

Imminent Risk of Really Serious Harm

Raising the Bar on the Interim Removal of Children?

In *Re L-A (Children)* [2009] EWCA Civ 82, Thorpe LJ and the Court of Appeal (CA) considered the phrase 'imminent risk of really serious harm', coined by Ryder J in *Re L* [2008] 1 FLR 575. The issue for the CA was the effect that this phrase had on the law already established in relation to the removal of children from their home under an interim care order (ICO). The CA concluded that the phrase should not be interpreted as raising the bar that a Local Authority (LA) has to reach when applying for such removal.

A LA applied for the swift removal of four children from the home of their mother. Care proceedings were ongoing, on the grounds of chronic neglect. Initially kept at home during proceedings, a visit to the home part way through proceedings suggested a deterioration that meant the children were in jeopardy. The final hearing was 8 months away, so interim removal was sought. Threshold was conceded by the mother, and the real issue was whether the removal was within the principles in section 1 of the Children Act 1989.

The Judge at first instance did not consider those provisions or recite them independently, but considered what he described as the "significant judicial gloss over the year since 1989". After considering the Court of Appeal cases of *Re M* [2006] 1 FLR 1043 and *Re H* [2001] 1 FCR 350, he considered the first instance decision of Ryder J in the case of *Re L* (above), who had said that if there is not an imminent risk of really serious harm (where the risk to the child(ren) demands immediate separation), the question whether the mother is able to provide good enough long term care should be a matter for the Court to decide at a final hearing.

HHJ Cleary concluded that the children should remain in the family home, albeit under the protection of an ICO. In doing so, he stated that he was bound by the decision of Ryder J and that he was not able to override his decision: that was a job for the CA.

The LA's main submission on appeal was that the Judge had misdirected himself in law: the trial judge was not bound by Ryder J's coined phrase, but rather by the CA authorities that Ryder J had referred to in *Re L*. It was noted that the phrase "imminent risk of really serious harm" had given rise to considerable problems in practice, emphasised as the key definition of the standard that must be achieved to justify the making of an ICO.

Thorpe LJ concluded that Ryder J in *Re L* was not seeking to break fresh ground, or to alter the approach that appears from *Re M* or *Re H*: he was aware he was bound by the authorities. Thorpe LJ reiterated the established case law, including the principles that the decision taken by the court on an ICO application must necessarily be limited to issues that cannot await the fixture, and that separation should only be ordered if the child's safety demands immediate separation.

Thorpe LJ concluded that HHJ Cleary had construed Ryder J's comments as altering the law, an alteration that raised the bar against the LA. That was a misdirection, and he was wrong to conclude that he was prevented by Ryder J's words from doing what he instinctively felt the welfare of the children required. The appeal was allowed.

In *B (a child)* [2009] EWCA Civ 1254, a judgment handed down by the CA on 25 November 2009, the effect of *Re L-A* was considered. Wall LJ emphasised the importance of Judges at first instance looking to case law such as *Re L-A* for guidance in determining the course to take in an individual case. Criticism was made of the Judge in *B (a child)* for describing the recent decisions of the CA as 'various glosses' that had been put on s. 38 of the Children Act 1989. Wall LJ noted that the Judge did not appear to have read *Re L-A* carefully and repeated the key paragraphs of Thorpe LJ's judgment.

Practitioners seeking or resisting the removal of children under an ICO should be careful to draw the court's attention to the relevant case law from the CA, and in particular the case of *Re: L-A*, to ensure that the court understands that the effect of the phrase 'imminent risk of really serious harm' is not to change previous guidance from the CA.



Jennifer Newcomb

Adoption panel decisions are under scrutiny

The issue of whether panel decisions have been properly reached and what information they base their decisions upon, is one which practitioners frequently encounter in care and adoption proceedings.

In a 2008 case, the Court of Appeal again considered the question of misconduct by a local authority acting as an adoption agency in proceedings involving an application for a Placement Order under the Adoption and Children Act 2002.

In *RE B (CHILDREN)* [2008] EWCA Civ 835; [2008] 2 FLR 1404, the Court of Appeal held that where an adoption agency considered that a child should be adopted, it was vital that it should provide the adoption panel with all available material and with material that was accurate. It was also important that any decision of the adoption agency to proceed to apply for a placement order was properly made and minuted.

In that case, the parents appealed against care orders made in respect of their three children and against a placement order made in relation to the youngest child, M. After an allegation that the two older children had been physically assaulted by F, all three children were accommodated by the local authority and then, after care proceedings were issued, placed with local authority foster parents. In the care proceedings, directions were made for a psychologist (G) to assess M and F and for a retired consultant child and adolescent psychiatrist (B) to assess the children. The local authority's final care plan was for the two older children to remain together and for M to be adopted on his own outside the family. The adoption panel met and recommended that M be placed for adoption. The reports of G and B were not made

available to the panel and a misleading summary of B's expert evidence was given to the panel by the social worker. On the following day, the local authority's director of social services endorsed the panel's decision and the local authority applied straightaway for a placement order in respect of M. After a contested hearing, the Recorder made care orders in respect of all three children and granted the placement order in relation to M. He acknowledged that there were errors in the panel's decision but concluded that they had been rectified by the hearing before him, at which G and B had given evidence and at which he had fully considered afresh whether adoption was in M's best interests. He rejected a request to adjourn the hearing and to remit the panel's recommendation to it for reconsideration, referring to the delay that would ensue. The parents argued that the decision-making process had been flawed in that the local authority's failure to provide the panel with G and B's reports, or a proper summary of them, meant that the panel had been given inaccurate information on material issues. Further, the panel's recommendation had merely been rubber-stamped by the local authority in a brief, unminuted meeting at which there had been no proper discussion or sharing of information.

The LA conceded that it had made a serious error and that it had acted in a way which breached the 2002 Act and the Regulations, but submitted that the Recorder's investigations of M's best interests within the contested care proceedings.



The Court of Appeal held that the provisions of the 2002 Act and the regulations must be adhered to by adoption agencies before making an application for a placement order under s 22 of the Act. Wall LJ held that **“the framework laid down by Parliament cannot be by-passed or short-circuited”**. The Court is not bound by the decision of the panel, and has clear and obvious discretion as to whether or not to make a placement order (section 21). Thus while the Court of Appeal upheld the Care orders, it concluded that the recorder should not have made the placement order and should not have refused to order a remission to the panel. If the panel's decision was flawed in any material respect, the decision-maker could not properly consider the recommendation, and thus could not be satisfied, in accordance with the process laid down by Parliament, that the child should be placed for adoption, *P-B (A Child) (Placement Order), Re (2006) EWCA Civ 1016, (2007) 1 FLR 1106* followed. The recorder should have remitted the panel's recommendation for adoption to the panel for urgent reconsideration. Had he taken that course, the delay would have been minimal (a matter of days) and the statutory framework would have been followed. The court therefore set aside the placement order. Wall LJ set out helpful guidance at paragraphs 81-83 of his full judgment, as to what should occur in the future, which is essential reading for all practitioners. Those paragraphs should be printed off and carried around by all practitioners to assist them in assessing whether or not the framework has been properly followed in each case. (It is also important to note that as of 1/10/07 the table in rule 10.20 A of FPR 1991 has been amended such that a party may disclose documents from proceedings to an adoption panel without prior permission from the Court. (SI 2007/2187).)

In *R (AT, TT and S) v Newham London BC [2008] EWHC 2640*, another panel decision came under scrutiny at judicial review proceedings before Bennett J. Approved local authority foster carers had adopted one child, and applied to be assessed as prospective adopters of a sibling of their adopted child, when that younger child was taken into the interim care of the LA. An Independent SWV recommended the couple as suitable to adopt. The adoption panel did not approve the couple for adoption because of a number of concerns they had about them, including their attitude to corporal punishment. The Independent Review Panel (IRP) unanimously approved the couple for adoption. The LA decision maker rejected the IRP's decision and confirmed the panel's decision as she felt the couple had not been clear in the evidence they gave to the IRP and felt that the panel's original concerns had not been dispelled. The couple applied to judicially review the decision and the Court upheld their application quashing the decision as *Wednesbury* unreasonable. Bennett J noted that when considering suitability for adoption and matching of a particular child, under part 4 and part 5 of the Adoption



Agencies Regulations 2005, that s 1 of the 2002 must apply under part 5 (matching) but is not relevant to part 4 (suitability). He also noted that the IRP carried out a full hearing into the issues raised, made its findings of fact as it thought appropriate, and resolved the “conflicting information” in favour of the couple. The IRP set out its reasons fully and the LA did not criticise its findings or reasonings. The LA argued that its' decision maker was entitled to come to a different decision overriding the IRP because of the conflicting information. Bennett J held that the decision maker was in “dangerous territory if she later concludes that the answers given by the couple are “not sufficiently robust”, as such answers convinced the various panel members. He held that the decision maker's decision was “bordering on the bizarre” given the IRP's very clear reasoning, and that she had not given clear and cogent reasoning for rejecting their reasons. He therefore quashed the decision maker's decision and the LA would now have to decide afresh whether the couple were suitable to adopt another child generally, and if yes whether they could adopt the child in question.



Aileen Downey

Ancillary Relief in 2009

“In all humility, may I make a plea for a period of reflective tranquillity? I believe that would now be most helpful; to the courts at first instance, the practitioners and the families involved in the litigation. Section 25 says it all, thereafter perhaps for the moment at least, the less said the better.” So concluded the judgment of Coleridge J in *RP v RP* [2006] EWHC 3409 (Fam) and a considerably vainer judge than he might have concluded that finally in 2009 his plea had been heeded. Regrettably we suspect the effect of the “credit crunch” is the more prosaic explanation for a quieter year for s25 MCA in 2009.

This article will consider Radmacher & MacLeod and the recent authorities on variation of orders.

The facts of each of these cases are likely to be well known by now so they are recorded in summary. Firstly *McLeod v McLeod* [2008] UKPC 64: the parties were resident on the Isle of Man. They signed a pre-marital agreement which they subsequently amended after marriage thus creating a post-marital agreement. The husband conducted himself in accordance with the agreement. Upon divorce he relied upon the agreement, but the wife sought in effect to set it aside.

The final appeal lay to the Privy Council where the leading speech was given by Baroness Hale. The terms of the post-nuptial agreement with one amendment to the sum provided for the accommodation of the children of the marriage. Perhaps of particular novelty was reliance upon sections 34 & 36 MCA to justify a post-as opposed to pre-nuptial agreement; sections which were later referred to by Wilson LJ in *Radmacher* as having been “dead letters” throughout his time in practice and on the bench.

In *Radmacher v Granatino* [2009] EWCA Civ 649 the parties had married in 1998 and separated in August 2006. The wife was German and the husband French. There were two children of the marriage. The parties had entered into a pre-nuptial agreement in which each party had agreed neither would have any financial claims against the other. The agreement was signed in 1998, in

Germany before a German notary. In her judgment Baron J placed only limited weight upon the terms of the agreement on the following grounds: (i) the lack of independent legal advice taken by the husband; (ii) the lack of any disclosure from the wife; (iii) the fact of children being born during the marriage and (iv) the manifest unfairness of the bar on any needs-based financial relief.

The Court of Appeal approved the first instance analysis of the law, but rejected the enumerated reasons for failing to apply the terms of the agreement. The Court of Appeal did not arrive at this decision with ease and laboured with the current state of the law: Rix LJ for example, fresh to family law, struggled with the legal requirement to take into account as part of the section 25 exercise an agreement which is void on public policy grounds!

The two cases arguably make ambivalent pronouncements on the current state of the law, however what appears clear from them both is that they have moved us one step closer to enforceable pre- and post-nuptial agreements. An agreement which has been arrived at in the absence of mistake, misrepresentation or undue influence, and where the parties have received independent legal advice and disclosure of their respective finances, is likely to hold considerable sway in the Court’s determination of an ancillary relief application.



Variation

Turning to variation, the recent case of *Hvorostovsky v. Hvorostovsky* [2009] EWCA Civ 791 again provides a helpful illustration of varying compromised proceedings and more importantly, how the Courts respond to the changing fortunes of former spouses. *Hvorostovsky* came hot on the heels of *Myerson v. Myerson* [2009] All ER (D) 05 April in the spring of last year: a case that highlights the restrictive circumstances in which Orders can be appealed. *Myerson* proved a great disappointment to many spouses who had seen their fortunes decline in the recession and were hoping to escape 'punitive' periodical payments. The decision confirmed the current jurisprudence that sees judges wary of reopening orders and adds to the mythology of a successful *Barder* application. Importantly however, *Myerson* illustrated the continuing importance of the power to vary periodical payments under s.31 MCA 1973: a spouse really can be for life and not just for Christmas.

The Court of Appeal in *Hvorostovsky* considered the relevant factors when assessing an application to vary maintenance: in this case, an application by W to increase the level of maintenance provided by H to her and her twin sons. As the names suggest, the parties were Russian, H being a particularly successful baritone singer. W had been a ballerina who had retired when she had married H (in 1989). The twin boys were born in 1996 with the decree absolute pronounced in 2001.

The initial award for W and her twin sons was set at £113K per annum, which equated to roughly 30% of H's then earnings. On application in 2002 this was increased to £117K. Some time later and H having remarried and had 2 further children, his fortunes increased and was earning well over £1.5M each year (from an initial £500K). On further application from W the £113K payment was increased to £120K each year with an addition £12.5K to be provided for the twin boys.

On appeal Thorpe LJ re-iterated the judgment of Charles J in *Cornick v. Cornick* (No3): that fairness dictates that awards can be varied upwards even if it would mean that W had a better standard of living than during the marriage. Further Thorpe LJ noted that the judge at first instance 'did not stand back from the figures to judge the overall proportionality of his conclusion'... In both of the reported cases by which he directed himself (*Lauder v. Lauder* [2007] EWHC 1227 (Fam); [2007] 2 FLR 802 and *VB v JP* [2008] 1 FLR 742), the utility of a percentage comparison between the original order and the order on variation was commended'.



The 'percentage' approach in *Lauder* which was endorsed in *Hvorostovsky* was again endorsed when the McFarlanes returned to Court, *McFarlane v. McFarlane* [2009] EWHC 891 (Fam). In a lucid judgment Charles J reminded the parties that any exercise of the Court's discretion under s.31 MCA 1973 should be assessed in light of the parties' financial needs, compensation and sharing. Charles J indicated that the structure and amount of any variation would be guided by: first, an application of the need principle with reference to the surplus income over and above the need by reference to the standard of living enjoyed during the marriage and second, an application of the aforementioned principles to determine how that surplus should be applied between the parties.

Having considered the above cases it is clear that variation remains a tool frequently used by spouses to redress perceived imbalance in financial provision caused by a change in fortunes (both up and down). As *Myerson* confirmed, *Barder* events remain a rare beast in England and Wales: not even the recent recession amounts to one.



Tim Parker

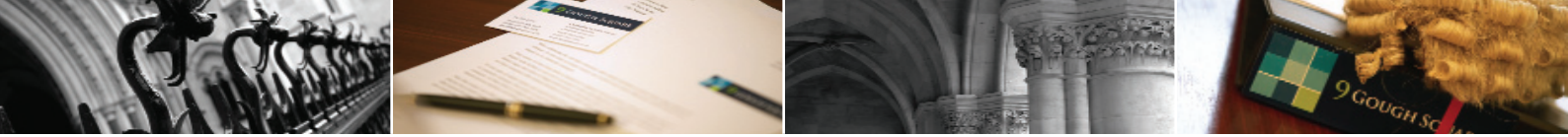


Ed Lamb

Guidance on Forced Marriages from the Ministry of Justice



In October 2009, the Ministry of Justice published Guidance for Local Authorities as relevant third parties in the multi-agency partnership working with Forced Marriages. The Guidance is for all caseworkers and legal advisors within local authorities who work to safeguard children and protect vulnerable adults. It offers advice to Local Authority 'frontline' employees when they are considering making an application for a Forced Marriage Protection Order (FMPO).



A forced marriage is not an arranged marriage, but one where either or both spouses do not consent to the marriage and duress is involved. The issues surrounding these marriages are complex. A number of individuals in the wider community may be involved. The duress may be physical, psychological, sexual, financial or emotional. The warning signs can include, a history of older siblings leaving education early to marry, depressive behaviour; unreasonable restrictions being placed upon the person in terms of leaving the house or attending school, not returning from a long holiday abroad or a person always accompanied to school or doctors' appointments.

The Forced Marriage (Civil Protection) Act 2007 has been in force since November 2008 and a FMPO would be sought under this Act to prevent a forced marriage from occurring, or to offer protective measures if the marriage has already taken place. Although neither the Act nor an order can annul a marriage, the examples of the types of orders the court might make are: to prevent a forced marriage from occurring; to hand over all passports (where there is dual nationality) and birth certificates and not to apply for a new passport; to stop intimidation and violence; to reveal the whereabouts of a person; to stop someone from being taken abroad; and to facilitate or enable a person to return to the UK within a given time period.

In handling cases where Forced Marriage is an issue, it is essential that Local Authorities refer to statutory guidance and the Multi-agency Practice Guidelines as soon as they are alerted to a potential case of a forced marriage.

To ensure the safety of the victim is protected, the Ministry of Justice has provided a list of important key points that practitioners must be aware of:

Do:

- **always take the issue seriously and recognise the potential risk of very significant harm to the victim:** many professionals find it hard to believe the lengths that families go to in order to force a marriage and that families do kill in the name of honour. Young people are regularly told that an elderly relative is dying in order to persuade them to leave the country;
- **see them on their own in a private place where the conversation cannot be overheard;**
- **gather as much information as possible about the victim – it may be the only opportunity;**
- **remind them of their rights i.e. that they have the right to enter into marriage with their full and free consent and the right to make decisions about their lives; and**
- **discuss the case with the Forced Marriage Unit on 0207 008 0151.**

Do not:

- send the victim away and dismiss the allegation of forced marriage as a domestic issue;
- inform the victim's family, friends or members of the community that the victim has sought help; or
- Attempt to be a mediator.

If court action is necessary, as a relevant third party, a Local Authority does not require the leave of the court to make an application ex parte or inter partes. The court can also make an order of its own volition in private or public proceedings.

The level of risk should be assessed to ascertain which order is most suitable for the case, as other orders such as Care Orders or Wardship are available alongside a FMPO. The application should be supported by an affidavit, but a 'threshold' document is not required. All the relevant information about making an application for a FMPO is in the HM Courts Leaflet FL701.

Courts that have been designated to accommodate these applications and hearings, in the South East of England are, The Principal Registry of the Family Division, Luton County Court, Romford County and Willesden County Court.



Emma-Jane Mahood

Our Family Group members have specialist and experienced practices in the law relating to children and in representing local authorities, guardians, parents, children, prospective adopters and foster parents and parties in public inquiries. They also act for local authorities and others in Disclosure Applications by and against the police and the CPS.

ROSINA COTTAGE 1988



Rosina has a mixed practice of child care work and serious crime. In her family work she concentrates on Public Law in the Principal Registry and the High Court, representing a number of local authorities, as well as representing children, guardians and parents.

AILEEN DOWNEY 1991



Aileen was called in 1991 and has practised in family law since the inception of the Children Act 1989. She specialises in matters relating to children, in both Private and Public law. Her Private Law work includes residence and contact disputes, as well as abduction and adoption cases.

TIM PARKER 1995



Tim's family law practice includes work on matrimonial finance, children and public law proceedings relating to non-accidental injury, allegations of sexual abuse and adoption.

TARA VINDIS 1996



Tara's practice specialises in cases involving children, both Public Law and Private Law. She is instructed by local authorities, parents and extended family members and on behalf of children's guardians. She frequently appears in the High Court in serious cases, typically involving allegations of non-accidental injury, sexual abuse, emotional abuse, neglect and domestic violence. She has considerable experience in calling and cross examining professional witnesses including psychologists and psychiatrists, both child and adult.

EMMA-JANE MAHOOD 2001



Emma practises exclusively in Family Law and specialises in Private and Public Children work. Emma also has considerable experience with Domestic Violence Cases and Family Law Injunctions. She has particular expertise in the following areas: Section 8 Applications, Seeking and Preventing Removal from the Jurisdiction, representation of Grandparents, Parents with Learning Difficulties, Parents with alcohol and drug problems, allegations of emotional, physical or sexual abuse and Private Law Proceedings involving both Injunctions and the Children Act.

OLIVER MILLINGTON 2003



Oliver's family practice encompasses both Private and Public Law proceedings on behalf of parents, guardians and local authorities. He has a particular interest in and experience of care proceedings. He regularly appears at Family Proceedings Court, County Court and High Court levels.

EMILY VERITY 2003



Emily is regularly instructed by local authorities in relation to care proceedings, particularly Care Orders, Supervision Orders and Emergency Protection Orders. She has also represented parents in both care cases and private cases involving residence and contact disputes, and contested adoption cases.

ESTHER MACLACHLAN 2005



Esther specialises in matters involving children and undertakes both Public and Private Law cases. She is instructed by local authorities, parents and on behalf of children's guardians. She has also been instructed on behalf of the Official Solicitor to act for parents who lack capacity. She has experience of adoption and special guardianship proceedings, including cases with an international element. Esther has experience of representing both applicants and respondents in injunction proceedings.

ALASTAIR HOGARTH 2005



Al regularly appears in the family courts representing parties on variety of both Public and Private Law matters, including Non-Molestation Orders, Occupation Orders and child contact disputes. He also represents both local authorities and parents in care proceedings.

JENNIFER NEWCOMB 2006



Jennifer regularly acts for parents in residence and contact disputes, as well as for both applicants and respondents to proceedings for Non-Molestation and Occupation Orders. She is instructed by both local authorities and parents in care proceedings. She has experience of appearing in the Family Proceedings Court, County Court, the Principal Registry and the High Court.

EDWARD LAMB 2006



Ed undertakes both Public and Private Law family work and has represented local authorities and parents at all levels. Ed has developed a particular interest in the property rights of cohabitants following separation and has advised clients on the financial aspects of the relationship breakdown.

CATHERINE ATKINSON 2006



Catherine joined Chambers on 1st October, having successfully completed her pupillage at 9 Gough Square, part of which was spent as a pupil to Aileen Downey.

BEN RODGERS 2007



Benedict joined chambers on 1st October after the successful completion of his 12-month pupillage here at 9 Gough Square, where he was pupil to Vincent Williams, Rosina Cottage and Tom Little.

KATE LAMONT 2007



Kate became a tenant in Chambers in October 2009 following successful completion of pupillage. She is now developing a broad and busy practice and has experience of appearing in a wide range of tribunals.

TOM RESTALL 2007



Tom became a tenant at 9 Gough Square in October 2009 after successfully completing 12 months' pupillage in chambers. He undertakes work in a range of private and public law family cases.

GARRY FARROW Senior Clerk (Family)



Having joined Chambers in 1977, Garry has wide experience having worked his way up from Junior Clerk and acquiring an all round knowledge of Chambers, its barristers and family clients.

JAIME BROOKS Junior Clerk (Family)



Jaime joined Chambers in March 2009, having previously worked at 2 Gray's Inn Square. During this time he has gained a wide range of experience from working with the Family and Crime practice areas.

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