ST. IVE'S CHAMBERS
FAMILY LAW GROUP

PRIVATE & PUBLIC LAW UPDATE - 2006

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A. RECENT CASES - GENERAL

1. Evidence & Procedure

Abduction

- ***Cannon v. Cannon*** **[2005] 1 FLR 169 (CA)**

  It was not enough to have regard to the physical characteristics of the child's settlement; equal regard had to be paid to the emotional and psychological elements. In cases of concealment and subterfuge the burden of demonstrating the necessary elements of emotional and psychological settlement was much increased. Although it was not the case that a period of concealment should be disregarded and therefore subtracted from the total period of delay in order to calculate the 12 month mark had been exceeded, judges should look critically at any alleged settlement that was built on concealment and deceit, especially if the defendant were a fugitive from criminal jusitice. Even if settlement were established on the facts, the court retained a residual discretion to order a return under article 18 of the Hague Convention.

- ***Re D (Children)*** **[2006] EWCA Civ (25.01.06)**

  The mother established a defence to the return of the children to Venezuela where she had been shot. The judge had been entitled to rely on evidence that the children were likely to be fearful for the safety of themselves and their mother if they returned.

- ***Best v. Hesketh*** **[2005] EWCA Civ 1380 (27.07.05)**
  The CA said the LSC needed to give priority to the question of funding in Hague Convention cases to ensure the court was not handicapped or, more importantly, a parent was not in danger of suffering injustice in the appellate process.

- ***Eskinazi & Chelouche v. Turkey*** **[2005] 14600.05 ECHR (14.12.05)**
  The European Convention of Human Rights and Fundamental Freedoms must be read in light of the Hague Convention. There was no breach of articles 6 or 8 where the Turkish authorities returned a child at the request of the Israeli Central Authority where there were no substantial grounds for refusing the request under articles 13 or 20 of the Hague Convention.

<u>Appeals</u>

- ***Re T (Contact: Alienation: Permission to Appeal)*** **[2003] 1 FLR 532 (CA)**

- ***Re B (Appeal: Lack of Reasons)*** **[2003] 2 FLR 1035 (CA)**
  The essential test of a judgment was whether it sufficiently explained what the judge had found and what he had concluded, as well as the process of reasoning by which he had arrived at his findings and then his conclusions. The more experienced the judge the more likely it was that he might display the virtue of brevity [4-5 & 11].
  See also: *Re G (Care Proceedings: Placement for Adoption)* [2006] 1 FLR 47 [2005] EWCA Civ 896 & *Re W (A Child)* [2005] EWCA Civ (26.05.05)

- ***Re U (A Child))*** **[2005] 2 FLR 444 [2005] EWCA Civ 52**
  The applicant mother (UM) sought permission to reopen an appeal following the Court of Appeal's previous refusal to grant permission to appeal ([2004] EWCA Civ 567, [2004] 3 W.L.R. 753). The

application was made subject to CPR r.52.17 and the principles in Taylor v Lawrence (2002) EWCA Civ 90, (2003) QB 528. HELD: (1) the probability of a significant injustice had to be clearly established and there had to be no effective alternative remedy, *Taylor* applied. The *Taylor* jurisdiction could only be invoked properly where it was demonstrated that the integrity of the earlier litigation process had been critically undermined. It was not concerned with where the earlier process had simply produced a wrong result. Fresh evidence that might have had a significant impact on the result had it been admitted at trial was not the proper subject matter of a *Taylor* application. If the discovery of fresh evidence was ever to justify reopening an appeal, the case at least had to have in common with the instances of corrupted process that the injustice that would be perpetrated if the appeal was not reopened had to be so grave as to overbear the pressing claims of finality in litigation. In principle, Ladd v Marshall grounds would not suffice to justify a second appeal. For a successful application to reopen an appeal on the grounds of fresh evidence, it at least had to be shown not merely that the fresh evidence demonstrated a real possibility that an erroneous result was arrived at in the earlier proceedings, but that there existed a powerful probability that such a result had in fact been perpetrated. Sufficient doubt had not been cast on the evidence of the three medical witnesses at the hearing before the judge to justify a reopening of the medical issues. An essential element of the new information was based upon the accounts of LU's parents, which were not consistent with the contemporaneous medical evidence. Application refused.

- ***Al-Khatib v. Masry* [2005] 1 FLR 381 (CA)**

  There was no family case, even at the appellate level, that was not potentially open to successful mediation, even if mediation had not been attempted or had failed during the trial process. It was vital for there to be judicial supervision of the mediation process.

- ***Re J (Child Returned Abroad: Convention Rights)*** **[2005] 2 FLR 802 (HL)**

  In the exercise of a discretion in which various factors are relevant, the evaluation and balancing of those factors is a matter for the trial judge. Too ready an interference by the appellate court, particularly if it always seems to be in the direction of one result rather than the other, risks robbing the trial judge of the discretion entrusted to him by law. If trial judges are led to believe that, even if they direct themselves impeccably on the law, make findings of fact which are open to them on the evidence and are careful in their evaluation and weighing of the relevant factors, their decisions are liable to be overturned unless they reach a particular conclusion, they will come to believe that they do not in fact have any choice or discretion in the matter (per Baronness Hale at 12).

- ***Re W (A Child)*** **[2005] EWCA Civ (22.06.05)**

  Where an order was made for return of a child abroad subject to stringent conditions (which order had been upheld on appeal) but the party seeking the return of the child failed to comply with the conditions, the proper course was to apply to the original trial judge to set aside the order for return and not to appeal.

<u>CAFCASS – Appointment of Guardian</u>

- ***Representation of Children Practice Direction*** **[2004] 1 FLR 1188**

  President's Practice Direction on the circumstances in which the child should be joined as a party and represented.

- ***CAFCASS Legal Practice Direction*** **[2004] 1 FLR 1190**

  Circumstances in which the issue of the representation of a child should be referred to CAFCASS Legal.

<u>CAFCASS – Children's Guardian</u>

- ***Re R (A Child)*** **[2005] EWCA Civ (20.12.05)**

  Where the issue was whether to make a care order or supervision order, the judge's decision to make a care order was fatally flawed where she had rejected the views and recommendation of the children's guardian without giving any reasons for doing so.

  See also: *Re C (A Child)* [2006] EWCA Civ (18.01.06)

<u>Case Management</u>

- ***Re C-P (A Child)*** **[2006] EWCA Civ (24.01.06)**

  The judge was entitled, in the circumstances, to make a final decision on the father's application for contact at a directions hearing and make no order for contact. The judge had a wide discretion and not only had the right but the duty to bring proceedings to an end if he thought it right to do so. Both parties had been legally represented and the hearing had lasted over one hour: there had been no unfairness to the father.

  BUT

- ***Re C (A Child)*** **[2006] EWCA Civ (27.01.06)**

  The failure of the judge to hear evidence from the father on the issue of whether contact should be unsupervised, when he had heard evidence from the supervision officer on the issue who was against the father's application, amounted to unfairness. The judge had failed to undertake the proper and necessary inquiry into the live issue.

<u>Disclosure</u>

- ***Re P (Non-disclosure of HIV Status)*** **[2005] EWHC Fam (12.10.05)**

The mother sought contact in private law proceedings and made an ex parte application for permission not to disclose her HIV status. On the special facts of this case the application was granted. The fact the mother was HIV was not relevant to any live issue nor to the case. Disclosure would not improve the children's welfare – rather it would be detrimental to the mother's relationship with the children.

<u>Findings of Fact: New Evidence</u>

- ***Re M & MC (Care: Issues of Fact: Drawing of Orders)* [2003] 1 FLR 461 (CA)**

  Where after a finding of fact hearing new evidence emerges, in this case the mother made a (disputed) confession of responsibility, an application for a re-hearing was unlikely to succeed, nor (depending on the nature of the new material) could the court simply ignore the new matters. A sensible middle course was for the judge to hear limited evidence on the issues in dispute (the new material) and to consider whether and, if so, to what extent he should revise his earlier findings, as part of the Part II welfare ('disposal') hearing.

- ***Re K (NAI: Perpetrator: New Evidence)* [2005] 1 FLR 285 (CA)**

  At the fact finding hearing the judge concluded parties' child had suffered non-accidental injuries but was unable to find who of the mother, father and paternal grandmother had perpetrated the injuries. After the welfare hearing when the children were freed for adoption the mother made a statement retracting her previous evidence, alleged she had been forcibly detained by the paternal family and made allegations, in relation to the NAI, against the paternal grandparents. The mother appealed. HELD: it is in the public interest for those who caused serious non-accidental injuries to children to be identified wherever such identification was possible. It was also in the public interest that children knew the truth about who had injured them. It was sufficient for the mother to show that the fresh evidence

might reasonably lead, on a rehearing, to a finding that the mother could be excluded as a possible perpetrator.

See also: ***Re H (A Child)*** **[2005] EWCA Civ (28.07.05)**

Human Rights

- ***Lebbink v. The Netherlands*** **[2004] 2 FLR 463 (ECHR)**

  Mere biological kinship without any further legal or factual elements indicating the existence of a close personal relationship could not be regarded as sufficient to attract the protection of Article 8. Relates on the facts to children born out of wedlock where the parents - since birth – have not and do not cohabit.

- ***Senthuran v. Sec. of State for Home Department*** **[2005] 1 FLR 229 (CA)**

  'Family life' within the meaning and protection of Article 8 could be engaged between adult siblings living together.

- ***Singh v. Entry Clearance Officer, New Delhi*** **[2005] 1 FLR 308 (CA)**

  The potential for the development of family life was relevant in determining whether family life already existed and that potential was not confined to relationships based on marriage or blood nor to formal relationships recognised in law.

  See also: ***Pini & Others v. Romania*** **[2005] 2 FLR 596 (ECHR)**

- ***Mabon v. Mabon & Others*** **[2005] EWCA Civ (26.05.05)**

  In considering the separate representation of children judges focus on the sufficiency of the child's understanding and, in measuring that sufficiency, reflect the extent to which, in the 21st century, there was a keener appreciation of the autonomy of the child and the child's consequential right to participate in the decision making processes that fundamentally affected his family life.

- ***B & L v. UK*** **[2006] 1 FLR 35 (ECHR)**

  The prohibition on marriage between former parents-in-law and children-in-law had the legitimate aims of protecting the integrity of the family and preventing harm to children who may be affected by the changing relationships of the adults around them. There were no incest or other criminal provisions in relation to such relationships. The fact that exceptions to the general prohibition were allowed under private Acts of Parliament undermined the rationality and logic of the prohibition. Neither the statutory exception (both applicants pre-deceased by former spouses) nor the possibility of applying for a private Act were sufficient to prevent a finding of a violation of art. 12.

- ***Mizzi v. Malta*** **[2006] ECHR (12.01.06) (Application no. 26111/02)**

  Father sought to dispute paternity of child born after he had separated from his wife. It was proved he was not the father but Maltese then provided he could not legally challenge paternity. The law was later amended to permit a legal challenge within certain time limits: the father fell well outside those limits. Held: there had been a breach of his art. 6 and art 8 rights. The time limits impaired his right of access to the court. Whilst time limits for challenges to paternity could be in the interests of children, such limits should not altogether prevent the use of the legal remedy in question.

<u>Leave to Issue Application</u>

- ***Re R (A Child)*** **[2005] EWCA Civ (18.08.05)**

  The language of s.10(9) CA 1989 and the authorities did not prohibit a broad assessment of the merits of an application under s.10(9).

What was prohibited was simply to apply the criteria that there was no realistic prospect of success.

Legal Professional Privilige – Proceeds of Crime Act 2002

- ***Bowman v. Fels* [2005] 2 FLR 247 (CA)**

  Section 328 of POCA was not intended to cover or affect the ordinary conduct of litigation by legal professionals. The ordinary activities of conducting litigation did not involve lawyers 'becoming concerned in an arrangement which….facilitates the acquisition, retention, use or control of criminal property' even if the lawyers suspect that the outcome of the legal proceedings might have such an effect. Even if the contrary view were to be taken, s.328 could not be interpreted as as meaning that legal professional privilege was to be overridden or that a lawyer was to breach his duty to the court and reveal to a third party documents revealed to him through the disclosure process.

  (**Query: pending appeal to House of Lords)**

McKenzie Friend

- ***FM v. Singer & Others* [2004] EWHC 793 (QB) (Newman J.)**

  Where Dr. Pelling applies to be an advocate for a claimant or to act as a McKenzie friend the court's attention should be drawn to this judgment where the role, approach and unhelpful attitudes of Dr. Pelling are fully considered [12-18].

- ***Re D (A Child)* [2005] EWCA Civ (15.03.05)**

  Where a litigant in person sought to be represented by a McKenzie friend, the court could grant that right of audience in exceptional circumstances and after care consideration. An argument that the McKenzie friend was able to put the applicant's case better that the applicant did not amount to exceptional circumstances.

- ***In the Matter of the Children of Mr. O'Connell, Mr Whelan & Mr. Watson* [2005] 2 FLR 967 (CA)**

  The presumption in favour of allowing a litigant in person the assistance of a McKenzie friend was very strong. A request for such assistance should be refused only for compelling reasons, which if found must be explained very carefully to the litigant in person. It was not good practice to exclude a proposed McKenzie friend from chambers whilst an application by the litigant in person was being made. The was no reason in principle why a litigant in person should not disclose the court papers to his court-sanctioned McKenzie friend and it would not be a contempt of court to show court papers to the proposed McKenzie friend prior to any application for the purposes of seeking advice.

<u>Medical Treatment</u>

- ***R (Burke) v. General Medical Council* [2005] EWCA Civ (28.07.05)**

  There was nothing in the GMC's guidance paper on the withholding and withdrawing of artificial nutrition and hydration that was unlawful or that constituted a breach of the European Convention. Where a competent patient indicated his or her wish to be kept alive by the provision of artificial nutrition and hydration, any doctor who deliberately brought that patient's life to an end by discontinuing the supply of artificial nutrition and hydration would not merely be in breach of duty but would be guilty of murder.

- ***Wyatt v. Portsmouth NHS Trust & Wyatt* [2005] EWCA Civ (12.10.05)**

  The best interests of a child in the context of the withholding of medical treatment were not to be determined by the test of whether the child's quality of life would be intolerable. Best interests were to be more broadly than medical interests and included emotional and other

welfare issues. There was a strong presumption in favour of preserving life, but not where treatment would be futile and there was no obligation on the medical profession to give treatment that would be futile.

See also Appendix I below.

Protecting Vulnerable Adults

- ***M v. B A & S* [2006] 1 FLR 117 (Sumner J)**

  The court had jurisdiction to make an order restraining those responsible for an adult *lacking capacity* from entering into a contract of marriage where such an order was in the interests of that adult.

- ***Re SA (Vulnerable Adults with Capacity: Marriage)* [2005] EWHC 2942 Fam (15.12.05) (Munby J)**

  The court's inherent jurisdiction could be exercised in relation to a vulnerable adult who, even if not incapacitated by mental disorder or mental illness, was (or was reasonably believed to be) under (i) constraint (ii) subject to coercion or undue influence or (iii) for some other reason deprived of the capacity to make the relevant decision or disabled from making a free choice or incapacitated or disabled from giving or expressing a real and genuine consent. In relation to a deaf woman who was unable to communicate with her own family in her first language, British Sign Language, or to lip read their first language, the court made an order to ensure she was properly informed in a manner which she could understand about any specific marriage prior to entering into it.

Public Hearings

- ***Pelling v. Bruce-Williams* [2004] 2 FLR 823 (CA)**

  Appeal from Bennett J was dismissed. The Court of Appeal observed that it was within the judge's discretion to hear a case in chambers and to refuse to pronounce judgment in public. However, greater justification was required for the refusal to give judgment (suitably anonymised) in public. Neither the inherent nor statutory jurisdiction

justified an automatic restriction without the exercise of a specific discretion in each case. The time had come for the Court of Appeal to consider in each case whether a proper balance of competing interests required anonymisation of any report of the proceedings and judgment.

Publicity

- ***Re S (Identification: Restrictions on Publication)*** **[2005] 1 FLR 591 (HL)**

  The guardian of an 8 year old child sought an injunction restraining publication of the identity of the child's mother who was the defendant in a murder trial accused of killing the child's older brother. HELD: dismissing the appeal and refusing the injunction, the House of Lords said that since the Human Rights Act 1998 the jurisdiction to restrain publicity now derived from rights under the Convention. The previous case law was not wholly irrelevant as it might be of interest in regard to the ultimate balancing exercise. A court must begin by acknowledging the force of the argument under Art. 10, before considering whether the right of the child under Art 8 was sufficient to outweigh it.

- ***A Local Authority v. W L W T & R*** **[2006] 1 FLR 1 [2005] EWHC (14.07.05) (President)**

  A local authority was entitled to an injunction restraining the publication of the defendant and her victim (the mother and father of the two relevant children) in a criminal trial, and that they were suffering from HIV virus, in order to protect the privacy of their children who had not been involved in the trial but had been the subject of care proceedings. Although the ordinary rule that the press could report everything that took place on a criminal court, that rule might nonetheless be displaced in unusual or exceptional circumstances. The novelty and issues involved in the criminal trial which rendered it of high interest would not be significantly inhibited by the suppression of the parents' names, address and photographs.

The naming of the parents was likely to form a focus of pressure and attention on the children's carers and potential carers. An injunction was both necessary and proportionate.

- ***President's Practice Direction*** **[2005] 2 FLR 121**
  Direction for the procedure for seeking an order restricting publication of information about children or incapacitated adults. Must be heard by a judge of the Family Division. Service on the press is effected via the Press Association's CopyDirect service.
  See: ***Practice Note (Official Solicitor: Dep. Director Legal Services: CAFCASS: Applications for Reporting Restriction Orders)*** **[2005] 2 FLR 111**

<u>Recusal</u>

- ***Attorney- General v. Pelling*** **[2006] 1 FLR 93 (CA)**
  Guidance given in respect of applications for recusal. There is no need to refer issue to a different judge.

<u>'No Order Principle'</u>

- ***Re G (Children)*** **[2005] EWCA Civ (27.07.05)**
  The wording of s.1(5) CA 1989 was clear and it did not create a presumption either way. All it required was for a court to decide whether it was better or not for there to be an order rather than no order at all.

2. Expert Evidence

- ***Re M (Residence)*** **[2002] 2 FLR 1059 (CA)**
  If uncontroverted expert evidence is not logically insupportable, a judge is NOT entitled to reject expert evidence on matters upon which the experts, by reason of their training and professional expertise and experience, are well equipped to guide the court (e.g. the causation of medical injuries). However, a judge was at liberty to

depart from the opinion of experts, even if UNANIMOUS, on issues of PLACEMENT, MANAGEMENT & WELFARE. But it was incumbent upon the judge to give full REASONS for such departure [46, 56 & 57].

See also: *Re B (Non-Accidental Injury)* [2002] 2 FLR 1133 (CA), *Re B (Non-Accidental Injury: Compelling Medical Evidence)* [2002] 2 FLR 599 (CA) (Evidence as to the mother's character, predisposition & personality could not be determinative and could not outweigh the compelling medical evidence) & *Re A&D (Non-Accidental Injury: Subdural Haematomas)* [2002] 1 FLR 337 (CA).

- ***R v. Cannings*** **[2004] EWCA Crim. 01 (CA)**

  "For the time being, where a full investigation into two or more sudden unexplained infant deaths in the same family is followed by a serious disagreement between reputable experts about the cause of death, and a body of such expert opinion concludes that natural causes, whether explained or unexplained, cannot be excluded as a reasonable (and not a fanciful) possibility, the prosecution of a parent or parents for murder should not be started, or continued, unless there is additional cogent evidence, extraneous to the expert evidence, (such as we have exemplified in paragraph 10) which tends to support the conclusion that the infant, or where there is more than one death, one of the infants, was deliberately harmed. In cases like the present, if the outcome of the trial depends exclusively or almost exclusively on a serious disagreement between distinguished and reputable experts, it will often be unwise and therefore safe, to proceed [178].

- ***A County Council v. K D & L*** **[2005] 1 FLR 851 (Charles J)**

  It was the role of the court to take into account and weigh the expertise and speciality of expert witnesses. In a case where the medical evidence was to the effect that the likely cause of an injury was non-accidental the court was entitled to find that the injury had a

natural cause or was accidental. Equally in a case where the medical evidence was that there was nothing diagnostic of a non-accidental injury, the court could nonetheless reach a finding on the totality of the evidence that there had been a non-accidental injury and that the threshold was established. It was open to the judge to reach a conclusion on the totality of the evidence that was different to or did not accord with the conclusion reached by the medical experts. Guidance given on the questions experts should be asked and how they should approach the issue and likelihood of the cause(s) of death, harm or injuries.

- ***Re S (Care: Parenting Skills: Personality Tests)*** **[2005] 2 FLR 658 (CA)**

  Very little reliance could be placed upon psychometric testing of the sort used in this case (Eysenck Personality Questionnaire – Revised), which should not ordinarily have any place in cases of this kind. Questions of credibility were for the judge to decide: judges did not need personality tests to assist them in deciding questions of credibility and were probably far better without them. Personality testing of this sort could not be used to resolve issues such as parenting skills unless validated by other evidence. If a judge were, exceptionally, minded to rely upon the results of personality tests, he had first to assess their validity, both generally and for the purposes of the case.

  See also: *Re B (Children)* [2005] EWCA Civ (15.03.05) (Experts commissioned too regularly and courts should be more hesitant in the future about doing so) &

- ***GW & PW v. Oldham MBC & KPW*** **[2005] EWCA Civ (31.10.05)**

  The Court of Appeal gave guidance on the advisability of the court relying on a single expert and the propriety of permitting parents who denied abusing their children a second opinion. In many family cases

it would be both unrealistic and unnecessary to permit parents to obtain second opinions in respect of all the expert evidence but in certain cases where the medical evidence of NAI or unascertained infant death became pivotal, the court would be slow to decline an application for a second expert, since such evidence was not easily challenged in the absence of another expert opinion. Such a second opinion should normally only be permitted where the question to be addressed went to an issue of critical importance. The fact that an expert had had clinical involvement provided an additional argument for a second opinion if one was sought.

B. RECENT CASES - PRIVATE LAW

3. Procedure

- ***R v. R (Private Law Proceedings: Residential Assessment)* [2002] 2 FLR 953 (Holman J.)**

  The court had no jurisdiction in private law proceedings to order a residential assessment of one parent against the will of the other. If a residual power did exist under the inherent jurisdiction, it would not be filling a lacuna in the 1989 Act but innovating a new tool in the court's armoury.

- ***Re N (Sexual Abuse Allegations: Professionals Not Abiding* [2002] 2 FLR 953 (HHJ Rumbelow QC)**

  Agencies who assistance is sought by the court in contact disputes should proceed on the basis of the findings of fact made by the court and should be even-handed, fair and transparent as between the parents.

4. Human Rights

- ***Yousef v. The Netherlands* [2003] 1 FLR 210 (ECHR)**

  The Court re-emphasised that where the Art. 8 rights of parents and a child were at stake the child's rights must be the paramount consideration and if any balancing of the interests were necessary the interests of the child must prevail. The denial of the right to 'recognise' a child (the equivalent of PRO here) was an interference with the father's right to respect for family life, but was in accordance with law, pursued a legitimate aim and was necessary in a democratic society – in that it was in the best interests of the child [73 & 53].

- ***Lebbink v. The Netherlands* [2004] 2 FLR 463 (ECHR)**

  Mere biological kinship without any further legal or factual elements indicating the existence of a close personal relationship could not be regarded as sufficient to attract the protection of Article 8. Relates on the facts to children born out of wedlock where the parents - since birth – have not and do not cohabit.

- ***Senthuran v. Sec. of State for Home Department* [2005] 1 FLR 229 (CA)**

  'Family life' within the meaning and protection of Article 8 could be engaged between adult siblings living together.

5. Residence

- ***A v. A (Shared Residence)* [2004] 1 FLR 1195 (Wall J)**

  "This case has been about control throughout. Mrs A sought to control the children, with seriously adverse consequences for the family. She failed. Control is not what this family needs. What it needs is co-operation. By making a shared residence order the court is making that point. These parents have joint and equal parental responsibility. The residence of the children is shared between them. These facts need to be recognised by an order for shared residence" (paragraphs 124 & 126).

  Approved by the Court of Appeal in *Re G (Residence: Same-Sex Partners) (below).*

- ***Re (Bibi) v. Camden LBC* [2005] 1 FLR 413 (Davis J)**

  A residence order under s.8 of the 1989 Act in favour of an applicant for housing was a highly material consideration for a housing authority but was not the only factor and could not be determinative. Where a shared residence order is proposed in family proceedings, and one or both of the parents intend to apply for local authority housing, the court should require specific evidence about the availability of that housing [42].

- ***Re M (Residence)* [2005] 1 FLR 656 (CA)**

  The judge failed to refer to the opinion of the CAFCASS officer, did not explain whey he was departing from her recommendations nor did he explain or give reasons for granting residence to the father when the children had hitherto lived with the mother. Appeal allowed and remitted for a re-hearing

- ***Re R (Children)* [2005] EWCA Civ 542 (19.04.05)**

A harmonious relationship between the parents is not a prerequisite of a shared care order. Indeed the presence of that sort of harmonious relationship is a contraindication of a shared residence order since such parents would fall within the no order principle emphasised by section 1(5) of the Act (per Thorpe LJ at paragraph 11).

- ***Re G (Residence: Same-sex Partner)*** **[2005] 2 FLR 957 (CA)**

  Same sex partners in 8 year relationship had two children conceived by artificial insemination by donor. After end of relationship appellant sought a shared residence order. The respondent concealed plans to relocate to another part of the country. The judge rejected the CAFCASS' recommendation and made contact and specific issue orders to protect the appellant's position vis a vis the children. HELD: appeal allowed and shared residence order made to grant parental responsibility to appellant and to safeguard against her being marginalised from the children's lives. Court observed that if the appellant had been a father he would undoubtedly have been granted a parental responsibility order.

- ***Law v. Knight*** **[2005] EWCA Civ (01.07.05)**

  The 3 children of the family lived with the mother and had contact with the father. At one contact period the children made statements to him which gave rise to the father making serious allegations against the mother. Father refused to return the mother who applied for a residence order. The judge made an order for the immediate return of all 3 children pending a hearing into allegations. HELD: appeal allowed. The allegations were so serious that the judge should have put into place at least pre-emptory investigations so he could be sure of the facts and the wishes of the children.

- ***Re S (A Child)*** **[2005] EWCA Civ (26.07.05)**

  Despite the mother's manipulation of her child, a shared residency order granting more time to the mother than the father (9 days and 5 days respectively per fortnight) was within the ambit of judicial

discretion, took a pragmatic approach to what was best for the children and could not be faulted.

- ***Re P (Child)*** **[2005] EWCA Civ (09.11.05)**
  A father appealed against the judge's refusal to increase contact and to make a shared residence order. HELD: in relation to the shared residence order it was difficult to see what the anxieties were that drove the judge to conclude that a shared residence order would empower the father in some way. A shared residence order reflected the reality of the case and there was no compelling reason for refusing to make such an order.

6. Contact

- ***Government White Paper on Contact (18.01.05)***
  - No new changes to 1989 Act
  - Amendment of 'harm' introduced by s120 Adoption & Children Act 2002
  - New version of Parenting Plan – April 2005
  - Telephone Hotline – 2006
  - Mediation – not compulsory but strongly encourage
  - CAFCASS – new role BUT no new money
  - Private Law Programme
  - Increase in funding for contact centres
  - Management & enforcement changes – strengthen FAO & community penalties

- ***Private Law Programme 2004***
  - Overriding objective – as per Protocol
  - First Hearing Dispute Resolution
  - Effective court control
  - Flexible facilitation and referral
  - Monitoring, control and enforcement of orders

- ***Re T (Contact: Alienation: Permission to Appeal* [2003] 1 FLR 531 (CA)**

  The Strasbourg cases suggested the methods and levels of investigation the courts conventionally adopted when trying issues of alienation might not meet the standards Articles 6 & 8 required. There were policy issues for the Government and the judiciary to consider: should judges see children to ascertain their wishes and feelings; what training should judges receive; to what extent should separate representation of children in private law proceedings be available and what services could CAFCASS provide to assist the forensic process [25].

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- ***Sahin v. Germany* [2003] 2 FLR 671 (ECHR)**

  "As regards the issue of hearing the child in court, the court observes that as a general rule it is for the national courts to asses the evidence before them, including the means to ascertain the relevant facts….It would be going too far to say that domestic courts *are always required to hear a child in court* on the issue of access to a parent not having custody, but this issue depends on the specific circumstances of each case, having due regard to the age and maturity of the child concerned" (emphasis supplied) (In this case the child was 5!).

- ***Hansen v. Turkey* [2004] 1 FLR 142 (ECHR)**

  The court made various orders for contact which the father did not comply with despite more than 50 visits by the mother and enforcement authorities. Finding a breach of Art 8 the ECHR ruled that the Turkish authorities had failed to take any measures to enable the mother to enjoy access: they had not sought expert opinion or the advice of social services. Although the children had at times expressed a clear wish not to see the mother, they had never been given any real opportunity to develop a relationship with her in a calm environment where they could freely express their feelings. The authorities should have taken measures, including realistic coercive

measures against the father of a type which were likely to lead to compliance: the fines imposed on the father were neither effective nor adequate. Although coercive measures against children obliging them to reunite with a parent were not desirable, such action could not be ruled out in the event of non-compliance or unlawful behaviour by a residential or custodial parent. [103-108]. **See also** *Sylvester v. Austria* [2003] 2 FLR 210 (ECHR)

[**cf. *Hoppe v. Germany* [2003] 1 FLR 384 (ECHR)** The court found no violation of Art 8 on the ground there was a legitimate basis for decreasing contact having conducted the balancing exercise and taken account of all relevant factors).

- ***Kosmopoulou v. Greece* [2004] 1 FLR 800 (ECHR)**

  There is an obligation on national authorities to take positive steps to reunite parent and child not only in cases of taking a child into public care but also in disputes over residence and contact. The ability of national authorities to apply coercion to secure contact and co-operation is limited in this area because of the need to take account and balance the competing interests of all concerned. Domestic measures hindering the mutual enjoyment by a parent and child of each other's company amounts to an interference with Art 8. It is of paramount importance that a parent has access to all relevant information before the domestic court to enable the parent to put forward all arguments in favour of obtaining contact. [42-49].

  See also: *Maire v. Portugal* [2004] 2 FLR 653 (ECHR)

- ***Re M (Intractable Contact Dispute: Interim Care Order)* [2003] 2 FLR 636 (Wall J.)**

  (1) One method of addressing an intractable contact dispute is by using the s.37 (1989 Act) procedure to remove the children who are being denied all contact with the non-residential parent and are suffering significant harm because of the residential parent's false distorted belief system about the non-residential parent. This procedure is not a panacea and comes with a series of strong health

warnings. The removal must be in the child's best interests, there must be a coherent plan and the consequences must be thought through. (2) Children should be separately represented in private law proceedings where all contact has ceased and the issue of contact has become intractable. Undue delay must be avoided.

- ***Re K (Procedure: FPR)*** **[2005] 1 FLR 764 (CA)**

  The children were not at immediate risk of harm before the peremptory transfer of residence from mother to father. Such a transfer should only be made if it is in the interests of the children, and either in a situation of emergency or as part of a proper strategy for the overall conduct of the case. In this case there was no emergency and the children should have remained with the mother until a further investigation had been carried out.

- ***Re B (s.91(14)Order: Duration)*** **[2004] 1 FLR 871 (CA)**

  Where a child was effectively denied or inhibited from an ordinary relationship with the non-residential parent by the determination of the residential parent to excise the father from her life, the court should never abandon endeavours to right the wrongs within the family dynamics.

- ***Re S (Unco-operative Mother)*** **[2004] 2 FLR 710 (CA)**

  The Court stressed it was essential that the passage of time should not become conclusive in depriving children of a relationship with the father. The mere fact that the mother refused to engage in family therapy was an end of the matter. Although the court could not order the mother to re-engage in therapy, adverse inferences could be drawn against her of she failed to do so.

  See also: ***Re O (Withdrawal of Application)*** **[2004] 1 FLR 1258 (Wall J) &** ***V v. V (Contact: Implacable Hostility)*** **[2004] 2 FLR 851 (Bracewell J)**

- ***Re S (Contact: Promoting Relations with Absent Parent)* [2004] 1 FLR 1279 (CA)**

  Per Thorpe LJ "Whatever the difficulties, however scant the prospects of success, the courts must not relent in the pursuit of the restoration of what had been a natural relationship between the father and the child absent compelling evidence that the welfare of the child requires respite."

  See also: *Re M (Contact: Long-term Best Interests)* [2005] EWCA Civ (21.06.05) and

- ***Re G (A Child)* [2006] EWCA Civ (31.01.06)**

  Where a father had been refused contact with his daughter the court was wrong to refuse to direct that CAFCASS should meet with the child to discuss contact issues. There was an obligation on the courts to pursue all possible avenues towards the resumption of contact. The judge's reasons for so refusing reflected an old fashioned approach to the difficulties that cases of this kind presented.

- ***Re C (A Child)* [2005] EWCA Civ (16.02.05) (CA)**

  Each party agreed that this was an appropriate case in which a guardian should be appointed to act for C. However, in the instant case it was clear that the CAFCASS officer who was involved had reached the limit of his expertise, and it was also clear that C had lost faith in him. In the circumstances, under para.5.2 of the President's Direction, the court had the power to make an order that NYAS be appointed guardian without any preliminary enquiries being made to CAFCASS on the basis that it was clear that CAFCASS was no longer appropriate. Accordingly, the NYAS was requested to become a party to the proceedings from which it would be in a good position to obtain expert advice if appropriate. (Obiter) Where an application was made by a caring parent for contact with a child who had expressed a view not to see that parent, and that refusal could have stemmed from a psychiatric problem, the court should not refuse the application for contact without proper expert assistance.

- ***Re S (Contact Dispute: Committal)* [2005] 1 FLR 812 (CA)**

  Judge no realistic option but to make a committal order against a mother who had obstinately failed to co-operate with the facilitation of contact, who had failed to attend the committal hearing despite being given notice and who had informed her solicitors she would not comply with the contact order. Faced with such defiance the judge would have been failing in her duty had she not upheld the authority of the court.

- ***Re F (Children)* [2005] EWCA Civ (07.04.05)**

  Where a respondent to an application for contact raised allegations of domestic violence, in defence to the application, which engaged the principles outlined in *Re L (A Child)* [2000] 2 FLR 334, but the application was subsequently compromised by the parties, the court need not carry out an investigation into the allegations if the compromise did not put the children's welfare at risk. But if a respondent abandoned the allegations of domestic violence which risked exposing the children's welfare, the court might well decide to proceed with an investigation notwithstanding the absence of the principal 'defence' evidence.

- ***Re H (Child)* [2005] EWCA Civ (22.11.05)**

  The failure of judge, when ordering contact to a father who had been violent to the mother, to consider adequately the 'seminal' decision of the Court of Appeal in *Re L (2001)* was fatal to the exercise of his discretion. Appeal allowed.

  See also *Re K & S* [2005] EWCA Civ (16.11.05) failure take account of *Re L* serious deficiency.

7. Specific Issue Orders

- ***Re S (Specific Issue Order: Religion: Circumcision*** **[2005] 1 FLR 236 (CA)**

  Muslim mother and Hindu father brought up children as Hindus but neither strict adherents to their respective faiths. After separation the mother applied for permission for both children to become practising Muslims and for the son to be circumcised. The father opposed both applications. Hinduism permitted continuing contact with Islam but forbade circumcision while Islam forbade continuing contact with Hinduism and required circumcision. Held: application stemmed from mother's need to portray herself as a practising Muslim, not from children's needs. Children should continue to enjoy the best of both worlds rather than follow one religion exclusively. Circumcision was not in the son's best interests. He could choose which religion to follow when old enough to make an informed decision and, if necessary, be circumcised then.

8. Parental Responsibility

- ***Re D (Contact & PR: Lesbian Mothers and Known Fathers)*** **[2006] EWHC 0022 Fam (12.01.06)**

  Where a man had fathered a child for a female same sex couple both of whom had PR for the child, it was right, in the circumstances, to grant the father PR but with conditions that limited his involvement in certain areas of the child's life.

9. Permission to Remove Jurisdiction

- ***Payne v. Payne*** **[2001] 1 FLR 1052 (CA)**

- ***Re Y (Leave to Remove from the Jurisdiction)*** **[2004] 2 FLR 330** (Hedley J.)

The mother was an American citizen who came to live in Wales to pursue her Welsh studies under the instruction of the father. They married in Texas (the mother maintaining close links with her family there) and later had a child. When the child was 3 the parents separated and developed an informal shared care arrangement which worked well and to the benefit of the child. He was bilingual but Welsh was his preferred language. The mother felt increasing isolated in Wales and applied for permission to move to live with the child in the USA. The father opposed and the application and sought a residence order. The judge refused the application to remove and made a shared residence order. He said it was rare case where the factors idenitifed in *Payne* were of less weight then commonly so. Least detriment to the child was to allow him to remain living in Wales even thought the mother would be compelled (out of consideration for the child) to continue to live in Wales.

- ***Re G (Children)*** **[2005] 2 FLR 166 (CA)**

  Argentinean mother sought leave to remove 5 year old twins to Argentina. Since parents' separation in 2001 there had been regular contact with the father. Judge refused the application. HELD: the judge was wrong to conclude the mother's plans were unrealistic: she could not be criticised for her failure to produce evidence in relation to her proposed business activities since she had not yet embarked upon them. Although mother concentrated in her evidence on reasons to go to Argentina rather than impact of a refusal, judge was wrong to refuse application on basis she had not established the consequence of refusal would be psychiatric damage. The judge had understated the impact of refusal on the mother and also on the children. In the circumstances, particularly as neither party was publicly funded, the instant case was not an appropriate one for

retrial. Appeal allowed. G's application to permanently remove the children from the jurisdiction granted.

- ***Re B (Leave to Remove: Impact of Refusal)*** **[2005] 2 FLR 239 (CA)**

  Mother of two children remarried in Australia where some members of her immediate family were living. She had lived there for a number of years some years earlier. She placed great emphasis on the emotional significance to her of the move. Judge refused permission in part because of her failure to afford the father more contact than provided in the court order and her failure to answer what she would do if the children did not settle. HELD: there is no difference in principle between a 'lifestyle' case or the more familiar cases of foreign national relocation or employment opportunity relocation. It was important to give great weight to the emotional and psychological well-being of the primary carer and not merely to take note of the impact on the primary carer of a refusal.

- ***R v. R (Leave to Remove)*** **[2005] 1 FLR 687 (Baron J)**

  English mother, whose family originated from France where many family members lived, wished to move to live in France with the children. A psychiatrist gave evidence that therapy for the mother was essential and her current coping mechanism was 'to fly'. Father and CAFCASS opposed the application. HELD: permission refused. The mother did not have the emotional stability to establish a new life in another country. Her current plans had not been sufficiently or carefully considered. The contact with the father would be adversely affected and the children would see much less of both sets of grandparents.

- ***Re A (Temporary Removal from Jurisdiction)* [2005] 1 FLR 639 (CA)**

  Mother sought permission to take her 4 year old daughter to South Africa for 2 years in order to carry out research necessary to complete her PhD. Application refused. HELD: the considerations relevant to an application to relocate permanently were not automatically applicable to applications for temporary removal. The judge had underestimated the impact on the mother's career plans of the refusal of permission. Temporary nature of move and ability to maintain contact between father and child, benefit of granting permission outweighed negative impact on child. Appeal allowed.

- ***Re W (Child)* [2005] EWCA Civ (17.11.05)**

  The mother opposed the father's application to remove the child from the jurisdiction to Australia. The mother appealed the decision to grant the father leave to remove. Surprisingly (!) the Court of Appeal decided that the judge had reached a balanced decision and had made a balanced discretionary decision as to what would best advance the welfare of the child.

<u>Internal Relocation</u>

- ***B v. B (Residence Order: Conditions)* [2004] 2 FLR 979 (Sally Bradley QC)**

  Prime motive of the mother was to get away from the father and prevent contact. She had misled the court and father on a number of very serious issues. Moving the child to a school in the geographical area of the UK proposed by the mother was not in the interests of the child. Furthermore the proposed move was to so distant a part of the UK that contact depended on the mother ensuring the child boarded a plane to London. The mother could not be relied on to promote contact. A residence order was made in favour of the mother with a condition that she resided with a defined area in the south east. This was an exceptional case.

10. Domestic Violence

- ***Lomas v. Parle*** **[2004] 1 FLR 812 (CA)**

  The Court of Appeal has the power to INCREASE a sentence imposed upon a committal application for breach of court orders. The court should take account of the element of double jeopardy when considering whether to increase a sentence and, if so, the increase in the sentence. The court gave guidance on the interrelationship between the family court (exercising powers under the Family Law Act 1996) and the criminal courts (exercising powers under the Protection from Harassment Act 1997).

  See Appendix I

11. Costs

- ***Re T (Order for Costs)*** **[2005] 2 FLR 681 (CA)**

  Those who unreasonably frustrate contact need to be aware that the court has power to make costs orders in appropriate cases, and that the consequences of such unreasonable behaviour may well be an order for costs made against the parent who has behaved unreasonably [56].

C. RECENT CASES - PUBLIC LAW

12. Evidence & Procedure

Challenge to Local Authority's Plans

- ***Re M (Care Proceedings: Judicial Review)*** **[2003] 2 FLR 171 (Munby J.)**

  Save in a wholly exceptional case, it was not appropriate to bring judicial review proceedings to prevent a local authority commencing emergency protection or care proceedings. Judicial Review was a remedy of last resort and should not be used where there was available another equally effective and convenient remedy 29, 35 & 37].

Anonymity of Witnesses

- ***Re W (Care Proceedings: Witness Anonymity)*** **[2003] 1 FLR 329 (CA)**

  A social worker sought to give evidence of the mother's continued association with the father, who was feared to be violent and dangerous, anonymously. The application was granted by the judge. On appeal, Thorpe L.J. held that the 'consequences to the parents of accepting the anonymous evidence of t the social worker were quite as dire as the consequences of a conviction…… As a generalisation oit must be recognised that social workers up and down the country are on the receiving end of threats and violence and sometimes actual violence from adults who are engaged in bitterly contested public law cases…..Social workers must generally regard this as a professional hazard. Perhaps it is enough to say that cases in which the court will afford anonymity to a professional social worker witness will be highly exceptional'.[13].

Privilege

- ***W.v Westminster City Council*** **[2005] 1 FLR 816 (Tugendhat)**

  Communications or reports to a child protection case conference were protected by qualified (not absolute) privilege. The irrelevance of the matters raised or the recklessness with which they were made went to the question of malice, not to qualified privilege.

13. Disclosure in Public Law Cases

- ***Re R (Care: Disclosure: Nature of Proceedings)*** **[2002] 1 FLR 755 (Charles J.)**

[The decisions of Charles J. place a heavy burden on local authorities seeking serious findings of fact against parents in terms of pre-trial preparation and disclosure. It deserves careful reading of a lengthy judgment]. The essential features of the judgment are:

i. the burden of proving the findings sought by the local authority in the fact finding stage of the proceedings rests with the authority [772B];
ii. the authority must at an early stage identify in a separate document the allegations sought to be proved [773F};
iii. the statements filed by the authority should be prepared by the authority's lawyers and not by social workers: the lawyer should be familiar with the case and should examine the files to ensure all proper disclosure has been or is made [773H-774E];
iv. social workers and guardians should exhibit to their statements/reports their notes of relevant conversations and of incidents relied on: following the practice of the Official Solicitor's representatives [778C]; and
v. all notes and contemporaneous records of allegations or disclosures, especially by foster carers, should routinely be disclosed [778G].

- ***Re L (Care: Assessment: Fair Trial*** **[2002] 2 FLR 730 (Munby J.)**

[This case follows on from the guidance given by Charles J. in *Re R* (above) and gives additional guidance].

i. the right to a fair trial guaranteed is not confined to the purely judicial part of the proceedings [113];
ii. where an expert instructed was "likely to have a preponderant influence on the assessment of the facts", the parents were entitled to participate effectively in the process by which the report was produced [113];
iii. care proceedings must be transparent and transparently fair at all stages of the process. Documents must be made openly available and crucial meetings at which the family's future was

to be decided must be conducted openly and with the parents present or represented; and

iv. professionals involved should at all times keep clear, accurate, full and balanced notes of all relevant meetings. Criticisms of and deficits in parenting or behaviour must be notified to parents as soon as ever practicable and advised on how to remedy or improve the same [154].

Note the 'health warning' accorded to this decision by the Court of Appeal: "Trial judges should be extremely cautious in reading too much into the judgment"! *Re V (Care: Pre-Birth Actions)* [2005] 1 FLR 627 (CA)

See also: *Re B (Disclosure to Other Parties)* [2001] 2 FLR 1017 (Munby J.)

14. Human Rights

- ***Venema v. The Netherlands*** **[2003] 1 FLR 552 (ECHR)**

  Health professionals were concerned that the mother of a yong child might be suffering from MSBP. A report was made to the Child Welfare Board which applied for a placement order for the child away from the parents. At no stage were the parents consulted or informed of the concerns. The provisional placement order was made without hearing from the parents. After 5 months the child was returned to the parents in light of a favourable psychiatric report. Held: the Art 8 rights of the parents and the child had been violated. The parents had not been sufficiently involved in the decision making process. The potential unpredictability of the parents' reaction was insufficient justification for excluding them from a procedure of immense personal importance to them – given that at the time the child was in hospital and safe from potential harm. It was crucial for the parents to be able to put forward their own point

of view at some stage before the making of the provisional placement order [89 & 96-97].

See also *P, C & S v. UK* [2002] 2 FLR 631 (ECHR)

- ***Hasse v. Germany* [2004] 2 FLR 39 (ECHR.)**

  The parents of 7 children (with a 8th on the way) sought family aid from the authorities. The authorities applied for an injunction to remove the children and the newly born 8th child and sought to prohibit all contact. The court made the orders without hearing from the parents or the children. The ECHR found a violation of Article 8. The removal of the 7 children was not supported by relevant and sufficient reasons and the parents had not been sufficiently involved in the decision making process. There had been no urgency to justify the interim injunction as imminent danger to the children had not been established. The removal of the 7 day old baby from hospital was an extremely harsh measure and the court was not satisfied there were extraordinarily compelling reasons for the authorities to proceed in such an intrusive way in respect of the baby. The German Appeal Court had set aside the interim measures nevertheless the initial decision formed the basis of the continuing separation of children and parents and because of the immediate impact and consequences of the measures, they were difficult to redress.

- ***Re P (Adoption: Breach of Care Plan)* [2004] 2 FLR 1109 (CA)**

  In September 2002 the parents consented to care orders in respect of two of their children on a care plan of pursuing long term fostering concurrently with adoption. Having ruled out the then foster carers, the LA in breach of the care plan sought prospective adopters and issued a freeing application on 01.04.03. The parents learnt of the change of plan in mid April. In May the father instructed solicitors who applied for discharge of the care orders. On 21.07.03 the children were placed with prospective adopters. The applications for freeing and discharge came on before the circuit judge in early

December. He dismissed the discharge applications and made the freeing orders. The Court of Appeal dismissed the appeal on the basis that notwithstanding the LA's breaches of the care and the father's Article 6 and 8 rights (which were admitted), it was incumbent on the father to apply for interim relief. Notwithstanding the father's passionately felt sense of injustice, the 'almost divine being' – the hypothetical reasonable parent – would be able to assuage his sense of injustice with a determination to put first and foremost the future prospects of his children.

15. Care Proceedings

Findings of Fact

- ***Re S (A Child)*** **[2005] EWCA Civ (10.02.05)**

  In care proceedings on a preliminary ruling the judge rejected allegations that the father had abused two children in the based and found the threshold criteria were not satisfied. He ruled that in future dealings between the parties, any court and the parties had to proceed on the basis that the alleged abuse had not happened. The Court of Appeal struck out that latter part of his decision as the purported rule of law was unsustainable. The failure by the LA to prove the threshold criteria of s.31(2) had no impact on its powers, duties and responsibilities in relation to child protection beyond the bounds of care proceedings. It was manifest that the LA continued in its powers and responsibilities to protect the child in any way which was necessary and within its lawful remit.

- ***Re K (Children)*** **[2005] EWCA Civ (16.08.05)**

Where life threatening injuries were inflicted on a child and the threshold criteria under the Children Act 1989 s.31 had been established for that child, there had to be exceptional circumstances for a judge to subsequently decide that the threshold criteria had not been satisfied in relation to that child's sibling.

Assessment

- ***Re G (Interim Care Order: Residential Assessment)* [2004] 1 FLR 876 (CA)**

  Section 38(6) had to be construed purposively. The essential question should always be whether what was proposed could be broadly classified as an assessment to enable the court to obtain the information necessary for its own decision. A permissible assessment for that purpose might well contain the provision of a variety of services, supports and treatments with or without accommodation. Applications under s.38(6) would fail if what was proposed was not required to enable the court to obtain the information necessary for its decision, if the child was only peripherally involved, if what was proposed was a bare treatment programme for one or both parents or if the cost of what was proposed was prohibitive. (Re M (Residential Assessment Directions) (1998) 2 FLR 371 doubted). An application for a direction under s.38(6) might potentially engage both Art.6 and Art.8.

but ……..overruled by the House of Lords

- ***Kent County Council v. G* [2005] UKHL 68 (24.11.05)**

  (The 'controversial' opinions delivered in this important case should be read in full) There is nothing in the 1989 Act which empowers the court to order the provision of specific services to anyone. It is the *present* capacity of the parent with which the court is concerned. It cannot be a proper use of the court's power's under s.38(6) to seek to

bring about change. What is directed under s.38(6) must be an examination or assessment of the child, including where appropriate her relationship with her parents, the risk her parents may present to her and the ways in which those risks may be avoided or managed, all with a view to enabling the court to make the decisions which it has to make under the Act with the minimum of delay. Any services which are provided for the child and his family must ancillary to that end. The court should not tolerate a day's full hearing devoted to decide whether or not to make a direction under s.38(6).

- ***Calderdale MBC v. S & LSC* [2005] 1 FLR 751 (Bodey J)**

  In general terms the proportionate approach of sharing the costs of joint expert reports between all of the parties was to be preferred to the 'moiety' approach contended for by the LSC (namely the publicly funded parties should bear 50% of the costs and the local authority should bear the other 50%). Guidance given on the relevant considerations when considering who should bear the costs of reports produced by joint experts in public law cases.

- ***Lambeth LBC v. S & Others* [2005] The Times, 19th May**

  The costs of a residential assessment in child care cases did not have to be borne solely by the local authority which had brought the care proceedings and could be apportioned between the parties. Moreover the LSC had power to fund the assessment.

<u>Emergency Protection Orders</u>

- ***X Council v. B (Emergency Protection Orders)* [2005] 1 FLR 341 (Munby J)**

  Guidance on the EPO jurisdiction. (i) The summary removal of a child was draconian, an extremely harsh measure and required exceptional justification and extraordinary compelling reasons. (ii) It should not be made unless it was both necessary and proportionate and no lesser order would protect the child. (iii) If the real purpose of

the removal was an assessment of the child a CAO under s.43 should be considered. (iii) The evidence in support of an EPO had to be full, detailed, precise and compelling. (iv) Save in wholly exceptional circumstances, parents must be given adequate prior notice of the date time and place of the application and without notice application should only be made in cases genuine emergency or great urgency. (v) The FPC must meticulously comply with the rules and keep a note of the evidence, reasons and findings of fact made, which must be made available to the parents, if sought. (vi) It would be prudent for the local authority to have procedures to ensure that the required decision making actually took place and was appropriately documented. (vii) The local authority must keep the case under review day by day and (viii) arrangements for reasonable contact had to be driven by the needs of the family and not stunted by lack of resources.

- ***X v. Liverpool City Council*** **[2005] EWCA Civ (11.10.05)**
  The removal of a child should usually be effected pursuant to an EPO under s.44 CA 1989 and the statutory scheme clearly afforded primacy to s.44 because removal under that section was sanctioned by the court and involved a more elaborate and sophisticated process. A constable could effect a removal under an PPO even though an EPO was in place if it was not reasonably practicable to execute an EPO. However, the constable must have regard to the paramount need to protect the children from significant harm and should consider whether there were compelling reasons to invoke s.46 (PPO) rather than leave it to the local authority to execute the EPO.

Secure Accommodation Order

- ***S v. Knowsley Borough Council*** **[2004] 2 FLR 716 (Charles J)**
  'Likely' to abscond and if absconds is 'likely' to suffer significant harm in s.25(1)(a)(i) and (ii) of the 1989 Act meant a real possibility that could not sensibly be ignored. The role of the LA during the

currency of an order, including its duty to review the continued legality of the placement, was amenable to judicial review. JR was likely to be the most appropriate remedy as to could be allied with points to be made in the Human Rights Act 1998.

Care Plans

- ***Re S (Care Order: Implementation of Care Plan)* [2002] 1 FLR 815 (HL)**

  An interim care order is not intended to be used as a means by which the court may continue to exercise a supervisory role over the local authority in cases where it is in the best interests of a child that a care order should be made. In an appropriate case, a judge must be free to defer making a care order until he is satisfied that the way ahead 'is no longer obscured by an uncertainty that is neither inevitable nor chronic' [90 & 101].

- ***Re M (Children)* [2005] EWCA Civ (03.11.05)**

  When making an ICO in relation to a 2 year old child, where it was impossible to fix the final hearing for a further 10 months, the judge had failed to balance the effect of long term removal on the child with the risk of short term harm if left with the parents.

- ***NP v. South Gloucestershire CC & MLC* [2005] EWCA Civ (10.11.05)**

  A judge hearing an application to discharge a final care order did not have the jurisdiction, if he decided to discharge it, to substitute an interim care order. If the court was minded to discharge the care order, the only CA 1989 Part IV order it could substitute was a supervision order. In the absence of evidence that it was in the child's best interests to discharge the care order, the order would remain.

Care Order/Supervision Order

- ***Re R (A Child)*** **[2005] EWCA Civ (20.12.05)**

  Where the issue was whether to make a care order or a supervision order, the judge's decision to make a care order was fatally flawed because she rejected the views of the guardian without giving any reasons for rejecting that evidence.

<u>Termination of Contact</u>

- ***Re S (Care: Parental Contact)***

  In the instant case the mother was to have contact with the children 6 times per year but the guardian recommended the making of an order under s.34(4) allowing for the termination of contact in the event the mother failed to keep to contact arrangements in the future. HELD: appeal allowed. An order refusing contact should not be made against the mere possibility that circumstances may change in the future.

  See also: *Re H (s.34(4))* [2005] EWCA Civ (CA)

<u>Designated Authority</u>

- ***LB of Redridge v. Newport City Council)*** **[2004] 2 FLR 226 (David Hershman QC)**

  When designating a local authority to hold care orders, the time to consider 'ordinary residence' was at the time the matter was being considered by the court and NOT at the commencement of the proceedings. Thus the result achieved might depend on the timing of the determination. Where determined at an interim stage, the issue may have to re-visited at the final hearing to consider whether the children had since aquired ordinary residence in the area of the new authority.

  See also: *Kirklees MBC v. London Borough of Brent* [2004] 2 FLR 800

* ***Re C (Responsible Authority)*** **[2005] EWHC 2939 Fam (15.12.06) (President)**

  Children moved to foster carers with mother's consent. Shortly after the children moved to live with the paternal grandparents who had been assessed and lived in a different LA area. After 10-11 months and before the LA's had made the administrative transfer of the case, the mother withdrew her consent and sought the return of the children. There were no public law orders. The issue arose of which was the responsible authority ? Held: the new authority because the children had a settled residence in that area and had changed their ordinary residence.

<u>Wardship</u>

* ***E (By Litigation Friend PW) v. LB of X*** **[2005] EWHC Fam 2811 (06.12.05) (President)**

  A determination by the court of the ward's age after an assessment by the LA did not involve the exercise of an appellate or supervisory jurisdiction over the LA.

16. Non-Accidental Injury

* ***Re O & N*** **[2003] 1 FLR 1169 (HL)**

  (1) Where a child had suffered significant harm but the court was unable to identify which parent had been the perpetrator or, indeed, whether both had been, the court should proceed at the welfare stage on the footing that each of the parents was a possible perpetrator. The judge should express such views at the fact finding hearing as he is able to do so, in order to assist social workers and psychiatrists in making their assessments and drafting the care plan. Transcripts of the judgment at the preliminary hearing should always be made

readily available [27-28, 31 & 35]. (2) In cases where some allegations are proved and other are not, then at the welfare stage the court should proceed on the footing that the unproven allegations were no more than that [38]. (3) The HL was attracted by the decision in *Re M & R (Child Abuse:Evidence)* that a court should not infer that a child was at risk of suffering future harm where the only evidence he was at risk was an unproved allegation that he had suffered harm in the past [44 & 45].

- ***North Yorkshire County Council v. SA*** **[2003] 2 FLR 849 (CA)**
  Where there was insufficient evidence for the court to positively identify the perpetrator of the injuries using the balance of probability test, the test to be applied was 'is there a real likelihood or possibility that A or B or C was the perpetrator or a perpetrator of the inflicted injuries'. It was important to consider at an early stage whether a split hearing was the best way forward or whether to hear the whole case and then, if necessary, adjourn for further assessments. In the absence of new evidence it would be difficult to revisit a decision made on the first part of a split hearing at the second part [22-26 & 37].

- ***Re U (Serious Injury: Standard of Proof)*** **[2004] 2 FLR 263 (CA)**
  The controversial medical experts cases. The Court of Appeal held the approach to the standard of proof was mistaken. The standard of proof to be applied in Children Act 1989 cases was the balance of probabilities and the approach was laid down in Re H (supra). That test had not been varied. The standard of proof applied in Re ET (supra) was too high. R v Cannings (supra) was solely concerned with a criminal prosecution, which was different from family proceedings and involved a different standard of proof. The parents'

submission that the local authority should refrain from proceedings in any case where there was a substantial disagreement between the medical experts was rejected. It did not follow that an acquittal or a successful appeal on a criminal charge would lead to the absolution of the parent in family or civil proceedings. Cannings turned on its own particular facts. The responsibilities of the local authority remained the same.

- ***Re Y (Evidence of Abuse: Use of Photographs)*** **[2004] 1 FLR 855 (Holman J)**
  There are dangers in relying on still or video photographs obtained by colposcope when diagnosing sexual abuse. The RCPCH and Association of Police Surgeons should consider whether current guidance should be revised. The aim of minimising the intimate examination of children is an important one, but further examinations may nevertheless be preferable to a potential grave miscarriage of justice and irreparable harm to children and their parents. Colposcope photographs should be treated with caution [45 & 46].

- ***Re T (Abuse: Standard of Proof)*** **[2004] 2 FLR 838 (CA)**
  Court warned of the real dangers of medical experts who have not examined the child not seeing all of the photographic material which was available and had been given to other experts.

- ***Re X Y Z*** **[2005] EWHC 31 (Fam) (Ryder J)**
  The court had to make a factual decision based on all available materials to be judged in context, and to have regard to the wide range of social, emotional, ethical and moral factors that would inform the decision on whether the threshold was satisfied for the making of a care order. The court had to be cautious of declining to follow un-contradicted expert evidence but it was not bound by it. The assessment of adult credibility as to the responsibility for

harming a child remained the function of the court. The terms 'Munchausen's syndrome by proxy' and 'Factitious/fabricated (and induced) illness (by proxy)' were merely descriptions of a range of behaviours, not a disease. The context and assessments of such behaviours could provide insight into the degree of risk a child might face and the court could be assisted as to that by psychiatric or psychological.

- ***R v. Harris & Others* [2005] EWCA Crim (21.07.05)**

  A new hypothesis (Geddes III), seeking to show that the conventional triad of intracranial injuries was not diagnostic of non accidental injury, was not credible. However, the triad had not been proved as a fact and remained only a hypothesis. Alleged non-accidental head injuries in infants were fact specific and had to be determined on their individual facts. Cases of serious injuries caused by very minor force such as might occur in normal handling or rough handling of an infant were likely to be rare or even extremely rare. Although the younger the infant, the more vulnerable it was likely to be, it was not possible to conclude that age was necessarily a factor in deciding whether injuries were caused by strong force or a minimal degree of force or impact.

- ***Birmingham City Council v. H, H & S* [2005] EWHC Fam 2885 (13.12.05)**

  Charles J. has raised the issue of whether the decision of the House of Lords in ***Re H*** that the court must make a finding of fact before finding the threshold criteria of s.31(2) CA 1989 satisfied should be re-visited in light of the incorporation of the European Convention into domestic law. He raised the issue of where the jurisdictional line set by CA 1989 should be drawn and whether a significant chance that a parent has harmed a child ought to be sufficient to find the threshold criteria satisfied. He considered the approach the court

should adopt when parents sought to review an earlier finding of fact of inflicted harm to a child.

17. Adoption

- ***Re A (Adoption: Placement outside Jurisdiction)* [2004] 2 FLR 337 (CA)**

  A LA and its staff who place a child for adoption outside of the UK without the benefit of an order under s.55 AA 1976, or under paragraph 19(6) Schedule 2 CA 1989, commit a criminal offence under s.56 AA 1976. A 'placement' for adoption within meaning of s.20 AA 1976 does not need to be a lawful placement. Accordingly the placement of children for adoption, within 12 months of freeing orders, in breach of s.56 AA 1976 does NOT entitle the natural parents to pursue an application to revoke the freeing orders under s.20 AA 1976.

  For the reverse position of applications to adopt and compliance with the 12 month residence requirement **see: *Re SL (Adoption: Home in Jurisdiction)* [2005] 1 FLR 118 (Munby J)**

- ***Re F (Adoption: Welfare of Child: Financial Considerations)* [2004] 2 FLR 440 (Black J)**

  The 2 sisters were to remain in foster care but the LA plan for their 3 half brothers was adoption. Guardian, expert and ISW opposed adoption given the close relationship of the boys with their half sisters and the foster carers. Judge agreed notwithstanding the

benefits of adoption for the boys who were only 7, 6 & 4 and fact that foster carers were from a private agency and long term fostering would cost the LA £131,000 pa.

18. Local Authority Negligence

- ***A v. Essex County Council*** **[2004] 1 FLR 749 (CA)**

  Dismissing the LA appeal and the parents' cross-appeal, it may be appropriate for an adoption agency to depart from its policy about what information should be passed onto prospective adopters in individual cases, either in withholding information which would otherwise be given, or in divulging information over and above that contained in the various forms and reports disclosed. There is no general duty of care owed by an adoption agency or its staff in relation to deciding what information is to be conveyed to the prospective adopters unless they take a decision which no reasonable adoption agency could take, in which case there could be liability. It is not fair, just and reasonable to impose upon the professionals involved in compiling reports for adoption agencies a duty of care towards the prospective adopters. A duty of care towards the child cannot be ruled out [58-59].

- ***D v. East Berkshire Community Health NHS Trust & Othrs*** **[2005] 2 FLR 284 (HL)**

  Healthcare and other childcare professionals did not owe a common law duty of care to parents not to make negligent allegations of child abuse. Such a duty would result in a conflict of interest: the doctor was under a duty to act in the best interests of his patient, the child, rather than in the interests of the parent: if his suspicions were aroused he had to be able to act single-mindedly in the child's

interests without regard to the possibility of a claim by the parent. The seriousness of child abuse as a social problem demanded that healthcare and other childcare professionals should not be subjected to conflicting duties when deciding whether a child might have been abused and whether further steps to take. Note: strong dissenting opinion from Lord Bingham.

- ***AD & OH v. Bury MBC* [2006] EWCA Civ 1 (January 06)**
  A LA did not owe a duty of care to parents in the conduct of care proceedings and the fact the investigation was conducted by agreement after an ICO do not mean that a duty of care had arisen. There was no evidence of harm to the child (then 5 months old) as a result of or consequent to the removal from the parents for 4 months: any harm was no more than transitory.

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February 2006

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APPENDIX I

1. Asylum Seekers

- *Re A (Care Proceedings: Asylum Seekers)* [2003] 2 FLR 921 (Munby J)
- *R(A) v. National Asylum Support Service* [2004] 1 FLR 704 (Munby J)
- *Anufrijeva v. Southwark LBC & Others* [2004] 1 FLR 8 (CA)
- *R(Berhe) v. Hillingdon LBC* [2004] 1 FLR 439 (Sullivan J)
- *M v. LB of Islington & Sec. of State for Home Department* [2004] 2 FLR 867 (CA)

2. Medical Treatment & Incapacity

- *Re N v. Doctor M* [2003] 1 FLR 667 (CA)
- *Re L (Medical Treatment: Benefit)* [2005] 1 FLR 491 (Butler-Sloss)
- *Portsmouth NHS Trust v. Wyatt & Othrs* [2005] 1 FLR 21 (Hedley J)
- *Re SK* [2005] EWHC (03.02.05) (Singer J)
- *M v. B A & S* [2005] EWHC (28.07.05) (Sumner J)

3. Fertility & Embryology

- *Leeds Teaching Hospitals NHS Trust v. A & B* [2003] 1 FLR 412 (CA)
- *Evans v. Amicus Healthcare Ltd & Hadley v. Midland Fertility Services Ltd.* [2004] 1 FLR 67 (Wall J)
- *Re R (IVF: Paternity)* [2005] 2 FLR 843 (HL)

4. Publicity

- *Re S (Identification: Restrictions on Publication)* [2003] 2 FLR 1253 (CA)
- *Re Roddy (A Child)(Identification: Restriction on Publication)* [2004] 2 FLR 949 (Munby J)
- *A Local Authority v. PD & GD* [2005] EWHC (10.08.05)

5. LA Accomodation

- *R(M) v. Islington London Borough Council* [2003] 2 FLR 903 (Wilson J)
- *R(G) & Others v. Barnet & Lambeth LBCs* [2004] 1 FLR 454 (HL)
- *Re T (Judicial Review: LA Decisions Concerning Children in Need)* [2004] 1 FLR 601 (Wall J)
- *R (Morris) v. Westminster City Council* [2005] 1 FLR 429 (Keith J)

6. Local Authority Foster Carer

- *R(W) v. Leicestershire County Council* [2003] 2 FLR 185 (Wilson J)
- *R(CD) v. Isle of Anglesey County Council* [2005] 1 FLR 59 (Wilson J)

7. Breaches of Injunctions & Committals

a. *H v. O (Contempt: Sentencing)* [2005] 2 FLR 329 (CA)

b. *Hipgrave v. Jones* [2005] 2 FLR 174 (Tugendhat J)

c. *Re M (Committal Sentencing)* [2005] EWCA Civ (11.04.05)

d. *Hutty v. Hutty* [2005] EWCA Civ (12.07.05)

e. *Robinson v. Murray* [2005] EWCA Civ (12.07.05)

f. *Carabott v. Huxley* [2005] EWCA Civ (19.08.05)

8. Care Proceedings

a. *R(J) v. Caerphilly CBC* [2005] 2 FLR 860 (LA duties child leaving care)

b. *Re O* [2005] EWCA Civ (20.04.05) (s37 report as opposed to s.7)

c. *Re K* [2005] EWCA Civ (27.07.05) (Risk of future harm)

d. *Re P* [2005] EWHC (Sumner J) (27.07.05) (Foster carer HIV: LA not under to inform father)

e. *Re N* [2005] EWCA Civ (24.08.05) (Refusal of residential assessment)

9. Non-accidental Injury

- *Re W S & C* [2005] EWCA Civ (21.07.05)

APPENDIX II

r.10.20A FPR 1991

EX710

Guidance on disclosing information about Family Proceedings involving children which are heard in private.
Guidance for Court Users and people receiving information.

From 31st October 2005 new rules will allow parties and other specified people to disclose certain information from family proceedings heard in private involving children to other specified people, without needing the specific permission of the court, or being a contempt of court.

What is disclosure of Information?
Disclosure means sharing information. It includes verbal or non - verbal communication and sending documents to someone by post or electronically. Disclosure of information includes information about your case given in writing or verbally about the proceedings. It includes information about your case given in discussions held inside and outside of court, and in correspondence concerning the case. It also includes information contained in documents on the court file, or evidence given in court such as statements, reports, and the judgment or reasons givenby the judge or magistrates for the decisions and orders they make. The existing law already allows you to tell someone else that your child is involved in court proceedings, but does not allow you to tell the public at large or a section of the public through the media. The new rules do not change this.

The existing law allows you to share information relating to proceedings with:
• Your legal representative or other professional legal adviser;
• any other parties in your case;

• A CAFCASS officer, Welsh family proceedings officer or a welfare officer;
• the Legal Services Commission;
• an expert authorised by the court;
• and/or a professional, including the police and the NSPCC, whose job it is to protect children.

The new rules will, in additon, allow you to share some information with a number of other people, so long as it is for one of the specific reasons set out below. This guidance does not apply to court orders, where the law has already been changed, so that parties to family proceedings may disclose orders to other individuals or bodies, but not to the general public or the media.

Who you can share information with without the specific
permission of the court

The sort of information you can share depends on who you wish to share the information with and why. You may want to make people that you are sharing information with aware of this guidance.

You can share any information relating to proceedings with:

• A lay adviser (e.g. Citizens Advice Bureau) or a McKenzie friend (person granted permission by the court to assist you and give advice, take notes etc.) so you can get help and advice in connection with your case and in court.
• Your spouse, cohabitant or close family member so you can have confidential discussions about it with them.
• A health care professional or a person/body providing counselling services for children and families so you can seek health care or counselling for you or your child.
• The Children's Commissioner or the Children's Commissioner for Wales so you can refer a matter to them which may affect the interests of children.
• A person or body conducting an approved research project so that they can carry out an approved research project.
• A mediator so that you can receive mediation in relation to the proceedings.
• A person or body responsible for investigating complaints about legal representatives or advisers so that they can investigate or determine the complaint in question.

You can also share the text or summary of the whole or part of a judgment given in proceedings with:

• Your MP, MEP (Member of European Parliament) elected in England and Wales, National Assembly member, or a Member of the House of Lords so they can advise you or investigate any complaint or raise any question of policy or procedure.
• The General Medical Council so you can make a complaint to the GMC.
• A police officer so they can investigate a crime, or whether a crime has been committed.
• A member of the Crown Prosecution Service so that it can carry out it's legal functions.