(cc) the name of any person with whom the child is alleged to be;

iii. contains the name and address of any other person who has an interest under the order and states whether the order has been served on that person;

iv. states in which of the jurisdictions of Scotland, Northern Ireland or a specified dependent territory the order is to be registered;

v. states that to the best of the applicant's information and belief, the order is in force;

vi. states whether, and if so where, the order is already registered;

vii. gives details of any order known to the applicant which affects the child and is in force in the jurisdiction in which the order is to be registered;

viii. annexes any document relevant to the application; and

ix. is verified by a statement of truth; and

d. a copy of the statement referred to in paragraph (c).

A second statement will be needed to set out the aforementioned information. This is because if the order for peremptory return is made, in the event that the return order is not complied with, it is crucial to begin the registration process as promptly as possible, to ensure that enforcement proceedings can commence immediately in Scotland.

Hearing and registration

At the on-notice hearing, it is important to seek four crucial elements to the order:

1) an order for the peremptory return for the child;

2) a declaration that the child's habitual residence is in England;

3) a declaration that it is a Part 1 order for the purposes of the Family Law Act 1986;

4) the attachment of a penal notice to the order.

A penal notice is a notice endorsed on the front of an order, providing that a party may be found guilty of contempt of court if they fail to comply with the terms of the order. Breach of a penal notice may be punishable by imprisonment, fine, confiscation of assets or other punishment under the law[10]. Seeking a penal notice is highly advisable, as it provides reassurance for the left behind parent that if the return is not achieved, the other side is in contempt of court, strengthening their enforcement case if needed. Furthermore, it gives a clear warning to the abducting parent that non-compliance with

[9] Family Procedure Rules 2010, rule 32.25.

[10] Family Procedure Rules 2010, rule 37.2.

the order for the child's return may be punished severely in the English court if needed. It is worth briefly noting that penal orders are not capable of being ordered in Scotland.

Should the abducting parent fail to facilitate the child's return to the family home in England, thus breaching the penal notice, the registration process for the order will need to be commenced immediately so that it may be enforced in Scotland. At this point, an important consideration for the English solicitor would be to organise a counterpart in either Scotland or Northern Ireland (depending on the circumstances) in case this is necessary.

At the hearing, the judge's paramount consideration is the child's welfare. In *AH (Mother) v AMH (Father)*, Hillier J reiterated the guidance given in *Re J (A child: custody rights jurisdiction)*[11] and summarised by Pauffley *J in A v B (Wardship: summary return: non convention country)*[12], namely that 'The welfare of the children is paramount. If a decision is made to return the child, it must be because it is in his best interests to do so'[13]. This is an essential principle which has been confirmed in subsequent case law.

In *Re R (A Child)*[14] Black, LJ confirmed that 'in a domestic abduction case, as in a non-Convention international abduction case, the judge must derive the answer by applying section 1(1) of the Children Act to the particular facts of the case before him, having regard to all the relevant features, including the matters listed in section 1(3) (whether because the circumstances are within section 1(4) of the Act or otherwise by analogy).'

It is therefore clear that summary return to the place where the child was formerly resident will not be granted automatically; the left behind parent must demonstrate that it is in the child's best interests to be summarily returned with reference to the welfare checklist contained at section 1 of the Children Act 1989.

Should the order be made, the second statement with the information required by FPR 32.25 (as set out above) will have been prepared as part of the first statement and therefore, the only step remaining is that the order needs to be certified.

Pursuant to FPR 32.25, the documentation should be sent to the court which made the order so that it can be registered under section 27 of the FLA 1986. However, in practice, the documentation may be sent directly to the Court of Session in Edinburgh for immediate registration there.

This had previously been more difficult to do, however, due to the Covid-19 pandemic, the documents may now be emailed to the Court of Session directly and payment for registration may be made over the telephone.

The speed and efficiency of the Scottish court is impressive as orders can be registered by the Court of Session within a couple of hours on the same day.

Enforcement

Once the Court of Session registers the order, the role of the English lawyer ends for the meantime and matters need to be transferred over to Scottish lawyers for enforcement proceedings to commence.

This is a very straightforward handover as the English and Scottish proceedings work well alongside each other. For example, it is possible to seek and be granted permission from the English court to have key documents in the English case disclosed into the Scottish proceedings very quickly.

The Scottish perspective

Before launching into the Scottish procedure for enforcement proceedings, it is worth noting that the Judicial Protocol Regulating Direct Judicial Communications between Scotland and England & Wales in children's cases is of relevance and assists in such cases where there has been wrongful retention/ abduction between the two jurisdictions.

The Protocol was jointly introduced in 2018 between Lord Carloway, Lord President of the Court of Session, and The Rt. Hon. Sir James Munby, the then President of the Family Division. The aim of the Protocol is to 'allow judges to communicate on a cross-border basis and to provide a framework for the mutual exchange of information through a centralised procedure.' [15] It formally recognises the importance of judicial co-operation in cross-border cases involving children. Although a framework for the judiciary, it reflects best practice for solicitors north and south of the border to act together for their mutual client in such cases.

As Sacha Lee rightly highlights, the order must first be registered at the Court of Session before enforcement proceedings may commence. The Court of Session is Scotland's supreme civil court and has been hearing cases since 1532 in the heart of Edinburgh. It is presided over by the Lord President, Scotland's most senior judge. Within the court, there are two chambers; the Outer House (which

[11] [2005] UKHL 40.
[12] [2015] EWHC 176.
[13] [2018] EWHC 2981 (Fam), at [17].
[14] [2016] EWCA Civ 1016, [2016] 3 FCR 532, [2017] 2 FLR 921, at [27].
[15] Judicial Protocol Regulating Direct Judicial Communications between Scotland, and England & Wales in Children's Cases (24 July 2018) p 1.

hears civil cases at first instance) and the Inner House (primarily an appeal court).

Before enforcement proceedings are raised, it may be worth considering whether registration of the English order is sufficient, or full enforcement proceedings are required. In some cases, there may be sufficient weight in simply advising the removing parent that the English order has been registered in Scotland. The purpose of this would be to encourage voluntary return to the jurisdiction of England & Wales.

Clearly in any case involving children, it is always hoped that matters can be resolved without litigation and, normally, a voluntary return would be in the child's best interests. Not only can this save financial cost, it can also save the family, as a whole, the emotional strain of court proceedings.

Encouraging a voluntary return can be raised in correspondence, and various conditions can be sought (such as setting a deadline for the child to be returned (and requiring sight of copies of travel documents as confirmation) to be clear that if there is no positive engagement from the removing parent, enforcement proceedings will be raised.

However, there are risks involved in seeking a voluntary return and this should be evaluated on a case-by-case basis. In particular, the client may be concerned the removing parent may pose a further flight risk once notice of registration is received. In such circumstances, giving notice to the removing party before enforcement proceedings are raised could be counter-productive. If notice of the order having been registered does not prompt a voluntary return, proceeding to enforcement should commence.

If the client is concerned about flight risk or the child's ongoing welfare, the safest course may be to register the English order, proceed to enforcement and seek protective orders, all before notice is given to the removing parent. Such protective orders can be sought at a pre-service hearing, as explained below.

Regardless of the route deemed most appropriate, it is important that solicitors both north and south of the border work together from the outset. This ensures roles are clear in terms of what work requires to be undertaken, by whom, and everyone is aware of deadlines in both sets of proceedings. In particular, there should be an agreed line of communication to the client who may feel overwhelmed between two sets of solicitors and court proceedings, in an already stressful situation.

With this in mind, it is worth considering whether Scottish solicitors should be instructed via the English firm, or directly by the client. There is no right or wrong here, however, due to the rapid nature of such cases, it may be of greater ease for the client to instruct Scottish solicitors directly. This allows ease of taking of instruction at short notice and it may be of comfort to the client to feel involved in proceedings. Regardless, a good working relationship and efficient communication between firms north and south of the border is crucial to allow exchange of information, particularly to ensure Scottish solicitors have all they need to proceed to enforcement.

Enforcement procedure

Once the English order is registered, the first step for enforcement is for solicitors to instruct an Advocate (the Scottish equivalent of a Barrister) to draft the necessary application to launch proceedings at the Court of Session. All applications to enforce an order in the Court of Session require to be made by Petition.[16] These are distinct from Petitions known and used in England. For these purposes, a Petition is a written document drafted by Counsel that sets out a brief history of the parties, where they reside, the background of the case and a brief overview of English proceedings. At the end, Counsel will set out what orders are being asked of the court. As it is a Petition, those seeking enforcement are known as the 'Petitioner' and correspondingly, the 'Respondent'.

It is likely in such intra-UK abduction/ wrongful retention cases for the following orders to be requested (although not exclusive nor exhaustive):

(1) to require the Respondent to inform the court of the current address of the child;

(2) an interdict (an injunction) preventing the respondent from moving the child to any other address in the interim;

(3) to lodge Answers (responding to the averments in the Petition) within four days of service;

(4) to order the respondent to return the child to the country of its habitual residence;

(5) to prevent the Respondent or anyone else from removing the child afterwards from England & Wales;

(6) to allow Messengers-at-Arms (i.e. process servers) to take possession of the child;

(7) to find the respondent liable to the petitioner in terms of expenses.

[16] Judicial Protocol Regulating Direct Judicial Communications between Scotland, and England & Wales In Children's Cases (24 July 2018), Chapter 71.5(2).

When drafted, Scottish solicitors will review the Petition with the client and suggest any changes before it is finalised. Once the draft is confirmed by a solicitor, the Petition requires to be signed by the Advocate. In response to the Covid-19 pandemic, the Scottish Courts and Tribunal Service have adapted working practices such that petitions can now be lodged electronically by email (in the same way that it was possible for an English practitioner to seek to register the order by email). It is best for Scottish solicitors to advise the Court of Session in advance that an urgent Petition is due to arrive so that a pre-service hearing can be identified and fixed.

First Hearing and Protective Orders

Court staff will email solicitors to confirm the Petition has been successfully registered at the Court of Session. From this moment, proceedings commence rapidly. Ideally that same day, depending on time and availability, there will be a pre-service hearing before a judge. This allows interim orders to be granted before the Respondent is to be made aware of the Petition.[17] Return is not ordered at this hearing, as there requires to be an opportunity for the Respondent to enter the process and lodge answers, as above.

Such interim orders can however be granted before the removing parent receives notice of Scottish proceedings. These orders can be important safeguards in protecting against further removal of the child, if the removing parent is considered a potential flight risk. An example of a protective order that could be granted by the Court of Session would be an interdict preventing the child from being removed from Scotland (the equivalent of an injunction). This in turn allows solicitors to liaise with Police in Scotland to put in place a port stop. This is designed to prevent the removing parent and child from leaving the United Kingdom and an alert should be raised at exit points if the child (and sometimes removing parent too) might attempt to leave the UK. Other protective orders can be sought (such as requiring public authorities to disclose information they may hold about the child) as may be required.

Service

Following the first hearing, notice of the proceedings and any protective orders require to be served on the removing parent. Usually, the safest (albeit most expensive route), is to instruct Messengers-at-Arms. These are the equivalent of process servers who are empowered by the courts to serve papers on parties. If the appropriate protective order has been granted at the pre-service hearing, Messengers-At-Arms can also be authorised to open locked doors, recover passports and/or remove the child from the removing parent (clearly, this last step should only be used as a last resort, given the inevitable distress to the child concerned). Messengers-At-Arms can usually be instructed to serve personally on the respondent on the same day as the first hearing.

At the moment, it is possible to effect service by email. The Coronavirus (Scotland) Act 2020 provides that email service may be used where the Respondent has acknowledged in advance that they are willing to accept service by email. Despite being a time and cost-effective option, if the Respondent is considered a flight risk this may not be the most sensible step. The respondent will effectively be receiving notice of proceedings and may choose not to consent to service via email. If such concerns are realised, service by any means will likely be jeopardised if the Respondent further removes the child. If deemed appropriate by the court, and the relevant submissions are made by Counsel at the pre-service hearing, the judge may order for service to be effected by email. In such an event, the Respondent's consent to receive is not needed. This may be a practical consideration if the Respondent is in a particularly rural location.

Answers

From the date of service, the Respondent has four days to lodge their Answers with the court. These four days include weekends. Answers are essentially a form of written defences and should respond to the averments in the Petition. This is the Respondent's opportunity to present their case before the court, and to explain why the English Order has not been complied with.

It is important to remember that the primary objective

[17] Family Law Act 1986, section 27(2).

of the Family Law Act 1986 in this context is to enforce the order from the other part of the UK. In this scenario, the Court of Session is not to be drawn into hearing what could effectively turn into an interim residence application.

This can strike practitioners as odd that a court action involving a child does not start from considering what is in the child's best interests.[18] The rationale reflects of course what the court is being asked to do; enforce an order granted by the court of the other part of the UK where the child is habitually resident. The purpose of enforcement proceedings is not to assume jurisdiction to make a welfare determination (however there may be exceptional circumstances in a true emergency when an immediate order may be necessary).[19] Rather, in most enforcement cases involving wrongful retention, the court being asked to enforce the order will be seeking to ensure the child is returned so that the court of the child's habitual residence can determine further orders according to the child's best interests.[20]

Second Hearing

After Answers have been lodged by the Respondent, there will usually be a second hearing within a few days thereafter. This will normally be before the same Lord Ordinary as before if it can be accommodated. Parties would usually be in attendance, with solicitors and Counsel. Of course, the parties may choose to represent themselves.

At this hearing, having considered the pleadings and any submissions, the judge will consider whether to seek to enforce the original order and require the return of the child. An order will in most cases be granted providing for the return of the child. The judge may provide for in their order additional practical issues - for example, they may order a certain date by which the child should be returned or seek confirmation from the respondent that return travel has been booked.

The judge will usually also fix a further hearing, to only be required if the order for return has not been complied with in the intervening period. Ideally, the Respondent will agree to return the child voluntarily, but if not, and as above, Messengers-at-Arms can be instructed to uplift the child.

Conclusion

Clients may be concerned that, as so often occurs in Hague or non-Hague convention proceedings, an order may be made, but enforcement can be nigh on impossible, depending on where the child has been wrongfully retained.

What struck us as interesting in this process is that whereas the English court will prioritise the child's welfare with reference to the welfare checklist at section 1(3) of the Children Act 1989, in deciding whether an order for the child's return should be made, in the context of enforcement proceedings, the Scottish court's role is, put simply, only to ensure compliance with the original order if it is found to have been breached. If this is found, its primary concern is the swift return of the child to the jurisdiction which made the order for its return. This ensures that further elements cannot be added to the proceedings while they are being enforced and that issues relating to the child's welfare remain within the jurisdiction of the court of the country in which the child is habitually resident.

This means that there is no wriggle room for the abducting/wrongfully retaining parent to avoid returning the child if an order is made. In practice, I have been impressed by the speed at which the Court of Session can commence and conclude proceedings to enforce English orders, with serious penalties for non-compliance by the other side. Proceedings can commence and conclude within a few weeks which hopefully provides reassurance for left behind parent and practitioners alike that the law doesn't run out once the order for peremptory return has been made.

The above guide demonstrates that England and Scotland work very well together in abduction/wrongful retention cases. Proceedings in both countries, especially Scotland, are very swift and highly effective. Although a traumatic time for clients, the safe and quick return of the child in question is clearly prioritised at all times in both jurisdictions, both from the perspective of the child's best interests under section 1(3) of the Children Act 1989 and the emphasis on compliance with the order already made in the enforcement proceedings.

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[18] *Cook -v- Blackley,* 1997 SLT 853; Carroll -v- Carroll 2005 Fam.L.R. 99.
[19] *Carroll -v- Carroll* 2005 Fam.L.R. 99, at [17].
[20] *Carroll -v- Carroll* 2005, Fam L.R. 99, at [16].

Child Arrangements in England and Wales and Switzerland

Sandrine Giroud,*Megan Griffin,* Werner Jahnel*

Introduction

This article looks at the key similarities and differences in the way the courts of England and Wales and the courts of Switzerland deal with issues pertaining to child arrangements, and how two different court structures, with very different sources of law, seek to achieve the same outcome: arrangements which are in the best interests of the child.

In England and Wales, parties seeking a Child Arrangements Order[1] will generally be required to issue their application at the Family Court closest to the child's habitual residence. The law that governs the outcome of that application, chiefly deriving from the Children Act 1989 ('CA 1989'), will be applied uniformly across the jurisdiction. In England and Wales, the court has the flexibility to make a vast array of orders to determine which parent the child is to live with and how, and when, they will spend time with the other parent; whether this be a shared care arrangement, indirect, or supervised contact only, or anything in between. The court has the power to make orders in relation to specific issues, such as which school the child will attend, and prohibitive orders, to prevent parents from taking actions which are not deemed to be in the best interests of the child.

By contrast to England and Wales which is a common law jurisdiction, Switzerland is a civil law country and largely operates according to codified rules. Irrespective of this difference of systems, child arrangements in both countries are governed by the welfare principle.

Another difference relevant between the English and the Swiss system results from the federal nature of Switzerland. While Swiss law on child arrangements is harmonised at the Swiss level, each canton has the authority for the organisation of its judiciary. Accordingly, while the law may be the same, the courts will be different.

Child Arrangements in England and Wales

1. Overarching Principles of the Children Act 1989

In England and Wales, the starting point in any children matter is the Children Act 1989, which contains three key principles which the court will consider in making an order, and a presumption that it will generally be in the best interests of the child to spend time with both parents.

Section 1(1) CA 1989 provides that which is referred to as 'the Welfare Principle', namely, that when a court determines any question with respect to a child's upbringing, or the administration of a child's property, the child's welfare will always be the paramount consideration of the court. The Welfare Principle exists to ensure that when the court is making, varying or discharging orders, the child's welfare is prioritised above all else.

In determining what is best for the child, the court affords different weight to each of the factors in the 'Welfare Checklist' contained at s.1(3) CA 1989. The weight afforded to each depends on the facts of the case; there is no 'one size fits all' for applying the criteria. For example, any particularities of the child's age, sex and background will be considered: it might be in a teenage daughter's best interests to live with her mother during puberty, or for the children to stay with the parent with whom they share a religion.

The consideration of a child's wishes and feelings is conducted in the light of their age and understanding. Generally, the older the child, the greater the weight afforded to their own desired outcome. The case of *Gillick v West Norfolk and Wisbech Area HA*,[2] provided the term 'Gillick-competence' to describe how capable a child is of making a sound decision on a given issue; 'age' being interpreted in terms of understanding and intelligence, rather than number alone. [3]

In addition, the court will look at the gravity of the decision, and whether a child has been influenced in its making: the greater the influence, the lesser weight to be afforded. [4]

The court will then look to the child's physical, emotional and educational needs: which parent is better placed to meet their daily care needs (which is to be decided based on the structure afforded by each parent, rather than their financial position), and if, for example, movement

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[1] Often abbreviated to 'CAO'.

[2] [1986] AC 112.

[3] *Gillick v West Norfolk and Wisbech Area HA* [1986] AC 112.

[4] *F v F* [2013] EWHC 2683 (Fam).

might disrupt their education. In terms of emotional needs, the court will consider not only the personal needs of the child, but which parent is most likely to facilitate contact with the other.

The court will tend to err on the side of the *status quo*, but they will consider the likely effect on the child of a change in circumstances. If a child has not seen a non-resident parent for a time, or is not used to spending time with them overnight, this might be introduced gradually, to limit any sense of upheaval and minimise disruption, particularly for young children, whilst ensuring an outcome wherever possible which involves time with both parents.

Any harm the child has suffered, or is at risk of suffering, will be considered; reports may be ordered, and the court will consider how capable the parents or any new partners are of caring for the child.

The court has the power to make an order different to that initially sought; and will consider the range of powers available to them in each case.

In accordance with the 'no delay' principle of s.1(2) CA 1989, however, a timetable must be set out, and the time taken to reach that decision limited as much as possible. Indeed, pursuant to the 'no order' principle of s.1(5), the court will only make an order if it deems that that would be in the best interests of the child; if the parties can agree matters outside of court, that is always preferable: to avoid delay, costs, and often unavoidable acrimony, which is never in the best interests of the child, if they find themselves in the middle of parental conflict.

A prevailing presumption of the courts of England and Wales is that, unless the contrary is shown, welfare will be furthered if both parents are involved in the child's life. This presumption can, of course, be rebutted, but it is rare for the courts to rule that a parent should have no involvement. In instances of serious safeguarding issues, indirect contact only might be ordered, or contact may be supervised. Each case will be analysed thoroughly, to come to a practical solution.[5]

2. Parental Responsibility

The concept of parental responsibility ('PR') as defined in s.3(1) CA 1989 constitutes the rights, duties and powers a parent has in relation to their child, and their child's property.

A child's mother has PR from the moment the child is born, whether they are married or not. By contrast, a father only has PR if he is married to the mother at the time of the child's birth.[6] There are options for an unmarried father seeking to acquire PR, which range from being named on the child's birth certificate, to entering into a PR agreement with the mother, applying for a PR Order, or applying for a Child Arrangements Order (CAO). If a CAO is granted which states that the child is to live with the father, he will automatically be granted PR. If a CAO is granted for the child to spend time with the father, the court must consider granting PR.[7] In deciding whether to grant a PR Order to a father, the court will consider:

- The degree of commitment the father has shown towards the child;
- The degree of attachment existing between the father and the child;
- The reasons for the father's application.[8]

These factors are to be considered alongside the guiding principles of the CA 1989. If a father can demonstrate the above, it is generally considered to be in the child's best interests for the order to be granted.

3. Section 8 Orders

Under s.8(1) CA 1989, the court has the power to make three types of order:

- Child arrangements orders ('CAO');
- Prohibited steps orders ('PSO');
- Specific issue order ('SIO').

A CAO is an order to determine the living and/or contact arrangements for a child, of which two types are provided by s.8(1) CA 1989. A 'lives with' CAO will state with which party a child is to live. In circumstances where the child has historically spent substantial time with both parties, a joint 'lives with' order can be made. This does not necessarily mean that the child will spend equal time with each parent. The parties should try to agree on a split, before the court will record in the order which days and nights are to be spent with each parent.

In accordance with s.13(1)(b) CA 1989, no person may remove a child from the United Kingdom without either the written consent of every person with PR or leave of the court. Where there is a CAO in force that the child is to live with one or more parties, however, there lies an exception. A party with whom a child lives may remove the child for a period of up to one month without the consent of the other parties with PR. It is only when that period exceeds one month, if the child has been taken without

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[5] Children Act 1989, section 1(2A).
[6] Children Act 1989, section 2.
[7] Children Act 1989, section 12.
[8] *Re H (Minors) (Local Authority: Parental Rights) (No.3)* [1991] Fam 151.

consent, that this constitutes abduction for the purposes of s.1(1) Child Abduction Act 1984.

The second type of CAO is a 'spends time with' order, which sets out the amount of time that a child is to spend with the non-resident parent. Generally, if parents are separated, the child will live with one, and spend time with the other. The CAO can cover regular contact (i.e. weekends, or specific days in the week), and one-off periods (such as holidays). The CAO might be prescriptive where the relationship between the parties so requires or, if the parties can decide between themselves, may be more general.

The starting point in the making of a CAO is the assumption that a child will benefit from contact with both parents. Conflict between the parents is not a good reason for not increasing the children's time with the non-resident parent, and it is not a pre-condition for such an arrangement for there to be a positive co-parenting relationship. Even where there are allegations of domestic abuse, this does not necessarily mean that the court will not allow contact, however, these cases need to be considered carefully. The court will look at the past and present conduct of both parties, the effect on the child and the residential parent, and the motivation of the parent seeking contact, when deciding whether contact is in the child's best interests.[9] The court should ensure that any order for contact will not expose the child to unmanageable risk and, ultimately, that it will be in the best interests of the child.[10]

In terms of a 'shared care' arrangement, there is no suggestion in law that these are exceptional, or that parental conflict would necessarily be a bar to such an arrangement. As Lord Justice Peter Jackson noted in *L v F,* in upholding a 'week on, week off arrangement' for a 5-year old:

> When considering what arrangements are best for a child, the court's powers are broad. There was a time when the orthodox view was that shared care should not be ordered where the parental relationship is bad. There will certainly be cases where that will be the conclusion on the facts, but the authorities show that there is no longer a *principle to this effect: A v A (Shared Residence)* [2004] EWHC 142; *Re R (Shared Residence Order)* [2005] EWCA Civ 542; *Re W (Shared Residence Order)* [2009] EWCA Civ 370.[11]

It is, however, well accepted and documented that shared care arrangements do not prosper where there is acrimony between parties.[12]

If the court is presented with a single-issue dispute, which has arisen from one parent wishing to exercise their PR in a way in which the other disagrees, the court can make an SIO. For example, an SIO might be granted to dictate matters relating to a child's schooling, religion, or medical treatment.

In terms of a child's surname, in accordance with s.13(1)(a) CA 1989, if there is a 'lives with' CAO in place, the surname cannot be changed without the consent of all parties with PR. Where there is no 'lives with' order, parties must agree to change a child's surname.[13] There must be evidence that a change in surname would lead to an improvement from the point of view of the welfare of the child, and the court will not make the decision lightly. If the seeking party merely wishes the child to have the same name as them, this may not be enough on its own for the court to grant such a change.[14]

A PSO can be sought to prevent a party from taking particular steps in relation to a child, for example to prevent them from changing the child's name, or from taking them out of the jurisdiction.

Section 10(4) CA 1989 states that a parent, step-parent with PR, or a person named in a CAO as the person with whom the child is to live can apply for any s.8 order. For a CAO, s.10(5) provides that the following additional persons may apply:

- Any party to a marriage or civil partnership (whether or not subsisting), in relation to whom the child is a child of the family;
- Any person with whom the child as lived for a period of 3 years (not beginning more than 5 years before the application, and not having ceased more than 3 months before the application); and
- Any person with the consent of:
  - Every person who is named in a CAO as a person

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[9] *Re L and others (Contact: Domestic Violence)* [2000] 2 F.C.R. 404,

[10] See FPR2010 Practice Direction 12J, Child Arrangements and Contact Orders: Domestic Abuse and Harm.

[11] *L v F* [2018] 2 FCR 417.

[12] See, for example, *Caring for children after parental separation: would legislation for shared parenting time help children?* Fehlberg, Smyth, Maclean and Roberts, Department of Social Policy and Intervention, University of Oxford, May 2011.

[13] *Re PC (Change of Surname)* [1997] 2 FLR 730.

[14] *Dawson v Wearmouth* [1999] UKHL 18; R*e W, Re A, Re B (Change of Name)* [1999] EWCA Civ 2030.

with whom child shall live;

– The Local Authority (if the child is in care);
– In any other case, those who have PR for the child.

Anyone else must apply for permission from the court to apply for a s.8 order (for example, a grandparent)[15]. A child can also apply on his or her own behalf, but needs permission to do so. The court will only grant permission if it is satisfied that the child has sufficient understanding to make the proposed application.[16]

The court has the power to terminate a s.8 order at any time. In the event that the orders are not terminated, however, s.9(6) CA 1989 states that no court shall make a s.8 order which is to have effect beyond age of 16, unless it is satisfied that the circumstances of the case are exceptional. Section 9(6) does not apply to a CAO which states the person with whom child should live; these continue until the child reaches the age of 18.[17]

Child Arrangements in Switzerland

1. Procedural Aspects

1.1 General Procedural Aspects

Switzerland is a federal state with 26 cantons. While all cantons apply the same set of rules substantive and procedural laws, each canton has its own court organisation. The relevant authorities in charge of child protection therefore vary amongst cantons, but generally, the local district courts are competent for child arrangements during divorce proceedings. Therefore, in contrast to England and Wales, Switzerland does not have one specialised court for such matters. It should be noted, however, that larger district courts, which deal with many Family Law cases, often have specialised chambers and/or specialised judges that deal with such disputes. In addition, Switzerland has a Child and Adult Protection Authority ('CAPA'). The precise competences of the CAPA depends on the canton and, as a result, also varies from canton to canton. Any matter related to a child's welfare outside divorce proceedings, especially in relation to children of unmarried or same-sex parents, falls within the competence of the CAPA.

While both substantive and procedural laws are uniform for the whole of Switzerland, case law may still vary amongst cantons. In fact, notably in the context of child maintenance, there remain vast differences despite recent efforts towards harmonisation, since maintenance contributions are often largely at the judge's discretion.

1.2 Child Protection Measures (German "Schutzmassnahmen", French "mesures pour la protection de l'enfant")

Any person may contact the CAPA if they feel that a child is at risk. Authorities, courts and the police (e.g. in a case of domestic violence) are obliged to report. The CAPA has very broad authority to meet the individual case and protect the best interests of the child. The preconditions for the application of an appropriate measure are that there is a remediable threat to the child's well-being which cannot be remedied by the parents themselves, and that proportionality is maintained. The following statutory measures are available to the CAPA, which can be combined amongst each other (from the mildest to the most drastic measures):

- Admonition, instruction and supervision of parents (educational assistance to parents); [18]
- Educational guardianship with special powers which can help to ensure maintenance or monitoring visiting rights, child asset management guardianship, representative guardianship and procedural guardianship; [19]
- Revocation of the parental right of residence (if a child must be placed in a foster family or a group home);[20]
- Withdrawal of parental responsibility.[21]

During divorce proceedings, the court can order the representation of the child and appoint a person experienced in welfare and legal matters as guardian if such representation is necessary to safeguard the child's best interests.[22] The court may consider a representation of the child in the divorce proceedings if the parents make different requests regarding the allocation of parental responsibility, the allocation of custody, important questions of visiting rights or the maintenance contribution. If a child of legal capacity applies for representation, it must be ordered.

[15] Children Act 1989, section 10(1).
[16] Children Act 1989, section 10(8).
[17] Children Act 1989, sections 9(6A) and (6B);
[18] Art 307 Swiss Civil Code ('SCC').
[19] Arts 306, 308, 314abis and 325 SCC.
[20] Art 310 SCC.
[21] Art 311 SCC.
[22] Art 299 Swiss Civil Procedure Code.

2. Overarching Principles

In Switzerland, there is no specific statute like the Children Act 1989 in England and Wales, but the provisions regarding the best interests of the child are derived from the Swiss Civil Code ("SCC") (in particular Article 270 *et seq*. SCC), as well as other laws and treaties. As in England and Wales, the child's welfare/best interests shall be the paramount consideration in all actions concerning children.[23]

In matters of this kind, the investigation principle (German "*Offizialmaxime*", French "*maxime d'office*") applies. In other words, the court must analyse *ex officio* which solution is best for the children, i.e. in the best interests of the child, and it must investigate the respective relevant facts. It further follows that the court is not bound by the parties' submissions. In fact, any and all agreements between parents concerning their children must be approved by either the court or CAPA. In the course of divorce proceedings, the children shall be heard in person in an appropriate manner by the court or by a third person appointed by the court, unless their age or other important reasons militate against it.[24] In principle, children from the age of six are to be heard; in justified cases, younger children may also be heard.[25]

3. Parental Responsibility

As enshrined in the law itself, parental responsibility serves the best interests of the child.[26] Under Swiss law, parental responsibility comprises care and upbringing[27] as well as legal representation of the child. It further includes the right to determine the place of residence,[28] the administration of the child's assets, and the right to determine education and religious upbringing.[29]

Joint parental care is the rule under Swiss law.[30] In fact, this generally also applies to cases where the parents are unmarried, separated or divorced. The court may only assign parental responsibility to one sole parent if this is necessary to safeguard the child's best interests.[31]

However, joint exercise of parental responsibility does not mean that all actions must be taken jointly by the parents. Rather, with the consent of the other parent, each parent is authorised to exercise parental responsibility independently, particularly if the matter is routine or urgent or the other parent cannot be consulted without incurring unreasonable trouble or expenses.[32]

Stepparents cannot acquire parental responsibility except in cases of adoption. The same goes for same-sex partners, who may also acquire parental responsibility rights and duties by adopting the child of a registered partner. In the absence of an adoption, similar rights and duties vis-à-vis a child rise out the marital duty of assistance and support.

As surrogacy is not legally possible in Switzerland, there is no provision on how parental responsibility is dealt with in this context. However, Switzerland follows the principle *mater semper certa est,*[33] which means that a surrogate mother in Switzerland would be the legal mother of the child she delivers, including parental responsibility, even if she is not biologically related to this child.

4. Various Other Aspects

4.1 Custody (German "Obhut", French "Garde")

Swiss law distinguishes parental responsibility from so-called custody. Custody is the authority to live with the child and to take care of the child's everyday needs. Unlike parental responsibility, which generally remains unchanged with both parents after a divorce, the court must decide on the custody of the children in case of a divorce. If the child lives predominantly with one parent, this is referred to as sole custody. If the child lives quite extensively with both parents, it is called alternating custody. The court must examine the possibility of alternating custody if one parent or the child so requests.[34]

Alternating custody does not necessarily mean that both parents take care of the child 50% of the time. Courts will order alternating custody when one parent cares for the

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[23] See also Art 3(1) UN Convention on the Rights of the Child, which Switzerland has ratified.
[24] Art 314a SCC, Art. 144(2) SCC.
[25] Swiss Federal Supreme Court Decision BGE 131 III 553 of 1 June 2005, consid. 1.2.4; see also Art. 298 Swiss Civil Procedure Code and Art. 12 Convention on the Rights of the Child.
[26] See Art 296(1) SCC.
[27] See Art 302 SCC.
[28] Art 301a SCC.
[29] Art 303 SCC.
[30] See Art 296(2) in conjunction with Art. 298(1) SCC.
[31] See Art 298(1) SCC.
[32] Art 301(2) SCC.
[33] Art 252(2) SCC.
[34] Art 298ter SCC.

child at least 30% of the time.

In principle, parents and courts are free to determine the form of alternating custody. The arrangement depends on the best interests of the child and the age of the child to be cared for. Possible models are weekly alternations or a division of custody during the week, e.g. one parent takes care of the child from Monday to Thursday and the other from Friday to Sunday, whereby these rotations can also be alternated. This model may be advantageous when one or both parents work part-time.

When deciding whether alternating custody can be ordered, the courts will base their decisions on the following criteria with always the best interests of the child as the highest principle:

- Parenting capacity (alternating custody presupposes that both parents are capable of parenting);
- Ability of the parents to co-operate;
- Geographical situation (distance between the parents' homes);
- Stability (especially relevant in the case of young children); alternating custody is more likely to be considered if the parents were already taking care of the child alternately before the separation;
- Possibility of the parents to care for the child personally, being noted that unless specific needs of the child make personal care appear necessary and the parent is at least available during off-peak hours (mornings, evenings, weekends), it is to be assumed that personal care and external care are equivalent;
- Desire of the child (even if the child lacks capacity to judge); and
- Other factors: age of the children; relationship to siblings; integration into the social environment (especially in the case of adolescents).

If alternating custody cannot be ordered, sole custody is allocated to one parent according to the same criteria mentioned above (para.16). The court will additionally investigate the ability of each parent to promote contact between the child and the other parent. In exceptional cases (e.g. where the child may be exposed to violence), when neither of the parents can be granted custody, the court will appoint a third person or an institution.

If the parents are unmarried and cannot agree on a custody model, the CAPA will use the same principles to decide whether alternating custody can be ordered.

If the parents exercise parental responsibility jointly and one parent wants to change the child's place of residence, he or she must obtain the consent of the other parent or the decision of the court or CAPA if the new place of residence is abroad, even if the parents has sole custody. The same principle applies if the change of residence within Switzerland has a significant effect on the other parent's ability to provide personal care and maintain contact with the child.[35] Without such permission, moving abroad with a child is abduction and therefore constitutes a criminal offence Switzerland.[36]

4.2 Visitation Rights / Contact

If alternating custody cannot be ordered, the parent with whom the child does not live has the right and duty to visit the child on a regular basis. It is customary for courts to order visitation rights every two weeks from Friday evening at 6 p.m. until Sunday evening at 6 p.m., to spend certain public and festive holidays together, and to take at least four weeks of vacation together with the child per year, although this may vary in different courts. Also, the extent of the visitation rights may depend on the ages of the children involved.

These visitation rights serve to maintain and to build up the personal relationship between the parent and the child. They must be established in the best interests of the child; the parent's own interests are secondary.

After the dissolution of a registered partnership, visitation rights may be granted to the former partner, if this serves the child's best interests.[37] If one partner was not only the cohabiting or registered partner of the parent, but also took on the role of the child's non-biological intended parent, i.e. if the child was conceived as part of a joint parental project and grew up within the couple relationship formed by both parents, the maintenance of personal relations will in principle be in the child's interest.[38]

In addition to the visitation rights of the parent, other persons (e.g. grandparents) may be granted visitation rights if this is in the best interests of the child.[39]

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[35] Art 301(2) SCC.

[36] Art 220 Swiss Criminal Code; Switzerland has also ratified the Hague Convention on the Civil Aspects of International Child Abduction of 25 October 2021.

[37] Art 27a(2) Swiss Same-Sex Partnership Act; Art. 274a SCC.

[38] See Swiss Federal Supreme Court Decision BGer 5A_755/2020 of 16 April 2021, consid. 5.

[39] Art 274a SCC.

4.3 Child Maintenance (German "Unterhaltsbeiträge", French "Contributions")

Both parents are obliged to contribute equally to child maintenance. In separation or divorce proceedings, the parent who is not awarded custody must pay child maintenance to the other parent for minor children and beyond majority until the child has completed an appropriate education (e.g. apprenticeship or university degree). Child maintenance takes precedence over post-marital spousal maintenance and is calculated separately from spousal maintenance. In the past, there were very different calculation models in Switzerland, which led to inconsistent determination of maintenance contributions in Switzerland. In a recent decision, the Swiss Federal Supreme Court established a uniform method for the whole of Switzerland. The efforts to achieve such uniformaty are, however, currently in progress, as case law is still lacking.[40] When assessing child maintenance, the parents' position in life and ability to pay must be taken into consideration.[41]

4.4 Children's Name

The parents give the child his or her first name. [42] Parents may change their child's surname after a divorce if the child is under twelve years old. However, when a child reaches the age of twelve, he or she is considered capable to judge by law and therefore the parents' right to change the name without the child's consent expires.

Conclusion

The Swiss legal system, as a civil law system, is, unsurprisingly fundamentally different to that of the England and Wales common law system. Despite their difference in nature, both jurisdictions rely however on statutory regulations combined with solid case law, all aligned with the same paramount consideration for the welfare of the child. Courts in both jurisdictions prioritise this principle above all else, and any order which is made will be carefully considered, to ensure that the arrangement is in the child's best interests.

Based on that principle and despite the codified law, Swiss courts have a similarly wide discretion as English courts do when deciding on child arrangements. In determining what is best for the child, the Swiss approach seems to favour automatic joint parental care and alternating custody of both parents, unless specific reasons speak against such arrangement, even if the parents unmarried. Both jurisdictions favour an agreement by the parents and grant the children the right to be heard considering their age and understanding, although in Switzerland the consideration of a child under the age of six is the exception.

While the court system in England and Wales is more centralised, the federal nature of the Swiss system attributes the organisation of the judiciary and courts to the cantons which may give rise to different processes depending on the cantons where the proceedings take place and possible differences in interpretation of the law despite it being harmonised. These differences however tend to be reconciled over time by the case law of the Swiss Federal Supreme Court. Irrespective of the legal system or court organisation both England and Wales and Switzerland put the child's welfare at the centre of the process and acknowledge the importance of both parents in the child's life and the necessity to find child arrangements tailored to the child's needs and the family's constellation.

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[40] Swiss Federal Supreme Court Decision BGer 5A_311/2019 of 9 March 2021, consid. 6.6.
[41] Art 285(1) SCC.
[42] Art 301(4) SCC.

Parental responsibility, decision making and the duty to consult and agree

Edward Devereux Q.C.*

As is well known, the concept of parental responsibility lies at the heart of the Children Act 1989. It may be thought, indeed, that, after some thirty years of the Children Act 1989 being in force, there is little that can be said that is new or interesting about the concept. This article does not purport to say anything particularly new; but it does seek to consider how, in recent years, the courts of England and Wales have interpreted the rights of those with parental responsibility to make decisions about their children.

Parental responsibility is defined for the purposes of the Children Act 1989 by virtue of section 3(1) of the Children Act 1989. In *Re W (Direct Contact)*[1] Lord Justice McFarlane (as he then was) said (at paragraph [47]): 'The detailed rights and duties of a parent are not defined more precisely in the Act, but, in general terms, it must be the case that where two parents share parental responsibility, it will be the duty of one parent to ensure that the rights of the other parent are respected, and vice versa, for the benefit of the child.'

He went on to say (at paragraph [80]): 'Whether or not a parent has parental responsibility is not simply a matter that achieves the ticking of a box on a form. It is a significant matter of status as between parent and child and, just as important, as between each of the parents.'

Section 2(1) of the Children Act 1989 provides that 'Where a child's father and mother were married to each other at the time of his birth, they shall each have parental responsibility for the child.'

Where the mother and the father were not married at the time of the birth, only the mother has parental responsibility: section 2(2)(a) of the Children Act 1989.

An unmarried father may acquire parental responsibility if (i) he is registered on the birth certificate in England and Wales; (ii) the parties enter into a parental responsibility agreement; and (iii) the court orders that he has parental responsibility for the child: section 4(1) of the Children Act 1989.

Section 1(2A) of the Children Act 1989 provides: 'A court, in the circumstances mentioned in subsection (4)(a) or (7), is as respects each parent within 6(a) to presume, unless the contrary is show, that involvement of that parent in the life of the child concerned will further the child's welfare.' Section 1(2B) provides that: 'In subsection (2A) 'involvement' means involvement of some kind, either direct or indirect, but not any particular division of a child's time.' Section 1(7) provides that: 'The circumstances referred to are that the court is considering whether to make an order under section 4(1)(c) or (2A) or 4ZA(1)(c) or (5) (parental responsibility of parent other than mother).'

In relation to decision making, section 2(7) of the Children Act 1989 is critical.[2] That provides: 'Where more than one person has parental responsibility for a child, each of them may act alone and without the other (or others) in meeting that responsibility; but nothing in this Part shall be taken to affect the operation of any enactment which requires the consent of more than one person in a matter affecting the child.'

Section 2(7) of the Children Act 1989 followed the Law Commission's recommendation at paragraph 2.10, under the heading 'The power to act independently', of its report, *Family Law, Review of Child Law, Guardianship and Custody.*[3] This is a somewhat different approach to the position previously: see section 85(3) of the Children Act 1975 which appeared to circumscribe the terms of section (1) of the Guardianship Act 1973.

Section 3(5) of the Children Act 1989 provides:

'A person who –

does not have parental responsibility for a particular child; but

has care of the child,

may (subject to the provisions of this Act) do what is

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[1] [2012] EWCA Civ 999, [2013] 1 FLR 494

[2] In this regard, see the characteristically interesting reflections of John Eekelaar 'Do Parents have a Duty to Consult?', (1998), LQR 337, 114.

[3] Law Com. No. 172, 25 July 1988.

reasonable in all the circumstances of the case for the purpose of safeguarding or promoting the child's welfare.'

The power to act independently pursuant to section 2(7) of the Children Act 1989 is subject to 'any enactment which requires the consent of more than one person in a matter affecting the child'. Further, the fact that a person has parental responsibility for a child shall not entitle him to act in any way which would be incompatible with any order made with respect to the child' under the Children Act 1989: section 2(8) of the Children Act 1989.

Examples of an 'enactment' are section 1 of the Child Abduction Act 1984 and section 13 of the Children Act 1989 (which is concerned with the change of a child's name or removal from jurisdiction in circumstances where a child arrangements order is in force).

Although the wording of section 2(7) of the Children Act 1989 would appear to be clear in its terms and scope, a number of cases have placed a restriction on the section.

In *Re G (Parental Responsibility: Education)* [4], Lord Justice Glidewell stated (obiter) that a mother, who had parental responsibility but with whom the children did not live, should have been consulted about a planned change of school (at 967):

> 'there is no doubt, to my mind, that the mother, having parental responsibility, was entitled to and indeed ought to have been consulted about the important step of taking her child away from the day school that he had been attending and sending him to a boarding-school. It is an important step in any child's life and she ought to have been consulted.'

In *Re PC (Change of Surname)*[5], Mr Justice Holman recorded (at 736) that 'vast areas of the law of parental responsibility are still derived from, and to be found in, the common law or a mixture of common law and statute.' He went on to hold (at 738) that the 'relevant provisions of the Children Act 1989 need to be considered in this historical context' and that 'the old law derived from *Y v Y* [6] still holds good', also that, accordingly, (as he concluded at 739): Where two or more people have parental responsibility for a child then one of those people can only lawfully cause a change of surname if all other people having parental responsibility consent or agree.'

In *Re H (Parental Responsibility)* [7] Lady Justice Butler-Sloss (as she then was) said (at 858 – 859):

'Parental responsibility is a question of status and is different in concept from the orders which may [be] made under s 8 in Part II of the Children Act. The grant of the application declares the status of the applicant as the father of that child. It has important implications for a father whose child might for example be the subject of an adoption application or a Hague Convention application. In each of those examples, a father with parental responsibility would have the right to be heard on the application. He would have the right to be consulted on schooling, serious medical problems, and other important occurrences in a child's life.'

In *Re J (Specific Issue Orders: Child's Religious Upbringing and Circumcision)* [8], the Court of Appeal held that 'the operation of circumcision is of considerable consequence and irreversible. It must, therefore, join the exceptional categories where disagreement between holders of parental responsibility must be submitted to the court for determination' (at 576). Dame Elizabeth Butler-Sloss P said (at 577):

'There is, in my view, a small group of important decisions made on behalf of a child which, in the absence of agreement of those with parental responsibility, ought not to be carried out or arranged by a one-parent carer although she has parental responsibility under section 2(7) of the Children Act 1989. Such a decision ought not to be made without the specific approval of the court. Sterilisation is one example. The change of a child's surname is another. Some of the examples, including the change of a child's surname, are based upon statute (see section 13(1) of the Children Act 1989).'

In *Re C (Welfare of Child: Immunisation)* [9], the Court of Appeal held that 'hotly contested issues of immunisations' should be added to the exceptional category of cases that required the agreement of each holder of parental responsibility, notwithstanding the terms of section 2(7) of the Children Act 1989.

In recent years, there have also been a number of cases which have considered the powers of local authorities to take steps pursuant to section 33(3) of the Children Act 1989.

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[4] [1994] 2 FLR 964.
[5] [1997] 2 FLR 730.
[6] [1973] Fam 147.
[7] [1998] 1 FLR 855.
[8] [2000] 1 FLR 571.
[9] [2003] 2 FLR 1095, at [17].

Section 33(3) of the Children Act 1989 provides:

'While a care order is in force with respect to a child, the local authority designated by the order shall –

have parental responsibility for the child; and

have the power (subject to the following provisions of this section) to determine the extent to which

a parent, guardian or special guardian of the child; or

a person who by virtue of section 4A has parental responsibility for the child may meet his parental responsibility for him.'

Section 33(4) of the Children Act 1989 provides: 'The authority may not exercise the power in subsection (3)(b) unless they are satisfied that it is necessary to do so in order to safeguard or promote the child's welfare.'

In *Re C (Children) (Child in Care: Choice of Forename)*[10] , the Court of Appeal held that (i) the choosing of a name (both a forename and a surname) and (ii) providing 'information of the particulars required to be registered concerning the birth' are acts of parental responsibility: see paragraph [54]. At paragraph [60] the Court of Appeal stated:

'In private law cases, some issues are considered so fundamental to a child's wellbeing that, even if a parent has a child arrangements order stating that the child is to 'live with' them (an old terms residence order), that parent cannot make certain decisions without the written consent of every person who has parental responsibility or the leave of the court, including, under section 13 of the CA 1989, changing a child's surname.'

The Court of Appeal went on to state that (at paragraph [77]):

'notwithstanding that a local authority may have the statutory power under section 33(3)(b) of the CA 1989 to prevent the mother from calling the twins 'Preacher' and 'Cyanide', the seriousness of the interference with the article 8 rights of the mother consequent upon the local authority exercising that power demands that the course of action it proposes be brought before and approved by the court.'

Lady Justice King articulated her conclusion (at paragraph [104]) as follows:

> 'I have reached the conclusion that there is a small category of cases where, notwithstanding the local authority's powers under section 33(3)(b) of the CA 1989, the consequences of the exercise of a particular act of parental responsibility are so profound and have such an impact on either the child his or herself, and/or the article 8 rights of those other parties who share parental responsibility with a local authority, that the matter must come before the court for its consideration and determination.'

In *Re H (A Child)* [11] the Court of Appeal considered an appeal from the decision of Mr Justice Hayden by which he declared that the local authority had 'lawful authority' pursuant to section 33(3) of the Children Act 1989 'to consent to and make arrangements for the vaccination of a child, notwithstanding the objections of the child's parents'.

> At paragraphs [26] – [27], Lady Justice King stated:
> 'On a strict reading of s.33(3)(b), and subject only to the exceptions already highlighted, the extent to which a local authority may exercise its parental responsibility is unlimited, provided that it is acting in order to safeguard or promote the welfare of the child in its care.
> However, whilst that may be the case when considering the section in isolation, local authorities and the courts have for many years been acutely aware that some decisions are of such magnitude that it would be wrong for a local authority to use its power under section 33(3)(b) to override the wishes or views of a parent. Such decisions have chiefly related to serious medical treatment, although in R*e C (Children) (Child in Care: Choice of Forename)* [2017] Fam 137, the issue related to a local authority's desire to override a mother's choice of forename for her children. The category of cases is not closed, but they will chiefly concern decisions with profound or enduring consequences for the child.'

Applying that approach, the Court of Appeal held (at paragraph [85]) that 'it cannot be said that the vaccination of children under the UK public health programme is in itself a 'grave' issue in circumstances where there is no contra-indication in relation to the child in question and when the alleged link between MMR and autism has been definitely disproved.'

[10] [2016] EWCA Civ 374, [2017] Fam 137.
[11] [2020] EWCA Civ 664, [2020] 3 WLR 1049.

It is worth emphasising what the Court of Appeal said at paragraph [94] in the course of a discussion as to the approach in private law and public law cases:

> 'Regardless of whether immunisations should or should not continue to require court adjudication where there is a dispute between holders of parental responsibility, there is in my judgment a fundamental difference as between a private law case and a case concerning a child in care. In private law, by section 2(7) of the CA 1989, where more than one person has parental responsibility, each of them may act alone and without the other. Section 2(7) does not however give one party dominance or priority over the other in the exercise of parental responsibility. Each parent has equal parental responsibility, even though the day to day realities of life mean that each frequently acts alone. This applies particularly where the parties live in separate households and one parent is the primary carer. As Theis J put it in *F v F* [2014] 1 FLR 1328, para 21, 'in most circumstances [the way parental responsibility is exercised] is negotiated between the parents and their decision put into effect'. As neither parent has primacy over the other, the parties have no option but to come to court to seek a resolution when they cannot agree.'

The ultimate conclusion of the Court of Appeal was that (see paragraph [104]):

> 'it was neither necessary nor appropriate for a local authority to refer the matter to the High Court in every case where a parent opposes the proposed vaccination of their child;' also 'under section 33(4)(b) of the CA 1989 a local authority with a care order can arrange and consent to a child in its care being vaccinated where it is satisfied that it is in the best interests of the individual child, notwithstanding the objections of parents'; and 'parental views regarding immunisation must always be taken into account but the matter is not to be determined by the strength of the parental view unless the view has a real bearing on the child's welfare.'

The power under section 33(3) was considered again in *Re Y (Children in Care: Change of Nationality)* [12], and *Re W and Re Z (EU Settled Status for Looked After Children)* [13]. In the former case, the Court of Appeal considered whether a local authority 'has the statutory power to take steps to change the nationality of a child in its care against the wishes of the child's parents, or whether it must first seek the approval of the court.' The answer was that, in relation to a change of nationality, the local authority was not entitled to rely on section 33(3) and (4) of the Children Act 1989; it had, instead, to make an application to court.

The latter case considered, *inter alia*, whether a local authority could proceed under section 33(3) of the Children Act 1989 to settle the immigration status for a child under the United Kingdom's European Union Settlement Scheme and to apply for a passport or nationality identity card. Mr Justice MacDonald concluded that a local authority could take those steps pursuant to section 33(3) of the Children Act 1989 (see paragraph [60]). At paragraph [65] (i), in the context of the application for a passport, he said:

> 'An application for, and the issuing to a child of a passport or national identity card by the State of which he or she is a citizen does no more than provide the child with an official means of evidencing his or her identity and nationality. The issuing of a passport evidences the child's legal status; it does nothing to *change* the child's legal status.' (emphasis as contained within the judgment).

At paragraph [79], Mr Justice MacDonald set out a summary of the position. That included (at paragraph [79], xiv)) the following:

> 'Whilst parents' views should be obtained and appropriately considered with respect to both applications for immigration status under the EUSS and for the provision or renewal of passports or other national identity documents, those views should

[12] [2020] EWCA Civ 1038, [2021] 1 FLR 484, at [1].
[13] [2021] EWHC 783 (Fam).

not be viewed as determinative unless they have a real bearing on the child's welfare.'

This survey indicates that notwithstanding the terms of section 2(7) and section 33(3) of the Children Act 1989, there are a number of important matters where the imprimatur of the court has to be sought. Indeed, it can be seen that the category of (exceptional) cases where a holder of parental responsibility – whether that be, say, a mother or a local authority – is prevented from acting unilaterally has expanded in recent years.

There remain, however, what could be regarded as anomalies. For example, the present policy of Her Majesty's Passport Office (reliant on section 2(7) of the Children Act 1989) is to allow a parent who holds parental responsibility to make an application for a passport for a child without requiring the consent of the other holder of parental responsibility. That means that the other parent might not even know that such an application has been made.

Is this out of step with current thinking in relation to the rights, duties and responsibilities that derive from and are owed to a child under the law of England and Wales? The direction of travel, as we have seen, is, in relation to certain important matters, to ensure that unilateral decisions are not taken without the consideration and endorsement of the court. Furthermore, there is a strong argument to suggest that the obtaining of a passport by one parent without the knowledge of the other parent could lead to catastrophic circumstances: the unlawful removal of a child from England and Wales to a country where, for whatever reason, the left behind parent may not be able to bring about the child's return. The argument that feckless, obstructive or missing parents would make a different approach unworkable seems to be easily met by the ability of a parent simply to apply to the court for an order that a child's passport should be obtained, in circumstances where a lack of agreement from the other parent was not in the child's best interests or where, for example, the parent could not be found or has failed to engage with any application for a passport.

Indeed, at an international level, it is interesting to note that a number of other jurisdictions take a different approach to that of HMPO: see, for example, the USA;[14] South Africa (see sections 1 and 18 of the Children's Act 2005); and the Republic of Ireland (see section 14 of the Passports Act 2008).

Thus it may be seen that even after thirty years the concept of parental responsibility – a concept which has been a cornerstone of the Children Act 1989 – still throws up interesting arguments and challenges as to its interpretation and application. As described above, there are an increasing number of areas where the court has determined that, notwithstanding the terms of section 2(7) of the Children Act 1989 or section 33(3) of the Children Act 1989, parents or local authorities must consult and seek agreement of all of the holders of parental responsibility and in its absence the court must determine the issue. Anomalies – such as applications for passports – remain. But the direction of travel is to ensure that, in relation to important matters, all holders of parental responsibility are engaged in the decision making process. This direction of travel might lead to the necessity for further discussion, at least in relation to private law disputes[15], as to whether section 2(7) of the Children Act 1989 is still fit for the purpose. In its current form, there is an argument to be made that it is not.

[14] The US Passport Application requires that 'both parents or the child's legal guardian(s) must appear and present' evidence; in the event that only one parent appears, that parent must provide a "second parent's notarized written statement or DS-3053…consenting to the passport issuance for the child" or the "second parent's death certificate if second parent is deceased" or "primary evidence of sole authority to apply, such as court order" or "a written statement or DS-5525 (made under penalty or perjury) explaining in detail the second parent's unavailability".

[15] One can see the justification for a different approach in relation to public law matters.

Re H-N and the need for clarification in Domestic Abuse cases

Mehvish Chaudhry and Katherine Res Pritchard*

Introduction

On 30 March 2021 the Court of Appeal handed down judgment in *Re H-N and others (children) (domestic abuse: finding of fact hearings)* [1] (herein referred to as '*H-N*'). Unusually, this was a linked appeal, involving four individual cases where domestic abuse was raised as an issue.

Not only did the Court of Appeal determine the individual appeals but the Court also took the opportunity to hand down general guidance in matters which commonly arise in the Family Court where domestic abuse is raised as an issue in proceedings concerning the welfare of children.

The Court of Appeal in particular considered the impact on children of coercive and controlling behaviour, the operation of PD12J and in particular the issue of whether, where domestic abuse is alleged in proceedings affecting the welfare of children, the focus should in some cases be on a pattern of behaviour as opposed to specific incidents, and the Court also addressed the issue of the extent to which it is appropriate for a Family Court to have regard to concepts which are applicable in criminal proceedings. The Court considered the consequence of these issues for the way such cases are conducted in applications made for private law children orders made under the Children Act 1989.

Given the importance of the issues under consideration a number of interveners also were permitted: Cafcass (First Intervener), Women's Aid, Women's Aid Wales, Rape Crisis and Rights of Women (Second Intervener), Families Need Fathers (Third Intervener) and the Association of Lawyers for Children (Fourth Intervener).

The context of the decision in *H-N*

Over the past 40 years there have been significant developments in the understanding of domestic abuse. The law has evolved significantly from requiring evidence of actual bodily harm before the power of arrest could be granted to an injunction (see The Domestic Violence and Matrimonial Homes Act 1976[2]) or approaching domestic abuse as a matter which purely concerns the adults involved and not as a factor which can be relevant to making determinations about the welfare of children (as was commonly the approach in the 1980s).

Practice Direction 12J – Child Arrangements and Contact Orders: Domestic Abuse and Harm 448 (herein referred to as 'PD12J') was implemented in 2008). PD12J provides mandatory guidance (described by the Court of Appeal as a 'step-by-step template' which sets out the what the Family Court is required to do in any case in which domestic abuse is alleged or admitted, or there is other reason to believe, that the child or a party has experienced domestic abuse perpetrated by another party or that there is a risk of such abuse.)[3]

A turning point in the Family Court's approach to *domestic abuse was the Court of Appeal case of Re L (Contact: Domestic Violence); Re V (Contact: Domestic Violence); Re M (Contact: Domestic Violence); Re H (Contact: Domestic Violence)* [4] (referred to herein as '*Re L*'). *Re L* highlighted the need for awareness of the existence of, and the consequences for children of, exposure to domestic abuse and led to significant changes in the approach to domestic abuse allegations in the context of child welfare proceedings over the following 20 years.

In 2017 the definition of domestic abuse was expanded to encompass controlling or coercive behaviour. PD12J paragraph 3 includes the following definitions each of which include patterns of acts or incidents:

'domestic abuse' includes any incident or pattern of incidents of controlling, coercive or threatening behaviour, violence or abuse between those aged 16 or over who are or have been intimate partners or family members regardless of gender or sexuality. This can encompass, but is not limited to, psychological, physical, sexual, financial, or emotional abuse. Domestic abuse also includes culturally

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1 [2021] EWCA Civ.

2 Section 2.

3 Practice Direction 12J, paragraph 2.

4 [2000] 2 FCR 404; [2000] 2 FLR 334.

specific forms of abuse including, but not limited to, forced marriage, honour-based violence, dowry-related abuse and transnational marriage abandonment;

'coercive behaviour' means an act or a pattern of acts of assault, threats, humiliation and intimidation or other abuse that is used to harm, punish, or frighten the victim;

'controlling behaviour' means an act or pattern of acts designed to make a person subordinate and/or dependent by isolating them from sources of support, exploiting their resources and capacities for personal gain, depriving them of the means needed for independence, resistance and escape and regulating their everyday behaviour."

More recently, in *Re JH v MF* [5], Russell J heard an appeal from a fact-finding decision involving serious allegations of domestic abuse including rape. The case was widely reported and attracted considerable media attention. The judge at first instance was found to have failed to give any effect to measures to assist vulnerable participants permitted under FPR PD 3A and 3AA and also found to have approached the issue of consent in a flawed manner. Following the decision in *Re JH v MF* the Judicial College devised a free-standing sexual assault awareness training programme for Family judges.

Proceedings concerning the welfare of children where domestic abuse is raised as an issue are far from rare. The Court of Appeal note that in the year 2019/2020 the Family Court is estimated to have considered around 22,000 such cases.

A number of private law initiatives are on-going in this area:

(i) The Ministry of Justice is moving to implement their report: *Assessing Risk of Harm to Children and Parents in Private Law Children Cases* ('The Harm Panel Report');

(ii) The Domestic Abuse Bill was before Parliament at the time of the appeal in *H-N* and subsequently received Royal Assent on 29 April 2021; and

(iii) Those within the judiciary, Cafcass and the legal and social work professions have contributed to the recommendations of the President of the Family Division's 'Private Law Working Group' ('PLWG') (2nd report published April 2020) which are beginning to be piloted in the courts.

The guidance in *H-N*

Given the current ongoing work and initiatives in this area the Court of Appeal limited the scope of the guidance given by noting that it would be both impossible and inappropriate for judges in the Court of Appeal to lay down comprehensive guidance aimed at resolving (or even identifying) the many difficulties that are said to exist in this area and which are the very subject of other more extensive endeavours.

The Court of Appeal held that PD12J is and remains 'fit for the purpose.' The Court was satisfied that the structure properly reflects modern concepts and understanding of domestic abuse, however the challenge relates to the proper implementation of PD12J by the Family Courts.

The Court of Appeal approved of the approach of Mr Justice Hayden in the recently decided case of *F v M* [6] (the case was described as 'essential reading' for the Family Judiciary) where the following guidance was given:

'4. In November 2017, M [the mother] applied for and was granted a non-molestation order against F [the father]. That order has been renewed and remains effective. The nature of the allegations included in support of the application can succinctly and accurately be summarised as involving complaints of "coercive and controlling behaviour" on F's part. In the Family Court, that expression is given no legal definition. In my judgement, it requires none. The term is unambiguous and needs no embellishment. Understanding the scope and ambit of the behaviour however, requires a recognition that "coercion" will usually involve a pattern of acts encompassing, for example, assault, intimidation, humiliation and threats. "Controlling behaviour" really involves a range of acts designed to render an individual subordinate and to corrode their sense of personal autonomy. Key to both behaviours is an appreciation of a "pattern" or "a series of acts", the impact of which must be assessed cumulatively and rarely in isolation. There has been very little reported case law in the Family Court considering coercive and controlling behaviour. I have taken the opportunity below, to highlight the insidious reach of this facet of domestic abuse. My strong impression, having heard the disturbing evidence in this case, is that it requires greater awareness and, I strongly suspect, more focused training for the relevant professionals.'

[5] 2020] EWHC 86(Fam).
[6] [2021] EWFC 4.

The Court of Appeal decided that the judgment in *F v M* is of value because of the exercise that the Judge conducted in highlighting the statutory guidance published by the Home Office pursuant to Section 77(1) of the Serious Crime Act 2015 which identifies in list form paradigm behaviours of controlling and coercive behaviour. The Court of Appeal held that that guidance is relevant to the evaluation of evidence in the Family Court.

The Court of Appeal also noted that it is equally important to be clear that not all directive, assertive, stubborn or selfish behaviour will be 'abuse in the context of proceedings concerning the welfare of a child; much will turn on the intention of the perpetrator of the alleged abuse and on the harmful impact of the behaviour.'

Having made the above observations about the current legal framework the Court of Appeal went on to hand down the following guidance:

(i) The need for a fact-finding hearing

The Court of Appeal invited careful consideration of the PD12J as a whole when considering whether a fact - finding hearing is necessary. At paragraph 37 the Court of Appeal summarised a four staged stage approach which involves considering the nature of the allegations, their relevance to the issues before the court, the purpose of the hearing, and consideration of whether a fact-finding hearing is necessary and proportionate.

(ii) Scott-Schedules

In cases where allegations of domestic abuse have been made, it is likely that the court will order that a fact-finding hearing takes place. In order to prepare for that hearing, the parties will be asked to prepare a Scott Schedule setting out the allegations made, the date on which they allegedly took place, and the responses to each allegation by the parent against whom they are made. Statements in support of the same, setting out the documentary evidence are also very likely to be ordered.

It has been standard practice that the issues are narrowed where possible, and that a composite schedule of allegations is agreed, and that the allegations themselves are limited in number. This exercise in and of itself, and by requiring a delineated number of allegations, runs almost contrary to at least part of the definition of coercive control, which relies on a 'pattern' of incidents. That pattern of abuse can take many forms, and could be made up from a series of seemingly small incidents, which when taken together, have a cumulative negative effect on the victim.

Further, the victim themselves, who may have been subjected to years of prolonged abuse, and whose recollection of the incidents be coloured by the impact of them, may find it difficult to distinguish which individual incidents had the most deleterious effect, given that their own mindset and ability to process what they have gone through will have been negatively affected. One incident could seem to the victim to be trivial, but taken in conjunction with the pattern of incidents, and viewed objectively by an advisor, could be the worst incident of all. The difficulties of distilling this behaviour into specific examples/incidents were therefore obvious.

The Court of Appeal considered two aspects of the use of Scott Schedules in particular: (i) concerns that abusive, coercive and controlling behaviour is likely to have a cumulative impact upon victims which cannot be identified simply by separate and isolated consideration of individual incidents; and (ii) parties being required by the Family Court to limit the number of allegations being relied on leading to the Court not being able to adequately assess the quality of the alleged perpetrators behaviour and in particular patterns of behaviour.

The Court of Appeal assessed that there was considerable force to these criticisms and that thought now needs to be given to a different way of summarising and organising matters what need to be tried at fact finding hearings so as not to distort the Court's focus when patterns of behaviour are alleged.

A number of submissions were made about alternatives to Scott Schedules, including for example the use of a document similar to a threshold document commonly used in public law proceedings, formal pleadings by way of particulars of claim as seen in civil proceedings and a narrative statement in prescribed form.

The Court of Appeal did not express any particular view on which method should replace the use of Scott Schedules but invited consideration of this issue by decision-makers.

(iii) Approach to Controlling and Coercive behaviour

The Court of Appeal held that it is 'old fashioned' and 'no longer acceptable' to consider coercive or controlling incidents that occurred between the adults when they were

together in a close relationship as being 'in the past' and therefore of little or no relevance in terms of establishing a risk of future harm.

Consideration of whether the evidence establishes an abusive pattern of coercive and/or controlling behaviour is likely to be the primary question in many cases where there is an allegation of domestic abuse. It is the responsibility of the individual judge in each case to set a proportionate timetable and the court expressed an expectation that in cases where an alleged pattern of coercive and/or controlling behaviour falls for determination, and the court has made that issue its primary focus, the need to determine a range of subsidiary date-specific factual allegations will cease to be necessary (unless any particular factual allegation is so serious that it justifies determination irrespective of any alleged pattern of coercive and/or controlling behaviour – one example being an allegation of rape).

The Court of Appeal expressed confidence that the modern approach is already well understood and has become embedded in the practice of the Family Court and expressed a considerable degree of hesitation in handing down guidance which could result in additional fact-finding hearings or extending the length of fact-finding hearings, with the result of increasing the work-load of an already overburdened court system.

(iv) The relevance of criminal law concepts

In Re R (Children) (Care Proceedings: Fact-finding Hearing)[7] (herein referred to as '*Re R*'), the Court of Appeal held that, as a matter of principle, it was fundamentally wrong for the Family Court to be drawn into an analysis of factual evidence in proceedings relating to the welfare of children based upon criminal law principles and concepts. The Court of Appeal confirmed that, for the avoidance of doubt *Re R* remained the authoritative guidance on this point.

The Family Court should be concerned to determine how the parties behaved and what they did with respect to each other and their children, rather than whether that behaviour amounts to criminal conduct such as rape or murder. Conduct which falls short of criminal conduct may nonetheless have a profound impact on issues relating to a child's welfare. The direct application of criminal law to establish whether a finding is proved or not was disavowed. However, the Court noted that the use of the language itself (for example rape to describe non-consensual penetrative sex) may well be appropriate.

Conclusions

As practitioners in this field, the writers have experienced a rise in cases concerning children commenced against a backdrop of alleged coercive and controlling behaviour. Such allegations require a nuanced and fact specific evaluative exercise to be undertaken by the Family Court as described by the Court of Appeal in order to assess the nature of the allegations, their relevance to the issues before the court, the purpose of the hearing, and consideration of whether a fact finding hearing is necessary and proportionate.

Whilst there are many cases where a fact-finding hearing is indeed necessary, the process and hearing itself is highly adversarial and costly. Often such hearings increase the conflict in a particular case, polarising the parents still further. Delays and backlogs in the Family Court may also have a profound impact on the outcome of proceedings which may in turn be harmful to the child. The key challenge of the Family Court is likely to be to establish a process which meets the need to evaluate the existence, or otherwise, of a pattern of coercive and/or controlling behaviour without significantly increasing the scale and length of private law proceedings.

A submission made by Cafcass was that it would assist the court and parties for Cafcass to have greater involvement prior to the determination of whether or not a fact finding hearing is necessary. The submission was that the judge should direct that Cafcass undertake an enhanced form of safeguarding assessment (including where appropriate meeting the child) prior to the case being listed for a second gatekeeping appointment, with any resulting listing decision being made on a more informed and child-centred basis. Such enhanced Cafcass involvement would undoubtedly assist the Family Court in carrying out an evaluation of whether a separate fact-finding hearing is necessary.

[7] [2018] EWCA Civ 198; [2018] 1 WLR 1821.

‘You can’t hug skype’: an examination of international child relocation and the impact of advancing technology

Rob George and Sam Evans*

Introduction

In the past, when the parent seeking to relocate abroad with the child has put forward proposals for how indirect contact can help bridge the gaps between the ‘left behind’ parent being able to have direct contact with the child, they have been limited as to what they can realistically propose due to the technology available at the time. However, this is changing with the rapid progress of technology. While proposals for direct contact after relocation have long been a crucial part of a relocation application,[1] the proposals for indirect contact between the ‘left behind’ parent and children are now a significant component in a large majority of international child relocation cases. If one parent is seeking permission from the court to relocate from the jurisdiction with their child/children permanently, the parent that is left behind in the jurisdiction needs a vehicle through which to remain in touch with their children on a regular basis, to maintain a strong relationship with the child, and prevent either child or parent feeling isolated from one another. The ability for a parent to use technology to contact, speak to, and see their children wherever they are in the world is incredibly important, and the next best thing to direct, face to face contact.

However, in past child relocation cases, indirect contact proposals have not always been given the importance that they currently merit in 2021. Indeed, in the 2015 case *Re R (A Child – Relocation)*[2] , Wood J determined that, in the event that the mother were to relocate to Hong Kong with her child, the mother’s proposals for contact between the child and the father were insufficient to compensate for the loss of the relationship between them, stating:

> ‘the disadvantages of Skype - as any user will know - are all too often the lack of clarity of image, the sound delay even if short, and, as Miss Mills colourfully notes in her closing submissions, "You can't hug Skype" ’[3].

We outline the current legal position in relation to international child relocation, and consider the current world of indirect contact. In a world where the effects of the COVID-19 pandemic are still omnipresent in our everyday lives; there has been a normalisation of and dependency on video conferencing technology to provide us with contact to others and there have been rapid, unprecedented improvements made to such technology (brought on by the pandemic), the importance of indirect contact worldwide has highlighted it as an invaluable tool in the context of international child relocation cases. As such, the sentiment expressed by Wood J in 2015 in relation to indirect contact between parents and children might start to seem outdated.

International child relocation - the current legal position

If one parent wishes to relocate permanently with their child outside the jurisdiction, to do so they must first obtain consent from the other parent or any party with parental responsibility for the child. Should this consent not be provided, the party wishing to relocate must seek the court’s permission by making a Leave to Remove application. If a party relocates with their child without the relevant permission, they can (in extreme cases) be found guilty of a criminal offence, and often civil remedies (most commonly under the 1980 Hague Convention) will require the child to be returned to this country.

For some time, the leading authority in relation to international child relocation cases was *Payne v Payne*.[4] In his judgment, Thorpe LJ posited that three questions should be asked before determining whether the relocating parent’s proposals were compatible with the child’s welfare:

> ‘(a) is the mother's application genuine in the sense that it is not motivated by some selfish desire to exclude the father from the child's life. Then ask is the mother's application realistic, by which I mean founded on practical proposals both well researched and investigated? If the application fails either of these tests refusal will inevitably follow.
>
> (b) If however the application passes these tests then there must be a careful appraisal of the father's

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1 R. George, *Relocation Disputes, Law and Practice in England and New Zealand,* Bloomsbury, 2014

2 [2015] EWHC 456 (Fam)

3 Ibid at [61]

4 [2001] EWCA 166.

opposition: is it motivated by genuine concern for the future of the child's welfare or is it driven by some ulterior motive?...

(c) What would be the impact on the mother, either as the single parent or as a new wife, of a refusal of her realistic proposal.' [5]

However, Thorpe LJ was also careful to stress that those questions 'must then be brought into an overriding review of the child's welfare as the paramount consideration' [6] and were accordingly subject to the paramountcy principle.

Since then, the law has shifted from the position in *Payne v Payne*. In accordance with the judgments of Munby LJ in *Re F (Relocation)* [7] and of Ryder LJ in *Re F (International Relocation Cases)* [8], the current starting point for considering an international relocation case is the 2011 decision in *K v K (Children: Permanent Removal from Jurisdiction)*. [9]

In *Re F (International Relocation Cases)*, Ryder LJ outlined a number of paragraphs from *K v K* and from *Re F (Relocation)* which he described as 'required reading by any judge faced with determining any international relocation case'.[10] These paragraphs emphasise that the particular child's welfare is the court's paramount consideration, and that this principle is the only authentic legal principle applicable to such cases. All other comments about the approach are to be taken are guidance, and the court may follow or not follow that guidance as appropriate to the particular case.

As Ryder LJ went on to say in *Re F,* since the court in a relocation case is almost inevitably faced with competing proposals from the two parents, it is also not enough for the judge to make an assessment only of the application to relocate:[11]

'Each realistic option for the welfare of the child should be validly considered on its own internal merits (ie: an analysis of the welfare factors relating to each option should be undertaken). That prevents one option (often in a relocation case the proposals from the absent or "left behind" parent) from being side-lined in a linear analysis. Not only is it necessary to consider both parents' proposals on their own merits and by reference to what the child has to say but it is also necessary to consider the options side by side in a comparative evaluation.'

Ryder LJ proposed that a 'balance sheet' approach may be helpful, with the pros and cons of each proposal set out clearly to aid the court's analysis.[12] However, as McFarlane LJ emphasised in the same case, a balance sheet approach is a tool to help with making an assessment, and the weight which individual factors should have must be considered, to avoid the risk of 'all elements of the table having equal value as in a map without contours'.[13]

The judgment of Vos LJ in *Re C (Internal Relocation)* is a helpful summary of the current approach:

'in cases concerning either external or internal relocation the only test that the court applies is the paramount principle as to the welfare of the child. The application of that test involves a holistic balancing exercise undertaken with the assistance, by analogy, of the welfare checklist, even where it is not statutorily applicable.' [14]

Vos LJ also outlined the relevance of the factors established in *Payne v Payne* to current international relocation cases:

'Whilst the *Payne* factors may still be of some utility in some cases, they are no part of the applicable test or the applicable principles."[15]

Williams J in *V v M (Child Arrangements Order: International Relocation)*,[16] drew together various of the authorities (which he termed a 'composite') and linked the relocation analysis specifically to the s1(3) welfare checklist:[17]

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[5] Ibid at [40].
[6] Ibid.
[7] [2012] EWCA Civ 1364 [2013] 1 FLR 645.
[8] [2015] EWCA Civ 882, [2017] 1 FLR 979.
[9] [2011] EWCA Civ 793, [2012] Fam 134.
[10] [2015] EWCA Civ 882 at [20].
[11] *Re F (International Relocation Cases)* [2015] EWCA Civ 882, [2017] 1 FLR 979, at [29].
[12] Ibid.
[13] Ibid at [52] (McFarlane LJ).
[14] [2015] EWCA Civ 1305, at [82]
[15] *Re F (International Relocation Cases)* [2015] EWCA Civ 882, [2017] 1 FLR 979, at [83].
[16] [2020] EWHC 488 (Fam), [2020] 2 FLR 387, at [50].
[17] Section 1(3) Children Act 1989.

'The composite may appear in this form:

(i) The ascertainable wishes and feelings of the child concerned considered in the light of his age and understanding.

(ii) Physical, emotional and educational needs.

(iii) The likely effect on the child of any change in their circumstances…

(iv) The child's age, sex, background and any characteristics of his which the court considers relevant.

(v) Any harm which he has suffered or is at risk of suffering…

(vi) The capability of the parents, how capable each of them are and any other person in relation to whom the court considers the question to be relevant is of meeting the child's needs...

(vii) The range of powers available to the court under this Act.'

The holistic balancing of factors requires the court to consider the entirety of the picture at once, taking into account the realistic options for the child's future.

The evolving role of indirect contact

In most assessments of competing proposals between parents, when analysing the welfare of the child upon relocation, great importance should be placed the role of indirect contact between the 'left behind' parent and their child. Clearly, while a child seeing their parent on a screen is not equivalent to direct contact, the current technology available with which to carry out indirect contact has exponentially improved since 2015, when *Re R (A Child – Relocation)* was heard.

The 'left behind' parent may not be geographically close to their child, in fact in cases where one parent is proposing to relocate abroad with the child there is likely to be substantial distance between the child and 'left behind' parent. But a parent can now maintain a presence within their child's life with the use of a platform that many across the world have had to become accustomed to in recent years and particularly since the start of the global pandemic. For a child growing up in a post-COVID world, their familiarity with the omnipresence of Zoom and FaceTime will be even greater, and a fixture of normality in their lives. The ability of a good quality relationship to be maintained over significant geographic distances will therefore be significantly enhanced by the availability of these technologies and children's familiarity with them.

Indeed, in a recent relocation case of ours where the mother requested to relocate to the USA with her son, the judge commented that as the child was already used to FaceTiming his American grandparents twice a week, if he began FaceTiming his father he would soon become used to it, as people are generally all getting more used to contact through screens. The child had experienced this as good quality contact, which had helped build and maintain a strong relationship with his maternal grandparents. The judge determined that the child would be able to cope with the mother's relocation proposals, in no small part because of the availability for the relationship between father and son to be maintained to a good standard through regular indirect contact to bridge the gap between any direct contact. This was an important factor in the Judge's mind when granting the mother's Leave to Remove application, as part of her overall welfare analysis of the competing proposals.

There are various different reasons why one parent may need to relocate with their child. For example, since Brexit, an increasing number of parents have had to leave the UK for work opportunities that can no longer be pursued in the UK. Alternatively, a parent may wish to return home to be with their family and close friends once a relationship has broken down, and to have that familial support available for them and their child. Whatever the reason, in cases where relocation is a necessity, it is in the best interests of the children that they or their parent don't feel isolated from one another. Being able to mitigate this should be looked at as a positive. The availability of high quality indirect contact between children and parents has only recently become an option. This is something to be grateful for and a chief reason why, in cases where Leave to Remove applications need to be granted, they can be, with as little impact on the quality of contact between the relocated child and 'left behind' parent as has ever been possible previously.

Not only can this be considered a good thing for international relocation cases, but this is the case for internal relocation cases too. While the children may not be moving as far away as say the USA, should a parent relocate with their child from London to Yorkshire, for example, if nothing else, this is still going to impact on the mid-week contact they have with the 'left behind' parent. The availability of child-friendly video conferencing technology

like Facebook Messenger has got to be positive for maintaining regular meaningful contact between children and parents in the face of this.

Technological improvements and the impact of the pandemic

Since 2015 there has been unprecedented growth in the area of video conferencing both from a personal and business standpoint. Indeed, even prior to the COVID-19 pandemic, in a three-year span after 2015, video chat uses by businesses and brands grew by 233%. This is due to the rapid advances in software that companies such as Skype, Zoom and Facebook were able to roll out during this period.[18] In 2017, Facebook Messenger introduced a group video call for up to 50 participants, which allowed live filters and emojis on people's faces during calls.[19] Features like these often prove exciting to children and help them to stay engaged for longer. In the same year Microsoft Teams was introduced, allowing an easily collaborative chat-based workspace which has gradually resulted in the phasing out of the previously popular Skype for Business. Even Whatsapp, in 2016, incorporated video calls into their software, which by 2018 allowed up to eight people at a time to video call on the world's most popular multi-platform messaging service.[20] The landscape in relation to the technological advancement and popularity of video conferencing software was already rapidly growing, however the effects of the COVID-19 pandemic made the use of these services a necessity. Many have now been forced to communicate through video calls for work and in their personal lives, whether they wanted to or not.

As a result of the pandemic, the prevalence of video conferencing in our everyday lives is staggering. From March 2020, when the coronavirus lockdown was first announced, to April 2020, first-time installations of Zoom's mobile app rose by an unprecedented 728%.[21] There are no signs of a drastic retreat from our current world of remote meetings in the professional field, as many firms are seeing the improved efficiency and reduced costs that remote working can yield. In the USA, it is estimated nearly 30% of the workforce will move to work-from-home/remote environments multiple days a week by the end of 2021[22] and in many companies over the UK, the concept of hybrid working has become popularised, with employees now demanding flexibility in how they work due to having successfully transferred to remote working over the past 18 months.

Indeed, for justice to continue to be administered throughout the pandemic, court hearings across the country had to be heard remotely. Remote hearings can now be seen as a helpful and viable alternative to the usual in-person hearing, saving clients' money on their legal team's travel costs and generally increasing efficiency – though of course, with down sides too.[23] It is almost inconceivable that, without the need to have done this, it would have happened so swiftly and evolved to the position we find ourselves in now. Pre-pandemic, the idea that almost all Family Court hearings would be heard remotely was unthinkable, but the advancements in technology and the popularisation of video conferencing technology has allowed this to happen.

By way of illustration, the accessibility of and advancement in such technology now allows a child to play a game of Pictionary with their parent while they FaceTime in high definition with a Memoji frame over their face. This world is a far cry from the one in which the judgment in *Re R (A Child – Relocation)* was given, and the impacts of that are yet to be fully realised. What is clear, however, is that our lives, and particularly the lives of children growing up are, and will continue to be, steeped in video chat as a form of indirect contact with friends and relatives.

At the same time, the development of the video calling software itself is only part of the advances in this area. As 4G and 5G data become increasingly widely available[24] and at lower costs, the possibilities for where and when the technology can be used have also expanded. Whereas even in 2015 when Wood J's comments were made, being 'on skype' meant, in practice, being at home with a broadband internet service. Now, video chatting on WhatsApp or FaceTime can often be done just as well from the car, in the park, or at a school event, allowing a parent who is not physically present to continue to participate in events remotely.

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[18] https://pepperlandmarketing.com/blog/video-conference-stats/.
[19] https://www.acefone.com/blog/evolution-of-video-conferencing-apps/.
[20] Ibid.
[21] https://www.drift.com/blog/how-zoom-grew/.
[22] https://globalworkplaceanalytics.com/work-at-home-after-covid-19-our-forecast.
[23] M Maclean and R George, 'Family Practice During Covid and Access to Justice' [2021] *Family Law* 226.
[24] Global 4G coverage increased from around 40% to over 80% between 2015 and 2020: https://www.itu.int/en/ITU-D/Statistics/Documents/facts/FactsFigures2020.pdf.

This should be seen as a huge positive, in circumstances where a parent needs to relocate with their child, the growth in video conferencing technology means that a meaningful and quality relationship can still be maintained with the 'left-behind' parent in a fun, familiar format, causing as little disruption as possible to either party. No one is claiming that this can act as a replacement for face to face contact or the 'frequent exchanges of physical as well as spoken affection'[25] that come with such interactions. However, the fact that there is a viable and easily available alternative should be celebrated and give judges a further reason to grant a Leave to Remove application when undergoing a holistic welfare analysis, rather than cause to criticise or reject an application.

Conclusion

It remains technically true that 'you can't hug skype', but the realities of video contact between children and family members who are not in the same geographic place as them have changed hugely in the last few years. Fuelled by the pandemic and the connected technological advances, video calling has become integrated into everyone's daily lives in a way that few imagined possible when Wood J made his comments in 2015. The problems that the court noted in *Re R,* of 'sound delay' and 'the clarity of the image' have mostly been replaced by more user-generated difficulties – the phrase 'You're on mute' must have been 2020's most used words, though personal experience says that these kinds of problems affect adults more often than they do children. As Wi-Fi and mobile data become better, the hardware supporting the calls more powerful, and the software itself ever more creative and sophisticated, the realities of what can be done with video calls is already a far cry from the position just a few years ago.

Indirect contact is not, and will not be, 'the answer' to a relocation case. In addition to the technological challenges, there are also human challenges. For example, younger children usually need an adult to help them remain focused on a screen – as a parent said in an earlier study about their child, 'she constantly wants to close it or thump on the keyboard', meaning that assistance was required throughout the call.[26] Such involvement may also not be welcomed by the other parent, depending on the relationship between them, as it can be seen as interfering or trying to monitor the contact. From parents' perspectives, there is also a question of whether expectations of what can be done by way of indirect contact can be set too high. Experience in practice suggests that parents often ask for fairly lengthy periods for each contact, beyond the likely concentration span of younger children. A recent case that the authors were involved with had a two-year-old child where the father wanted 20 to 30 minutes on FaceTime three times a week; the Judge set a minimum of 10 minutes for each call, based on her view of the child's ability to engage and the need to manage the demands on the mother after the relocation.

The possibilities for post-relocation contact will always be just one part of a multi-factorial analysis. However, the increasing extent to which video calling is part of a world in which children are living in any event, adds to the possibilities that this technology can offer. In cases where relocation is being proposed, therefore, this element should no doubt now be more central than it was just a few years ago, and courts might be slower to dismiss the benefits that it can offer as part of a broader package of holidays and other contact. Certainly, the availability of this form of contact will be significant when undertaking a holistic balancing of factors in child relocation proposals. It is true that this is a mitigating factor rather than a like-for-like replacement for in person contact – but relocation cases are often described as 'all or nothing' for the parties involved, and the more mitigating factors that are available to assist them to minimise the possible impact on their children has got to be something that is welcome.

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[25] *Re R (A Child – Relocation)* [2015] EWHC 456 (Fam).

[26] R George and A Gallwey, 'How do Parents Experience Relocation Disputes in the Family Courts?' [2016] *Journal of Social Welfare and Family Law* 394, p 410.

Surrogacy in the United States and England and Wales during a global pandemic

Marla Neufeld and Emma Williams*

Introduction

The novel coronavirus, COVID-19, has had a dramatic effect on every corner of the globe, on every part of society. No industry or area of our lives has remained untouched. The past 16-18 months have been unprecedented. Never before has an infectious virus been able to spread so quickly or widely, but globalisation and an increasingly small world created the ideal conditions for a highly contagious disease like COVID-19 to spread like wildfire (well, far better than wildfire as not even the vast oceans could act as fire breaks here).

This article looks specifically at the impact of COVID-19 and resulting restrictions put in place by the US and UK governments in the surrogacy sector, including the ramifications on the medical side of the process as well as the legal process which intended parents and surrogates have to go through in order to ensure rights for the child rest in the long term with the intended parents. Florida attorney, Marla Neufeld, looks at the impact in the United States (including Florida), while Emma Williams, a solicitor in England and Wales, looks at the impact in the USA.

COVID-19 Impact on the surrogacy process in Florida and the United States as a whole

The COVID-19 virus has had a ripple effect through the entire world, and this impact has not spared the Assisted Reproductive Technology ('ART') process in the United States and in Florida, where Marla Neufeld is licensed to practise law. With initial closures of many facets of the fertility world from fertility clinics, courthouses, and even U.S. and international borders regulating entry to the USA, the entire community needed quickly to pivot to find a way to allow parties to continue building families during these challenging times.

Over time, and as fertility clinics opened up following voluntary and mandated shutdowns, professionals in the USA's ART community have found their stride in traversing the many issues that arise in a third party ART journey caused by the COVID-19 pandemic. The impact has been felt right from the start of the surrogacy matching process through finding a way to travel home from the U.S. with the baby.

The American Society for Reproductive Medicine ('ASRM') has adopted the continually evolving guidelines established by the ASRM Coronavirus/COVID-19 Task Force ('Task Force')[1] on best practices for ART during times of COVID-19 and was pivotal in allowing USA fertility clinics to start practising safely again after initial closures.

Medical process impacts

According to many states' definitions, fertility clinics fell into the category of elective healthcare and were required to close for business or drastically limit the types of procedures they performed. Such closures and delays severely impacted on the third party ART world. Without an ability to create embryos, screen egg/sperm/embryo donors, or perform embryo transfers, the reproductive process is simply not possible. Many intended parents had

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Among other organizations, Marla is proudly involved with Men Having Babies, an organization dedicated to providing gay men with educational and financial support to build a family via surrogacy. Marla is also the co-author of the book published by the American Bar Association, The ABA Guide to Assisted Reproduction: Techniques, Legal Issues, and Pathways to Success.

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[1] https://www.asrm.org/news-and-publications/covid-19/

a huge break in the continuity of their journey; some surrogates were mid-cycle and had to wait indefinitely at this time to continue that cycle.

The closures of fertility clinics were a relatively brief pause of services, as fertility clinics developed the ability to practise medicine safely during the pandemic with the help provided by the refined recommendations of the ASRM. To name a few helpful adaptations in response to COVID-19, the use of telemedicine and digital consultations, which were rarely used prior to COVID-19, has assisted all parties in performing certain appointments without coming into a medical office. Additionally, in-person appointments are now spaced out in a way to allow for safe medical care and efficiency in scheduling cycles.

Even once medical screenings for third party ART were reinstated, COVID-19 continued to impact on the medical reproductive process. For example, when egg donors and/or surrogates were required to travel to an out-of-state fertility clinic for screenings or procedures, some clinics (pursuant to the applicable state law or clinical best practices) required lengthy quarantine periods prior to undergoing medical treatment. When an egg donor and/or surrogate travels, travel expenses and sometimes childcare and lost wages of the donor and/or surrogate are borne by the intended parents so any mandatory quarantine period would add expense to the travel budget for the intended parents. While a typical time period to perform an out-of-state egg retrieval may take 2-3 days of travel for the donor, there were instances where a donor had to be out of town for 2 weeks or more at the expense of the intended parents. As COVID-19 evolves, intended parents considering out-of-state donors or surrogates should speak to their fertility clinic about the possibility of future quarantine requirements to budget for unanticipated expenses in the process.

During the medical consultation process, a huge impact from COVID-19 is the debate about whether an egg donor or surrogate should receive the COVID-19 vaccine or COVID-19 booster shots, and for the parties to understand the risk associated with undergoing a pregnancy during the pandemic.

The ASRM Task Force[2] : '…continues to support both vaccination with currently available vaccines for all individuals, including women who are either pregnant or contemplating conception, and continued strict adherence to its earlier recommended mitigation strategies for disease prevention, including use of social distancing, and rigorous attention to hand washing, Personal Protective Equipment (PPE), especially masking, and quarantines when appropriate…'

Despite recommendations from the ASRM on COVID-19 vaccines, many parties, be they the surrogate, donor, the intended parents, or all involved, have in some cases expressed reluctance about getting vaccinated; this can present an obstacle to the process if not everyone is on the same page.

Psychological process impacts

As part of any third-party process in the USA, it is best practice established by the ASRM, and in some instances required by state law, for the parties to undergo psychological counselling prior to engaging in third-party ART. Florida does not legally require a psychological counselling session, however it is highly advised, and most fertility clinics will not allow the cycle to proceed without a recent psychological examination.

The increase in popularity of telemedicine has greatly benefited the psychological counselling sessions which are now seemingly exclusively done in a remote capacity or a hybrid remote/in-person session, at least as seen in Florida. The ability to perform remote counselling is beneficial not only to domestic intended parents but certainly to international intended parents who many have difficulties travelling to the United States for purposes of medical and psychological screening.

In pre-pandemic times, it was important for the parties to see eye to eye on the general lifestyle of a surrogate as intended parents cannot micromanage the day-to- day choices a surrogate makes during the surrogacy process. Now more than ever, psychosocial counselling is important to be certain that the parties are on the same page with COVID-19 lifestyle choices; all involved must discuss in great detail various precautions the parties plan to take, including stances on the vaccine. Differences in opinion have the opportunity to arise in a psychological counselling session and it is always better to determine if the match is not right early in the process than too far in when it can cause significant problems.

COVID-19 has understandably created challenges such as job and health insecurity, fear, loneliness, sudden

[2] https://www.asrm.org/news-and-publications/covid-19/statements/patient-management-and-clinical-recommendations-during-the-coronavirus-covid-19-pandemic/.

home schooling obligations, and general burnout and a properly performed psychological counselling session is important to ensure that all parties are stable from a mental health perspective to engage in third party ART. Following the ASRM Task Force's Update #14 [3], 'a psychological understanding of people's motivations, perceptions, and behaviours will help providers in fertility clinics to develop successful strategies to ensure the safe delivery of reproductive care.'

Legal Process Impacts

The legal process in the United States begins once a donor and/or surrogate is medically and psychologically approved. At the time of starting the legal agreement, the intended parents are on the last step necessary before the fertility clinic will issue a cycle schedule. At this juncture everyone is eager to proceed forward. A challenge seen on occasion presented by COVID-19 is that even following medical approval, and despite all efforts to reduce the risk of sickness, donors or surrogates have in some instances contracted COVID-19 prior to the medical procedure which completely halted the process, causing delay, frustration and worry for the parties.

All of the donor and surrogacy agreements seen in Florida by Marla Neufeld, and from other lawyers around the United States, now include language addressing COVID-19 such as the donor or surrogate agreeing to follow precautions and guidelines from the medical professionals as it relates to staying safe from COVID-19. Such precautions may include mask wearing, social distancing, certain travel restrictions, reporting health updates to the fertility clinic and intended parents, and quarantining from family members if someone gets sick during the process. The legal agreements may also address the parties' preferences on whether the donor or surrogate will receive the COVID-19 vaccine.

It is important for anyone embarking upon third party ART in the United States to speak to an experienced ART attorney in the applicable state to learn about the legal process to confirm the parental rights of the intended parents, and based on COVID-19, what delays they may experience in the court process. Each state has different laws regarding surrogacy and each state has different challenges presented from COVID-19.

In Florida, at the beginning of the pandemic, many governmental offices completely shut down to the public, such as courthouses and passport and social security offices and were running only on a limited staff. As we all are adapting to a COVID-19 safety protocol, courthouses and the Florida vital records departments are working as quickly as they can and the delays for the legal process in Florida to obtain a Florida birth certificate have dissipated, however such closures are always subject to change. Each state faces its own challenges to the court procedures and vital records closure due to COVID-19, and an intended parent should consult with an attorney in the applicable state to understand what delays they may face in confirming their parentage and ultimately getting a state issued birth certificate.

How an International Intended Parent Can Prepare for Surrogacy Delivery in the United States

For intended parents who are based outside the USA and therefore will need to travel internationally to engage in the surrogacy process, including to be present for the delivery of the child, it is important to start the travel planning process immediately. They will need to determine how the intended parents will be able to make it to the hospital in the United States in time to attend the delivery and have the baby discharged to the intended parents.

Intended parents should keep their surrogacy agency (if any), and ART legal adviser updated on their international travel arrangements to ensure that the delivery process goes as smoothly as possible under the current COVID-19 circumstances. It may be necessary for intended parents to travel to the location of the birth hospital much sooner than anticipated in the event of travel bans or quarantine periods following any international travel.

Hospitals in the United States vary greatly on whether they are allowing support people in the hospital and/or delivery room at the time of birth due to COVID-19. Mandatory quarantine periods also vary between the states. It is important to coordinate the delivery logistics with the surrogate to ensure she is happy to allow the intended parents in the delivery room in the event the hospital limits those allowed to only one person, and to coordinate with the hospital staff to see the applicable hospital protocol on visitors. The rules regarding hospital visitation is constantly changing in Florida; at certain points during the pandemic Florida did not allow any visitors or greatly limited visitors

[3] https://www.asrm.org/globalassets/asrm/asrm-content/news-and-publications/covid-19/covidtaskforceupdate13.pdf.

in the hospital, even in the delivery room, and surrogates at certain points were required to wear masks during delivery of the baby. Due to a recent surge in COVID-19 cases in Florida around July 2021 due to the Delta variant, Florida hospitals now are starting to impose various regulations and limitations on visitors allowed at the hospital.

Intended parents may need to consider appointing someone with a power of attorney and health care designee located in the United States to take certain actions relating to the birth of their child such as making medical decisions and taking the baby home if they are unable to make it in time to the delivery. The intended parents' U.S. attorney can prepare such documentation, but the applicable hospital may have their own required paperwork to appoint a power of attorney for the intended parents; it is important to coordinate such logistics with the hospital in advance of any birth. If intended parents are unable to make it to the delivery, it may be necessary for the intended parents, the surrogate, and any power of attorney to have a discussion in advance of the birth to determine many of the birth logistics such as:

1. The parties should exchange contact information with one another and with the power of attorney to ensure they can communicate around the time of the birth;
2. Whether the intended parents want the baby to have certain vaccinations at birth;
3. Whether the surrogate is going to pump breast milk (and supplies need to be provided);
4. Whether cord blood is going to be stored;
5. Whether a male infant should have a circumcision performed;
6. Whether the baby can be placed on life support if deemed medically necessary;
7. Whether a surrogate can consent to surgery for the baby in an emergency situation if the intended parents cannot be reached to decide).

COVID-19 Impact on the U.S. surrogacy process involving international intended parents

Every day since the inception of the pandemic the travel restrictions due to COVID-19 are changing globally. The impact this causes is for both international and domestic parents who may have difficulty making it to the birth of their child (either due to travel restrictions, cancelled flights, or proper legal documentation), and also, may cause difficulties returning home with the child after the birth.

An international intended parent considering surrogacy in the United States should consult with an attorney in their home country for guidance as to what is required of the consulate in the home country to allow the intended parents to travel to the United States, and to determine what legal steps need to be taken once they return to their home country following the USA surrogacy process. An international intended parent may also need to speak to a USA immigration lawyer to ensure that they have the proper documentation to allow for extended visits in the United States for the surrogacy process. Extended stays in the United States may be necessary to accommodate any quarantine period, or in the event the baby requires lengthy medical care while in the United States.

The ability to get a USA passport for the baby after the USA state birth certificate has been issued is an ever-changing process due to COVID-19. Local USA State Department branches have opened and then subsequently closed during the pandemic which impacts on an ability to receive a U.S. passport quickly. As of July 2021, there are still delays with the U.S. passport process with standard and expedited passport processing taking weeks to months to process; emergency passports are issued on a limited basis, and urgent passport appointments, which can take up to 2 weeks to secure, are limited. Emergency and urgent passport appointments also require proof that the intended parents are planning return travel to their home country in a certain time period. International intended parents need to be flexible and prepare for delays in the issuance of a USA passport and should determine a game plan prior to any delivery (subject to changes due to COVID-19) and may need to travel to another city or state within the United States to access a passport appointment as certain cities present greater challenges to making a passport appointment.

International intended parents may consider consulting with a USA passport expediting service well in advance of the anticipated delivery date to guide them through the passport process as quickly as possible based on the closures/restrictions at the time. If obtaining a USA passport is not feasible due to constraints on time or the inability to obtain an urgent or emergency passport

appointment, international intended parents may need to contact their consulate in the United States for the issue of a foreign passport or Laissez-Passer travel document to allow for the baby to return home. Intended parents need to keep in mind that absent signing certain documentation, both intended parents need to be present in the United States for the issue of a USA passport so both of the intended parents need to ensure they have the legal ability to stay in the United States long enough after the birth of the baby and can accommodate such extended travel based on their life circumstance at home.

In a surrogacy matter, the hospital should not issue a social security number linking the baby to the surrogate, so in many instances the intended parents need to apply for a social security number once the birth certificate is issued in the intended parents' names. Some social security offices are closed to the public, but many do still have limited staff. While a social security number is not required for return travel home, intended parents ideally want to process the social security number while still in the United States. It will be a state-by-state and city-by-city analysis whether a social security office is open and/or taking appointments to issue a social security number for the new-born child.

Impact on the surrogacy process in England and Wales

If we cast our minds back to early March 2020, we will recall that COVID-19 was sweeping across Europe like a tidal wave and had started hitting the shores of the United Kingdom. By mid-March, many people were looking at European countries whose leaders were imposing lockdown and restrictions on an almost daily basis and asking not if, but when, will it be our turn for our Prime Minister to address the nation and close everything down. Legal restrictions finally came on 20 March 2020 with the closing of schools, government buildings such as courts, and businesses. Only essential retail such as supermarkets and vital services remained open.

Clearly, similar to the surrogacy process in Florida, the surrogacy and fertility sector in the UK was not going to avoid feeling the impacts of a global pandemic and the unprecedented restrictions brought in by the UK government as a result. There was a 'stay at home' order in place and as such individuals had to have a very good reason to explain why they were out of their home.

One can only imagine the worry this sudden change in our daily lives and threat to our health must have caused many intended parents and surrogates around the country. It was an anxious time for all of us; the fear of the unknown of what a lockdown meant for our lives, livelihoods and liberty was overwhelming at times. The surrogacy process can be nerve-wracking enough for intended parents, particularly in the UK where they have no legal rights or certainty prior to the birth of their child. The addition of COVID-19 into the mix must have been a lot to cope with.

Medical process impacts

Like in many US states where assisted reproductive treatments were considered to be elective healthcare, COVID-19 also brought about a temporary halt to assisted reproduction treatment in the UK as well. Even once things were able to reopen and begin moving again, there were additional delays and restrictions around the medical process and new medical risks for all involved, including the professionals assisting the parties as well as the surrogate and intended parents.

The strain placed on the National Health Service ('NHS') and state services in the UK by COVID-19 has been mammoth. Wait times for non-routine surgery in the NHS are higher than they have ever been. Even for private clinics involved in the surrogacy industry, the economic impacts of having to close and then adhere to new guidance regarding social distancing and Personal Protective Equipment ('PPE') etc. has taken its toll. There are naturally now questions about the future sustainability of state funding for assisted reproduction services. The economic impact on private households as well may also have an impact on intended parents' ability to afford private assisted reproduction services. This is at a time where more and more people have started looking to alternative ways to start a family, including via the surrogacy process.

A significant difference between a state like Florida in the US and the UK is that commercial surrogacy is legal in Florida unlike in the UK where it is still banned. There were already significant waiting lists for UK surrogates before the pandemic, in light of the fact that only altruistic surrogacy is legal in the UK. This had already been putting intended parents off waiting to find a UK surrogate and instead turning to other countries to find a surrogate where

commercial surrogacy is legal. Faced with an even greater timescale to start a family, which many intended parents may feel is simply too long for them to wait, particularly if they have already spent years trying to conceive themselves, is only likely to push more intended parents to turn to international surrogacy. One popular place for intended parents from the UK to turn to is Florida in the United States, where surrogacy agreements are binding and enforceable with an established legal framework, waiting times to find a surrogate may be shorter, and there is generally considered to be a sophisticated surrogacy industry in place. Given the fact commercial surrogacy is legal in Florida and also legal in many places in the United States, it can be substantially more expensive however to go through the surrogacy process in the United States compared to in the UK, not just because of travel and accommodation costs of going out there, but the expenses and reimbursements that are paid as part of the overall surrogacy process can end up being far higher.

Increased delays may also cause an increase in intended parents looking to preserve any existing egg and sperm and embryos they already have. This may lead to more freezing in order to maximise their chances of being able to start a family once they eventually find their surrogate, if this could take much longer than pre-pandemic. It may also give intended parents much needed time to address any economic impacts the pandemic has had on their livelihood and household income, and therefore the affordability of the surrogacy process for them. The storing of reproductive cells and subsequent use of frozen eggs, sperm and/or embryos can bring their own legal and practical considerations too which intended parents need to seek advice on in addition to any other professional advice (both medical and legal) they may have previously sought.

For intended parents and surrogates in the UK who had already embarked on the process prior to the pandemic, they still faced some daunting challenges. Most if not all medical appointments and check-ups could only be attended by the individual undergoing the medical treatment, so in this case, only the surrogate. Where intended parents had previously been used to attending all medical check-ups during the pregnancy with their surrogate, this has been a significant change for them. Intended parents commented on how difficult they found this change in particular as until that point they had felt fully involved with the surrogacy process, but now felt somehow further away from their child than before.

Immediately after the UK government introduced the first lockdown in March 2020, it took hospitals some time to adjust to the pressures they were facing as a result of the high numbers of COVID-19 admissions each day, which had a knock-on effect for other areas such as maternity wards. Some intended parents whose surrogate was due to give birth in the first few weeks following 23 March 2020 would not have been able to be present at the birth of their child.

However, hospitals did get used to the new normal relatively quickly, and many recognised the importance for intended parents to be able to be there for the birth of their child. Many intended parents did not know this for sure *though. Many had worries such as: 'will we get stopped by a police roadblock on the way to the hospital to ask us why we are out of our homes' and 'will I need a solicitors' letter to present to police to justify why I am out of my house when on the way to the hospital'* and *'do I need proof I am on the way to the hospital for the birth of my child by a surrogate'*. With hindsight, we now know that this would have been accepted as an essential reason for travel and to be outside your home, but hindsight is a wonderful thing, and we often forget now how unnerving the new laws and restrictions were in the first lockdown.

It came as a relief to many intended parents that, in the end, they were able to attend the hospital for the birth, with the surrogate's agreement, and stay with their baby until they were discharged and could take them home for the first time. Unlike in Florida where intended parents can have peace of mind knowing their parental rights are secure from the moment of birth based on well-established surrogacy laws, for intended parents in the UK, this is an uncertain time anyway, as they do not have any legal rights and are not recognised as the child's legal parents from birth. There would also have been the added worry about the child or surrogate having contracted COVID-19 in the hospital, as hospitals were seeing patients coming in with other conditions and all too regularly catching COVID-19 while they were there. This has been the same in many countries around the world; the threat of contracting COVID-19 for pregnant women has been a concern for scientists and medical professionals, with a fear of the unknown as to how severe pregnant women were likely to experience the virus if they became infected.

Legal Process Impacts

When the UK government announced the closure of

schools and non-essential businesses on 20 March 2020, the courts briefly shut down too. Many Family Court hearings listed in the month immediately following this date were adjourned and as a result the resolution of those proceedings saw a significant delay. Contrast this to Florida where the courts generally quickly adapted to virtual hearings to avoid delays in the surrogacy court proceeding process. However, to the credit of Her Majesty's Courts and Tribunals Service ('HMCTS') and all the people involved in the running of the Family Courts in England and Wales, they had soon put into place an efficient remote hearing protocol that worked well from the start. Very quickly, hearings in the Family Courts were going ahead by telephone or video link to ensure that the parties and their legal teams, as well as the Judge and court staff, could stay at home and avoid having to go to a public building in close proximity to others. Similar to the legal process in Florida, remote hearings have worked very well and ensured the administration of justice has been able to continue smoothly in the Family Courts during the COVID-19 pandemic.

Inevitably, the Family Courts did feel the impact of having to adjourn many hearings at the end of March and early April 2020, as well as seeing many staff have to take sick leave if they contracted COVID-19 themselves and were symptomatic. This has led to longer delays than before in the administrative teams within the Family Courts to process new applications, as well as for the listing office to find the first available date to list hearings. This certainly had an impact on any new applications for a Parental Order and how promptly this process would be able to conclude.

Having said that, the delay and extended timescale for this process from lodging the C51 form (application form for a Parental Order) to commence the proceedings and apply for a Parental Order, to the final hearing, has not been as bad as initially feared and the courts are starting to get back to relative normality.

Likewise, Cafcass, the court appointed social workers who necessarily have to be involved in the Parental Order application process, have also had to adapt to government restrictions and public health concerns due to the pandemic. During lockdowns where the UK government have put in place 'stay at home' orders, Cafcass have turned to a policy of only remote meetings taking place in order to undertake assessments for their reports. This has meant rather than always being able to arrange a meeting at the intended parents' home, where by the time Cafcass are involved the child will also be living, they have had to speak with the intended parents and see where the child is living via video link. This is not ideal, but ensuring that the Parental Order application process and proceedings could continue to go ahead even when in person meetings were not possible was vital in order to avoid further delays.

The statistics point to the impact COVID-19 has had on the surrogacy process in the England and Wales. Parental Order applications have been on the rise since 2008. In 2009 just 62 births were recorded in the Parental Order register, by 2012 this was up by 211% to 193 and by 2016 it was up again from 2012 by another 61% to 311[4] . In 2019, 444 Parental Orders were granted, which is a very substantial increase when looking back to the numbers around 2008. However, fast forward to 2020, the year of the COVID-19 pandemic, and for the first time the mostly upward trend is stopped in its tracks. In 2020 only 400 Parental Orders were granted[5], a 9.9% decrease on the previous year.

These figures include both domestic and international surrogacy cases where the intended parents have applied for and been granted a Parental Order in England and Wales. A not insignificant decrease in 2020 therefore makes sense. The logistical challenges for international surrogacy cases which faced additional challenges like travel restrictions and varying COVID-19 rates between countries were unavoidable. Even in domestic cases, potential surrogates' concerns around added health risks with having medical procedures during a pandemic plus multiple government lockdowns, coupled together with delays in the court process, all will likely have resulted in overall lower

[4] Second Report of the Surrogacy UK Working Group on Surrogacy Law Reform, Surrogacy UK December 2018.

[5] Ministry of Justice data. https://inews.co.uk/news/health/number-children-born-surrogacy-triples-past-five-years-43813.

numbers of Parental Orders being granted.

Comparing this with, for example, the state of Florida in the US, they too saw many governmental offices completely shut down to the public at the beginning of the pandemic, including courthouses, and many offices were running only on a limited staff and/or conducting virtual hearings. While office closures due to COVID-19 in Florida is a constantly evolving determination, many offices and government departments in Florida are currently allowing in-person visits or have adapted with the ability to conduct business virtually or via the mail to allow for the Florida surrogacy process to move as quickly as possible considering COVID-19 delays. The major delay to account for in the United States which international intended parents need to consider is the time it takes to obtain a U.S. Passport for the baby after birth to return home to the UK. The issuance of a U.S. Passport is a federal determination so this has impact on the surrogacy process throughout the entire United States and not just specific to Florida. The U.S. Passport Agency is constantly changing its policies as to intended parents' ability to quickly receive a U.S. Passport and so a potential UK intended parents needs to account for any unanticipated delays it may take to obtain a U.S. Passport after the birth of the baby.

Conclusion

While the surrogacy legal process varies greatly between the UK and the USA, what both countries have in common is that in both the USA and the UK, we are all going to be living with the impact of COVID-19 for decades to come. The economic hit in particular is going to take a long time to recover from; you only have to look at the UK government borrowing, at its highest level since the Second World War[6], to see this. The fertility sector will no doubt feel the knock-on effects of this for some time, with the NHS struggling to keep providing assisted reproduction services and individuals trying to stabilise their household finances and afford the costs of going through the surrogacy procedure. The UK Family Courts appear to be recovering back to a sort of normal more quickly, which is certainly cause for celebration; at the very least the legal process should remain relatively efficient and timely, to ensure children born to surrogates are not placed in legal limbo for any longer than is necessary.

Only time will tell what the longer term impacts of the Covid-19 pandemic will be on the surrogacy industry, but one thing is certain, in the first 16-18 months of the virus being prevalent, it has had a substantial impact on intended parents, surrogates and children all involved in this process.

[6] https://www.bbc.co.uk/news/business-56856195.

International Family Law, Policy and Practice

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These are discouraged but if used should be provided electronically in a separate file from the text of the article submitted and it should be clearly indicated in the covering email where in the article such an item should appear.

Headings

Other than the main title of the article, only headings which do substantially add to clarity of the text should be used, and their relative importance should be clearly indicated. Not more than three levels of headings should normally be used, employing larger and smaller size fonts and italics in that order.

Quotations

Quotations should be indicated by single quotation marks, with double quotation marks for quotes within quotes. Where a quotation is longer than five or six lines it should be indented as a separate paragraph, with a line space above and below.

All quotations should be cited exactly as in the original and should not be converted to *International Family Law, Policy and Practice* house style. The source of the quotation should be given in a footnote, which should include a page reference where appropriate, alternatively the full library reference should be included.

Cross-references (including in footnotes)

English terms (eg above/below) should be used rather than Latin (i.e. it is preferable NOT to use 'supra/infra' or 'ante/post' and similar terms where there is a suitable English alternative).

Cross-referencing should be kept to a minimum, and should be included as follows in the footnotes:

> Author, title of work + full reference, unless previously mentioned, in which case a shortened form of the reference may be used, e.g. (first mention) J Bloggs, *Title of work* (in italics) (Oxbridge University Press, 2010); (second mention) if repeating the reference - J Bloggs (2010) but if the reference is already directly above, - J Bloggs, above, p 000 will be sufficient, although it is accepted that some authors still use "ibid" despite having abandoned most other Latin terms.

Full case citations on each occasion, rather than cross-reference to an earlier footnote, are preferred. Please do not use End Notes (which impede reading and will have to be converted to footnotes by the typesetter) but footnotes only.

Latin phrases and other non-English expressions

These should always be italicised unless they are so common that they have become wholly absorbed into everyday language, such as bona fide, i.e., c.f., ibid, et seq, op cit, etc.

Abbreviations

If abbreviations are used they must be consistent. Long titles should be cited in full initially, followed by the abbreviation in brackets and double quotation marks, following which the abbreviation can then be used throughout.

Full points should not be used in abbreviations. Abbreviations should always be used for certain well known entities e.g. UK, USA, UN. Abbreviations which may not be familiar to overseas readers e.g. 'PRFD' for Principal Registry of the Family Division of the High Court of Justice, should be written out in full at first mention.

Use of capital letters

Capital letters should be kept to a minimum, and should be used only when referring to a specific body, organisation or office. Statutes should always have capital letters eg Act, Bill, Convention, Schedule, Article.

Even well known Conventions should be given the full title when first mentioned, e.g. the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 may then be abbreviated to the European Convention. The United Nations Convention on the Rights of the Child should be referred to in full when first mentioned and may be abbreviated to UNCRC thereafter.

Spellings

Words using 's' spellings should be used in preference to the 'z' versions.

Full points

Full points should not be used in abbreviations.

Dates

These should follow the usual legal publishers' format:

1 May 2010
2010–2011 (not 2010-11)

Page references

These should be cited in full:

pp 100–102 (not pp 100–2)

Numbers

Numbers from one to nine should be in words. Numbers from 10 onwards should be in numerals.

Cases

The full case names without abbreviation should be italicised and given in the text the first time the case is mentioned; its citation should be given as a footnote. Full neutral citation, where available, should be given in the text the first time the case is cited along with the case name. Thereafter a well known abbreviation such as the Petitioner's or Appellant's surname is acceptable e.g. *Livesey (formerly Jenkins) v Jenkins* [1985] AC 424 should be cited in full when first

mentioned but may then be referred to as *Livesey* or *Livesey v Jenkins*. Where reference is to a particular page, the reference should be followed by a comma and 'at p 426'.

For English cases the citation should follow the hierarchy of reports accepted in court (in order of preference):

– The official law reports (AC, Ch, Fam, QBD); WLR; FLR; All ER
– For ECHR cases the citation should be (in order of preference) EHRR, FLR, other.
– Judgments of the Court of Justice of the European Communities should be cited by reference to the European Court Reports (ECR)

Other law reports have their own rules which should be followed as far as possible.

Titles of judges

English judges should be referred to as eg Bodey J (not 'Bodey', still less 'Justice Bodey' though Mr Justice Bodey is permissible), Ward,LJ, Wall, P; Supreme Court Justices should be given their full titles throughout, e.g. Baroness Hale of Richmond, though Baroness Hale is permissible on a second or subsequent reference, and in connection with Supreme Court judgments Lady Hale is used when other members of that court are referred to as Lord Phillips, Lord Clarke etc. Judges in other jurisdictions must be given their correct titles for that jurisdiction.

Legislation

References should be set out in full in the text:

Schedule 1 to the Children Act 1989
rule 4.1 of the Family Proceedings Rules 1991
Article 8 of the European Convention for the Protection of Human Rights1950 (European Convention)

and in abbreviated form in the footnotes, where the statute usually comes first and the precise reference to section, Schedule etc follows, e.g.

Children Act 1989, Sch 1
Family Proceedings Rules 1991 (SI 1991/1247), r 4.1 (SI number to given in first reference)
Art 8 of the European Convention

'Act' and 'Bill' should always have initial capitals.

Command papers

The full title should be italicised and cited, as follows:

(Title) Cm 1000 (20--) NB Authors should check the precise citation of such papers the style of reference of which varies according to year of publication, and similarly with references to Hansard for Parliamentary material.

Contributions in edited books should be cited as eg J Bloggs, 'Chapter title' (unitalicised and enclosed in single quotation marks) in J Doe and K Doe (eds) 'Book title' (Oxbridge University Press, 2010) followed by a comma and 'at p 123'.

Journals

Article titles, like the titles of contributors to edited books, should be in single quotation marks and not italicised. Common abbreviations of journals should be used
whenever possible, e.g.

J.Bloggs and J. Doe 'Title' [2010] Fam Law 200

However where the full name of a journal is used it should always be italicised.