PUBLIC AND PRIVATE LAW UPDATE

Public Law

Legal Principles

1. *B (A Child: Post-Adoption Contact)* [2019] EWCA Civ 29

B was born in April 2017. Both of her parents were disabled with respect to their intellectual functioning. When B was a few days old she moved with her parents to a residential placement. Care proceedings commenced concurrently. The residential placement was unsuccessful. B was placed with foster carers who were also approved adopters. In October 2017 a final care order and placement for adoption order was made. The final care plan did not make provision for direct contact with the birth parents. The Recorder agreed with the care plan but suggested that further thought might be given to direct contact in the future. The adoption application was issued in December 2017. The birth parents neither consented to nor opposed the making of an adoption order but expressed their wish for post-adoption contact. They were granted leave to make such an application. After a final hearing, their application was refused in September 2018.

The birth parents appealed. They argued that the purpose of section 51A of the Adoption and Children Act 2002 ('ACA 2002') was to reflect developing views about the benefits of greater openness in adoption. The CoA reviewed the statutory context, the previous authorities on post-adoption contact and recent social work research. It was noted that section 51A was added to ACA 2002 through amendments made by the Children and Families Act 2014 ('CAFA 2014'). Section 51A provided a statutory scheme for post-adoption contact and replaced a process of birth parents applying for section 8 orders. The previous authorities emphasised that ordering direct contact with birth parents, where adoptive parents are not in agreement, is extremely unusual. Although section 51A introduced a regime for regulating such contact, there is nothing in the wording of section 51A or 51B which indicates any variation in the approach to be taken. The Explanatory Note to CAFA 2014 stated that changes were made *"with the aim of reducing the disruption that inappropriate contact can cause to adoptive placements".* Whilst there was a juxtaposition in timing between the implementation of the new provision and a wider debate about 'openness' in post-adoption contact, parliament intended for section 51A to enhance the position of adopters rather than the contrary.

https://www.familylaw.co.uk/docs/default-document-library/re-b-(a-child-post-adoption-contact)-2019-ewca-civ-29.pdf?sfvrsn=18795e4f_2

2. *Re Q (Child: Interim Care Order: Jurisdiction)* [2019] EWHC 512 (Fam)

Q was one of four children under an interim care order ('ICO'). She was 16 at the date of the hearing but set to turn 17 very shortly. The question arose as to whether the ICO in respect of Q could subsist beyond her 17th birthday. The specific issue appears to have arisen following amendments to the Children Act 1989 made by Section 14 of the Children and Families Act 2014. This removed the requirement for a local authority to apply to renew an interim order after 8 weeks and every 4 weeks thereafter. If a power to allow an ICO to continue after a child had turned 17 previously existed that order could only ever have lasted a maximum of 7 weeks and 6 days.

In reviewing the statute, Knowles J recognised that parliament chose to "*demarcate seventeen or sixteen (if married) as the age after which a child could not be placed in the care or supervision of a local authority without a full disposal of the case having been achieved."* This was recognition of the developing autonomy of the child. The intention of the 2014 amendments was to reduce the administrative burden of renewing interim orders, not to extend the period in which a child could be subject to an ICO. There was a risk that a 17-year-old may otherwise be impermissibly placed in care by the extension of interim orders in circumstances where only the threshold under section 38(2) had been established. It was held that no interim care or supervision order will endure beyond the date of a child's 17th birthday (or the date of marriage if aged 16). It did not, however, follow that proceedings themselves necessarily lack purpose once a court can no longer make interim or final public law orders. Whether it is proportionate to continue proceedings will be a matter of good sense for the individual judge. There may be cases in which it is crucial to establish whether the threshold criteria have been met as this will impact the local authority's decision making.
https://www.familylaw.co.uk/docs/default-document-library/re-q-(child-interim-care-order-jurisdiction)-2019-ewhc-512-(fam).pdf?sfvrsn=ea2dc61d_2

3. *Re C (A child)* [2018] EWHC 3332 (Fam)

The mother (M) was 14 years old when she gave birth to C. M had become pregnant at 13 but was unaware of this until her waters broke. M immediately concluded she could not care for C and wanted to have her adopted. M was described as having considerable potential and hoped to continue with school and go to university. Her family were unable to care for C. The father (F) was 15. M did not want F or his family to be informed of C's birth. F had a history of mental health problems, was known to abuse drugs and alcohol, and had a criminal record for violent offences. M feared that if she informed him of the birth her privacy would be lost, F would be violent towards her and his family would harass her. From the point at which M was discharged from hospital C had been living with foster carers under a section 20 agreement. The local authority issued care proceedings when the child was two and a half months old.

Cohen J criticised the local authority for not following the established procedure for relinquished babies. He disagreed with a submission that the parents were in a special category because they were both minors and that a special test should be applied. M had the mental capacity to make

decisions about C's future and to litigate. Considerable regard needed to be had for M's wishes and the interests of both parents, and their youth would feed into that; but the court's paramount concern was for C. It was held that the combination of factors in the case did not make it appropriate for F to be informed of the birth. These factors included M's young age, her fear of what F might do, the likelihood of her education being terminated and the risk of her becoming socially isolated if the birth became known. The care proceedings were dismissed and permission was given to the local authority to withdraw proceedings and to issue an application under Part 19 of the Family Procedure Rules 2010 for the invoking of the inherent jurisdiction of the court.
https://www.bailii.org/ew/cases/EWHC/Fam/2018/3332.html

4. *Re A (Children)* [2018] EWCA Civ 1718

A local authority sought care orders in respect of five children aged between 1 and 16. A sixth child, S, a 10-year-old girl, was found dead in the bedroom she was sharing with two of her younger siblings. The police and paramedics who attended the scene believed the death was an accident in which S had become entangled in and strangled by decorative netting around her top bunk. A special post mortem was subsequently conducted and the preliminary report identified genital injuries, as well as the neck injuries. It concluded S's death was probably the result of a sexually motivated homicide. The police investigation was riddled with mistakes and delay and the opportunity to gather critical evidence was lost. The judge identified his first task as being to decide whether on the balance of probabilities "the act" was perpetrated by a third party. He contended that where there are rival hypotheses he is not bound to make a finding and the burden of proof comes to his rescue. He calculated that: *"Aggregating, as I must, the probability of suicide together with the probability of accident, I find that the aggregate of these two is more than 50 per cent. Doing the best that I can, I find that the possibility of suicide is about 10 per cent, and the possibility of accident and a perpetrated act are about 45 per cent each…"* He refused the applications for care orders on the basis the local authority had failed to prove that the genital injuries and the fatal neck injuries were deliberately inflicted.

The CoA held that the judge was wrong to attach a percentage to each of the possibilities and thereafter add together the percentages attributed to an innocent explanation. A court must look at each possibility, both individually and together, factoring in all the evidence available including the medical evidence before deciding whether the "fact in issue more probably occurred than not". King LJ explained that; (i) judges will decide cases on the burden of proof alone only where no other course is open to them due to the state of the evidence; (ii) consideration of such a case involves looking at the whole picture including what gaps there are in the evidence; and (iii) the court arrives at its conclusion by considering on an overall assessment of the evidence whether the case for the event happening is more compelling than the case for not reaching that belief.
https://www.bailii.org/ew/cases/EWCA/Civ/2018/1718.html

Evidential/Procedural considerations

5. *G (Children: Fair Hearing) Re* 2019 EWCA Civ 126

The police engaged their emergency powers in respect of two children after a fracas outside the father's home led to the mother ('M') and members of her family being arrested. Care proceedings were issued as M withdrew her consent to the children being accommodated under Section 20. HHJ Carr QC heard the local authority's application for interim care orders. There was no written evidence from either parent. M met her counsel (called in 2016) for the first time at court. M was the only party intending to contest the application. HHJ Carr QC warned M that if she was to go ahead and hold a contested hearing M would be 'stuck' with adverse findings. She also warned M's counsel that she would probably send her findings to the police and 'require it goes to the CPS'. After a twelve minute break (at the request of M's counsel), M consented to the interim care order.

M appealed. She submitted that she had been deprived of a meaningful opportunity to oppose the orders. The local authority argued that 'however firm the judge may have been it did not amount to duress'. Lord Justice Peter Jackson allowed the appeal. There was a serious procedural irregularity and M did not get a fair hearing. Mr Justice Moor agreed. He took the opportunity to restate the difference between the threshold required under Section 31 and Section 38. He stated that *"at an interim hearing, rarely, if ever, will findings of fact be made that will have the effect of establishing the threshold at a final hearing"*. Courts should be very cautious before referring to the significance of conclusions drawn at the interim stage. Such comments may appear to the parents to be a form of pressure. The interim care orders were set aside and replaced by short-term orders to last until an early contested hearing before another judge.
https://www.bailii.org/ew/cases/EWCA/Civ/2019/126.html

6. *Re P (A Child)* [2018] EWCA Civ 1483

The child (L) was 7 months old at the date of the hearing. The mother had been an alcoholic since 2009. She had a history of rehabilitation and sobriety, followed by relapse. L had older sisters, M and B. M died of Sudden Infant Death Syndrome in September 2014, on a night when the mother had been drinking. The local authority became involved. This led to a period of heavy drinking by the mother. On 10 September 2014 B was placed in foster care. The mother, following a criminal conviction for assaulting a taxi driver (whilst drunk), was referred to an alcohol treatment programme from January to July 2015. She made good progress and maintained sobriety. B was rehabilitated to her care under a supervision order. The mother then started drinking again. Hair strand testing indicated that she was drinking between May and November 2016. In February 2017, whilst pregnant with L, she was arrested for shoplifting. An interim care order was made in respect of B, placing her with her paternal grandmother. The local authority then removed L at birth, with a care plan for adoption. They therefore did not offer the mother any support during the proceedings. At the final hearing, the Child Permanence Report recorded that the mother had, in the absence of support, engaged independently with the AA and had worn a SCRAM

bracelet. Contact with L was reported as good. The mother had remained sober and began to develop insight into her addiction and its effects on her children.

On the basis of her progress and a report from an adult psychologist, the mother sought an adjournment to continue her sobriety and see if she could build on the progress made. The judge concluded that there was a real risk of relapse and of the mother not being able to be open and honest with professionals. She refused the mother's application to adjourn and made a final care order and placement order. The CoA held that the judge placed too much emphasis on historic lies told by the mother. As a consequence these were not set against the genuine progress made. It was also felt that insufficient consideration was given to L's young age, evidence that she was able to make good attachments, and the fact that the adjournment sought was one in which the mother could demonstrate real change. The appeal was allowed.
https://www.bailii.org/ew/cases/EWCA/Civ/2018/1483.html

7. *X and Y (Children)* [2018] EWHC 451

The proceedings concerned two teenage girls, X (born in 2002) and Y (born in 2003). Both girls were made the subject of care orders in March 2010 and placement orders in April 2010. Family finding for an adoptive placement together was unsuccessful and in 2011 the plan for each girl was changed to permanence via separate long-term foster care. In February 2011 a decision was made by the local authority to suspend direct contact to both parents and permit indirect contact only. In January 2012 X disclosed historic sexual abuse by her father. In October 2013 Y also disclosed sexual abuse by her father. In March 2014, following a trial at which X and Y gave evidence, both parents were convicted of offences against X, Y and their brother Z. The father had pleaded not guilty and continued to maintain his innocence post-conviction. He was sentenced to imprisonment, with the earliest release date being spring 2025. Both X and Y remained extremely fearful of their father.

In October 2017 the local authority applied to revoke the placement orders relating to both girls. They made several applications in relation to the girls, of particularly note were the orders sought to limit the father's involvement in proceedings. These included removing him as a party to the proceedings relating to the placement order, removing him as a party to the proceedings pursuant to s.34(4) of the Children Act 1989 and limiting the local authority's notice and disclosure obligations to the father. The local authority also sought an order that the court officer should not serve the father with notice of any proceedings or any documents relating to any future proceedings. At the outset of the hearing, Knowles J considered restricting the father's access to the bundle of documents within the proceedings. Balancing his Article 3, 6 and 8 rights, she concluded that limited disclosure was permissible as he did not need to see this additional material which was intensely private to both girls. The father was dismissed as a party in relation to both elements of proceedings - the girls' right to privacy took precedence over the father's Convention rights. The exceptional nature of the case also persuaded the judge to make an order

limiting disclosure of information about future local authority applications relating to the girls' welfare. However, she did not think it proportionate to make an order binding officer of the family court to withhold documents/information.
https://www.bailii.org/ew/cases/EWHC/Fam/2018/451.html

Non-Accidental injuries

8. *Re L-W (Children)* [2019] EWCA Civ 159

A mother ('M') was held to have failed to protect her four-year old daughter (L). M also had twins with a new partner. The evening after L stayed with her father on 14 January 2018, M noticed a lump on her head and bruises on her face and body. Despite attempts by her partner to dissuade her, M took L to the doctor on 15 January. L claimed her injuries had been inflicted by her step-mother. However, L was known to tell lies. The local authority initiated care proceedings. All four adults were possible perpetrators. M separated from her partner before the final hearing. The judge found that L's injuries had been inflicted by M's partner and that M "*knew or ought to have known that the bruising would be inflicted and failed to protect L"*. This was because M had (a) failed to ask the partner what happened on the day L returned from the contact visit; (b) failed to listen to L's maternal grandmother who, after the incident, said that L was frightened of the partner; (c) allowed the partner to return to the family home after a verbal altercation over a mark on L's neck several months earlier; (d) stayed in a relationship with the partner, despite being aware that several years earlier he had attacked the father with a bat and had been involved in a fight with another man.

At the appeal, the local authority accepted that factors (a) and (b) would be insufficient to show that M had closed her mind to her partner's potential culpability. Those factors post-dated the incident. In relation to (c), the mark in question had been caused by eczema. The finding therefore could not be based on her partner previously injuring L and so was presumably linked to his verbal loss of temper. That left only (d), which focused on the partner's involvement in fights outside of the home. There was no history of domestic violence within the home. The CoA held it could not be right to say that a woman who failed to separate from a partner who had been violent to adults outside the home was failing to protect her children. Courts should be wary of such a serious finding becoming a *"bolt on"* to the central issue of perpetration, or assuming that if a person was living in the same household as the perpetrator such a finding was almost inevitable.
https://www.bailii.org/ew/cases/EWCA/Civ/2019/159.html

9. *C (Interim threshold not crossed)* [2019] EWFC B5

The proceedings concerned C who was six and a half. Until November 2018, he had lived for almost all his life with his maternal grandparents under a child arrangements order. In October 2018 C's cousin, D, was admitted to hospital with fractures to both legs. In proceedings relating to D, it was alleged that the maternal grandmother should be placed in the pool of perpetrators, along with D's mother, P (the maternal grandparents' daughter) and her partner Q. The grandparents subsequently gave their consent to C being placed with the maternal aunt R and her partner T under Section 20. D and E are currently subject to interim care orders in foster care. A fact-finding hearing to determine the cause of D's injuries is listed for April 2019. Proceedings in respect of C were issued in November 2018. At the time of the hearing C remained in R's care, but in January

2019 the local authority's fostering panel decided not to authorise its continuance and it became an unregulated placement. The local authority proposed that C be placed with his father (who was not involved in D's life and not under any suspicion). The grandmother, whilst not accepting that she presented any risk to C, was prepared to move out of the home to secure C's return to the grandfather.

HHJ Vincent asserted that the test she had to apply had been presented to her incorrectly. It was not a question of which of the two potential carers would offer the best care to C in all the circumstances. The test was whether the threshold in s.38 Children Act 1989 had been met. She applied the guidance in *Re A [2015] EWFC 11* in relation to a local authority's requirement to prove the facts relied upon. The judge felt that the wrong approach had been taken and, as a result, inadequate consideration had been given to the nature of the risk that each of the grandparents was said to present. The threshold document was based on potential findings in relation to the grandparents' failings in respect of D but did not establish a link that showed C was at risk of immediate harm. It was mentioned throughout the hearing that the grandmother was *"in the pool of perpetrators"*. The judge clarified that technically she was not yet. A person is only in the pool after a finding of fact has been made (that they are likely to be in the pool of perpetrators). On the basis of what was before her the interim threshold had not been crossed.
N.B. This case was heard by a Circuit Judge and is not binding.
https://www.bailii.org/ew/cases/EWFC/OJ/2019/B5.html

10. *B (A Child)* [2018] EWCA Civ 2127

A child sustained fractures to both lower legs and six rib fractures. The only possible perpetrators were the parents, who, by virtue of their denials, attributed blame to each other. The Guardian was neutral and there was no evidence of collusion. The father ('F') worked and the mother ('M') stayed at home. The first instance judge identified M's greater opportunity to inflict injuries. Opportunity did not necessarily equate with probability, but that greater opportunity was significant.

The decision was upheld. The correct approach to circumstances such as these was for the court to consider whether there is sufficient evidence to identify a potential perpetrator on the balance of probabilities; if there is not, it should look at whether there is a *"real possibility"* an individual might have caused the injury and exclude those of which this cannot be said. In a 'simple binary case' the identification of one person as the perpetrator on the balance of probabilities carries the logical corollary that the second person must be excluded. However, the court should survey the evidence as a whole as it relates to each individual and assess whether the allegation is made out in relation to one or both of them. This may ultimately involve comparing probabilities. In the end, the question is not *"who is the more likely?"* but *"does the evidence establish that this individual probably caused this injury?".* Whilst opportunity alone is not enough to support a finding, it may prove crucial in overcoming the evidential burden.
https://www.bailii.org/ew/cases/EWCA/Civ/2018/2127.html

11. X (A child) (No 4) 2018 EWHC 1815

In 2012 X's birth parents took X, then six weeks' old, to A&E in the small hours of the morning. At a fact finding hearing before HHJ Nathan, three categories of injuries were found:

1. Marks above X's right nipple, elbow, both knees, both arms, abdomen, right shoulder, back, and groin. These were likely to have resulted from the impact of a hard object or gripping with a hand with unreasonable force.
2. X's upper lip frenulum was red and infected and had been torn. This was likely to be caused by a blow to the mouth or an object being rammed into the mouth.
3. Fractures to X's shin and thigh bones. This was likely caused by a twisting force to the limbs, possibly on the same occasion but requiring at least three separate applications of force.

On 1 March 2013, Judge Nathan held that, on the strength of the medical evidence, the injuries were inflicted by either of the parents. He could not identify whether one of them was the sole perpetrator. That decision was not appealed. At the welfare hearing, care and placement orders were made. Those orders were not appealed either. X was placed with prospective adopters, who applied to adopt X. The birth parents applied for permission to oppose the adoption application. Judge Nathan refused their application made the adoption order. Again, there was no appeal from his order. In September 2015, the parents faced a criminal trial on counts of child cruelty. Several experts gave evidence. Mid-way through the trial, Dr John Somers, a consultant paediatric radiologist, indicated to prosecution counsel that he could not be sure that the X-rays showed fractures. The prosecution offered no evidence. In December 2015, the birth parents applied to appeal Judge Nathan's decision in the fact-finding of 1 March 2013, out of time, on the ground of fresh evidence, indicating they would seek revocation of the adoption order if they succeeded. The CoA ordered that the facts found should be reconsidered. However, in October 2016, six days before the rehearing, the birth parents withdrew and stated they no longer challenged the findings.

Despite, the parents' withdrawal, Sir James Munby decided that the hearing would proceed. Given the unusual nature of the litigation, the court was in a very good position to know what the birth parents' case was and how it would be deployed. He assigned the guardian's counsel the role of challenging the witnesses on the essentials of the birth parents' case. The birth parents were summoned to give evidence. They answered questions willingly. Neither was represented or otherwise involved in the hearing. The court also had before it seven further expert reports. Sir James Munby concluded that the LA's case had been proved effectively and satisfied the relevant *"burden and standard of proof*". He dismissed the suggestion raised within the criminal trial that the child had rickets and/or a vitamin D deficiency. At the conclusion of his judgment, he emphasised the differences between the criminal and family courts in the practice and procedure relating to expert witnesses. He stated that he had no cause for concern about the *"continuing utility and appropriateness of the processes and procedures in the family courts provided for in FPR 2010 Part 25 and PDs 25A-E".* https://www.bailii.org/ew/cases/EWHC/Fam/2018/1815.html

12. *A & anor v Northamptonshire* [2018] EWHC 3244

In April 2012, E, then aged 7 weeks, was admitted to hospital. She was found to have sustained several fractures, which treating clinicians considered to be non-accidental injuries. A fact finding hearing was held. The court heard expert medical evidence and ruled out any underlying condition that would have pre-disposed E to the fractures. It was held that injuries were inflicted by either the mother or father. Further medical examinations took place thereafter. Dr Youssef and Dr Calder, consultant radiologists at Great Ormond Street, reported that films demonstrated "mild diminished bone density", and that a "mild form of osteogenesis imperfecta could not be excluded". The matter came before King J, as she then was, in December 2012. The question of an application to reopen the findings of fact was raised. No application was made during the care proceedings. At the welfare hearing, the parents accepted that they could not care for E and her sibling, D. The children were made the subjects of Special Guardianship Orders in favour of the maternal grandparents.

In 2018, the mother applied for permission to re-open the fact-finding. Keehan J noted that a three-stage approach should be taken: first, the court must consider whether it will permit any reconsideration or review of, or challenge to, the earlier finding; second, if it does allow the said review the court must decide the extent of the investigations and evidence concerning the review; and finally, the hearing of the review, at which time the court decides the extent to which the earlier findings stand, by applying the relevant test of the circumstances then found to exist. Summarising the case law, Keehan J identified the essential features of the first stage to be:

(1) Whether the court will permit a reconsideration or review of, or challenge to, the earlier findings.
(2) Is any reason to think that a rehearing will result in a different finding: is there any new evidence or information casting doubt upon the accuracy of the original findings?
(3) The test is not whether the applicant stands a real prospect of disturbing the original findings.
(4) Rather, there must be some real reason to believe the earlier findings require revisiting. Mere speculation and hope are not enough. There must be solid grounds for challenge.
(5) The recognition of the tension between the powerful public interest in finality in litigation and the strong public interest in identifying accurately those who cause serious non-accidental injuries to children, wherever such identification is possible.
(6) The court must have regard to whether, if at all, medical knowledge and expertise may have advanced in the years between the original findings and the application to reopen the findings.

The mother relied on a report from Dr Watt, a consultant paediatric radiologist. Dr Watt had been asked by the parents to view two sets of X-rays completed of E, one from April 2012 and one from October 2012. The questions provided to Dr Watt by the parents, his report, and his answers to subsequent questions were not provided to the court until the first day of the hearing. Nonetheless, the report was admitted into evidence. Having reviewed the report, the court held that there was no material difference between Dr Watt's conclusions and those of the experts who gave evidence

in the original proceedings. There was no evidence that E was suffering from, or had ever suffered from, a disease or organic process that would predispose her to suffer fractures. The parents had not established a solid ground for challenging the previous findings, nor some real reason that the earlier findings required revisiting. The application was dismissed.
https://www.bailii.org/ew/cases/EWHC/Fam/2018/3244.html

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Police Disclosure

13. *Lancashire County Council v A, B and Z* [2018] EWHC 1819 (Fam)

The case concerned Z, a girl aged 22 months. On 16 August 2017 Z's sister X died of severe brain and spinal injuries caused by shaking. X also sustained injuries to her eyes and brain and 36-72 hours before death had sustained further head injuries, as well as bruising to her left femur. On both occasions X was in the care of her mother (A) and father (B). Knowles J found both parents had lied and that X was injured by either A or B but could not decide who was responsible.
On day five it came to light the police held material that they had not considered relevant, including a statement from the social worker about A's handling of Z during contact and extracts from the parent's social media accounts. These both confirmed witness evidence and provided insight into the family dynamics before and after Z's death. On day nine 900 pages of extra material were provided. To ensure proceedings were fair; 2-3 days of court time was lost reviewing the documents. One issue was that the Disclosure Team within the police did not have access to the same case management system as the Force Major Investigation. At the conclusion of the hearing the police and the parties were invited to submit in writing what had gone wrong and how this could be avoided in future. Knowles J proposed a number of practical solutions:

(i) Police forces in England and Wales should check their own data management systems to ensure avoiding the problem arising in this case. LA lawyers should also check with their local police force which data management system is being used.

(ii) Training issues needed to be addressed so that confusion over what might be relevant information for family proceedings was avoided.

(iii) As the proceedings are quasi inquisitorial and the LA bear the lion's share of assisting the court to determine its application and pertinent issues in the case, it must be fair, independent and objective. The LA should always act in the interests of justice and not solely for the purpose of obtaining the order it may seek.

(iv) The proposals of Francis J in *London Borough of Southwark v US and Others* [2017] EWHC 3707 (Fam) were endorsed.

https://www.bailii.org/ew/cases/EWHC/Fam/2018/1819.html

14. *H (Children)* (2018) EWFC 61

Sir James Munby took the opportunity to reiterate the importance of police cooperation with disclosure requests. He described an incident in a recent case before him where the legal department of a police force had sought to avoid complying with an order for disclosure made by a Circuit Judge by sending a letter to court suggesting the disclosure was inappropriate. He stated:

"Without having thought it necessary to require the hapless writer of this astonishing missive to be brought to court to provide an explanation, it would not be fair to assume that this was impertinence or defiance rather than simple ignorance and incompetence; but either way it is deeply troubling that any police force can have thought that this was an appropriate response to an order of the court, even if it was a family and not a criminal court."
https://www.bailii.org/ew/cases/EWFC/HCJ/2018/61.html

Accommodation of Children

15. Williams and another v London Borough of Hackney [2018] UKSC 37

The appellants were the parents of eight children, at the relevant time aged 14, 12, 11, 9, 7, 5, 2 and 8 months. On 5 July 2007 the 12-year-old son was caught shoplifting. He told police that he had no money for lunch and that his father had hit him with a belt. Police visited the home and found it to be unhygienic and unfit for habitation. The police exercised their powers under section 46 of the Children Act. The children were placed in foster care by the LA. The parents were arrested and interviewed, before being released on police bail on the condition they would not have unsupervised contact with the children. The parents were asked to sign a 'Safeguarding Agreement' on 6 July 2007 agreeing to all the children remaining in their foster placements. They were not informed of their right (s.20(7)) to object to the children's continued accommodation after the expiry of 72 hours, nor of their right (s.20(8)), to remove them at any time. On 13 July, the parents' solicitors gave formal notice of the parents' intention to withdraw consent. On 16 July the LA decided the children should be returned home. They did not arrange with police for the bail conditions to be varied until 6 September. The children returned home on 11 September. Criminal proceedings against the parents were subsequently dropped. The parents claimed damages for a breach of their Article 8 rights. The High Court upheld their claim on the basis they had not given informed consent to the placement and that it was no longer lawful after 72 hours. The CoA allowed the LA's appeal, holding that consent was not required and the interference with their Article 8 rights had been proportionate.

The parents appealed to the Supreme Court. Lady Hale set out when and how children could be accommodated under section 20. In dealing with what has become known as *"parental consent"* to a section 20 placement, she explained that this is better framed as a parent delegating their parental responsibility to the LA. Whilst a line of authorities have held that a parent needs to give informed consent to any such placement, Lady Hale clarified that a delegation may be *"real and voluntary"* without being fully *"informed*". Where the LA steps into the breach to exercise its powers under section 20 where there is no-one with parental responsibility, the child is lost or abandoned, or the parent is not offering to look after the child, active delegation is not required. If a parent with unrestricted parental responsibility objects at any time pursuant to section 20(7), the LA may not accommodate the child, regardless of the suitability of the parent or of the accommodation which the parent wishes to arrange. Finally, it is not a breach of section 20 to keep a child in accommodation for a long period but a LA must also think of the longer term and consider initiating care proceedings in order to fulfil its other duties under the Children Act.

In this case, the focus was not on the parents' delegation of parental responsibility, but on their rights under subsections 20(7) and 20(8). The 'Safeguarding Agreement' which the parents had signed did not give them the impression they could not object to the accommodation of their children. The solicitor's letter could not be read as an objection or an unequivocal request for the children's immediate return home. The placement had remained lawful. The appeal was dismissed. https://www.supremecourt.uk/cases/docs/uksc-2017-0037-judgment.pdf

16. M (A Child) 2018 EWCA Civ 2707

The appeal was brought by a young person referred to as Emma, aged 15½. She had been subject to a child protection plan since the age of 13 due to being beyond parental control. Emma would leave home, drink, use drugs and place herself at risk of sexual harm. In February 2018, she was diagnosed by a forensic psychiatrist as having a conduct disorder. On 5 April 2018 HHJ Sharpe authorised a deprivation of liberty at a residential placement under the inherent jurisdiction of the High Court. Over the next four months, Emma disappeared from the residential home, self-harmed, and was violent or abusive to members of staff or other children. On 8 June 2018, HHJ Sharpe made a three-month secure accommodation order and Emma was placed in her current placement. On 13 August, the forensic psychiatrist and Emma's clinical psychologist met. They agreed that the work that needed to be done and that this would take at least 6 to 9 months. The LA applied for a further secure accommodation order. Emma accepted that there should be a care order, and that no suitable residential unit was available. However, she opposed a secure accommodation order, arguing that she could now be trusted. On 9 November 2018, HHJ Sharpe granted a six month accommodation order, finding both the absconding criterion (s 25 (1)(a), Children Act 1989) and the injury criterion (s 25 (1)(b), Children Act 1989) to be met.

Emma appealed. She argued that (i) the judge was wrong to find that either of the statutory gateways was satisfied, (ii) that that the making of the order was disproportionate and (iii) its duration too long. The appeal was dismissed on both grounds. The case for making a secure accommodation order was compelling. The judge was fully entitled to have regard to the history of her absconding. The length of the order was also appropriate, in light of Emma's behaviour her transition was likely to be a lengthy one.

In the opening paragraphs of his judgment, Peter Jackson LJ reaffirmed a number of principles relating to secure accommodation orders. He clarified that 'absconding' means more than trivial disobedient absence. It may connote an element of escape from an imposed regime but is not limited by consideration of the intention of the individual involved. His Lordship also reiterated that whilst the welfare paramountcy principle does not apply to Section 25 applications, the child's welfare should still be considered. Finally, he commented that it remained unclear whether or not the criteria within Section 25 had an inbuilt proportionality check or, notwithstanding the statutory wording, something more was required. This was not, however, at stake in this appeal.
https://www.bailii.org/ew/cases/EWCA/Civ/2018/2707.html

Private Law

17. *Re G (Children: Intractable Dispute)* [2019] EWCA Civ 548

The case concerned children named as Gina (11) and Frances (8). Litigation had been ongoing since 2013. In August 2014, a fact-finding hearing took place before HHJ Waine. He formed a favourable view of the mother ('M') and an adverse view of the father ('F'). He relied on two section 7 reports and made adverse findings about F. F made complaints against the author of the reports. These were upheld by the local authority after an independent review found that the reporter was biased, knowingly included untrue information, and accepted the truth of M's allegations before the fact-finding process had taken place. F successfully appealed the judge's decision on the basis that reliance on the discredited section 7 reports created *"a strong prima facie perception of unfairness"* [*P-G (Children)* [2015] EWCA Civ 1025]. The case was then allocated entirely to HHJ Handley. After the appeal in 2015, F had some supervised contact with the children. He had, however, totally lost trust in Cafcass. A caseworker from NYAS was appointed the Children's Guardian. In February 2016, a section 37 report was ordered following F's continued allegations that the children were at risk of emotional harm in M's care. However, F refused to engage with the local authority. Judge Handley conducted a 'final' hearing in January/February 2017, with judgment given in April 2017. The Judge preferred F's case and M was found not to have given the girls the emotional permission required for them to build a relationship with F. Following the April 2017 judgment, a different NYAS caseworker was appointed as Guardian. However, F's relationship with NYAS broke down, as it had done previously with Cafcass. F threatened to report the Guardian to the police for harassment or to sue him if he made contact with him. The relationship between the parents improved briefly after the April 2017 judgment, but in April 2018 M applied for a s.91(14) order.

HHJ Handley held a final hearing in April 2018. The Judge made an order for limited indirect contact only and made a section 91(14) order against F on the basis of the following findings:
(1) M had reflected on and accepted the findings made against her in 2017.
(2) F lacked insight into the children's welfare needs. He was unable to prioritise their welfare above his own wishes. His hostility towards M was harmful to her emotional and psychological welfare. This was, in consequence, likely to impact her parenting and be damaging to the children.
(3) The children did not want to live with F or spend time with him and would suffer emotional harm if placed with him or required to have direct contact with him against their wishes.

F appealed. His grounds of appeal were separated into four strands:
(1) Procedural issues of unfairness and delay
(2) Compartmentalisation and inconsistency
(3) Not pursuing all reasonable routes to maintaining contact

(4) A s.91(14) order was disproportionate

The appeal was dismissed. Peter Jackson LJ concluded that, since 2015, the Judge had *"diligently and sympathetically attempted to revive the father's relationship with his children but has been forestalled by the mother's earlier lack of support for contact and by the father's increasingly extreme attitude."* The findings that (i) the children would suffer emotional harm if they were placed with F or required to have direct contact with him and (ii) that F had completely lost sight of their welfare effectively determined the outcome of the trial and appeal.
https://www.familylaw.co.uk/docs/default-document-library/re-g-(children-intractable-dispute)-2019-ewca-civ-548.pdf?sfvrsn=1c383e50_2

18. *R (A Child – appeal – termination of contact)* [2019] EWHC 132 (Fam)

Proceedings concerned R, a child with autistic spectrum disorder. R was born in 2006. The mother ("M") first made an allegation that the father ("F") had abused R in 2013. A series of hearings were subsequently held. Following a section 37 direction, care proceedings were issued in February 2016. A psychological assessment of the parents was completed by Dr Duprey. Proceedings culminated in a conjoined fact-finding and outcome hearing before HHJ Thorp. He held that F had, at times, got frustrated with R and had shouted at him. He made far more serious findings relating to M. These included that she had dishonestly alleged F had abused R and that she had primed R to make untrue allegations. It was also found that she had alienated R from F and that R had suffered and/or was at risk of suffering long-term emotional harm as a result. Parallel to that order, the judge granted permission for the local authority to withdraw its application for an extension of a supervision order. In determining the outcome, the court heard evidence from Dr Duprey. She was reluctant to support ending F's contact but acknowledged that separating R from M would cause extreme distress and that the continuation of proceedings was harmful. She recommended extensive therapeutic work. The Guardian felt that forcing contact could be harmful. HHJ Thorp held it was not possible for contact to take place without further intervention, and further intervention was likely to be damaging to R. He determined that R was to live with M and was only to receive indirect contact with F. He also made a section 91(14) order. F appealed.

At the appeal, Williams J commented on the stark difference between the findings relating to F and those to M. Findings in respect of F were 'broadly within the ordinary parameters of parental behaviour'. Those in respect of M were extremely serious and, with respect to her alienation of R, had been couched in the language of the threshold criteria. The judge failed to give due weight to the consequences of the findings made. The judgment below had not adequately balanced the medium to long term harm R would suffer if his relationship with F was lost with the short-term harm R would suffer through seeking to re-establish contact with F. Pertinent issues had also not been investigated with Dr Duprey; such as the impact on R of reaching adulthood without a relationship with F, R continuing to hold inaccurate beliefs about F, and R being solely parented by a mother who had not only been identified as having caused emotional harm to him but also whose

parenting was identified as creating an enmeshed relationship where R was unable to developmentally separately to her. There was a gap in the enquiries made, partly because the local authority had withdrawn. The court should not have made an order for no contact. The end of the road had not been reached. The appeal in respect of direct contact was allowed and, as a result, the section 91(14) order fell away.

The judge also praised two of the advocates for acting pro bono, comparing lawyers who act for free up and down the country as far removed from the stereotyped 'fat-cat', and more akin to Boxer in George Orwell's Animal Farm, always telling themselves "I will work harder".
https://www.bailii.org/ew/cases/EWHC/Fam/2019/132.html

19. *PS v BP* [2018] EWHC 1987 (Fam)

A father ('F') applied for a Child Arrangements Order to allow him to spend time with L, his three year old daughter. The matter was listed for a fact-finding hearing before HHJ Scaratt. F (a serving police officer) acted in person. Lawyers on behalf of the mother (M) prepared a Scott schedule containing six allegations against F. Judge Scaratt considered that only the two most serious required determination. The allegations were of (1) strangulation and rape of M and (2) attempted strangulation, said to have taken place in the presence of L. Judge Scaratt decided that F would not be permitted to cross-examine M directly, relying on *Re: A (a minor)* (fact finding; unrepresented party) [2017] EWHC 1195 (Fam). Instead, the judge read out some of F's questions himself, curtailing them where he felt necessary. In an ex tempore judgment, he found the allegations proved. He stated that F was a 'deceitful, dishonest and dishonourable' witness. F appealed.

Hayden J reviewed the authorities relating to cross-examination by litigants in person accused of domestic violence. He noted that Judge Scaratt found himself 'in an invidious position'. The Judge had intended for F to identify questions and for him to refine them in a way that did justice to both parties. However, the Judge clearly found his role as cross examiner both challenging and distasteful. F's questions were rendered superficial, overly simplified and phrased in a way that minimised their impact. This hindered the effectiveness of cross-examination. Once the judge had decided to put F's case, he was required to do so fully, properly and fairly. The appeal was allowed.

Hayden J made several observations (which he stressed was not guidance) to assist family courts in these situations. He stated that until parliament legislates for these circumstances, he could merely provide 'a forensic life belt until a rescue craft arrives'. His observations were as follows:

(ii) Once it becomes clear to a court that intimate and serious allegations must be "put" to a factual witness, where the witnesses are accused and accuser, a Ground Rules Hearing ('GRH') will be necessary;

(iii) The GRH should, in most cases, be conducted prior to the hearing of the factual dispute;

(iv) Judicial continuity between the GRH and the substantive hearing is essential;

(v) The accuser bears the burden of proving the allegations. The investigative process must ensure fairness to both sides. The burden may not be compromised in response to a witnesses' distress;

(vi) There is no presumption that the accused may not cross-examine the accuser. The Judge must consider whether the evidence would be likely to be diminished if conducted by the accused and improved by a prohibition on direct cross-examination. In a Family Court fact-finding hearing, these two factors may be divisible;

(vii) Where cross-examination runs a 'real risk' of being abusive (if allegations are established), the court should bear in mind that the impact of the court process is likely to adversely affect the welfare of the subject children;

(viii) Where the factual conclusions are likely to impact the arrangements for, and welfare of, a child, the court should consider joining the child as a party and securing representation. The child's advocate may be best placed to undertake the cross-examination;

(ix) If cross-examination is not permitted by the accused in person and there is no advocate available, questions should be reduced to writing under specific headings. The Judge is not constrained to put every question sought but will have to evaluate relevance and proportionality. Cross-examination is dynamic and the process cannot become formulaic;

(x) Although fact-finding hearings have a 'highly adversarial complexion', the central philosophy of Children Act proceedings is investigative. A judge may conduct questioning in an open and less adversarial style without compromising fairness to either side.
https://www.bailii.org/ew/cases/EWHC/Fam/2018/1987.html