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Private Law Children Update

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Coronavirus & ex-parte FLA injunctions

“Thank you for your email. I am particularly interested in the part concerning Family Law Act Injunctions during the Covid Lockdown. I am wondering whether they have any insight into the approach that the Court is taking in relation to ex-parte applications as I have a client who is the subject of one where the
evidence is particularly weak. When you look at the existing case law it is hard to see why the Judge approved it. I appreciate you can get different approaches by judges and in different areas but wonder if they have any up-date as to how the court is approaching these applications.”

(HMCTS) Coronavirus (COVID-19) contingency arrangements for Family Law Act injunctions:

We've developed guidance to help make sure injunction applications are prioritised and victims of domestic abuse receive protection as soon as possible.

What do legal representatives need to do? Please help courts to deal with your client's application promptly by:

- Including the words injunction, non molestation, FL401, domestic violence or domestic abuse in the subject line of your email.
- Complete a draft order using the standard template 10.1. Remove any unnecessary paragraphs.
- Include your contact details in the body of your email if they are different from those on the application.
- Do not contact the court by email or telephone within a 3-hour period after submitting your application to give court staff time to progress it.

Family courts have been asked to:

- Create a priority folder and set up a filter on email accounts with these words in the title: injunction; non molestation; FL401; domestic violence; domestic abuse.
- Update auto responses to reflect the information set out in this update.
- Check the priority folder at least every hour.
- Refer without-notice injunction applications to a judge within three hours of receipt.
- Communicate the judge's response and arrange an emergency hearing if it is needed.
- Give the injunction order to the applicant's solicitor for service on the day it is made.
- Make immediate arrangements for service if the applicant is unrepresented.
- If the judge approves the draft order, it only has minor amendments and remains legible, they'll seal it and email it back to the solicitor. They'll do this before updating the case management system to avoid delay.
- They'll update the case management system at a later stage to make sure all relevant data is captured.

The President of the Family Division supports this initiative and urges the use of the standard template order 10.1.

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JH v MF [2020] EWHC 86

- F's application for CAO
- Fact-finding on M's allegations of domestic abuse & sexual assault
- Findings not proven at first instance
- M appealed on grounds of procedural irregularity

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Ground: M to give evidence from Counsel's row

Mrs Justice Russell, para 15:

The judge took the inexplicable step, contrary to the expressed view and request of the Appellant, and contrary to the rules of procedure, of ordering that the Appellant give evidence from counsel's row as "better" than using the witness box and screens. In doing this he had not only decided not to follow Part 3A of the FPR 2010, but he also completely failed to give any or adequate reasons for doing so as required by r3A.9 of the FPR 2010. These are serious procedural irregularities which would allow for an appeal to be granted under FPR 2010 r30.12 (3) (b).

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Ground: Undue weight on M's demeanour

Mrs Justice Russell, para 25:

The grounds of appeal go on to say that the judge was wrong in that he had placed undue weight on the demeanour of the parties in Court when assessing their evidence. Appellate case law is redolent with cautionary guidance and comment on the need to look beyond demeanour when reaching a conclusion about the veracity of any witness …he failed, as he was required to, to give reasons for preferring the evidence of one party over the other (Cf. Lord Justice McFarlane (as he then was) in *V (A Child) (Inadequate Reasons for Findings of Fact)* (2015) EWCA Civ 274).

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Ground: Requirement for physical resistance / misdirection on the burden of proof

Mrs Justice Russell, para 37:

This judgment is flawed. This is a senior judge, a Designated Family Judge, a leadership judge in the Family Court, expressing a view that, in his judgment, it is not only permissible but also acceptable for penetration to continue after the complainant has said no (by asking the perpetrator to stop) but also that a complainant must and should physically resist penetration, in order to establish a lack of consent. This would place the responsibility for establishing consent or lack thereof firmly and solely with the complainant or potential victim. Whilst the burden of proving her case was with the Appellant, in any counter allegation the burden lay with the Respondent. Indeed it was the Respondent who had brought the case as the applicant in the Family Court, thus the burden of proof did not lie solely with the Appellant. Moreover the judge should have been fully aware that the issue of consent is one which has developed jurisprudentially, particularly within the criminal jurisdiction, over the past 15 years (of which more below).

Ground: expectation that crime is reported / help is sought

Mrs Justice Russell, para 38:

"The judge then comments that the Appellant did not take immediate action to call the police or anyone else and that her description, in the view of this judge, did not "indicate that the circumstances were such that she might in any way have been thought wise to seek medical advice." In keeping with his approach thus far the judge had apparently concluded that it is necessary for victims of sexual assault to report the assault or make a contemporaneous report. Yet it is now explicitly accepted that many victims will not do so, out of fear or embarrassment which are based on their cultural, social or religious background and the concomitant pressures, mores or beliefs."

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Ground: no need for physical coercion

Mrs Justice Russell, para 40:

*"There is no evidence of any kind that a struggle pursued, nor again is a case advanced that the father was being **physically coercive** (my emphasis) on this occasion…"*

"…as can be seen below physical coercion or violence or the threat of violence is not considered a necessary element when considering consent or the lack of consent, thus the judge was wrong in his approach."

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Costs Orders:
Timokhina v Timokhina [2019] EWCA Civ 1284

- F's application for permission to move with son to live in Russia
- M bribes police to charge F with offences
- M is arrested and held in custody
- Final hearing is adjourned once
- Final hearing proceeds in M's absence; application granted
- M seeks stay and permission to appeal
- Stay refused on following day; permission / appeal hearing listed
- M sentenced to 4 years in prison

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Order at Permission Hearing:

- M must pay F's costs of the appeal and stay applications summarily assessed on an indemnity basis in the sum of £109,394

Grounds of Appeal:

1. The court did not have jurisdiction to assess the costs of the stay hearing as the order from that hearing was silent as to costs.
2. The costs should have been assessed on the standard basis, not the indemnity basis.
3. A detailed not summary assessment of the costs was necessary.
4. The costs were at an unreasonable level in any event.

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CA's Judgment on the Grounds:

1. The court did have jurisdiction to assess the costs of the stay hearing despite the general rule that no party is entitled to costs in relation to an order that does not mention costs (CPR r.44.10), because the family court continues to have a discretion on costs pursuant to FPR 28.1
2. The judge had correctly assessed costs on the indemnity basis (Three Rivers District Council v Bank of England [2006] 5 Costs LR 714 applied.)
3. A summary assessment of the costs was consistent with CPR PD44.9.2(b)
4. Part of the costs were unreasonable in amount and the sum of £78,144 replaced £109,394.

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Re C1 and C2 [2019] EWHC B15 (Fam) and *Re C3 and C4* [2019] EWHC B14 (Fam)

- C1 and C2 were subject to one application. Both children have the same mother; C1 is the applicant father's child; C2's father was joined as a respondent.
- C3 and C4 – in separate proceedings – have the same father as C1. Their mother was a respondent to the second set of proceedings.
- A had been found to have shaken C4 in 2016. The court made orders for no direct contact between A, C3 and C4, and a s.91(14) bar for 3 years.
- A made a series of appeal applications – all dismissed until 2018 when HHJ Plunkett granted A permission to apply.

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Re C1 and C2 *and* ***Re C3 and C4*** *cont.*

- These proceedings kick-started because A refused to return C1 to M1.
- Keehan J described F's behaviour as '*nothing short of appalling*' – the judgment makes for extremely uncomfortable reading.
- Takeaways points:
  - Keehan J ordered the disclosure of the 2016 papers concerning C3 and C4 into the C1 and C2 proceedings;
  - Same guardian for both cases;
  - Run-down of the law on orders for no contact;
  - Extreme examples of litigation conduct and conduct against professionals (including the Guardian, the judge and the mothers).

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Re S (Parental Alienation: Cult) [2020] EWCA Civ 568

- Fascinating history to the case and development of parental alienation within the background in the judgment.
- Even at this stage, the CoA gave the mother one final chance to engage in therapy and disassociate herself from Universal Medicine.
- Takeaway points:
  - Grapple with alienation at an earlier stage, particularly when there is an outside source (such as a cult/organisation) of that alienation;
  - Concise grounds of appeal in paragraph 71.

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Re S [2020] EWCA Civ 515

- M's appeal against a decision of HHJ Hillier (sitting DHCJ) to dismiss M's application for a summary return of her children from Libya.
- Although permission was granted by Moylan J, stage was set in his comments that the appeal '*will have to surmount the high threshold for the Court of Appeal to interfere with findings of fact*' [3].
- This was essentially M's downfall: CoA found no fault with HHJ Hillier's judgment.
- Takeaway points:
  - commentary on *parents patriae* jurisdiction at [52 – 58];
  - Ever-helpful summary of law on habitual residence [66 – 67; 79 – 80] and the difficulty with re-opening findings of fact at appellate level [47 – 48]

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Re D (A Child) (Appeal out of Time) [2020] EWHC 1167 (Fam)

- Extraordinary successful appeal of a 7-year-old fact-finding judgment which made findings against F of sexually abusing the child.
- Francis J based the decision on the following:
  - The child psychologist (Dr G) went beyond his remit and gave opinions on the veracity of the evidence, upon which the DJ relied – a big no no;
  - Dr G's report was flawed in many respects, which should have been noticed by the judge.
  - Cross-examination of Dr G on behalf of F was conducted by counsel for M (!!!), so F's case had never properly been put.
- Takeaway point: how obviously wrong procedure has to be to be granted permission to appeal that far out of time.

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Re Al M (Publication) [2020] EWHC 122 (Fam)

- The ongoing dispute between Princess Haya and Sheikh Mohammed - the media judgment.
- Legal context of the arguments for and against publication of the fact-finding judgment [20 – 30] very clearly summarised, including the case law on the 'balancing exercise' between Arts 6, 8 and 10
- A reminder to the family practitioners that where a court is asked to lift or extent reporting restrictions, the child's welfare is *not* the court's paramount consideration but that does not mean the interests are dismissed.
- Takeaway point: all the law on the publication of family proceedings is in this judgment, should you ever need it!