4pb For Family

PRIVATE CHILDREN LAW UPDATE

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Piers practises exclusively in the field of children law with a predominantly private children law practice. Shortlisted as 2024 Family Law Silk of the Year at the Legal 500 Awards and 2024 Family Law KC of the Year at the Family Law Awards, he has been recommended by the major guides to the legal profession for almost 20 years and for the last 5 years has been ranked in the top tier for children law by the Legal 500. A former co-chair of the Association of Lawyers for Children, he co-authors the leading practitioner work, Dictionary of Private Children Law, published annually. He took silk in 2010 and joined 4PB in 2021.

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Greg Davies is ranked as a leading junior in both Chambers and Partners and the Legal 500 and has nearly 20 years' experience in both private and public law children work.

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Julia is a dual-specialist in both private law children and matrimonial finance proceedings. Julia's practice spans both domestic and international matters, with recent cases involving serious domestic abuse, substance misuse, alienating behaviours, relocation and termination of parental responsibility. Julia co-authors the chapter on section 8 Children Act 1989 orders in practitioners' text Rayden & Jackson. Recently Julia has been involved in the decisions in B v C (No.2) (1996 Hague Convention Art 22) [2023] EWHC 2424 (Fam) and SM v PM [2023] EWHC 3446 (Fam).

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Jonathan is regularly instructed in complex private law children matters for both applicants and respondents at all levels of court. He has particular experience in cases involving an international element.

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Olivia has been building a thriving practice across all areas of family law. She regularly represents local authorities, parents, and children at all stages of care proceedings, including cases involving domestic abuse and drug or alcohol misuse, and she has experience with applications for the deprivation of liberty of minors. Olivia often appears in the High Court, Family Court, and before Lay Justices, and has conducted appeals in both the High Court and the Court of Appeal, appearing in cases both led and unled.

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Mani is a specialist in cases that have an international element relating to child abduction. Mani deals with cases concerning applications for summary return under the Hague Convention 1980, the recognition and enforcement of foreign orders relating to the Hague Convention 1996, applications concerning wardship / the inherent jurisdiction and forced marriage. Mani is known for his experience in 'stranded spouse' cases and is the author of 'A Practical Guide to Stranded Spouses in Family Law' which is available for purchase here. He also co-authored an article in The Times about this topic. Further, Mani has published a book in respect of 'A Practical Guide to Exercising the Inherent Jurisdiction' which can be purchased here.

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Miriam appears in the High Court in child abduction matters and represents parents in applications for leave to remove to Hague and non-Hague Convention countries. Miriam appeared in PG v PR [2018] EWFC 85 where she represented the respondent father in an application for the summary return of a child to Portugal. Miriam also appeared in SZ v DG & PG v LG [2020] EWHC 881 (Fam) seeking permission to make an Article 21 application whilst a Section 91(14) order was in place against her client. She has also represented parties in committal applications following non-compliance with passport orders.

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1. The Pathfinder Pilot in Practice

In September 2024 Catherine Wood KC and Julia Townend were kindly hosted by HHJ Simmonds, DJ Lowe and the staff at the Bournemouth Family Court to see the Pathfinder Pilot in operation. A comprehensive timetable for the visit included discussions with the judiciary and court staff responsible for implementing the Pathfinder Pilot, a special measures tour, observing Pathfinder hearings and attending meetings with the Pathfinder Pilot branch of the local CAFCASS team and a domestic abuse support agency.

WHAT IS IT?

The Pathfinder Pilot is an approach for the management of private law children disputes (section 8 and enforcement applications), launched in early 2022, in place of the Child Arrangements Programme.

The Pathfinder Pilot came about following calls for reform, for example recommendations from the Private Law Working Group (which built on the June 2020 Harm Report). Research had indicated that the adversarial processes which can be a product of the family justice system often worsened conflict between parties and risked causing repeat trauma to abuse victims and children.

The aim is an investigative, problem solving and early intervention approach to reduce prolonged litigation. To this end, the Pilot seeks to achieve the promotion of non-court dispute resolution, enhancement of the voice of the child, improvement of the court process and better information sharing between agencies.

WHERE IS THE PILOT OPERATIONAL?

Initially the Pilot was launched in February 2022 in some family courts in Dorset (Bournemouth and Weymouth) and North Wales (Caernarfon, Mold, Prestatyn and Wrexham). The feedback from litigants, court staff and the judiciary was positive. The early evidence-gathering process appeared to lead to fewer finding of fact hearings, thus freeing up judicial resources. The Pilot continues.

Subsequently there was a rollout, which is continuing, to elsewhere in Wales (Blackwood, Cardiff, Merthyr Tydfil, Newport and Pontypridd) for cases which commenced from April 2024 and to Birmingham for cases which commenced from May 2024. The purpose of the expansion to these centres has been to learn what needs to be done to operate the scheme in bigger court centres.

A national expansion had been planned subject to an evaluation of the Pathfinder Pilot's findings. At present it is understood that the timeframes are not set in stone. The commentary to FPR 2010, r. 36.2 explains that the Practice Direction runs from 21 February 2022 until the end of 28 February 2024/29 April 2025/28 May 2025.

A discussion hosted by the Nuffield Family Justice Observatory between HHJ Simmonds and HHJ Lloyd (DFJs for the areas involved in the initial stage of the Pathfinder Pilot) can be found here: https://www.nuffieldfjo.org.uk/events/in-conversation-withhis-honour-judge-chris-simmonds-and-her-honour-judge-gaynor-lloyd.

HOW DOES THE PATHFINDER PROCEDURE WORK?

The Pathfinder Pilot is addressed in Practice Direction 36Z of the Family Procedure Rules 2010. Some of the key procedural differences between the Child Arrangements Programme and the Pathfinder Pilot per the Practice Direction are:

- The initial stage is known as the **Information Gathering and Assessment stage**. This is designed to be child welfare focussed and investigative of the impact of the issues raised in the application. Generally, the court will direct completion by a multi-agency panel a Child Impact Report. This may be led by CAFCASS, a Welsh Family Proceedings Officer or a local authority officer. It will include safeguarding checks, parental engagement, indirect or direct engagement with the child or children (depending on their age and maturity), a DASH risk assessment (if domestic abuse features) and consideration of other relevant matters. This is designed to inform a Judge or Legal Adviser how to proceed. If the court directs a finding of fact hearing in relation to domestic abuse, the Child Impact Report should contain information needed for that hearing and the Child Impact Report should be updated after the hearing to take account of any findings made.

- The First Hearing Dispute Resolution Appointment is substituted with a **Safeguarding Gatekeeping Appointment/Case Management** stage. At this juncture the Child Impact Report will be reviewed. The tribunal may determine the necessary steps to enable the case to proceed to the Interventions/Decision Hearing stage (e.g. issues to be determined, whether there is a need for a finding of fact hearing, whether interim child arrangements are required etc).

- The next stage is the **Interventions/Decision** stage. It is intended that the court will use its discretion to decide how to enable the application to progress to its conclusion. Final hearings are referred to as **Decision**

Hearings.

- There is provision for a **Review** stage. In principle this was to be optional, taking place say 3 to 12 months post-order. This involves the opportunity for the parties to be contacted, including the child if necessary, to ascertain how the order is working for them. The focus is on the safety of the parties and the child and whether any post-order support is required. The focus is not on compliance with the order unless the court considers that to be appropriate or necessary.

HOW IS THE PILOT WORKING IN PRACTICE?

In **A View from The President's Chambers: July 2024** Sir Andrew McFarlane stated that "*as those who have experienced it will attest, Pathfinder has turned out to be more radical, and far more successful, than even its most ardent supporters would have anticipated*".

What became clear from discussions with the judiciary and staff at the Bournemouth Family Court is that there are some deviations in practice from the Practice Direction and perhaps between the areas in which the Pilot is being run whilst the trial framework beds in.

HHJ Scannell sitting in the Family Court at the Cardiff Civil and Family Justice Centre in **In the Matter of Child A and B [2024] EWFC 284 (B)** (addressed elsewhere in this update) dedicated part of that judgment to guidance about how Pathfinder operates in South East Wales. Paragraphs 39 to 57 of that judgment provides that information.

On a preliminary basis it appears that:

- Private law children proceedings are being concluded far more swiftly under Pathfinder than had generally been the case under the Child Arrangements Programme. This is partly due to the work that has been undertaken in the relevant areas to clear the backlogs before or during implementation of the Pathfinder Pilot. It will be interesting to see how this will operate if/when Pathfinder comes to London.

- The procedure at the outset for urgent cases has not changed, whether a matter proceeds pursuant to the Pathfinder Pilot or the Child Arrangements Programme. These will still be dealt with urgently and/or without notice as appropriate and the case will subsequently follow the relevant procedure.

- Terminology for the stages of the procedure is not always consistent. In Dorset, cases are generally treated consistently at the Information Gathering

and Assessment stage (referred to there as 'gatekeeping 1') and the Safeguarding Gatekeeping Appointment/Case Management stage (referred to there as 'gatekeeping 2') whereupon cases may go in different directions if the issues require it. In Southeast Wales it is suggested in the judgment of **In the Matter of Child A and B [2024] EWFC 284 (B)** that a 'twin track' approach is taken at the 'gatekeeping 2' stage. In that decision the case was allocated to the 'adjudication track' – where it appears to the court that the case is capable of settlement by agreement and the issues for determination are limited. Whilst parties would not have any input to this categorisation at the second gatekeeping stage, they have a right to apply to set aside any such order pursuant to FPR 2010, r. 4.3 in the usual way.

- At inter partes hearings following receipt of the Child Impact Report (certainly in the more straightforward cases), the judge may take a proactive case management approach. This could include providing a judge-led conciliation (with which practitioners may be familiar from FDAC), indicating to the parties what the likely outcome of the case might be with a view to encouraging agreement prior to hearing submissions or evidence, and/or determining issues as appropriate. Certainly, in Bournemouth Family Court the judicial proactivity exhibited appeared genuinely to assist litigants in resolving disputes more expeditiously. It is for the judge at this stage to determine whether or not any subsequent Decision Hearing which proves necessary should suitably be before a different tribunal or not.

- Review hearings have not generally been occurring. It became obvious in the first tranche of cases that these were not particularly effective. The experience in Dorset and North Wales seems to be that fewer cases are subject to enforcement applications.

- The role of independent social workers as we know it, especially in terms of authoring welfare reports under the Child Arrangements Programme, does not fit as neatly into the Pathfinder Pilot. Independent social workers are not rendered otiose for such cases, but it is important to think about any such instruction early and flag it in an application form as appropriate.

- If a children's guardian is appointed, at the current time in Dorset this does not fall to the author of the Child Impact Report. There is a separate guardian team within the local CAFCASS organisation.

- Certainly in Dorset there is a set of pro forma orders for Pathfinder. These are in fact fairly similar to the standard library of orders for the Child

Arrangements Programme with some tweaks.

- The challenges in practice so far, based on the feedback from the team at Bournemouth, arise where all of a sudden an out of area local authority (in which the Pathfinder Pilot is not operational) becomes involved with a family. The conflicting roles of section 7 welfare reports versus Child Impact Reports arise and this can cause confusion and delay.

- There has been an increase in domestic abuse support workers assisting litigants in court. Generally, the referrals to the domestic abuse support agencies come from CAFCASS and they are funded through the Domestic Abuse Commissioner's office (as introduced by the Domestic Abuse Act 2021).

WHAT DOES THE FUTURE HOLD?

It remains to be seen what will happen in terms of rolling out the Pathfinder Pilot to further courts. Based on discussions had by Catherine Wood KC and Julia Townend with the team at the Bournemouth Family Court, further reports are anticipated and soon to be published.

It is understood that further funding is essential to ensure the resources are in situ (particularly for CAFCASS and CAFCASS Cymru) to enable work on the Pilot alongside the more conventional Child Arrangements Programme and other cases. Sir Andrew McFarlane has stated that the additional funding required does reduce substantially once the 'old' cases are no longer live. The President expressed a hope to engage in early discussions with minsters on the future of Pathfinder and its rollout.

2. Disclosure of Information Between Family and Criminal Agencies and Jurisdictions: 2024 Protocol

This protocol replaces the 2013 Protocol and Good Practice Model – Disclosure of information in cases of alleged child abuse and linked criminal and care directions hearings (October 2013) and applies to the exchange of information and material between criminal and family agencies and jurisdictions. It relates to all private and public family law proceedings, including contemplated public law proceedings, and all material held by the police.

In private law proceedings, representatives must complete the Annex 1 when instructed to do so by the court. All Annex 1 applications must be submitted to police with a copy of the Annex 5. Without this, applications for disclosure will be rejected. The police will respond by providing disclosure as soon as reasonably practicable.

Annex 2 sets of the guidance notes for completing Annex 1 within private law Proceedings.

The guidance notes outline the objectives and procedures for a request form used by the Family Court to obtain relevant police information in family proceedings. The aims include providing the court with early insights into evidential materials, notifying the police about ongoing family cases, and facilitating timely document disclosure. Confidentiality is emphasised, allowing police material to be disclosed only when public interest or child protection is at stake. The notes detail the protocols for handling sensitive materials, including electronic devices, the need for redaction and polices costs of disclosure. They also stipulate the necessity for court orders in relation to PII applications and provide guidance in cases that involve indecent images. Additionally, the guidance underscores proportionality in requests and the importance of coordination between the police and legal representatives to ensure appropriate access to disclosure while safeguarding ongoing investigations.

Annex 5 provides the standard order to be sought from the court for police material, for litigants in person and solicitors involved in private law proceedings.

3. Shared Child Arrangements (Live With) Orders

Ever since the Children and Families Act 2014 introduced child arrangements orders in place of residence and contact orders, there has been debate as to what should be the court's proper approach to the making of shared child arrangements (live with) orders. Should the old shared residence case-law, with its focus on message-sending and parity of parental status, continue to apply? Or, should child arrangements orders simply be about setting the practical arrangements for the child's care without attribution of enhanced or diminished status attached?

In his Association of Lawyers for Children Hershman Levy Memorial Lecture 2014, McFarlane LJ, who had served on the 2011 Family Justice Review that had recommended this statutory change, had placed himself on the latter side of the argument, and his approach had been followed in *K v C*, a 2016 unreported decision of HHJ Rowe KC (sitting as a High Court Judge).[1]

But the debate now seems to be settled in the former direction. In **LKM v NPM [2023] EWFC 118** Williams J had drawn on the previous shared residence order authorities when making observations about the making of a shared child arrangements (live with) order, but this was without argument as to their ongoing relevance. Now in **AZ v BX (Child Arrangements Order: Appeal) [2024] EWHC 1528 (Fam)**, the issue has been properly argued on appeal, albeit unfortunately with silk on one side and litigant in person on the other. In that case Poole J set out the following principles applicable to a decision whether or not to make a shared live with order:

(i) the choice of whether to make a shared live with order or a live with/spend time with order is not merely a question of labelling, it is likely to be relevant to the welfare of the subject child(ren) and must be made by applying the principles of section 1 Children Act 1989 - in every case the appropriate choice of order depends on a full evaluation of all the circumstances, with the child's welfare being the court's paramount consideration;

(ii) the choice of the form of any live with order should be considered alongside the division of time and any other parts of the proposed child arrangements order;

(iii) a shared live with order may be suitable not only when there is to be an equal division of time with each parent but also when there is to be an unequal division of time; and

(iv) it does not necessarily follow from the fact that the parents are antagonistic or unsupportive of each other that a shared live with order will be

[1] Both cited in the Dictionary of Private Children Law (2024) - Saunders, Pressdee, George (Class Legal).

unsuitable.

Applying those principles, Poole J identified the following welfare advantages of a shared live with order in this particular case:

(a) it would make it more difficult for either parent to regard themselves as being in control of contact or to seek to control contact;
(b) as a shared live with order would set out arrangements for the division of time in the same terms for each parent (if not the same periods of time), it would put the parents on an equal footing when seeking to make arrangements for the children;
(c) it would also put the parents on an equal footing with regard to holidays abroad;
(d) a shared live with order would signal to each parent that each was of value in the lives of the children;
(e) it would also signal to the children that each parent has, in their capacity as parent, the same inherent importance in the children's lives; and
(f) it would promote a sense of stability within the family: whatever the disagreements between the parents, the court had ordered that the children shall live with both of them.

The approach of Poole J to the making of a shared child arrangements (live with) order has since been given a ringing endorsement by Cobb J in **A v K (Appeal: Fact-Finding: PD12J [2024] EWHC 1981 (Fam)**.

4. Fact-Finding Hearings – To Direct or Not to Direct?

The difficult decision whether or not to direct a fact-finding hearing is one occurring in very many private children law disputes and will likely arise even more so following the introduction of Cafcass' new domestic abuse practice policy.

The key Court of Appeal decisions are of course **Re H-N [2021] EWCA Civ 448** and **K v K [2022] EWCA Civ 468**. But they have now been usefully added to by Cobb J's decision in **A v K (Appeal: Fact-Finding: PD12J [2024] EWHC 1981 (Fam)** – of particular interest not only because of Cobb J's elevation to the Court of Appeal but because he was one of the architects of Practice Direction 12J.

Having reviewed the relevant procedural rules and authorities, Cobb J, at [47], emphasises the requirements for judges to deal with cases proportionately and to decide promptly which issues need investigation and hearing and which do not, and extracts the following from the case-law:

(i) not every case requires a fact-finding hearing even where domestic abuse is

alleged;

(ii) it is important for judges to hold firm to the notion that every fact-finding hearing must produce something of importance for the welfare decision;

(iii) there is a need for advocates to focus on those issues which it is necessary to determine to dispose of the case, and for oral evidence and/or oral submissions to be cut down only to that which is necessary for the court to hear;

(iv) decisions about the scope of fact-finding are core case management decisions with particular consequences for the length and cost of proceedings, the impact of the litigation on parties and others, and the allocation of court time;

(v) the function of the family court judge in resolving issues of fact is different from that of the criminal court judge.

This case also sees Cobb J align himself firmly with the approach of Poole J to the making of shared child arrangements (live with) orders, set out in **AZ v BX (Child Arrangements Order: Appeal) [2024] EWHC 1528 (Fam).**

5. The Principle of Contact and Domestic Abuse

Re H (A Child: Contact: Domestic Abuse) [2024] EWCA Civ 326 involved an appeal to the Court of Appeal against a first instance decision which, against a background of domestic abuse, had involved the making of a child arrangements order under which a father was to have no face-to-face contact with his three-year-old son for an indefinite period.

In dismissing the father's appeal, the lead judgment of Peter Jackson LJ cites with approval the summary of the general approach to contact in cases where domestic abuse is a feature provided by MacDonald J in **D v E (Termination of Parental Responsibility) [2021] EWFC 37,** and, in so doing, endorses MacDonald J's view that, whilst the principles set out in Practice Direction 12J are expressed by reference to domestic abuse, "*it is plain that this approach will apply, in proceedings relating to a child arrangements order, to all allegations or admissions of harm to the child or parent relevant to the question of contact or evidence indicating such harm or risk of harm*".

At [46] of his judgment, Peter Jackson LJ crystalises the issue for the court in these all too familiar circumstances and the way to arrive at the correct answer with admirable succinctness:

> *"[The] court must approach the fundamental welfare assessment that underlies every decision with full alertness both to the inherent value of the parent-child relationship and to the significance of any harm that a contact order may entail for the child or for the parent with*

care. Where these considerations conflict, the court must identify the best solution for the child or, where there is no good solution, the least worst one."

6. Specific Issue Orders

How far could and should the court go by way of specific issue order to override the parental responsibility of one parent? That was the essential question addressed by the Court of Appeal in **T-D (Children: Specific Issue Order) [2024] EWCA Civ 793.** It concerned the appeal of the mother of two children, currently dividing their time equally between their separated parents, against a first instance specific issue order that gave "overriding parental responsibility" to their father in three key respects, expressly providing as follows:

> *"The court directs that the following questions insofar as they may in future arise in connection with parental responsibility for either or both children are to be determined by the father in the event of disagreement with the mother.*
> *a. All questions relating to schooling, this is to include which schools the children are to attend; who shall attend parents' evenings, sports events etc;*
>
> *b. All questions relating to future therapy including whether and if so on what basis therapy is to be provided; by whom, etc.;*
>
> *c. All questions relating to interactions with social workers and medical professionals, including what is to be said to them concerning the children and the extent to which they may be involved in the children's lives.*
>
> *For the avoidance of doubt the father must still consult the mother in relation to decision making for all significant events in which he exercises overriding parental responsibility."*

That order had been made on the back of a number of findings, including about the level of parental conflict (which had led to the initiation of public law proceedings); about the mother's controlling personality, of which the father had long been a victim, and her exertion of pressure on professionals; about the mother's inability to promote the children's need for a positive relationship with the father, her refusal to co-operate with him and failure to communicate constructively with him, with her unable to be trusted to place the children first whenever there is a dispute with the father; and about the mother's need to exercise control over the circumstances of the children's relationship with their father. But the court had also found the parents to be equally capable of meeting

the children's basic care needs, that they both desired and promoted the children's education, and that there were positive aspects to the mother's parenting.

The two questions for the Court of Appeal were whether the Family Court had the power to make a specific issue order in those terms, which it determined it did, and secondly whether it was wrong for the judge to make such an order in this case. And on that score the Court of Appeal determined that the judge had erred in relation to the issue of schooling, providing four reasons for their decision:

(i) the specific issue order (as made) was unlikely to be effective - the order invited differences of interpretation, the mother was able to contest any decision of the father's by making an application to the court and there was a particular need for the ground rules to be unmistakably spelled out;
(ii) the issues of residence and schooling were integrally connected and the court was obliged to deal with them both;
(iii) the evidential basis for the order about school choices was not apparent - as regards schooling, the judge had found the parents each to be genuinely interested but there was nothing about the mother's otherwise deplorable behaviour that would justify the conclusion that she should not have equal input into such an important decision; and
(iv) the order was unnecessary and disproportionate, with the judge bound to face up to the fact that there is no reported precedent for an order depriving a fully-engaged carer of significant elements of their parental responsibility.

7. Requests for Clarification of Judgments

In a series of judgments over recent years, the Court of Appeal has, with limited success, sought to curtail the practice of advocates providing to judges lengthy and/or inappropriate requests for clarifications of their judgments. It would appear from **YM (Care Proceedings) (Clarification of Reasons) [2024] EWCA Civ 71**, a decision in a care case with plain relevance in this context for private children law proceedings, that its patience has now run out.

With characteristic clarity, Baker LJ sets out the following five lessons to be learned from the case of general applicability:

(i) a judgment does not need to address every point that has arisen in the case - the court should only be asked to address any omission, ambiguity or deficiency in the reasoning in the judgment if it is material to the decisions that have to be taken in the proceedings;
(ii) when making a request for clarification of any perceived omission, ambiguity or deficiency in the reasoning in the judgment, counsel should therefore identify why the clarification is material to the decisions that have to be taken

in the proceedings;

(iii) counsel should never use a request for clarification as an opportunity to re-argue the case, reiterate submissions, or invite the judge to reconsider the findings;

(iv) requests for clarification should not be sent in separately by the parties but rather in a single document compiled by one of the advocates - save in exceptional circumstances, there should never be repeated requests for clarification;

(v) judges should only respond to requests for clarification that are material to the decisions that have to be taken in the proceedings.

8. Appeal Against Transfer of Residence

Sir Jonathan Cohen allows an appeal against a transfer of residence, made by way of an interim care order, in **LT v RT [2024] EWHC 2085 (Fam).**

The parties separated in January 2020 and the children (10 and rising 8) had been living with the mother since separation. The contact with the father was described as problematic at best, and the father asserted that the mother had repeatedly breached the orders. The father issued an application for enforcement, which came before a District Judge on 28 March 2024, who timetabled the matter to DRA. It was recorded on the order that there was substantive agreement between the parties regarding the father spending time with the children, and as a result, the Judge directed that the father's enforcement application be adjourned generally with liberty to restore.

Parenting assessments were completed which recommended a change of residence from the mother to the father under a child arrangements order. The Judge had directed those assessments to be provided to the parents in May 2024, the day after they were disclosed to the Guardian. The Guardian was concerned about the transfer of residence being managed in the absence of an interim care order and considered that unless the court took control, there was a risk that the mother would say something that would poison the children against the father. The Guardian filed a C2 application for an urgent hearing, and completed a s16A risk assessment, neither of which were served on the parents.

The parents came to court for a hearing, not knowing what it was about. Sir Jonathan Cohen considered it would not be an exaggeration to describe it as an 'ambush'. The Guardian's analysis was emailed to the parents shortly before the hearing (the mother had about 25 minutes to read it on her phone), and the parenting assessments, which were over 70 pages long, were given to the parents at court; they had at most 1 hour to consider them. The Judge then heard the

parties and made an interim care order with a plan of immediate transfer *that afternoon* to the father. Neither parent was legally represented at the hearing, although the mother was supported by a McKenzie Friend.

Sir Jonathan Cohen determined that the procedure was unfair, and it was deeply unsatisfactory that the parents had come to court unaware that there was any application for the children to be removed from the mother's care. To transfer residence in the circumstances could not be justified. At no stage were other possibilities ventilated, and even though that was not what the Guardian or the local authority were proposing, they should have been discussed given that the parents were unrepresented. There was no reference at the hearing to suggest that the mother could apply for a stay or seek to appeal the decision.

The court determined that it was 'axiomatic' that parents must have a proper opportunity to prepare and argue their cases. There are occasions where the court makes orders removing children from parents in circumstances where proper notice cannot be given, but such cases are few and far between and they are invariably cases where children have suffered or risk of suffering serious physical or sexual harm. The court did not agree that the risk identified by the Guardian demanded summary removal from the mother.

The Guardian had also referred to the mother as a flight risk, about which Sir Jonathan Cohen considered that the evidence was virtually non-existent.

The appeal was allowed. Sir Jonathan Cohen had asked the parties to consider some sort of shared care arrangement; the mother was willing to agree to an alternate week pattern, the father and the Guardian opposed. The local authority had not attended the appeal hearing and the Guardian sought an adjournment for the local authority to attend. The court did not adjourn but indicated that the local authority could apply to attend before the court two days' later (no application was made). Sir Jonathan Cohen expressed his intention that the children should spend time with the parents on an alternate week basis until the DRA.

9. Parental Responsibility for Step-Parent

A v M [2024] EWHC 2020 (Fam) *involved an application by a step-parent for parental responsibility heard by Mr Justice Hayden, following Hague proceedings. The court granted parental responsibility for one child but not the other*

Eight members of 4PB were involved in this case:
Christopher Hames KC and Ralph Marnham represented the applicant (A), Mark Jarman KC and Mani Singh Basi represented the first respondent (M), Teertha Gupta KC and Indu Kumar represented the second respondent (S), and Frankie Shama and Alexandra Halliday represented the fourth respondent (T).

The court was concerned with D (14) and K (10), who were half-siblings.

The case had a complex factual background. M and N had begun a relationship in August 2008 and D was born in the UK in 2010. M and N did not marry, they separated in around November 2010 and N made an application for contact in 2012.

Meanwhile, in summer 2013, M had begun a relationship with T, and gave birth to K in June 2014. It was common ground that T took no interest and played no part in K's life at the time. D became subject to a child protection plan.

In February 2014, by a final order made in private law proceedings, N was to have contact with D on alternate weekends and on intervening Tuesday evenings.

M thereafter met A online; A lived in New Zealand. In November 2016, M took D and K to live in New Zealand without consulting N (nor T, but he had not played a part in K's life thus far).

A and M married in New Zealand in March 2017 and had a child, Y. They applied jointly for A to be appointed as a Guardian for D in November 2018. There were attempts to notify N and engage him in the process but there was no response. The application was granted. There was no application made in relation to K (M had signed a letter in those proceedings stating that A was 'the only father K had ever known'); K regarded A as her biological father and M did not want K to be told otherwise.

In 2022, A and M's relationship began to break down, and it was said by A that M's behaviour became increasingly erratic. In 2023, A removed herself and the children to a refuge in New Zealand.

In August 2023, A applied for orders preventing Y's removal (and later amended his application to seek care of all the children). In September 2023, an order was made for shared care, with the children spending fractionally more than half the week with A.

In October 2023, M sent D and K to live with their maternal aunt in the UK. A was not told about this. D was told the day before; K at the airport. The children had not seen the aunt for years. M and Y remained in New Zealand.

A applied under the 1980 Hague Convention for D and K to return to New Zealand. His application was ultimately withdrawn. In March 2024, Mr Todd KC, sitting as a Deputy High Court Judge, refused to recognise A's parental responsibility for the children, and orders were made in relation to D and K spending time with A. A's appeal against that decision was adjourned pending resolution of his application for parental responsibility.

The court gave a summary of the applicable law in relation to granting parental responsibility, and decided as follows:

Given D's age, the court did not consider that the existence of a parental responsibility order would add or subtract significantly from the quality and importance of his relationship with A. To overrule D's consistently expressed wishes and feelings (which were resistant to an order being made), would generate a sense of disempowerment which was likely to be inconsistent with his best interests and welfare.

However, the court considered it appropriate to grant A parental responsibility for K, to reflect the fact that until now, A was the only father she had known, it would assure her of his unwavering commitment to her, and enable him to intervene if there was any further attempt by M to disrupt matters. The court was beyond any doubt that A had shown lengthy and instinctive commitment to K, and no doubt that she had regarded him as her father. There was a strong attachment, buffeted to some degree by the traumatic circumstances of her removal from New Zealand but also M's negativity about A. The parental responsibility order would reassure K that she is loved by A and recognise the reality of the status of A in her life. The court disagreed with the Guardian that an order would add a layer of complication.

10. Indirect Contact and Section 91(14) Order

Re B and K (Children: Contact: Section 91(14) Orders) [2024] EWFC 167 involved an *order of Mrs Justice Henke for the father to have indirect contact with the children by way of letters, with a s91(14) order to remain in place until the expiry of the prohibited steps order and non-molestation order.*

The parents were in a relationship between 2009 and 2014. The court was concerned with K (nearly 13) and B (nearly 11). There had been various applications since 2014. There was a history of domestic abuse and allegations made by both parents. An order was made in January 2018 for the children to spend extensive time with the father. The mother said that in late 2018, she became aware of domestic abuse between the father and his then partner. B is said to have been aware of that abuse. Matters deteriorated and by July 2022, the mother was saying that the children did not want to spend so much time with the father, and in September 2022, B saw the father for the last time (K continued to spend about 3 nights and substantial parts of 6 days per fortnight with the father until July 2023). The father applied to enforce the 2018 order, and a 16.4 Guardian was appointed.

At the final hearing in June/July 2023, the court initially decided to reduce K's time with the father to once per month, following the recommendations of the Guardian. However, the father's very concerning behaviour on hearing this decision, both inside and outside the courtroom, led the Guardian to change her recommendation. In her view, the children could only be kept safe from emotional harm from the father if there was an order for indirect contact only. The court made a final order for indirect contact only by way of letters. The court made a prohibited steps order to prevent the father from removing the children from the mother's care, and a non-molestation order to protect the mother, the children and their half-siblings.

The father sought permission to appeal the orders and was granted permission to appeal. Sir Jonathan Cohen allowed the part of the order which terminated K's contact with the father.

The Guardian made an application for a s91(14) order and submitted an updated report in respect of the children's wishes and feelings. The Guardian recommended that contact stay as it is. The father made an application for the court to 'action' an independent mental health medical professional to assess the mother. He alleged that the mother had alienated the children and sought a progression of his contact. The Guardian recommended that indirect contact

should be limited to monthly letters and small gifts on special occasions, as well as recommending a s91(14) order until each child was 16. The mother agreed with the Guardian.

The Judge determined that an assessment of the mother's mental health was not necessary. She found that the father himself was emotionally fragile, not empathetic to the children's needs, and did not truly understand or appreciate that the manner in which he pursued his goals impacts on others. Harassment by texts and emails was part of how the father responded to decisions which are adverse to him, and that he had, as recently as earlier in the year, bombarded the Guardian and the solicitors with emails (between the hearings in March 2024 and May 2024, the father sent 22 emails to the children's solicitor and the court, some of which were accusing Cafcass of being biased, taking bribes, tampering with information and evidence, and having an inappropriate relationship with the mother). The mother was a victim of domestic abuse from the father; she had not deliberately alienated the children, but they had likely been impacted by their experiences.

B had consistently articulated that she did not want to have any contact with her father, and the Judge accepted that her reasoning was influenced by her lived experience. K's wishes and feelings were more complex; he did not want to see his father now but may wish to in the future, and was confident that when he is ready to see his father again, the mother will arrange it for him.

The Judge ordered indirect contact by way of monthly letters, and the mother was to send the father quarterly updates. The prohibited steps order and non-molestation order were continued, with a s91(14) order in place until their expiry to give the children respite from the almost continuous litigation and remove any pressure from them by being subject to applications. The Judge disagreed with the Guardian that the s91(14) order should continue until the children were 16; the purpose of the order was to give the children a period of respite, not to send a message to the children that they need not have contact with the father until they are 16.

11. Interim Child Arrangements

Re E, F and G (Interim Child Arrangements) [2024] EWCA Civ 874 *involved a successful appeal against an interim child arrangements order made for unsupervised contact between the children and the father, pending a fact-finding hearing into the parties' cross-allegations*

M was born in Egypt and F was born in Pakistan. They met in 2010 and married the following year. They had three daughters, who were 11, 10 and 8. The parties had separated for short periods in 2018 and 2020, whereupon the mother and the children had moved into a refuge. The marriage finally broke down in July 2022, and the mother and the children moved again to a refuge. The father applied for a child arrangements order, a prohibited steps order preventing the mother from removing the children from the jurisdiction or their home town, and a specific issue order for the father to take the children on holiday. Subsequently, the father made an application for FGMPOs in respect of the children. The mother raised allegations of domestic abuse, including physical abuse of children, and coercive and controlling behaviour, including that the father's FGMPO application was a further means of coercive and controlling behaviour.

Interim FGMPOs were made and the case was listed for a combined fact-finding/welfare hearing. Cafcass had completed a section 7 report, which recommended a fact-finding hearing to determine the allegations. The matter came before the court in October 2023 but had to be adjourned. Directions were made, including for a QLR to be appointed on behalf of the father. The interim child arrangements order was varied from supervised to supported contact at a contact centre. An addendum section 7 report was completed in January 2024; the Cafcass officer maintained her original recommendation that the progression of contact was dependent on the findings made.

When the matter came before the court for the fact-finding hearing in March 2024, no QLR had been identified for the father. At the suggestion of the mother's solicitors, the father had sent questions to the court which he wished to be put to the mother. The mother invited the court to proceed with the hearing and put questions to the mother on behalf of the father. The court rejected this proposal and adjourned the hearing.

The court then went on to consider interim arrangements. The mother proposed that the existing supported contact should continue; the father sought for the supervision to be lifted. The Judge determined that supervision was no longer necessary, ordered unsupervised daytime contact, and listed the matter for a combined fact-finding/welfare hearing in July 2024.

On being notified of the Judge's decision, the Cafcass officer submitted s16A risk assessment and made a referral to the local authority.
The mother applied for permission to appeal on two grounds: 1) that the Judge was wrong to make an order for unsupervised contact in the interim pending determination of the allegations; and 2) that the Judge was wrong to adjourn the fact-finding hearing. The mother also sought a stay of the interim child arrangements order. Permission was granted on both grounds of appeal and the court ordered a stay of the interim child arrangements order.

Christopher Hames KC and Olivia Gaunt of 4PB appeared for the appellant in the Court of Appeal.

In respect of the second ground of appeal, in relation to the decision to adjourn, the Court of Appeal gave an overview of the QLR framework and rules. The court acknowledged that the scheme had not so far attracted sufficient lawyers to meet the demand for QLRs, and acknowledged the 'warning' raised by the mother in relation to further delays and backlogs, as well as the risk of alleged perpetrators deliberately exploiting the shortage of QLRs as a further means of abusing and controlling their victims. Despite this, the Court concluded that the Judge's case management decision to adjourn the hearing should not be interfered with; the Judge had taken an entirely reasonable view that the questioning of the mother should be conducted by a lawyer, which the court could understand. That ground of appeal was therefore dismissed.

In relation to the interim child arrangements order, the Court of Appeal found that the Judge's reasoning was inconsistent with PD12J and in particular with paragraph 25. Lord Justice Baker, giving the leading judgment, stated that *"the notion that any relaxation in contact which might follow findings can somehow be tested out before the fact-finding hearing is contrary to paragraph 25 of the Practice Direction"* [**38**]. The Cafcass report had been no more than a restatement of the policy underpinning the Practice Direction, and the Judge had been wrong to express doubt about this. The Judge's comments that the *'time has come, on any view of facts, to move to unsupervised time'* was unsustainable, as were his assertions that unsupervised contact *'is what the children need'*, that *'the children will not come to any harm'* and that *'it creates no unmanageable risk for the children'* before the fact-finding hearing had taken place. The Court determined that the Judge's *"observation in dismissing the application for permission to appeal that it could not be said that the risk was unmanageable because, "even if those aspects of domestic abuse which the mother alleged were correct, it did not mean that the contact should be [supervised]" is plainly contrary to paragraph 25 of the Practice Direction and in my view irrational. Unless and until the court has considered the allegations of*

abuse, the extent of the risk is unknown and thus unmanageable unless contact is supervised" [**40**]. The Court allowed the appeal on this ground and remitted the matter for further case management.

12. 'Parental Alienation'

Father v Mother & Anor [2024] EWHC 2578 (Fam) involved the judgment of Lieven J hearing an appeal against the refusal of a Recorder to transfer the care of a child from his mother to his father. The case involved allegations of parental alienation in circumstances in which the court had previously made findings of domestic abuse against the father. The child was joined to proceedings and his R.16.4 Guardian recommended a transfer of care, as did the court appointed expert who conducted a psychological assessment of the family.

The judgment is relevant to (i) appeals of factual determinations; (ii) consideration of parental alienation; (iii) the court departing from the recommendations of experts; and (iv) the wide discretion that a first instance judge has in weighing up competing welfare concerns.

Rob Littlewood of 4PB represented the Children's Guardian.

The child was aged 9. The parents' relationship broke down shortly after he was born. The Father had made his first application for a Child Arrangements Order in December 2015. This concluded with an order that the child live with his mother and spend time with his father. By the time of a fourth application by the father in 2018, the court held a fact-finding hearing. The court found that the father was 'dictatorial and obsessive' and that he had an 'obsession with compelling M to co-parent and to mediate'. The court found that the mother 'did not hamper father's contact'.

The child had not had contact with his father since February 2020. This followed the mother reporting to the school that the child had alleged physical abuse by the father. The Local Authority initially advised the mother to suspend contact, but shortly afterwards suggested that there was no reason why contact should not resume, subject to the child's wishes and feelings.

In September 2021, the court directed a psychological assessment of the family and joined the child to proceedings. Both the guardian and the psychologist recommended a transfer in care. The Judge heard a final hearing over 3 days in February 2024 and departed from the recommendations and did not transfer care to the father, who appealed.

In her judgment, Lieven J sets out the relevant laws to appeals and particularly to appeals on issues of fact. Lieven J is clear that '*there is no doubt that a Judge is entitled to depart from the view of an expert as long as adequate reasons for doing so are given*' [*Re B (Care Expert Witnesses)* [1996] 1 FLR 667.

Lieven J is similarly clear that when considering allegations of 'alienating' behaviour, '*ultimately the question whether one parent has acted, whether deliberately or otherwise, to influence a child against the other parent is a matter of fact which turns entirely on the individual case*'. The Judge referred to the draft Family Justice Council Guidance on Parental Alienation, but considered that, as it is merely guidance and secondly is only in draft form at the consultation stage, it carried limited weight.

Lieven J considered that ' *'parental alienation' is not a helpful categorisation*' and that there may be multiple reasons why a child is suspicious of, or hostile to, one parent and that there will be a spectrum between on the one hand a child's wholly justified concerns and on the other, the parent who deliberately seeks to turn a child against the other parent out of hostility; further that there will then be a spectrum between the lived with parent's worries and the degree to which the child reflects them or magnifies them.

The judgment was critical of the apparent assumption that if the child is scared of the father, that must be because he has been 'alienated' and his fear is somehow illegitimate and must be ignored. The Judge described this as 'illogical' and that the child's fear of his father '*may be wholly real and impactful upon him, even if it has no rational basis*'. Utilising the court's duty to pursue the child's welfare, Lieven J stated that '*forcing him to live with a parent he is afraid of, whether objectively justified or not, is something that would need considerable justification*'.

Lieven J described this appeal as '*a classic example of an appeal which is in truth a challenge to the merits of the decision and to the weight the Judge gave to particular evidence*'. She stated hat '*it is important that Family Court judges can exercise their functions without feeling that judgments have to be overly long and detailed because of their fear of being successfully appealed*'.

Ultimately, the court considered that the Recorder's approach was a balance of harm and benefit which was plainly open to the Judge, subject to him giving adequate reasons; that it was a matter for the Recorder as to the weight he gave the harm of removing the child from his mother, as against the potential benefits in the longer-term of restoring a relationship with his father.

The appeal was accordingly dismissed.

13. Schooling Dispute in Pathfinder Case

Child A and B, Re [2024] EWFC 284 (B) involved an appeal concerning an application about where the two subject children should attend school – whether in England or in Wales. The judgment of HHJ Scannell, on appeal from Lay Justices, provides helpful guidance as to best practice in 'Pathfinder' cases. Although the Judge limits the guidance to South-East Wales, it may be of wider practical application.

By way of a brief reminder, the Pathfinder Pilot arose out of the '*Assessing the Risk of Harm to Children and Parents in Private Law Children's Cases*' report from 2019. This raised concerned that the adversarial court process often worsened conflict between parents and had negative impacts on both children and on adults, particularly those who were victims of domestic abuse.

The 'Pathfinder Model' is intended to be more investigative and less adversarial, with the focus on solving problems, rather than creating, or worsening conflict. The pilot was initially run in Dorset and North Wales and in May 2024 was expanded to Birmingham and to South Wales, before a potential nationwide rollout.

A key document in the Pathfinder Model is the Child Impact Report, which replaces safeguarding letters in this process. There is a presumption that the subject children will have an opportunity to be seen and heard at this stage. The court will then decide the next steps. In the Pathfinder Model, emphasis is placed on hearings being used to make decisions, as greater evidence and information should be before the court.

In this particular case, the parties were married for 10 years and separated in May 2022. Each made counter-allegations of abusive behaviours against the other, but in previous proceedings in 2023, neither party sought to pursue findings and the court, in considering PD12J did not consider that a fact-finding hearing would be necessary or proportionate.

The application now before the court concerned where the children should attend secondary school. The application was made on 31 May 2024. A Gatekeeping 1 hearing took place on 4 June 2024, directed a Child Impact Report to be prepared and listed a Gatekeeping 2 hearing on 30 July. The case was then allocated to the adjudication track, to be heard by the lay justices on 14 August 2024.

The Child Impact Report had recommended a move to the school in England for both children. The father's representatives had written to the author of that report with a list of questions, without the court's permission and without consultation with the mother or her representatives. The lay justices determined the application on submissions and without hearing from the CAFCASS officer, whose recommendations they departed from.

HHJ Scannell allowed the appeal. She considered that the court had determined that it required further evidence but took no steps to obtain it, departed from the recommendation of the CAFCASS Officer without good reason or hearing from the officer and failed to carry out its own analysis on the issues; further, that the court failed to properly consider the welfare checklist.

Upon the invitation of the advocates, HHJ Scannell proceeded to offer some guidance as to how Pathfinder operates in South Wales and in particular to cases allocated to the adjudication track. This will be done when it appears to the court that the matter is capable of being settled by agreement and when the issues for determination are '*limited*'. This assessment will be carried out on papers after the court has received the Child Impact Report and any risk assessment in respect of domestic abuse. The parties themselves have no input into this hearing, but can apply to vary the order within 7 days.

If a party seeks to ask questions of the CAFCASS Officer, they should apply to vary the GK2 order and invite the CAFCASS Officer to attend, or to put the questions in writing to them.

HHJ Scannell emphasised the 'problem solving approach' to the Pathfinder Model and that Judge led conciliation is a significant feature of the adjudication track. It is not like conciliation which takes place at a FHDRA, but is informed by evidence. In the Pathfinder model, this should take place prior to submissions or evidence being heard. To fail to do so would be to miss out a key part of the problem solving approach. A decision that Judge led conciliation is not appropriate is a significant case management decision and should only take place after hearing submissions from both parties.

The judgment contains helpful guidance, which although limited to the application of the model in South Wales, will likely be of assistance to practitioners engaged with the model as it is rolled out across the country.

14. Participation Directions and Expert Evidence

In **Re: A (A Child: Appeal: Case Management Decision: Identity of Expert) [2024] EWHC 1669 (Fam)** Henke J was concerned with an application against a case management decision in private law proceedings. The judgment emphasises the need to (i) proactively consider participation directions in cases involving allegations of domestic abuse; and (ii) the need to ensure that the best possible evidence is before the court for welfare assessments to be made.

HHJ Jacklin had previously in August 2023, granted the parties permission to instruct Dr Willemsen to undertake a global psychological assessment of the family. There was no appeal of that order by either party. However, in September 2023, the Mother applied to discharge or vary that order and sought a fact-finding hearing. The Recorder hearing that application refused to vary or discharge the instruction of the expert and refused the Mother's application for a fact-finding hearing. The Mother sought permission to appeal those orders, not the earlier orders of HHJ Jacklin. After the Recorder had given his judgment, the Mother informed him of significant male sexual, physical and emotional abuse that she had suffered at the hands of males other than the Father. She informed the Recorder that this included sexual abuse by a consultant paediatrician when she was a teenager.

Henke J gave permission to appeal on the papers and heard the substantive appeal. The Judge reminded herself of *Re TG (A Child)* [2013] EWCA Civ 5 and in particular, that (i) the Court of Appeal has emphasised '*the importance of supporting first instance judges who make robust but fair case-management decisions*', (ii) that case management should not be interrupted by interim appeals which lead to satellite litigation and to delays; (iii) the circumstances in which the court can or should interfere with case management decisions are limited; and (iv) a judge making case management decisions has a very wide discretion.

Both parties accepted that the Mother should have had participation directions in place during the hearing before the Recorder and their absence was a procedural irregularity. Henke J referred to the judgment of Mrs Justice Lieven in *BF v LE [2023] EWHC 2009 (Fam)*, that there is a '*proactive duty no judges to consider whether special measures are required. The fact that an alleged victim does not request them, even if represented, does not relieve the judge of that proactive duty*'. However, this does not lead to an automatic conclusion that the first instance decision ought to be set aside.

The Judge did not consider that the appeal should be allowed on the Recorder's refusal to permit a fact-finding hearing. Although he did not mention PD12J explicitly, his decision cannot be said to have been wrong.

Henke J then went onto remit the decision as to the ongoing need for a psychological assessment and who should conduct the same. However, the Judge referred to the decision of Lady Justice King in *Re N (A Child) (Instruction of Expert)* [2022] EWCA Civ 1588, in which the Court of Appeal refused an appeal against the instruction of a female Independent Social Worker. In that case, King LJ held that "'*The need to obtain the best possible evidence applies equally to that part of the proceedings which takes place before the hearing, whether in the form of assessments or the commissioning of experts reports.*"

Henke J expressed her view that the Mother in this case had '*put forward good reason why a female psychologist should be used*' and that on the facts of this particular case, '*the best possible assessment evidence will be obtained by appointing a female psychologist to undertake the assessment*', is most likely to engage the Mother in the assessment process and would limit opportunity for any further objection and further delay in the future.

Although Henke J explicitly referred to the facts of this particular case, there can be seen the scope for the principle to be extrapolated to other cases involving similar principles.

15. Publication of Judgment

Re T (Children: Publication of Judgment) [2024] EWCA Civ 697 (21 June 2024)

This appeal concerned the publication of a welfare judgment and the High Court's decision that its judgment should be published when the youngest child attained the age of 18, with the parents' full name, whilst the children would be referred to by unrelated initials.

The proceedings were extremely protracted and heavily contested over nearly a decade. The Judgment refers to the fact that between 2013 and 2022, there were more than 70 hearings involving some 26 judges. The only remaining minor subject child was aged 16. His sister was now 18 and he had two adult half-siblings.

Arbuthnot J conducted a two-day hearing focussing on the child's contact with his father. The Mother sought an order for no contact. The Judge found that *inter alia* the Mother had been '*devious and dishonest*' and was not a victim of domestic abuse; the children had taken their mother's side in ignorance; for many years the

mother's aim was to cut the father out of the children's lives; the father was a decent man but lacked insight and was at time insensitive; the child's wishes and feelings had been formed by his mother's manipulative behaviour since he was a young child, but the reality was that he did not want contact with his father to continue.

The Judge invited submissions as to publication and the CAFCASS Officer spoke to the children about the issue. Arbuthnot J determined that the judgment should be further published in the summer of 2026 once the child attained 18 and that the parents should be given their full names and the children referred to by random initials.

The Mother appealed the publication decision.

In the Court of Appeal, Peter Jackson LJ summarised the Mother's grounds of appeal thus:

> 1) Publication without anonymisation is unnecessary to help the public to understand how this case and others of its kind involving 'ordinary' people are treated by the family courts: the publication of the anonymised welfare judgement sufficiently achieves that.
> 2) The anonymised welfare judgment explains the court's approach to the application of s. 9(6) CA 1989.
> 3) It was wrong to find that publication was consistent with the children's best interests. Their informed choices, now and as adults, will not be enhanced by placing their private lives further into the public domain.
> 4) The children's wishes and feelings should have been given more respect.
> 5) Having accepted that there would be an impact on S and T of future publication of the parent's names, both at the time of publication and in the period beforehand, the Judge was wrong to give greater weight to the public interest in naming the parents.

He noted that the order was unusual as publication would have effect at a distant future date when the impact upon the children could not reliably be known or evaluated.

Peter Jackson LJ stated that '*A decision about whether and in what form a judgment should be published is pre-eminently a matter for its author, acting within a framework of law and guidance. As a matter of law, the decision calls for the familiar balancing of the competing advantages of privacy (Article 8) and freedom of expression (Article 10) as applied to the individual circumstances. Having tried the case, the judge will usually*

be best placed to identify the relevant factors and to determine where the balance falls. An appeal will only succeed if the judge has erred in principle or reached a conclusion that is outside the range of conclusions which a judge could reasonably reach'.

The judgment notes that since the 2014 Practice Guidance *Transparency in the Family Courts: Publication of Judgments* issued by Sir James Munby P, several thousand judgments had been published by judges and almost all of them are anonymised, with notable exceptions being *Griffiths v Tickle (Rights of Women and another intervening)* [2021] EWCA Civ 1882 and *Re Al M (Publication)* [2020] EWHC 122 (Fam).

Peter Jackson LJ considered that '*this was a case about an ordinary family that became engulfed in extraordinary, though sadly familiar, litigation*'. The Judge noted the factors on both sides of the argument. In favour of naming the parents was:

a. The principle of open justice;
b. The increased focus on transparency;
c. Increased public interest where names are given;
d. Public interest in the court's limitations in intransigent and lengthy cases;
e. Previous secrecy following non-publication of earlier judgments;
f. Public interest in the application s.9(6) CA 1989;
g. The father's right to speak of his experiences and correct the mother's misinformation; and
h. The benefit to the children in being able to access a balanced account and make informed choices as adults.

Against naming the parents were:

i. The children's clearly expressed views;
j. The uncertain impact on them of publication;
k. The worry caused to the children in the meantime;
l. The mother's opposition;
m. The fact that the family has no public profile.

The Court of Appeal considered that two particularly important factors were her acceptance that jigsaw identification of the children would be easy once the parents were named and her assessment that the impact of publication on the children was difficult to predict. Peter Jackson LJ considered that '*the court was not in a position to predict the effect of its order upon them*' and that it could not assess the impact in the short, medium or long-term as it must do. Further that in general, arrangements for publishing a judgment are best dealt with in the immediate aftermath of a trial. Accordingly, the publication order was set aside, but the Father was given liberty to apply to make a formal application to the Judge

after the youngest child's 18th birthday if he seeks any further publication of the judgment.

This case reiterates the very unusual case which will involve naming the parents to a case and that publication of an un-anonymised judgment at a future date is filled with difficulties as to determining the impact at that point in time upon the subject children.

16. Disclosure and Withholding Information

T (Children: Non-Disclosure), Re [2024] EWCA Civ 241 was a case involving our own Charles Hale KC and Laura Morley. The Court of Appeal reviewed and provided clarity on the courts approach to disclosure when one party seeks to withhold information from another party, together with the correct format that should be used when a Judge is called upon to decide whether certain information should not be provided to another party.

The case involved two children, aged 8 and 12 where the parent's had been separated and involved with court proceedings since 2021. Up until the final hearing the children had been spending time with the father for 6/14 nights and half the holidays. At a final hearing in July 2023 the father sought equal shared care. HHJ Roberts found the father's behaviour to have been very unreasonable in ways that were harmful to the mother and which had had a negative effect on the children. She found this behaviour to be coercively controlling. She did find the children had a rich experience in both households but reduced the father's time to 4/14 nights with a visit in the intervening week, half the holidays and made a lives with order to mother.

Difficulties between the parents continued and sadly by October half term matters became more serious when the youngest child began to show acute distress. In early November mother ceased all contact after consultation with and advice from the GP, the school, a mental health nurse and the local authority.

The mother applied ex parte to vary the final order and suspend contact. She filed a 'confidential statement' setting out the concerns that had arisen with the youngest child, which was duly ordered to remain confidential from the father. A return hearing took place where HHJ Roberts transferred the case to the High Court for re consideration of the disclosure point.

A hearing took place before Francis J in January 2024 where the father sought disclosure. This was supported by the children's Guardian and the mother was

neutral. Francis J declined to order disclosure but ordered that a global family psychological assessment could nevertheless take place, notwithstanding the father's ignorance of the concerns levelled against him and the impact of that on his ability to meaningfully engage with the assessment. Whilst he commented that this was an extreme decision to take he was ultimately concerned with the risk to the child's welfare.

The father applied for permission to appeal, with the support of the Guardian, on the following grounds:

> *'1. The Court erred in law by failing to disclose the confidential material to the father in light of the Guardian's position and the father's position that there should be such disclosure for the reasons clearly set out by both parties, both in writing and orally, and the mother's unopposed position; the case was not finely balanced but firmly balanced in favour of disclosure.*
>
> *2. The Court failed to carry out a correct balancing test in respect of the risk to the children and their Article 8 rights and the undeniable interference with the father's Article 6 rights to a fair trial, to know the case against him, to be able to respond to that case and to be able to engage properly and fully in any assessment of him and the family.*
>
> *3. The Court failed to carry out a correct balancing test (proportionality) in respect of the children's Article 8 and the father's Article 8 rights, given that contact has been suspended and the father's ability to challenge was disproportionately impacted without access to the confidential material. Further, the decision is flawed, given the failure to consider any appropriate safeguards, including those promoted by the Guardian. The decision in fact impacts the ability of all parties to undertake the family assessment that the court determined should take place.*
>
> *4. By ordering continued, open ended, non-disclosure of the confidential material, the court failed to ensure a fair hearing and fair process, and it denied the father access to natural justice'*

Lord Justice Jackson in his judgment endorsed the methods of approaching non-disclosure in Re D (Minors) (Adoption Reports: Confidentiality) [1996] AC 593, and Re B (Disclosure to other Parties) [2001] 2 FLR 1017and Re A (Sexual Abuse: Disclosure) [2012] UKSC 60.
He further helpfully set out a series of questions a Court should ask when asked to authorise non-disclosure in the interests of a child:

> *"1) Is the material relevant to the issues, or can it be excluded as being irrelevant or insufficiently relevant to them?*

(2) Would disclosure of the material involve a real possibility of significant harm to the child and, if so, of what nature and degree of probability?

(3) Can the feared harm be addressed by measures to reduce its probability or likely impact?

(4) Taking account of the importance of the material to the issues in the case, what are the overall welfare advantages and disadvantages to the child from disclosure or non-disclosure?

(5) Where the child's interests point towards non-disclosure, do those interests so compellingly outweigh the rights of the party deprived of disclosure that any non-disclosure is strictly necessary, giving proper weight to the consequences for that party in the particular circumstances?

(6) Finally, if non-disclosure is appropriate, can it be limited in scope or duration so that the interference with the rights of others and the effect on the administration of justice is not disproportionate to the feared harm?"

The appeal was allowed and disclosure was ordered. The court found that Mr Justice Francis had erred, and Lord Justice Jackson made the following observations:

- Francis J reached his decision on disclosure during the 'closed' part of the hearing which left father's counsel in a position of trying to change the judge's mind *after* he had reached his decision. He failed to ensure procedural fairness;
- The court's view that the father could engage with the assessment without full disclosure was unrealistic especially where the Guardian supported an assessment after full disclosure. Francis J failed to give sufficient weight to the Guardian's view, which was based on the current circumstances and he over relied on HHJ Roberts previous assessment of the father;
- The court failed to conduct a sufficiently thorough investigation of what would be in the child's best interests, including looking at the immediate and long-term harm. Secrecy was likely to become burdensome for the child;
- The child could be safeguarded by not being told that disclosure had been made without expert guidance and by giving very strict warnings to the father not to disclose or inform the child;
- The father's Article 6 and 8 rights were not given any weight and there was no reason to override the fathers' rights to have the same information as the other parties where the risks to the child could be managed and where it was not in the child's overall welfare interests for non-disclosure to continue;
- The Judge's approach was insufficiently thorough.

This judgment serves as a reminder to all that the bar is set high when it comes to arguing or attempting to justify the reasons for withholding disclosure, particularly when that disclosure may have a material impact on the ability of a party to fairly engage with the proceedings and ultimately on the outcome of those proceedings.

17. Qualified Legal Represenatives – A Further Perspective on Re Z

The judgment from Sir Andrew MacFarlane P in **Re Z (Prohibition on Cross Examination: No QLR) [2024] EWFC 22** addresses the challenges faced by Family Courts when a Qualified Legal Representative (QLR) cannot be appointed, despite efforts under Part 4B of the Matrimonial and Family Proceedings Act 1984 (MFPA 1984). In a recent case involving allegations of sexual abuse against a 3-year-old girl, both parents represented themselves, with the mother opting not to seek an adjournment despite having legal aid.

The court had mandated the appointment of a QLR to cross-examine the mother regarding the father's allegations. However, despite over 120 attempts by the court to find a QLR, none were available. Consequently, the judge decided to proceed with questioning both parties directly. The MFPA 1984 prohibits cross-examination in specific circumstances, such as when domestic abuse is alleged or there are protective injunctions in place. If no QLR is found, the court has several options, including adjournment, engaging private representation, or having the judge conduct the questioning, although the latter is generally viewed unfavourably.

Ultimately, the court must prioritise fairness and the overriding objective of dealing with cases justly. If it is deemed necessary for the court to step in, the original order for a QLR must be discharged, and the reasons documented. This approach aims to ensure that vulnerable witnesses can still provide their evidence effectively, while maintaining the integrity of the judicial process.

In judicial settings where parties are unrepresented, judges may face the challenging task of questioning witnesses on behalf of both parties. This process, while essential for fairness, risks compromising the judge's neutrality. The court must balance adequately the testing of a witness's evidence while avoiding partisanship, as highlighted in the case of **Serafin v Malkiewicz [2020] UKSC 23** which emphasised the importance of judges remaining 'aloof from the fray and neutral during the elicitation of the evidence'

In **K and L (Children: Fairness of Hearing) [2023] EWCA Civ 686** excessive questioning undermined the trial's fairness. The judicial role should be that of a neutral facilitator, merely channelling questions rather than advocating for one side. This requires a clear understanding of when to ask questions and how to structure them.

To maintain fairness, courts should conduct a Ground Rules Hearing (GRH) before fact-finding hearings, ensuring that the rights and needs of all parties are addressed. The overarching principle must always be fairness, facilitating a process that, although inherently adversarial, remains focused on investigating the truth rather than favouring either party. Ultimately, the judge's role is to ensure that the questioning process is as fair and impartial as possible, even in challenging circumstances.

In addition to the guidance of Hayden J in **PS v BP [2018] EWHC 1987 (Fam),** the President offered the following practical points for courts to consider either when appointing a QLR or when preparing to put questions itself:

- Whilst there is value in the QLR attending court for the ground rules hearing so that they may meet the party on whose behalf they will be asking questions, where this is impractical, and where holding the hearing remotely means that a QLR who could not otherwise act can be appointed, it should be acceptable for the QLR to attend the ground rules hearing remotely.

- The default position for the full hearing should be for the QLR to be in attendance at court, rather than joining remotely, as the overall effectiveness and fairness of the process is likely to be diminished if they are not in the courtroom.

- In all cases (whether there is a QLR or not) at the ground rules hearing, or earlier, the court should direct that the prohibited party should submit a clear statement shortly stating the allegations, facts or findings that they seek to establish.

- In all cases, the prohibited party should be required to file a written list of the questions that they wish to have asked prior to the main hearing. The list should go to the QLR, or to the court if there is no QLR, but not to the witness or other parties. This process should not prevent the prohibited party from identifying additional questions that may arise during the hearing.

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