***Private children law update: cases published in March 2015***

References in [square brackets] correspond to the relevant paragraph of the judgment.

**Re V (A Child)** [**[2015] EWCA Civ 274**](http://www.familylawweek.co.uk/site.aspx?i=ed144014)

**Summary:** The Court of Appeal allows an appeal against findings of fact due to the first instance judge’s failure to provide any adequate reasons for his judgment. The Court of Appeal also comments on the need to ensure that courts do not get distracted by allegations of domestic abuse which are not relevant to the welfare issues.

**Background:** T had contact with his father from his parents’ separation (the date of which was in dispute between the parties by a year) until he was two and a half (in August 2012). The mother made various allegations of domestic abuse against the father, which were the subject of a finding of fact hearing where the first instance judge made the findings sought. All but one of the allegations were dated 2011 or earlier.

**Appeal:** The father appealed on the basis that the judge had failed to give adequate reasons for his judgment. The Court of Appeal record [3] that the judgment “is to the effect that the judge has simply announced his conclusions having recited the evidence and without allowing the hearer of the judgment or the reader of the transcript to be privy to the reasons that led the judge to come to those conclusions.”

McFarlane LJ summed the applicable law up as follows [14]:

“In simple terms, what the law requires is that the losing party needs to know why he or she has lost on any particular point. This court rightly affords a great deal of respect to trial judges who sit in a courtroom for a number of days immersed in the evidence in the case, be it written or oral, and, most importantly, seeing the demeanour of the key players in the courtroom, particularly when they come to give evidence. What I say in this judgment in this case is not, and I repeat not, intended to raise the bar, alter the law or otherwise cause 99.9 per cent of the judges who undertake this work to depart from their current practice. If indeed there is a general move to encourage judges to change their approach in these cases, it is a move towards giving shorter judgments, rather than longer judgments.”

The Court of Appeal considered that the judge had failed to explain why he preferred the mother’s evidence to the father’s or what approach he took to the mother’s inconsistencies. The Court of Appeal therefore concluded “the absence of reasons creates an unnecessary and unwelcome fault-line in the progress of the case from the fact finding onto achieving an outcome in this child's best interests” [32].

The Court of Appeal were also critical of the first instance judge’s failure to make findings as to when the parents separated and as to the quality of the contact between T and his father [9]-[10].

**Allegations of domestic abuse:**  During the course of its judgment the Court of Appeal reminded itself of the basic principle as set out in *Re: L, Re: V, Re: M, Re: H* [2000] 2 FLR 334 and Practice Direction 12J (in particular paragraphs 6 and 14) requiring judges to consider which (if any) allegations of domestic abuse are “relevant” to the welfare question(s) in the case [35].

McFarlane LJ commented [34] that:

“There is a danger, I fear, that in any case where the label "domestic abuse" or "domestic violence" is used, that there is a semi-automatic reaction generated in the minds of CAFCASS officers and other professionals in the court proceedings to think that inevitably all such allegations need to be thoroughly investigated no matter how old or disconnected to the child they may be and, more worryingly, that all such allegations, if found proved, indicate that there should be no direct contact between the abusive parent and the child.”

Elias LJ added:

1. *Re: L* establishes that the effect of domestic violence on the children may be a highly relevant consideration when considering orders for contact and the form such orders such take. At the same time, it stresses that there is no presumption against contact simply because domestic violence is proved. It depends on the circumstances. The significance of domestic violence is generally that a young child witnessing the violence will frequently be emotionally damaged as a consequence. That is hardly likely in this case. Save for one incident in April 2013, after contact had already ceased, all these incidents, even if witnessed by [T] at all, occurred before the child was 14 months old and most of them before he was 6 months old. The child would have been too young to suffer any lasting trauma from these incidents. It has not been suggested that there was any physical abuse shown to this child.
2. For these reasons, it seems to me that even if the allegations of domestic violence which were the subject of the fact finding inquiry had been satisfactorily proved, at best they could only be of marginal importance in determining the right of contact. Moreover, the mother was at the time happy to allow contact notwithstanding the fractious relationship. There is a dispute as to how regular that contact was but that there was direct and unsupervised contact after these alleged incidents had occurred is not in issue.

McFarlane LJ pointed out the need for there to be judicial evaluation of why the mother stopped contact (she did not initially rely on the domestic abuse allegations in stopping contact).

Elias LJ addressed the lack of interim contact [52]:

“I also do not understand why the father was suddenly denied any right even to supervised contact pending the fact finding exercise and before any allegations of violence had been proved against him. It does leave me with the uneasy feeling that the focus may have been on punishing the father because of alleged domestic violence rather than focusing on the best interests of the child.”

**Cafcass’ approach to allegations of domestic abuse:** At a much earlier stage in proceedings the court directed that Cafcass observe two contact sessions for the purposes of their report. The Cafcass officer decided not to arrange to observe those sessions because of her own appraisal of the safeguarding risks. This did not impress McFarlane LJ [46]:

“The progress of the case is not to be dictated by a CAFCASS officer. The judge who takes this case needs to form his or her own evaluation of what needs to be decided, what needs to be evaluated and, if necessary, what contact needs to be attempted in controlled and safe circumstances.”

***MG & JG v JF*** [**[2015] EWHC 564 (Fam)**](http://www.bailii.org/ew/cases/EWHC/Fam/2015/564.html)

**Summary:** Mostyn J makes an order under Schedule 1 of the Children Act 1989 that the father funds the mothers’ costs in private law proceedings whilst criticising cuts to public funding.

**LASPO:** Mostyn J uses 40% of his judgment (paragraphs 4 to 20) to set out the consequences of the removal of public funding from private law proceedings; it is depressing reading. He refers to ten other reported cases where “each case focused on the gross unfairness meted out to a parent in private law proceedings by the denial of legal aid.” He concludes [20], echoing the comments of those in the family justice system across the country:

“In the field of private children law the principle of individual justice has had to be sacrificed on the altar of the public debt … [and] it can reasonably be predicted that the phenomenon of the massive increase in self-representation will give rise to the serious risk of the court reaching incorrect, and therefore unjust, decisions.”

**Facts:** The mothers (a same-sex couple) and the father (a gay man) entered into an arrangement whereby all three of them would have equal legal rights in respect of the child. The contact between the father and the child broke down and complex and lengthy private law proceedings followed. The mothers (now separated) sought for the father to contribute £25,000 towards their legal costs.

**The law:** Mostyn J considered the following to be engaged [22]:

1. The subject matter of the application is centrally relevant, as is the reasonableness of the applicant's stance in the proceedings.
2. There are generally recognised advantages flowing from competent representation, and from there being an "equality of arms" in an investigatory as well as in an adversarial process.
3. The court cannot make an order unless it is satisfied that without the payment the applicant would not reasonably be able to obtain appropriate legal services for the proceedings. A costs allowance should only be awarded to cover historic unpaid costs where the court is satisfied that without such a payment the applicant will not reasonably be able to obtain in the future appropriate legal services for the proceedings.
4. In determining whether the applicant can reasonably obtain funding from another source the court would be unlikely to expect her to sell or charge her home or to deplete a modest fund of savings. This aspect is however highly fact-specific.

After examining the parties’ financial situations, the judge ordered the father to meet 80% of the mothers’ claims commented that:

“It could be said that it is grossly unfair that JF should have to pay now £20,596 plus 80% of the future therapeutic costs up to the IRH. But that is where the government has left him. It is a sorry state of affairs.”

**HU v SU**[**[2015] EWFC 18**](http://www.bailii.org/ew/cases/EWFC/HCJ/2015/18.html)

**Summary:** Keehan J makes a wasted costs order against solicitors for failure to seek the leave of the court to extend the time for compliance with a directions order.

**Facts:** At a directions hearing, Keehan J made directions in preparation for a finding of fact hearing in private law proceedings. He directed, *inter alia*, police disclosure and a Scott Schedule and witness statement in support from the mother. Police disclosure was delayed due to issues with the mother’s public funding certificate and the mother’s solicitors contended that they were unable to file and serve a Scott Schedule or witness statement without the police disclosure (no such linkage was provided for in the directions). Those representing the father therefore sought an urgent directions hearing for re-timetabling.

**Wasted costs order:** Keehan J reminded himself of recent case law emphasising the importance of parties and practitioners complying with court orders [47]. He summarised [48]:

“It must now be clear and plain to any competent family practitioners that:

1. court orders must be obeyed;
2. a timetable or deadline set by the court cannot be amended by agreement between the parties; it must be sanctioned by the court; and
3. any application to extend the time for compliance must be made before the time for compliance has expired.”

After considering the law on wasted costs order (CPR r 46.8 and *Ridehalgh v Horsefield*[[1994] Ch 205](http://www.bailii.org/ew/cases/EWCA/Civ/1994/40.html" \o "Link to BAILII version)) [49] and the chronology of events, the judge concluded:

1. In my judgment however the serial failures of the mother's solicitors were elementary. The failure to seek the leave of the court to extend the time for compliance with the directions order … is to be characterised as incompetence, the result of which could have been the adjournment of this fact finding hearing. Their actions, as set out above, are redolent of past poor practices which should no longer feature in private or public law family proceedings.
2. I am satisfied that the conduct of the mother's solicitors is so serious and so inexcusable that I find that they acted improperly and unreasonably. Further the conduct caused the father to incur unnecessary costs. Finally in all of the circumstances I consider it just to order the mother's solicitors to compensate the father for the whole of the costs he incurred by reason of the [urgent] directions hearing.”

***Also published in March 2015***

***B v C (Surrogacy: Adoption)*** [**[2015] EWFC 17**](http://www.bailii.org/ew/cases/EWFC/HCJ/2015/17.html)**:** Theis J makes an adoption order concerning A (who was born via a surrogacy arrangement and a donor egg) in favour of A’s biological father. Unusually, A’s gestational surrogate was also his biological paternal grandmother. This was the first time (to the judge’s knowledge) that the court had encountered such an arrangement, which was entirely lawful [8]. The judge warns [33]:

“It is … imperative that single parents contemplating parenthood through surrogacy obtain comprehensive legal advice as to how to proceed as adoption is the only means to ensure that they are the only legal parents of their child. The process under which they can achieve this is a legal minefield, they need to ensure that all the appropriate steps are undertaken to secure lifelong legal security regarding their status with the child.”

***Sanchez v Oboz (Sentencing for Contempt of Court)*** [**[2015] EWHC 611 (Fam)**](http://www.bailii.org/ew/cases/EWHC/Fam/2015/611.html): Cobb J sentences the father (in the father’s absence) to 12 months imprisonment for his continued failure to return the child from Poland where she was unlawfully retained seven months prior.

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