DEKA CHAMBERS

BRIEFING
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FAMILY LAW

Welcome to the latest edition of the Briefing from the Family Team at Deka Chambers with articles by Madeleine Miller and William Dean.

Madeleine Miller considers the Court of Appeal's decision in *Re K (Children) (Powers of the Family Court)* [2024] EWCA Civ 2, in which the President provides very helpful guidance about the jurisdiction of the Family Court as against the inherent jurisdiction of the High Court.

William Dean provides a helpful summary of 5 recent authorities touching on: the appointment of intermediaries; what the court should do in the absence of a Qualified Legal Representative being appointed; a review of the test for permission for expert evidence; the use of the High Court's Inherent Jurisdiction; and time limits for notice in adoption applications.

Deka Chambers is one of the largest common law sets in the country. We have a strong and experienced team of barristers who provide advocacy and advice in all areas of family law.

We are delighted that Ed Lamb has been appointed King's Counsel and formally took silk on 18 March 2024 at a ceremony presided over by the Lord Chancellor.

Oliver Millington
Head of the Family Law Team

RE K (CHILDREN) (POWERS OF THE FAMILY COURT) [2024] EWCA CIV 2

By Madeleine Miller

The Court of Appeal in *Re K (Children) (Powers of the Family Court)* [2024] EWCA Civ 2 reaffirmed that the family court does have the power to make supplemental orders that could be made under the inherent powers of the High Court to give effect to the Family Court's substantive decision. This power can be exercised by any family judge or by magistrates, not only by a section 9 judge.

Background

The issue arose as a result of an application for an injunction. There had been long-running private law proceedings which had resulted in findings of fact being made against the father of alienating, controlling and coercive behaviour. Following a s.37 investigation the local authority issued care proceedings, and the two children were removed from the father's care under ICOs and moved to a maternal family placement. At the final hearing HHJ Gargan made care orders for the children to remain in the family placement, which was supported by the mother and guardian. The father and the elder child, who was separately represented, had argued for the children to return to the father's care.

The application for the injunction was made by the mother. There was an issue throughout proceedings about the parental controls on the children's iPhones, which the mother said remained linked to the father's account so he could track their movements. The application required the father to provide to the local authority his Apple ID and password and co-operate to effect the transfer of parental controls of the children's accounts.

None of the parties argued that the judge did not have the power to make the order. However, the judge refused the application on the basis that she had no power to make the injunction. Her reasoning was that only a Circuit Judge who was sitting s.9 had jurisdiction to make such an order, particularly as it would involve Apple. The judge did however make clear that in her view there 'may well be justification for the order sought' and made a finding that the father did in fact still have access to an Apple device, contrary to his assertion.

The Grounds of Appeal

(1) It was wrong to interpret s.31E(1)(a) as requiring such a power to be exercised by a Judge of the Family Court sitting as a Deputy (or full) High Court Judge.

(2) The case law referred to was wrongly distinguished so as to determine that the power did not extend to a Judge (or magistrates) of the Family Court.

(3) It was wrong to conclude that the injunction sought involved Apple in any relevant way and/or that any such involvement would be relevant to the question of jurisdiction.

The Decision

The Court of Appeal held that a family judge does have the power to make such orders, as long as the order is incidental or supplemental to the substantive orders sought in the proceedings, and the matter is not reserved to a higher level of judge or court. The application sought was not one reserved to the High Court, so the judge's lack of s.9 authorisation did not prevent the order being made.

The Court of Appeal further found that the

injunction would not have been directed against Apple, as it would simply have directed the father to co-operate with the Apple helpdesk if necessary, but that even if the order had impinged on Apple, that would not necessarily have required the matter to be transferred to the High Court. The matter was remitted to the judge for the application to be determined.

Guide for Practitioners

Can a non-s.9 judge of the Family Court grant an application for an injunction?

The Court of Appeal gave a useful summary of the position at paragraph [35]:

(1) The Family Court is a single, unified court within which almost all family proceedings are conducted.

(2) The legislation shows that Parliament intended the Family Court to have full and flexible powers to achieve its aims, and for family business to be conducted by the court unless there are specific reasons for the High Court to be engaged.

(3) Family business is distributed within the Family Court to the levels of judge ordained by the Rules, the 2014 Guidance and the 2018 Guidance.

(4) Once a family case has been allocated, there is parity among judges and magistrates of the Family Court in relation to the orders that can be made, subject only to the limits on remedies that appear in the Schedule 2 to the Rules.

(5) Family proceedings that cannot or should not be commenced in the Family Court, but must instead be commenced in the High Court, are most conveniently listed in the Schedule to the 2018 Guidance.

(6) When family proceedings have been properly issued in the Family Court, it is open to the court to make incidental and supplemental orders to give effect to its decisions.

Judges should approach the matter on the basis that they do have the power to make such orders unless it is shown by reference to the Rules and Guidance that they do not (per paragraph [37]).

Before transferring a matter to a higher level, consideration should be given to delay and expense (per paragraph [38]).

The relevant law:

The Matrimonial and Family Proceedings Act 1984

"31E Family Court has High Court and County Court powers.

(1) In any proceedings in the Family Court, the court may make any order -

(a) which could be made by the High Court if the proceedings were in the High Court"

The Family Court (Composition and Distribution of Business) Rules 2014 (SI 2014/840)

"Persons who may exercise jurisdiction of the Family Court

14 Subject to the provisions of this Part or of any other enactment, any jurisdiction and powers conferred by any enactment on the Family Court, or on a judge of the Family Court, may be exercised by any judge of the Family Court."

Presidential Guidance: Jurisdiction of the Family Court: Allocation of cases within the Family Court to High Court Judge level and transfer of cases from the Family Court to the High Court (2018, updated 2021)

"15 Section 31E(1)(a) of the 1984 Act provides that "In any proceedings in the Family Court, the court may make any order… which could be made by the High Court if the proceedings were in the High Court." This does not permit the Family Court to exercise original or substantive jurisdiction in respect of those

exceptional matters, including applications under the inherent jurisdiction of the High Court, that must be commenced and heard in the High Court. It does, however, permit the use of the High Court's inherent jurisdiction to make incidental or supplemental orders to give effect to decision within the jurisdiction of the Family Court. Thus, for example, the Family Court can: (a) issue a bench warrant to secure the attendance of a judgment creditor at an enforcement hearing: see *Re K (Remo: Power of Magistrates to issue Bench Warrant)* [2017] EWFC 27); and (b) require a party to use his or her best endeavours to procure the release of the other party from mortgage covenants: see *CH v WH* [2017] EWHC 2379 (Fam)."

The Family Court can also issue a freestanding port alert order (but not a tip staff order) as an incidental or supplemental order to give effect to its decision: see *A v B* [2021] EWHC 1716 (Fam).

It is also within the power of the Family Court to make a geographic exclusion order to prevent a parent from subverting a care order as a supplemental order under s.31E: see *Re T (a Child)* [2017] EWCA Civ 1889.

What approach should be taken moving forward?

At paragraph [36] the Court of Appeal proposed that, when judges of the Family Court are considering whether they have the power to make a particular order, that they should ask the following questions:

(1) Are these properly issued family proceedings?

(2) Is the order sought one that is incidental or supplemental to the substantive orders that are sought in the proceedings?

(3) Is the remedy one that is reserved to a higher level of judge by the Schedule to the Rules or by the 2014 Guidance?
Schedule 2 2014 Rules

(4) Is the application one that is reserved to the High Court by the Rules or by the 2018 Guidance?
Schedule 1 2014 Rules

If the answer to questions one and two is yes, and the answer to questions three and four is no, the power to make the order exists.

If the power exists, whether an order will in fact be made will depend on:

1. An assessment of welfare and fairness;

2. Considerations of necessity and proportionality (insofar as the Convention rights of others are affected).

Appointment of Intermediaries

Guidance on the use of intermediaries was given by Lieven J in *West Northamptonshire Council v. KA* [2024 EWHC 79 (Fam), a case involving a mother described as *"profoundly deaf"*. A cognitive assessment concluded that the mother did not have a learning disability, her functioning was *"in the low average range"* but she had the ability to learn and understand, she required all information to be translated into British Sign Language, and she would benefit from the assistance of a deaf intermediary.

The judge noted that the Family Procedure Rules provided a definition of an intermediary but otherwise gave no guidance on the appointment or role of an intermediary. She looked to the criminal law, and particularly *R. v. Thomas* [2020] EWCA Crim 117, for authority on their use, considering that notwithstanding some differences in the jurisdictions, *"the reasons for the appointment of intermediaries and their function in assisting those with communication difficulties facing important litigation, are essentially the same"*. The judge drew several principles *"directly applicable to the Family Court"* from her analysis: (i) intermediaries are not to be appointed on a *"just in case"* basis and (although a judge should consider it *"very carefully"*) it will be *"exceptionally rare"* for an intermediary to be appointed for a whole trial; (ii) the judge must consider both the individual's circumstances and the facts and issues in the case; (iii) there should only be an appointment *"if there are 'compelling' reasons to do so"*; (iv) other adaptations that may obviate the need for an intermediary must be considered; (v) an expert's recommendation is not determinative; (vi) if an intermediary cannot be found, it would be *"unusual"* (indeed perhaps *"very unusual"*) for the case to be adjourned for that reason alone; and (vii) there are other steps available to a court to ensure effective participation even without an intermediary.

The decision, though only at first instance, is likely to be treated as important guidance in the Family Court and might bring about a change of approach in cases in which, in recent years, the use of intermediaries has become more routine (and often for the whole of a trial). Lieven J emphasised that the fact an appointment *"will make the hearing easier"* is not the correct test for a court to apply and, citing Hallett LJ in *R. v. Lubemba* [2014] EWCA Crim 2064, reminded practitioners that *"[a]dvocates must adapt to the witness, not the other way round"*. (On the facts of the particular case before her, the judge did decide that the appointment of a deaf intermediary was necessary for the whole of the hearing, an alternative being *"very onerous, and potentially not possible"* for the mother's lawyers to achieve.)

What to Do If There Is No Available Qualified Legal Representative ("QLR")

The Domestic Violence Act 2021 introduced (in Part 4B of the Matrimonial and Family Proceedings Act 1984) a prohibition on cross -examination by certain persons, including a person convicted, cautioned or charged with specified offences or subject to a protective injunction. The rule, which applies in proceedings commenced after 21 July 2022, is intended to protect victims of abuse from re-traumatisation from being questioned by their abusers. The alternative provided for in the 2021 Act is the instruction of a qualified legal representative (a "QLR") to undertake the cross-examination instead. The problems with the QLR system are well known to practitioners; one is that (for various reasons) there are not enough QLRs.

In *Re Z (prohibition on cross-examination: no QLR)* [2024] EWFC 22, Sir Andrew McFarlane P considered circumstances where (as the title of the case suggests) no QLR could be found. The options included adjournment, reviewing the need for oral evidence to be given by the protected person and/or whether fact-finding is required at all, considering other means of avoiding cross-examination and the court asking questions of the parties. He noted that Practice Direction 3AB stated that *"a satisfactory alternative to cross-examination in person does not include the court itself conducting the cross-examination on behalf of a party"* and recognised the discomfort instinctively felt by judges and practitioners of that approach. Taking a practical and realistic view, however, the President said that PD3AB is *"not … black-letter law"* and did not prevent the court from undertaking the task. Part of the court's task is to consider, per s.31W of the 1984 Act, whether it is *"necessary in the interests of justice"* to appoint a QLR; and where the alternative is multiple adjournments without certainty as to resolution the balance might weigh in favour of the court conducting the questioning:

"Where there is no other alternative, and oral evidence that engages MFPA 1984, Part 4B is required, the need to ensure that the parties are on an equal footing, with the other party's case being 'put' and the vulnerable witness'[s] evidence being appropriately challenged, coupled with the need to bring the proceedings to an expeditious and fair conclusion in a proportionate manner, are likely to lead a court to conclude that there is no other alternative but for it to ask the necessary questions."

That is the approach the President took in the case before him, notwithstanding that he found the task to be *"particularly burdensome, unnatural and tricky"*. He also gave guidance for judges on how to undertake questioning without "descending into the arena".

The Test for Permission for Expert Evidence

In *West Northamptonshire Council v. The Mother* [2024] EWHC 395 (Fam), Lieven J considered an application for a cognitive assessment of a respondent parent in care proceedings. The stated aims of such an assessment were to assist in understanding: (i) how other assessments should be conducted (ii) her level of intellectual functioning, to inform how she retained information and learned skills; and (iii) what support she required for hearings and meetings. The judge noted that *"minimal evidence"* had been submitted to support the application, and the mother's vulnerabilities owing to her age, experiences and mental health were *"exceedingly common"* matters. The judge emphasised the need for *"proper evidence which explains why the case goes beyond the standard difficulties faced by many parents in care proceedings"*. Referring to the now classic words of the former President in *Re HL (a child)* [2013] EWCA Civ 655 (*"'necessary' means necessary … [i]t is, after all, an ordinary English word"*), the judge found that the application did "*not come close*" to meeting the relevant test: *"necessity does not mean that a report would be 'nice to have' or might help in determining what psychological support the parent might need in the future"*. The judge also referred to the Advocates' Gateway resources and suggested that a psychological assessment relating to the court process would only be appropriate if the Advocates' Gateway resources were *"plainly insufficient"*.

In fact, the mother had sought to withdraw her application *"a few minutes"* before the hearing commenced (an indication in the judge's view of an appreciation of its weakness), and that lateness caused the judge to decline to allow it to be withdrawn and to give a reasoned decision on it. The judge also adversely commented on late production of skeleton arguments and position statements for the hearing and the guardian's decision to take a *"neutral"* position on the application when the contents of her skeleton argument made clear that she

did not consider the necessity test to be met.

Use of the High Court's Inherent Jurisdiction

Limits on the High Court's exercise of its inherent jurisdiction are set out in s.100 of the Children Act 1989. One is that a court may not make an order under its inherent jurisdiction that has the effect of placing a child into care or to be accommodated. In *Re V (a child) (limits of exercise of inherent jurisdiction)* [2024] EWHC 133 (Fam), Cusworth J considered the case of a child who turned 17 during the course of care proceedings in which (before her 17th birthday) she had been made the subject of an interim care order. Following the analysis in *Re Q (a child)* [2019] EWHC 512 (Fam), the interim care order lapsed on her 17th birthday, but the child had remained in local authority accommodation notwithstanding that she became entitled to leave it.

The local authority, concerned about (undetermined) allegations against the parents and reports of suicidal ideation, sought an order regulating the child's placement such that she would not return to the family home. It sought to draw a distinction, elucidated in *Re E (a child)* [2012] EWCA Civ 1773 and *Re M (jurisdiction: wardship)* [2016] EWCA Civ 937, between a child who was already voluntarily accommodated (as, argued the local authority, the subject child was) and a child who would not be accommodated but for a further order. The judge rejected that argument on the facts because the child informed the court through her legal representatives that she was remaining in the placement pending the determination of the instant application but otherwise wished to return home: *"[t]he effect of the order sought would be to convert what has up to now been voluntary accommodation into ongoing involuntary provision"*.

Construction of Time Limits on Giving Notice of Adoption Applications

In *X v. X (time-barred adoption)* [2024] EWHC 364 (Fam), Arbuthnot J considered an application for the adoption of an 18-year-old, *"Z"*, by his stepfather. The stepfather, a British national, had lawfully adopted Z in Ukraine, where they had previously lived, but that adoption was not recognised in the United Kingdom.

The application had been made two days before his 18th birthday. By s.44(3) of the Adoption and Children Act 2002, the applicant was required to give the relevant local authority three months' notice of his intention to apply, but on the facts he had given only two and a half months' notice. Otherwise, the various requirements in ss.42 to 51 of the 2002 Act were satisfied.

The judge considered authority on the statutory time limit, including *Re A (a child)* [2020] EWHC 3296 (Fam), in which Keehan J gave a *"purposive construction"* to the upper time limit (two years), which drew on the decision of the former President in *Re X (a child) (parental order: time limit)* [2014] EWHC 3135 (Fam), which concerned the Human Fertilisation and Embryology Act 2008. She considered that the *"purpose of the written notice … was to enable the local authority to investigate the application, assess the parties and then offer advice to the court"*, which it had in fact done in a *"very thorough"* report that *"supported the application"*. Further, it was *"clearly in Z's best interests throughout his life that an adoption order should be made"*.

Arbuthnot J concluded that *"failure to comply with [s.]44(3) was a technical matter"* and *"the breach of the lower time limit did not cause any disadvantage or prejudice to any party or the court"*. Applying a purposive construction to the statute, she held that the breach was not a bar to the making of an

adoption order. The judge added that even if she were wrong about that, she considered that she would be required to *"read down"* the provision pursuant to s.3 of the Human Rights Act 1998 in order to avoid a breach of the parties' (and Z's) Article 8 rights and, on the facts, it would be an affront to public policy if he could not be adopted.