CASELAW IN 2010 – THE CASES YOU NEED TO KNOW

A. Procedure: Registration of Orders

Re S (Foreign Contact Order) [2010] 1 FLR 982

Thorpe and Wall LJ

As a matter of principle it was not open to any English court to depart from the court designations incorporated within the lists attached to Art 68 of Brussels II Revised. Although Art 31 provided that the procedure for making applications was to be governed by the law of the Member State of enforcement, the routes of appeal were clearly established by the Regulation itself and it was not open to the domestic court to depart from that designation; any question as to the construction and application of a Brussels Regulation was ultimately for the European Court of Justice, not the English courts.

Given that the task of the judicial officer considering an application for permission to register a decision under Brussels II Revised was essentially administrative, in that the judicial officer had only to check: (a) that the order of the foreign court was apt on its face; and (b) that the application fell within the general provisions of the Regulation, it was a task that fell within the province of the district judge. The uncomfortable and certainly counter-intuitive prospect of a Family Division judge hearing an appeal from another judge of the Division was avoided if the first process of registration went to a district judge in the Principal Registry. An appeal against registration under Art 33 of Brussels II Revised would also go to the Principal Registry, but to a judge at the higher tier of the hierarchy, that is a judge of the Family Division or a s 9 circuit judge. No permission to appeal was required. In relation to a second appeal, that manifestly lay to the Court of Appeal, and, given that such an appeal would not involve the liberty of the subject, permission to appeal would be required. No further appeal would be permissible beyond that provided for in Art 34.

B. Leave to Remove Applications

Re D (Children) [2010] EWCA Civ 50

Wall LJ

Application by father for permission to appeal the decision to allow his former wife to relocate to Slovakia with their two sons. Application refused.

Wall LJ "In my judgment, this case is not the right case for a challenge to *Payne v Payne*. In the first place, on the facts, the respondent makes a powerful case for relocation. Secondly, there is currently no legislation requiring a different approach in place, with the consequence that were this case to go the Supreme Court it is probable that – were the Supreme Court to take the view that insufficient consideration had been given to the harm likely to be suffered by the children by relocation and alteration of their current way of life – the Supreme Court would order a re-trial, rather than saying that the judge, in the exercise of her discretion, was plainly wrong. In my judgment, it is contrary to the interests of the children to impose a fourth hearing on this family."

D (A Child) [2010] EWCA Civ 593

Wall LJ

The case concerned the father's application for permission to appeal against an order made on 10th March 2010 by the Recorder giving the mother, who has remarried, permission to remove the parties' 5 year old son, David permanently from the jurisdiction to Australia.

In this case the Court was faced yet again with the difficulties arising out of the myriad of problems currently facing CAFCASS. The Court set aside the Order of the Recorder as there was an absence of a CAFCASS Report. Wall LJ was at pains to emphasis the importance of justice being seen to be done.

C. Residence: Wishes and Feelings, Shared Residence

R (A Child)[2010] EWCA Civ 303

Thorpe LJ

Appeal by mother against shared residence order on the grounds that it may have been made as a result of procedural unfairness. Appeal dismissed.

The proceedings had arisen out of the father's application to prevent the mother from removing their child to the US, after which, for various reasons, the mother ceased to be the primary carer. The case was set over and that situation endured after it was listed on 2nd September for a further 16 days before the case came before HHJ Pearlman. At that hearing, the judge made the shared residence order but in an exchange with the mother had erred by saying that residence and parental responsibility were the "same sort of thing". Thorpe LJ held that, although judicial error normally leads to the grant of an appeal, this should not be the case here as this was a paradigm case for

shared residence.

S (A Child)[2010] EWCA Civ 325

Thorpe LJ Smith LJ and Baron J

Appeal against an order requiring a mother to hand over her son to the father's residence, or if she failed to do so, that the Tipstaff would effect the transfer.

Thorpe LJ upheld the decision of the Circuit Judge stating that *"this is the third occasion on which in recent months, in my experience, this court had to consider applications for changes of residence, and our approach has been consistent; namely, if the court below has exercised its discretion appropriately on all the material, has taken into account all the relevant factors and has not taken into account material which is immaterial or irrelevant, then the court will not interfere."*

S (Children) [2010] EWCA Civ 447

Thorpe LJ Wall LJ and Aikens LJ

Intractable contact dispute. Appeal against the conditions included in a contact order. Appeal allowed.

An order for contact with the father of two children, O and T, who were 12 and 13 years old, included a provision in the following terms:

> "it is a condition of the contact … that the children have to decide for each contact whether to take it up or not."

The father argued that this amounted to no order. The condition conformed with the wishes and feelings of the children, as expressed to their guardian. However, Thorpe LJ concluded that their wishes and feelings were secondary to their welfare which, on the fact of the case, required the removal of the condition. Accordingly the appeal was allowed and the condition set aside, subject to a stay pending a remitted hearing.

Re F (a child) (Shared Residence Order) [2009] EWCA Civ 313

Ward LJ

"When I ask myself whether the judge exceeded the generous ambit within which there is that room for disagreement, I cannot say that he has. The problem with this jurisdiction is that the more finely balanced the case is, the more difficult it becomes to appeal it. Much as many trial judges would willingly surrender their adjudicative powers to a complete re-hearing by an appellate court, that is not the law."

D. Section 91(14) Orders

C (A Child) [2010] EWCA Civ 469

The case concerns the parties' son J (12 years old). The father made an application for permission to appeal against an order made by HHJ Waddicor on 28 September 2009 in which she directed that there should be no order as to father's contact with J and, on the application of J's guardian, imposed an order under Section 91(14) of the Children Act 1989 refusing the father permission to apply for contact for a period of two years.

Contact had not taken place since 28 September 2009 and the difficult relationship between the parents had polarised. The father had written to the mother seeking to reinstate contact and cooperation. He had no reply, and, as a result, sought firstly to appeal the Section 91(14) order out of time; secondly, he had been back to HHJ Waddicor to ask her to allow him to make an application, despite the Section 91(14) order, and she had refused. As a result, he sought permission to appeal against the order made in September 2009.

Wall and Aikens LJ

Father given permission to appeal the Order of HHJ Waddicor out of time and the matter listed accordingly

G (A Child) [2010] EWCA Civ 470

Wall LJ

Appeal by a father against an order that he was to have no contact with his daughter and was not to make an application for contact or residence without the court's permission for a period of five years. Appeal allowed and period of two years substituted during which indirect contact would be permitted.

Wall LJ: 8. But I remain of the view that what the judge said was, on the whole, excessive: the period was excessive and the refusal of all forms of contact were excessive, and in my view that is an error of principle with which this court can interfere on the basis that it was based on and in relation to one aspect, a misapprehension as to the facts, and, as to the other, a reason which is not fully articulated, and in those circumstances it seems to me that what should happen is this: that over the next two years Mr G should be given the opportunity to send cards and small gifts to his daughter. He says he knows their address, and so any suggestion that we need an independent third party may not be necessary, and if he can demonstrate in that period that those presents are appropriate, that the messages he sends are calm and suitable; and if he is able to accept the fact that his daughter is living with her mother and will continue to live with her mother throughout her minority -- if he can do that for a period of two years, then it seems to me he should then be able to apply for a more direct form of contact. It may in the first instance have to be supervised, I do not know, but, speaking for myself, what I would do in these circumstances, having carefully read the papers and the judgment of the judge, would be to substitute for the period of five years a period of two before any application can be made without permission, and I would order that there should be indirect contact during that period -- at Easter, her birthdays and Christmas, by means of cards and small presents, and it goes without saying that if at the end of that period Mr G has not been able to demonstrate the calm which we think he should be able to demonstrate, and if the presents and cards have been unsuitable, then the judge may take a very dim view. But if, on the other hand, he is able to demonstrate that he is calm, that he accepts the status quo and that he is able to abide by an order of the court which enables him to send cards and small presents, then it may well be that the judge would enlarge the contact period.

9. Speaking for myself, therefore, I do take the view that, with all respect to him, the judge, albeit exercising his discretion, went too far in cutting off all contact without any really good reason for doing so, and went too far in imposing a period of five years, and therefore I would propose a period of two years, during which time there should be the indirect contact I would propose. To that extent I would grant permission to appeal and allow the appeal.

A (A Child) [2009] EWCA Civ 1548

Wilson LJ

Application by father for permission to appeal, with appeal to follow, orders in contact proceedings including a s91(14) order. Permission was granted and the appeal relating to the s91(14) order was allowed.

G (A Child) [2010] EWCA Civ 469

Wall LJ

The judge at first instance had made an order that the father, Mr G, was to have no contact of any kind with his daughter and was not to make any application to the court for contact or residence without the court's permission for a period of five years. Contact had hitherto been difficult and the mother had made allegations against the father of violence and excessive alcohol consumption. There was also a suggestion that the father was essentially resident in Panama. A social services report which was more than two years old said that contact was impracticable because there was no means of it being monitored. However, there had been no fact finding to establish or disprove such allegations.

In his judgment Wall LJ indicates that he would look at the case purely and simply from the point of view of the child and what is perceived to be in her best interests.

Wall LJ substituted an order that Mr G should have indirect contact with his daughter for two years (permitting him to send cards and small gifts) and that at the end of that period he should be able to apply for a more direct form of contact.

Re N (Section 91(14) [2009] EWCH 3055 (Fam)

Munby LJ

The proceedings, which involved an application under Schedule 1 of the Children Act 1989 by the mother and residence and contact applications by the father, had been ongoing for over 5 years, and had been acrimonious, confrontational and emotionally fraught. The guardian considered that the parents, by their behaviour towards each other and by their conduct of the litigation, had caused the child, who was now 8 years old, emotional harm. There was evidence that the child was stressed and anxious as a result of the litigation; he had repeatedly asked for 'the trouble' to

stop. In his final judgment concerning residence and contact, the judge expressed criticisms of both parents, but his more serious criticisms were directed towards the father. Both the mother and the guardian applied for a s 91(14) order to be made against both parents. The guardian initially took the view that such an order should be for a lengthy term, possibly over 7 years. However, in response to a suggestion by the father that a 2-year order might be agreed, the guardian said that she would not oppose an agreed order for 4 years, and the father duly proposed a term of 4 years. The mother's counter-proposal was a term of 4 1/2 years, on the basis that this would inhibit litigation until after the child's Bar Mitzvah. At the judge's invitation, the guardian subsequently explained that she had suggested 4 years as a reasonable compromise which would protect the child for a set period of his development.

Munby LJ: *Whilst the s 91(14) order remains in force no application can be made without the prior consent of the court. But even after the s 91(14) order has ceased to bite the court will, of course, still be able to exercise the powers which I analysed in* Re N, A v G and N, *[2009] EWHC 1807 (Fam), [2010] 1 FLR 272, at paras [219]–[234] – in particular, the power of summary dismissal of an application which is unmeritorious or the pursuit of which is not in the child's best interests. Given the history of the litigation to date I anticipate that any judge in future, even if the s 91(14) order has expired, will wish to scrutinise with an appropriately questioning and sceptical eye any application by either parent which is not securely founded on some* really material *change of circumstance.*

(iii) Finally, both parents, and the father in particular, will do well to bear in mind (a) the observations I made in Re N (A Child) v A and Others *[2009] EWHC 2096 (Fam), [2010] 1 FLR 454 at para [52] as to the potential exposure to adverse costs orders in the event of future unsuccessful applications and (b) the observations Wilson LJ made in* Re A (A Child) *[2009] EWCA Civ 1249 (unreported) 10 November 2009 at para [21] in relation to civil restraint orders.*

A section 91(14) order was made against both parties.

E. Enforcement: Committal

S-C (Children) [2010] EWCA Civ 21

Wall LJ

Appeal by wife against a committal order for contempt made on the application of a husband arising from allegedly prohibited disclosure by the wife of information wife relating to their contact litigation. Appeal allowed.

The appellant was Iranian and the husband Turkish. They had married in Turkey in 1999 and had two children but separated in 2006, following which proceedings were commenced in Turkey and England. In early 2008, in English proceedings concerning contact, a psychologist described the husband as "by nature, narcissistic". The trial judge then made an order which included a clause prohibiting disclosure of any documents. This was later found by the judge to have been breached as the wife had disclosed the contents of the report to her Turkish lawyer. In this appeal the wife contended that she had simply shown the court order to her lawyer and discussed the psychologist's report with him.

Appeal allowed

Wall LJ: The first point to note, although it was taken somewhat belatedly by Mrs Seddon, for the appellant, is that the order of 29 January 2008 did not include a penal notice, nor is there any warning on its face that breach was a contempt capable of being punished by imprisonment. As para 6 of the order bound both parties, one of whom was a litigant in person, and neither of whom English it was, in our judgment, important that it should include a penal notice if alleged breach was to found an application for committal to prison for contempt.

[16] There is abundant authority in this court that the formalities of committal proceedings are to be strictly observed, but that a breach of the formalities may be overlooked if it does not affect the justice of the case: see, for example *Nicholls v Nicholls* [1997] 1 *WLR 314, [1997] 1 FLR 649*. In a case such as the present, where the order is unusual; where one of the parties is in person; and neither is English, it would seem to us important for the formalities to be observed if the order is to have penal consequences.

[17] Secondly, if para 6 of the order of 20 January 2008 was to have penal consequences, it seems to us that it needed to be clear on its face as to precisely what it meant, and precisely what it forbad both the appellant and the respondent from doing. Contempt will not be established where the breach is of an order which is ambiguous, or which does not require or forbid the performance of a particular act within a specified timeframe. The person or persons affected must know with complete precision what it is that they are required to do or abstain from doing: – see (inter alia) *Federal Bank of the Middle East Limited v Hadkinson and Others* [2000] 1 WLR 1695; *D v D (Access: Contempt: Committal*) *[1991] 2 FLR 34* and *Harris v Harris*, *A-G v Harris [2001] 2 FLR 895* at para [288].

[18] On the evidence available to the judge, the appellant was not in breach of para 6 of the order of 28 January 2008. She did not disclose Dr Banks' report to anybody. If the judge had wanted to prevent her from disclosing or discussing the contents of the report with a third party, the order should have said so. It did not.

[19] We agree with the judge that an order forbidding the disclosure of confidential documentary information can be breached by a party disclosing the contents of that information – for example by a party reading the contents of a document to an unauthorised third party over the telephone or otherwise communicating its contents. However, if that is the mischief against which the order is directed, it should say so.

[20] We note in passing that the respondent attempted to commit the appellant on the basis that she had disclosed the court's order to her Turkish lawyer. Quite apart from the exception provided by s 12(2) of the Administration of Justice Act 1960, it is plain that the order of the court dated 29 October 2008 is not 'a document filed in the proceedings' (a point left open by the judge in para [5.3] of his judgment). The appellant admitted showing this document, and a translation, to her Turkish lawyers. She says she did so on the advice of her solicitors. In our judgment, she was entitled to do so.

[21] Thirdly, we do not think it was open to the judge to commit the petitioner for discussing the content of Dr Banks' report with her Turkish lawyer. A party must be entitled, in the exercise of legal professional privilege to discuss any issue with his or her legal advisers, and it is not a contempt of court for a litigant to disclose information arising from or connected with the proceedings with his or her lawyers.

[22] Furthermore, we express some surprise that the judge should have thought it appropriate to limit the amount of information available to the Turkish court about the English proceedings. If the judge was of the view (which he plainly was) that he was dealing with a litigious couple each of whom was prepared unscrupulously to disclose information for their own ends in the Turkish litigation one would have thought that the more the Turkish court knew about the English proceedings, the better. Indeed, modern good international practice would have called for co-operation and even appropriate discussion between the English and the Turkish judges.

F. Costs

S (a child) [2010] EWCA Civ 623

The father applied for permission to appeal against an order for costs made against him in favour of the mother in proceedings under the Children Act 1989 by Mr Recorder Chippendall in the Bristol County Court on 14 July 2008.

Wilson LJ: it was entirely within the recorder's discretion to order him to pay the mother's costs of and incidental to the application; and, of course, the fact that the mother was publicly funded was irrelevant to the issue. According to the solicitor's note, counsel for the mother had also, in my view legitimately, pointed out to the recorder that the father had chosen to continue his opposition to the mother's application even after he had learnt of the Cafcass officer's report about M's wishes in respect of the holiday, being a report in which the officer had apparently proceeded to recommend that the mother's application should be granted.

Re S (Leave to Remove: Costs) [2009] EWHC 3120 (Fam)

Sir Christopher Sumner

During the marriage the Swedish mother and the English father lived in London with the child. When the marriage ended, the child's time was split between, on the one hand, the mother, and, on the other hand, the father and the paternal grandparents; the latter looked after the child while the father was at work. Having formed a relationship with a Swedish man, who lived in Stockholm, after about 18 months of this arrangement the mother applied to the court seeking permission to relocate to Sweden with the 8-year-old child; she explained that she was in financial difficulties in England and that the Swedish man had tried, but failed, to find work in England. Despite a Cafcass report indicating that the child would cope well with change, and recommending

that permission be granted, permission to remove the child to Sweden was refused at first instance, on the basis that the current arrangement was one of shared care, and that the move would cause the child long-standing distress and disappointment. However, the mother's appeal was allowed; the appeal judge found that the mother had been the primary carer and that the judge below had not only failed to give appropriate weight to the conclusions of the Cafcass officer, but had also failed to take account of the impact of a refusal of permission upon the mother. The appeal judge then granted the father a rehearing, primarily because the father's recently announced loss of employment would allow him to care for the child to a greater extent. The rehearing judge, taking into account the potential impact of a refusal on the health and financial wellbeing of the mother and her partner, and how that would affect the child, granted the mother permission to relocate to Sweden. The mother sought her costs of the appeal, of the rehearing and of the costs hearing, a total of £144,725.13. The parties invited the judge to dispense with an oral hearing and to rely on written submissions.

Sir Christopher Sumner: The appeal was successful. The father was represented by experienced family lawyers. The grounds of appeal were clear, each point succeeded because of a number of fundamental flaws in the judgment which should have been recognised. It is no defence that the father's conduct was not itself responsible for the appeal.

[70] There was plenty of opportunity to take stock. The father could have made an offer to concede the appeal but argued, as he later did successfully, for a retrial. He did not do so. Finally the original judgment (and subsequently the appeal) made it clear that education was not itself decisive.

[129] I return to the questions raised by Wall LJ in *Re T (Order For Costs)*. Was the litigation conduct of the father unreasonable such as to justify the making of a costs order? I have concluded that it was. I then consider in the exercise of my discretion, bearing in mind all the circumstances of the case and the exceptional nature of a costs order, what if any order for costs I should make.

[130] I am satisfied I should make a costs order in the light of my findings and conclusions. I do so in relation to the appeal on the principles set out in *EW v SW*. I have reached the same conclusion by applying them also to the costs of a rehearing. However if I am wrong to do that, I consider that there has been unreasonable conduct by the father in relation to the litigation which amounts to litigation misconduct.

Re J (Children) (Costs of fact-finding hearing) [2009] EWCA Civ 1350

Wall LJ

The parents had two children prior to their separation in 2007. The mother thereafter refused to allow the father to have other than supervised contact with the children at a contact centre, alleging that there was a substantial history of domestic violence on his part which suggested that he might be a risk to the children. The father applied for unsupervised contact, stating that the mother's allegations were false. At a fact-finding hearing scheduled in light of that dispute, the mother made 20 allegations against the father. The district judge found 14 established, that number including one allegation established only to the extent of an admission by the father, four allegations which had been the subject of a partial admission by the father but which had been established to the more serious extent alleged by the mother, and nine allegations which the father had entirely denied but which had nevertheless been established. The mother applied for her costs of the hearing, contending that, although it had been in the context of the father's application for contact and it was rare to make an order for costs in proceedings under the Children Act 1989, the hearing had been a fact-finding inquiry into allegations properly made by her which had been the subject of positive findings despite being denied by the father to a significant extent. Her application was dismissed, the district judge observing that the parties had had a right to come to court. She then appealed to a circuit judge, submitting that the fact-finding element of the father's application had to be looked at it in a different light from the welfare aspect of it. The circuit judge dismissed the appeal, holding that such a compartmentalised approach was erroneous since the question of the child's best interests could only be ascertained by having such a fact-finding hearing as part and parcel of the whole process. The mother appealed

Wilson LJ: [19] I am well aware that, in most disputed cases in relation to children, whether in private or in public law, parties justify their proposals for the future arrangements for the child by reference, at any rate in part, to past events, of which another party or other parties will often present a different version. Thus, to a greater or lesser extent, issues of historical fact arise in probably the majority of such proceedings. I would be concerned if our exercise of discretion in relation to the mother's costs in this case today were to be taken as an indication that it was appropriate in the vast run of these cases to make an order for costs in whole or in part by reference to the court's determination of issues of historical fact. In my view, however, the mother's costs of the hearing before the district judge fell into a separate and unusual category. The hearing was devoted exclusively to the court's consideration of serious and relevant allegations against the father

of what can only be described as misconduct on his part. Over two-thirds of the mother's allegations were true. Less than one-third of them were not established yet were not found to be untrue. Of the true allegations, nine had been falsely denied by the father; and all but one of the remainder had been admitted by him only in part. I cannot accept Miss Hildyard's analysis that this case is an example of what she calls the 'run of the mill' fact-finding inquiry in which the mother will exaggerate, and the father will minimise, almost, so she implies, in equal measure. Where, asks Miss Hildyard rhetorically, do you draw the line between those cases to which the general proposition against an order for costs applies and those in which an order for costs is appropriate? But under our system, even in this court, we do not have to draw the line. If we consider that we can confidently do so, we may well consider it fruitful to do so; but it is often unwise to do so. We have only to determine whether the case before us falls on one or other side of the line.

[20] This case is in my judgment one in which a proper exercise of discretion on the part of the district judge did call for an order for costs to be made against the father. In the light however of the allegations which the mother undertook to establish but failed to establish, and of the limited admissions made by the father prior to the hearing, my view is that he should have been ordered to pay only two-thirds of the mother's costs of and incidental to the fact-finding hearing. It follows that the mother's appeal to the circuit judge should have prevailed. We should hear argument about whether the father should also pay the mother's costs of that appeal.

G. <u>Recent Decisions and Appeals</u>

R (Kang) v Cafcass [2010] EWCA Civ 317

Renewed application for permission to appeal against refusal to grant a father permission to apply for judicial review against Cafcass arising out of his dissatisfaction with the service's performance in private law proceedings. Application refused.

D (Children) [2010] EWCA Civ 496

Appeal by mother against residence order in favour of paternal grandparents following intractable contact dispute. Appeal dismissed.

H (A Child) [2010] EWCA Civ 448

Appeal against a contact order in favour of father concerning a 4 1/2 month old child. Appeal allowed.

PRACTICE DIRECTIONS AND GUIDANCE

The Practice Direction (the Revised Private Law Programme), handed down 26 March 2010; There was also President's Guidance (Split Hearings) issued on 28 May.

One Garden Court Family Law Chambers
June 2010