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Albion Chambers FAMILY TEAM NEWSLETTER

The use of witness intermediaries

I was recently involved in a fact finding hearing concerning multiple injuries to a nine month old baby, including a supracondylar fracture to the left distal humerus (simplified to 'the elbow fracture' during the hearing to assist the parents), fractures (plural) to the left distal radius and ulna (wrist), fracture to the right proximal tibia (knee) as well as chronic subdural haematomas and retinal haemorrhage. The parents had accepted the medical evidence that these injuries were all non-accidental inflicted injuries and the issue was whether the perpetrator(s) could be positively identified from the pool, all parties denying causation or any knowledge of causation. The radiological and paediatric evidence could assist us in identifying a window but as ever the evidence of the parties themselves would be crucial. From the outset of the proceedings a psychologist well known to most local practitioners had concluded that the father did not have capacity and should be represented by the Official Solicitor but that the mother (whilst 'quite near the cusp') did not require the OS. Both parents had Full Scale IQs in the Extremely Low Range and numerous difficulties were identified in terms of the reliability of their evidence, particularly in cross-examination. At a later stage the same psychologist provided a further report confirming her view that the father was not competent to give evidence (note the factors set out in Practice Direction 15B of the FPR 2010 'Adults who may be protected parties and children who may become protected parties in family proceedings' in particular paragraphs 1.4 and 1.5). The case is ongoing and therefore it would be inappropriate to set out too much detail but for at least one of the injuries the medical and health professional evidence had identified a more narrowly defined window that might have suggested a time when only mother and father had care and therefore only mother and father could potentially provide the evidence of events at that time and possibly the nuances of each other's presentation, as well, of course, as the presentation of the baby. Upon instruction the OS provided a statement setting out inter alia 'If all of the other identified possible perpetrators are able to participate fully by giving oral evidence the father will undoubtedly be seriously disadvantaged, unless he is able to give evidence.' Notwithstanding the expert view an application was made on behalf of the OS for a declaration that the father was a competent witness and for a direction permitting the use of a witness intermediary. Leading counsel for the father relied upon comments of Baker J in *Re JS (A Minor) [2012] EWHC 1370 'They must have the fullest opportunity to take part in the hearing and the court is likely to place considerable weight on the evidence and the impression it forms of them'* and the fact the evidence of the parents forms an important part of the *'wide canvas'* as per Dame Elizabeth Butler-Sloss P in *Re U (Serious Injury: Standard of Proof); Re B [2004] EWCA Civ 567* when determining these difficult cases. Also relevant, of course, was the Article 6 ECHR right to a fair trial.

Section 29 Youth Justice and Criminal Evidence Act 1999 provides for a range of 'special measures' in the criminal courts including the use of formal witness intermediaries to help vulnerable witnesses understand questions and to communicate their best evidence. There are some examples of reported cases where a witness intermediary has been successfully used in the family court, for example *Re A (A Child: Vulnerable Witness: Fact Finding) [2013] EWHC 1694 (Fam)* but this authority does little more than simply record that the vulnerable witness in that particular case would likely have found it impossible to give the evidence they did in the absence of the WI's assistance. Recommended early reading for any practitioner considering the merits of a WI is the 'Registered Intermediary Procedural Guidance Manual, Ministry of Justice 2012' (available on the CPS website) which sets out the code of practice and code of ethics for registered witness intermediaries. The Manual states as follows *'...the judgment in C v Sevenoaks [2009] EWHC 3008 (Admin) now provides authority for the court to appoint an intermediary to support a vulnerable defendant's oral evidence-giving throughout the court process, including during trial.'*

In the family court the use of WI's has been raised as a possible mechanism to assist the live evidence of children, see Thorpe LJ's Family Justice Council December 2011 'guidelines in relation to children giving evidence in family proceedings' which states, *'14. At the earliest opportunity and in any event before the hearing at which the child's evidence is taken, the following matters need to be considered: a) if 'live' cross examination is appropriate, the need for and use of a registered intermediary...or other communication specialist to facilitate the communication of others with the child or relay questions directly, if indicated by the needs of the child.'* The use of a WI for a child was considered by Theis J in *Re X (A Child: Evidence) [2012] 2 FLR 456* and there is much helpful guidance in this authority. This case is also useful for highlighting the significant difficulties of funding a WI, *'as far as I have been able to establish, although the use of intermediaries has been considered at the highest level no scheme has yet been made available for family cases (unless there is a direct linking to a criminal case in which the witness is involved) and there are real obstacles to the funding of such support.'*

In the absence of the witness themselves having access to funds the OS has no resource for the cost (acting merely as a litigation friend) and it is understood that the Legal Aid Agency (previously the LSC) have said that a WI is not part of 'representation' and therefore they have no duty to pay. It is submitted that the approach to be adopted might be this, seek in the first instance a direction that the costs be borne by the MoJ (as per criminal proceedings), failing which a request of the LA could be made or a hopeful direction to split the cost equally between all parties.

Having observed the use of a WI first hand I would encourage identifying the need for a WI as early as possible so that the vulnerable witness has a chance to build some form of rapport and trust in the WI and the WI can have a greater opportunity to understand the particular difficulties of the witness in practice. In terms of process it is understood that after instruction a WI will meet with the vulnerable witness and prepare a report of their recommendations. This will likely include a 'ground rules hearing' to consider those recommendations with all of the advocates and the judge. The recommendations in the case I was involved in demonstrate that the WI's role goes far beyond just assisting the vulnerable witness whilst giving live evidence and includes the following, 'Explain proceedings by sitting next to him and simplifying the key points; using diagrams and visual aids where required. Take notes on his behalf to aid his memory. Write notes to remind him of things to tell his legal team. Monitor his emotional and psychological state. Use strategies to maintain concentration. Alert the judge to any difficulties. Inform the judge when a break is necessary.'

Benjamin Jenkins

Add-backs: Moylan J tries to close the door

Evans v Evans [2013] EWHC 506 (Fam)

Being original has never been tougher. At one time, when a significant case came out, we could wait to see whether the editors of the learned journals would see fit to publish an article about it. Those days are gone. The advent of online publishing and the desire of professionals (like me), to write articles, means that the question is no longer whether one can find an article on a subject but where to start.

A good example was the recent case of *Petrodel v Prest*. The handing down of the Court of Appeal's judgment led to a barrage of commentary. We were then treated to notification of when the appeal had been listed for judgment and an examination of what the Supreme Court "might do". Successive articles commented on what earlier articles had said. By the end it was possible to say, not only that everything that could have been said had been said; but also that everything that could have been said, about what had been said, had been said. It is not out of the bounds of possibility that someone will soon be hosting a year long cruise to discuss the implications of the Supreme Court's judgment as happened in the wake of the OJ Simpson trial.

Perhaps the economic reality is that with only one source of published judgments, the higher courts in London, and with few litigants having the resources to mount appeals, there is a shortage of material. Simply put, demand for article and seminar fodder outstrips supply.

That said *Evans v Evans* is an interesting case. The parties were very rich. They were both in their late 40s. They were married for 25 years. There were two children, 18 and 16. The cost of the litigation was £2.7M. Moylan J stated with regret that:

"Each side seemed to be focused largely on forensic point scoring..."

Sadly the learned judge did not tell us who scored more forensic points.

Mr and Mrs Evans spent most of their married life in Pittsburgh, Pennsylvania. In 1991 it all came together when the husband set up a company called Confluence (laughter). Not long after, the wife embarked on qualifying as a lawyer and she received government loans which were used to support the family until the business began to generate sufficient income.

By the time of the hearing the parties' shares in Confluence were worth £32m. There were other assets worth £9m. The wife asked for 50% of the shares. The husband wanted to give her 33%. The wife said that as part of the calculation:

- There should be an adjustment in the capital division to reflect a "wanton campaign of extravagance" by the husband.

The husband said:

- I made a "special contribution"
- That the shares could not be realised for some years by which point he would have made a further contribution.

Add-backs

Moylan J picked up a broad brush labelled proportionality:

"My initial response to this part of the wife's case was that it would depend on an analysis of what both parties had been spending. It is not sufficient merely to point to certain aspects of the husband's expenditure..."

His Lordship cited Wilson LJ in *Vaughan v Vaughan [2008] 1 FLR 1108*:

"A notional reattribution has to be conducted very cautiously, by reference only to clear evidence of dissipation (in which there is a wanton element) …".

And ruled:

"Reattribution must be justified in the context of the case. It is a form of conduct and as such it must be "inequitable to disregard it".

Should he have been minded, his Lordship could have cited *N v F (Financial Orders: Pre-Acquired Wealth) [2011] 2 FLR 533*. In that case Mostyn J stated:

"In this country we have separate property. If a party disposes of assets with the intention of defeating the other party's claim then such a transaction can be reversed under s 37 of the MCA 1973. Similarly, where there is 'clear evidence of dissipation (in which there is a wanton element)' then the dissipated sums can be added back or re-attributed...But short of this a party can do what he wants with his money. What is not acceptable is a faint criticism falling short of either of these standards. If a party seeks a set aside or a re-attribution then she must nail her colours to the mast."

In *Evans v Evans*, the Husband had spent:

- $2.4m in 20 months
- $13,000 on a meal for two at the "well known" restaurant "El Bulli"
- $205,000 on his new lady "Dr Bramlette"
- $400,000 furnishing the new home in California.

In Moylan J's judgment certain of the spending did appear startling in its extravagance, but in the context of the

case the re-attribution did not need to be decided. In fact W was seeking an add-back of just 0.5% of the overall wealth.

Special contributions

In 1996 H had written some software which revolutionised how the financial industry communicated with its clients. Moylan J considered a number of reported cases and stated:

"It is clear that for such a contribution to justify influencing the court's determination it must be "of a wholly exceptional nature, such that it would very obviously be inconsistent with the objective of achieving fairness (i.e. it would create an unfair outcome) for (it) to be ignored".

His Lordship then referred to *Charman v Charman (No 4) [2007] 1 FLR 1246* where it was said:

"… In such cases can the amount of the wealth alone make the contribution special? Or must the focus always be upon the manner of its generation? In Lambert Thorpe LJ said, at para [52]: 'There may be cases where the product alone justifies a conclusion of a special contribution but absent some exceptional and individual quality in the generator of the fortune a case for special contribution must be hard to establish.' "

Moylan J then reflected: *"Has there been in the present case such a disparity in the parties' respective contributions during the marriage, in that the husband has made a contribution of a wholly exceptional nature, such that fairness requires that his contribution should result in his receiving a greater share of the marital wealth? The answer to this question should not depend on any detailed analysis of contributions. It requires a striking evidential foundation which so clearly stands out that the question almost answers itself...The extent to which the case, at times, seemed in the eyes of the parties to require what Coleridge J has aptly described as "a general rummage through the attic" was unedifying. This is not required, even when a case of special contribution is being advanced."* The case for a special contribution was rejected.

Post separation endeavor

The judge did make an adjustment to reflect the fact that the Husband would need to inject significant effort even after the hearing to develop the company and procure a sale. The value would be realised in 2 to 3 years time. It was held that in relation to the shares the husband should receive 55% and the wife 45%.

Learning points

It is arguable that this case provides a good example of the courts' attempts to narrow the issues in this type of litigation and to prevent *"a general rummage through the attic"*.

- Add backs are difficult. If you want money added back you will have to either demonstrate it has been wantonly dissipated or apply to have transactions set aside under section 37.
- One footnote might be that add-backs could be more applicable in smaller money cases because it will not be possible to downplay the significance of extravagant spending in the overall picture, as happened in Evans v Evans. As a further point, in a smaller money case it might be that running a section 37 argument separately would be disproportionate, such that it could be argued at the case management stage that it should be dealt with at final hearing as a general conduct matter.
- Special contributions are difficult to show in the post-*White* era. That seems likely to be the situation even in a "big money" case such as *Evans v Evans*. Perhaps the difficulty *post-White* is that it is difficult for a spouse to persuade a court to ignore the fact that their "special contribution" is likely to have started (or borne fruit) at a time when the parties were in a partnership making equally valued contributions.

David Chidgey

Habitual Residence

A review of A (Children) (AP) [2013] UKSC 60

We live in a world where global travel is easy and foreign relations are so important. As a family lawyer, it is important not only to be aware of safeguards that are in place to protect children in the UK, but also sanctions that can be taken when a child is not within our jurisdiction when they ought to be.

The Supreme Court heard an appeal on 9th September 2013 from a mother against the Court of Appeal's refusal to make a child a ward of court. In the Court of Appeal, the father had successfully argued that his youngest child could not be habitually resident in England because he had never been physically present here.

This case highlighted a fundamental flaw in our law and one that four of the five justices concluded could not be rectified by a decision of the Supreme Court and would, if necessary, have to be referred to the Courts of Justice of the European Union ("CJEU").

Summary of facts

The parents are first cousins. The father was born in the UK, the mother in Pakistan. They married in Pakistan in 1999 and lived in the UK as a couple from 2000. The three eldest children were born in the UK in 2001, 2002 and 2005. The father and his four children have dual Pakistan and British Nationality and the mother has indefinite leave to remain in the UK.

The following facts (some disputed by the father) were found by Parker J in the High Court. From 2006, Father started spending significant periods in Pakistan and in 2008, the mother sought police protection because of domestic abuse perpetrated by the Father and thereafter moved into a refuge with the three children. In October 2009 mother took the children to Pakistan to visit their Maternal Grandfather for a holiday; they had return flights for early November. Unbeknownst to her, father was also in Pakistan and once there she was forced by him and family members to a reconciliation. She reluctantly did so on the understanding that they would all return to England. However, her passport and the children's passports were removed and she was forced to remain in Pakistan against her will.

In February 2010 the mother gave birth to H. In May 2011 with the help of her father and the local elders she managed to acquire a passport and flee Pakistan back to England. On 20 June 2011, she made an application to the High Court for the

immediate return of her four children under the inherent jurisdiction of the High Court.

The proceedings

Jackson J made all four children wards of the court and ordered that they be returned to England and Wales by the father forthwith. On 20 February 2012, Parker J determined that all four children were habitually resident in England and Wales [2012] EWHC 663 (Fam). By adopting the approach of Charles J in *B v H (Habitual Residence: Wardship) [2002]* 1 FLR 388 she concluded that because H was an infant born to a mother who had habitual residence in England and Wales but who had been kept in Pakistan against her will, he adopted the habitual residence of his mother.

Father appealed the decision of Parker J on various grounds. In particular, he argued that habitual residence required the child in question to have been physically present in England and Wales. The Court of Appeal concluded that his appeals against the three elder children were "entirely hopeless". However, allowed the appeal in relation to the youngest child, who was conceived and born in Pakistan and had never been to England. Rimmer and Patten LJJ agreed that habitual residence was a question of fact and a rule that a newly born child's habitual residence is dependant on their mother would be *"a legal construct divorced from fact"* and thereby inconsistent with European Law.

Thorpe LJ dissented and applied the decision in B v H, a case on all fours with this case. He concluded that H was habitually resident in England by virtue of being a young infant and therefore having the same habitual residence of his Mother.

The Supreme Court

The Supreme Court had two main questions to tackle. First, could H be considered to be habitually resident in England even though he had never been here? Secondly, could the High Court claim jurisdiction on the basis that H is a British National (this was not considered by the lower courts).

Lady Hale wrote the judgment, with which Lord Wilson, Lord Reed and Lord Toulson agreed. She summarised the legal position and concluded that the order was not made under part 1 or the Family Law Act 1986 [28] but was made under the Brussels II Revised Regulation ("the Regulation") in relation to parental responsibility. She gave an in-depth analysis of the jurisdiction under various articles within the Regulation and examined the case law both domestic and European that dealt with habitual residence.

She opined that it was highly desirable that the meaning of habitual residence be the same for the purposes of the 1986 Act, the Hague Child Abduction Convention and the Regulation, being that which is adopted by the CJEU for the purposes of the Regulation [35-39]. The CJEU has ruled that habitual residence relates to the place which reveals a degree of integration by the child in a social and family environment. This depends on various factors such as the reasons behind the family's stay in the country [54].

Four of the justices held that on the face of it, presence was a necessary precursor to residence. A child could not be integrated into the social environment of a place he had never been.

However, Hale J held that the law was not acte claire for the purpose of European Union law for four reasons:

1. The CJEU had never considered a case like this, or indeed the examples referenced by Thorpe J and referred to in the Supreme Court where a Mother gives birth whilst on holiday.

2. The facts are particularly stark. *"This child would probably not have been conceived, and certainly would not have been born and kept in Pakistan, had his mother not been held there against her will".*

3. CJEU would have to consider the implications for the Hague Child Abduction Convention if a child such as this, or a child born on holiday, were held to have no country of habitual residence.

4. There is judicial, expert and academic opinion in favour of the child acquiring his mother's habitual residence in circumstances such as these.

She concluded that she, *"would not be able to dispose of the case on the basis that H was not habitually resident in England and Wales... without making a reference to the Court of Justice".*

However, the reference was not needed as unanimously the court found that there was an inherent jurisdiction of the High Court that could be exercised because the child was a British National [60]. This common law rule is instituted on the basis that the child owed allegiance to the Crown and in return the Crown had a protective jurisdiction over the child wherever he was *(Lord Cranworth LC in Hope v Hope (1854) 4 De GM & G328)*. As one can imagine, the Courts are very cautious of exercising this slightly antiquated and eccentric law because of the implications it may have on our foreign relationships, especially in a case where a child has dual nationality. The appeal courts have held that it should only be used in the most "dire and exceptional" of circumstances (Re B; *RB v FB and MA (Forced Marriage: Wardship: Jurisdiction)* [2008] 2 FLR 1624, Hogg J).

Hale LJ concluded that the case needed to be returned to Baker J so that he could direct his mind to this basis of jurisdiction as he had not done so before. In the event that he chooses not to exercise jurisdiction on the basis of nationality and allegiance, it will become necessary to answer the question of H's habitual residence and therefore a reference to the CJEU will be needed.

The fact that this case is of huge significance to international child and family law is exemplified by the inclusion of the three interveners in the appeal; Reunite International, Children and Families Across Borders and The Centre for Family Law and Practice; all of whom are highly influential organisations within the field. Hughes LJ made some compelling points in his dissenting judgment which I think gets to the nub of the problem. He opined that the cases referred to by the other justices were not considering whether presence in a country was *necessary* but whether presence was *sufficient* and therefore the question of necessity of presence to establish habitual residence had still not been grappled with. He emphasises the importance of examining the infant's environment and his degree of integration into that environment.

He highlights *"the trans-national movement of children in the course of disputes about their upbringing, and the associated forum-shopping by parents and others, is a major international problem. Its incidence has only grown since the 1980 Hague Convention, with the increase in cross-border personal relationships and the ever-greater ease of international travel"*. If the law requires a physical presence, there will be a slowly increasing stack of cases where a child, wrongly removed or withheld from the jurisdiction may not be afforded the protection they so desperately need.

The law should always be weighted towards the protection of children from abduction and therefore I entirely agree with Hughes LJ when he concluded that there would be *"a serious failure of the protection afforded by the 1980 Hague Convention and Article 10 if a newly born child in this situation is held to have no habitual residence and thus to be incapable of wrongful removal or retention."* If Baker J accepts jurisdiction on the grounds of nationality or allegiance it may be some time before the question on habitual residence ever gets a definitive answer.

Emily Brazenall

The thirty three steps

It is generally the case that some time is required before new statutory provisions become standard practice. The provisions of Practice Direction 25, relating to the preparation of an application to the court to adduce expert evidence, however, seem to have taken even longer than usual.

In the nine months the provisions have been in place I have yet to do a case where both the letter and the spirit of the Practice Direction have been complied with in full. I know that I am as guilty as anyone in not keeping them at the forefront of my mind and so what follows is a gentle mental prompt to us all.

The PD requires that where experts are to be instructed in Financial Remedies proceedings, the following steps should be taken:

- Any party wishing to instruct an expert should provide a list of proposed experts.
- Within 10 days of receipt the other party should indicate whether they have objection to any expert on the list.
- Both parties should indicate if they have already consulted any expert on the list.
- The parties should attempt to agree the use of a Single Joint Expert.
- If possible the parties should agree the use of an SJE and the proportion of the expert's fee that each will bear.
- If it is not possible to agree the use of an SJE the parties must think carefully before issuing sole instructions.
- In good time before the hearing at which permission to put expert evidence before the court will be sought approach the proposed expert(s) with the following:
    - The nature of the proceedings and the issues likely to require determination by the court;
    - The issues in the proceedings to which the expert evidence is to relate;
    - The questions about which the expert is to be asked to give an opinion and which relate to the issue in the case;
    - Whether permission is to be asked of the court for the use of another expert in the same or any related field (that is, to give an opinion on the same or related questions);
    - The volume of reading which the expert will need to undertake;
    - Whether or not it will be necessary for the expert to conduct interviews and, if so, with whom;
    - The likely timetable of legal steps;
    - When the expert's report is likely to be required;
    - Whether and, if so, what date has been fixed by the court for any hearing at which the expert may be required to give evidence (in particular the Final Hearing); and whether it may be possible for the expert to give evidence by telephone conference or video link,
    - The possibility of making, through their instructing solicitors, representations to the court about being named or otherwise in any public judgement given by the court,
    - Whether the instructing party has public funding and the applicable rates.
- Again, in good time before the relevant hearing the expert should have confirmed that the work is within their expertise, their availability and the cost. They must also confirm that they are not conflicted, when they can and can't give evidence and by what means and any representations they wish to make to the court about their appointment.
- If possible an application notice should be issued.
- Any application, oral, or written should specify:
    - The discipline, qualifications and expertise of the expert (with CV if possible);
    - The expert's availability;
    - The timetable for the report;
    - The responsibility for instruction;
    - Whether the expert evidence can properly be obtained by one party,
    - Why the expert evidence proposed cannot properly be given by an expert already instructed in the proceedings;
    - The likely cost on an hourly or other charging basis.
- A draft order should be filed setting out:
    - The issues to which the evidence is to relate;
    - The party responsible for instructing the expert and providing documentation to the expert;
    - The timetable;
    - The organisation of, preparation for and conduct of any experts' discussion;
    - The preparation of any statement of areas of agreement and disagreement;
    - The making available of the report(s) as soon as possible to the court in electronic form;
    - he attendance of the expert to give evidence, by whatever means.

That is no fewer than thirty-three steps to take before the presentation of an application to the court. It seems onerous but it will be a shame if the checklist is continued to be ignored – it is actually rather helpful!

Daniel Leafe

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