Private Client ~ March 2023

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Accidents Will Happen - Family Judge Clears Couple of Harming Their Baby

Family Judge Intervenes to Protect Unborn Child of HIV-Positive Mother

High Court Comes to Aid of Widow Left Almost Penniless by Husband's Will

High Court Opens Way for Teenager to Undergo Gender Surgery Abroad

Japanese Knotweed Victim Wins Compensation in Landmark Nuisance Case

Let Down by a Cowboy Builder? Your Complaints Should Not Go Unheard

Occupant of 'Floating Caravan' Granted Protection from Eviction

What Can a Family Judge Do When Faced With a Parent's Absolute Defiance?

**Accidents Will Happen – Family Judge Clears Couple of Harming Their Baby**

Where a child suffers injuries on more than one occasion, it is hardly surprising that professionals may suspect that they are not accidental but inflicted. However, a case in which loving parents were cleared of harming their baby showed that it is always possible for lightning to strike multiple times in the same place.

The young couple took their baby to hospital after he sustained a fall when his father left him momentarily alone on his changing mat. He was initially discharged with no identified injuries. However, a subsequent review of X-rays and a skeletal survey revealed a number of fractures, some of them partially healed.

Suspecting that the injuries were non-accidental, a local authority initially placed the baby and his twin in foster care. Their maternal grandmother and great aunt were subsequently permitted to take charge of their care. The council asserted that the baby's injuries were inflicted by either his mother or his father. The non-perpetrating parent was alleged to have failed to protect him.

Following a fact-finding hearing, a family judge noted that it was undisputed that the baby had sustained three accidental events in the space of about a month. In the first, he wriggled free from his grandfather's arms; in the second, his mother tripped and fell while carrying him. The third was the changing mat incident.

The couple, both of them professionals of exemplary character who had never had any previous involvement with social services, accepted that the string of accidents was extremely unfortunate and somewhat embarrassing. They vehemently denied inflicting the injuries and said that they were loving, caring parents who did all in their power to give their twins a high standard of care.

Exonerating them, the judge found their evidence both truthful and compelling. Their accounts of what happened were entirely consistent and the medical evidence was not inconsistent with all the injuries having been sustained accidentally. There was also a small possibility that their baby suffered from a condition giving rise to reduced bone density, placing him at greater risk of fractures.

On the totality of the evidence, the council had failed to discharge the burden of proving, on the balance of probabilities, that the injuries were non-accidental. The parents were subject to no other safeguarding concerns and the judge directed that the twins be returned to their care forthwith.

We can advise you if you have been drawn into a care order dispute with a local authority.

**Partner Note**

*A Local Authority v The Mother and Others [2022] EWFC 172*

**Family Judge Intervenes to Protect Unborn Child of HIV-Positive Mother**

In rare and exceptional cases, family courts have to intervene to protect the welfare of children even before they are brought into the world. A judge did just that in the case of a baby boy who was at high risk of being born HIV positive.

The boy's mother, who was 37 weeks pregnant with him, was infected with the virus during her childhood. She declined anti-retroviral treatment during her pregnancy in the firm belief that he would escape infection and that such treatment would not be good for him. She said that she had lived a normal life without treatment and had controlled her condition by adopting a good diet and taking vitamins.

However, doctors in charge of her case took the view that her baby was very likely to be born with HIV. The day before she was due to undergo a planned caesarean delivery, the NHS trust responsible for her care sought a judicial declaration that it would be lawful to give her baby anti-retroviral drugs immediately after his birth. The prospects of such treatment succeeding critically depended on it being commenced within four hours of his delivery.

Ruling on the matter, the judge noted that the mother was one of a cohort of children infected with the virus overseas during a programme of routine childhood vaccination that must have involved infected needles. In those circumstances, it was not difficult to see why she might have a pervasive distrust of medical advice. Her anxieties concerning treatment were deep-rooted and pervasive.

On the sole occasion when she underwent anti-retroviral treatment herself, she felt very unwell, enduring vomiting and dizziness. There was no doubt that she wanted the best for her baby and the Family Court emphasised that her objection to medication should not be construed otherwise. During her pregnancy, she had prevaricated as to whether to accept treatment. She had repeatedly attended hospital, apparently prepared to comply with medication, before changing her mind.

Granting the declaration sought, the Court noted that it was certainly not possible to be confident that she would cooperate with her baby's proposed treatment following his birth. It was beyond argument that such treatment offered him the best hope of avoiding infection. Although HIV is happily not the death sentence it once was, the fact that the boy might be able to live with HIV did not mean that he should. Treating doctors viewed his treatment in the immediate post-natal period as imperative and the Court had no doubt that it would be in his best interests.

The case had a happy ending in that, following his ruling, the judge was informed that the boy's birth went well and that his mother had complied with anti-retroviral medication prior to the caesarean. She and the boy's father had expressed clear consent to his proposed treatment. The judge congratulated the couple on the birth of their son.

Empathy and sensitivity are as important as legal expertise in cases such as this. Our experienced team can provide guidance in the most sensitive manner possible.

**Partner Note**

*Kettering General Hospital NHS Foundation Trust v C and Another [2023] EWHC 239 (Fam)*

**High Court Comes to Aid of Widow Left Almost Penniless by Husband's Will**

Failing to make reasonable provision for your dependants in your will is to positively invite discord between your loved ones after you are gone. That was certainly so in the case of a man who bequeathed not a penny to his elderly widow.

The man wanted his fortune – which was estimated to be worth up to £1.99 million – to pass solely down the male line. By his will, he divided his estate equally between his two sons. He made no provision at all for his four daughters or his widow, to whom he had been married for about 66 years.

Following his death, his widow, aged 83 and in failing health, moved out of the family home after one of the sons, with whom she had a very strained relationship, moved in. She lived with one of the daughters but had very few assets of her own. Her income consisted of under £12,000 a year in state benefits.

After she launched proceedings under the Inheritance (Provision for Family and Dependants) Act 1975, the High Court noted that it was a clear-cut case of a will failing to make reasonable provision for a financial dependant. All the husband's wealth had been accumulated during a very long marriage to which his wife had made a full and equal contribution.

Although she had worked for years in the family business, she had no direct stake in it and received no salary. She was financially dependent on her husband, who took charge of money matters and met all the family outgoings. Had the marriage ended in divorce, she would have been entitled to half his assets; yet, by the terms of his will, she was left with next to nothing.

In effectively rewriting the will, the Court ordered that the widow should have half of her husband's estate. Such an inheritance would be sufficient comfortably to meet her reasonable capital and income needs and would enable her to purchase a modest home close to her daughter.

For advice regarding inheritance law, contact **<<CONTACT DETAILS>>**.

**Partner Note**

*Kaur v Singh and Others [2023] EWHC 304 (Fam)*

**High Court Opens Way for Teenager to Undergo Gender Surgery Abroad**

Any proposal for a child to have gender surgery is likely to be subject to close judicial scrutiny. In opening the way for a teenager to undergo a double mastectomy abroad, however, the High Court reminded local authorities that they must always treat the welfare of the child concerned as the paramount factor.

The case concerned a 16-year-old who was assigned to the female gender at birth but who had lived socially as a boy for some years. On the basis that he was, and always had been, male, he did not consider himself as transgender. His parents were overseas nationals, but had lived in England for many years and had the right to remain here.

With his parents' support, he proposed travelling to their homeland for the operation. Their local authority, however, expressed deep concern about the boy's emotional and physical wellbeing and opposed the family's plan in strong and uncompromising terms. It obtained an emergency court order that prevented him undergoing the proposed surgery without judicial permission or travelling abroad for that purpose.

The council questioned whether the boy had lawfully consented to the proposal and whether the operation could legally be performed in his parents' homeland. Shortly before a further hearing of the matter, however, the council radically changed its position and applied to withdraw its opposition to the family's plan. It did so on the basis that it did not have sufficient evidence to discharge the burden of proving its case on either of those issues.

Granting the application, the Court noted that the boy was well settled in his life as a young man. He was plainly an intelligent and thoughtful person who was capable of instructing his own legal team. He was a very private individual and the lengthy legal process, which involved his most personal details being scrutinised by 30 or more professionals, had been excruciating for him.

His parents were conspicuously well-intentioned, law-abiding, loving and focused on his welfare. Although the decision to undergo surgery was a complex one, involving many sophisticated factors, the prospect of a finding that there was some defect in his consent to the operation was remote. The evidence indicated that the proposed surgery was not specifically prohibited in his parents' homeland and, in practice, does take place there.

In ordering the council to pay substantial legal costs, the Court found that criticisms of its handling of the matter were justified. It was particularly concerning that, from the start of the case, it lacked the necessary focus on the twin lodestars of the boy's welfare and the risk of significant harm. It developed a misplaced fixation on subsidiary issues and, as the evidential picture became clearer, it should have withdrawn its opposition to the family's plan earlier than it did.

**Partner Note**

*Re S (Inherent Jurisdiction: Transgender Surgery Abroad [2023] EWHC 347 (Fam)*

**Japanese Knotweed Victim Wins Compensation in Landmark Nuisance Case**

Landowners should sit up and take notice of the Court of Appeal's ground-breaking decision to award thousands of pounds in compensation to a property investor, the value of whose land was blighted by notoriously invasive Japanese knotweed.

The case concerned an investment property that adjoined local authority-owned land on which the pernicious weed had apparently been growing for over 50 years. Its owner sought damages from the council on the basis that the plant's relentless encroachment onto his land amounted to a nuisance.

Following two hearings, the owner succeeded in establishing that he had suffered a nuisance for a period of five years prior to the council taking steps to eradicate the weed from its land. However, he was refused compensation in respect of the blight on the value of his land arising from the infestation. His loss in that regard was found to be purely economic and thus irrecoverable.

Upholding his appeal against that outcome, the Court noted that the case raised an important point of principle. It found that, in nuisance cases, there is no legal bar on the recovery of damages to reflect pure economic loss. The owner's loss arising from the diminution in the value of his land was not, in any event, purely economic because of the physical manner in which it had been caused.

Japanese knotweed's evil reputation is such that the residual blight on the value of his property continued even after it was eradicated. The nuisance arose because of the plant's physical encroachment onto his property, interfering with his amenity and quiet enjoyment of his land. The blight was a consequence of that nuisance and he was thus entitled to be compensated in respect of the damage to his economic interests.

The council argued that the encroachment was historical and that any diminution in the value of the owner's land arose long before any nuisance was established. The Court, however, found that the council's delay in treating the infestation gave rise to a continuing loss for the owner. Until the council treated the Japanese knotweed on its land, any attempt by the owner to eradicate it from his own property would have been futile. In awarding him £4,900 in damages, the Court found that that was a reasonable sum to reflect the diminution in his property's value.

Contact us for expert advice on any matters relating to nuisance.

**Partner Note**

*Davies v Bridgend County Borough Council [2023] EWCA Civ 80*

**Let Down by a Cowboy Builder? Your Complaints Should Not Go Unheard**

So-called 'cowboy' builders who demand overpayment for delayed and shoddy work are a curse on householders. However, as a Court of Appeal ruling showed, the law takes a tough line with dishonest tradespeople.

The case concerned a builder's work for four clients, performed at a cost of almost £35,000. In each case, he presented himself as a solvent and stable businessman although that was far from being the case. The clients complained that his faulty work was long delayed and left incomplete.

One client received an electric shock each time she touched a washing machine he had installed. He left another client's home uninhabitable so that she and her children were left homeless and had to move in with her ex-husband for months. She spent her life savings to get her home back into some sort of order.

After he was prosecuted, the builder pleaded guilty to engaging in unfair commercial practice, contrary to the Consumer Protection from Unfair Trading Regulations 2008. The Regulations require tradespeople to exercise skill and care in their work, to adopt honest market practices and to observe the general principle of good faith.

In sentencing him to nine months' imprisonment, a judge noted that he had strung along and grossly misled all four clients. Making false promises, he simply ignored their concerns. Each of them was asked for more money and at least one of them was asked for cash in order to evade VAT. He behaved aggressively to one of the clients before walking off the uncompleted job.

Ruling on his appeal against the sentence, the Court had no doubt that the custody threshold was passed given the litany of wreckage and disaster he had left behind him. It was no excuse for him to argue that he was a victim of his own success, in that his business had mushroomed to the point where he was unable to keep pace with his commitments. It was a case of excessive greed rather than a businessman getting out of his depth. The judge's decision that only immediate custody would suffice as punishment could not be faulted.

Cutting his sentence to six months, however, the Court noted his powerful personal mitigation. He was of previous good character and had received numerous positive references. He had performed charity work and had a sound working history, and his imprisonment would impact on his young family. He had wisely decided that he no longer wished to run his own construction company.

If you have been let down and negatively impacted by a dishonest tradesperson, we can help you to pursue justice. Contact **<<CONTACT DETAILS>>** for advice.

**Partner Note**

*R v Wray [2022] EWCA Crim 804*

**Occupant of 'Floating Caravan' Granted Protection from Eviction**

Those who, by agreement, live in caravans on protected sites enjoy some valuable statutory protections against eviction. In a case that raised novel issues, the Upper Tribunal (UT) extended that benefit to the occupier of a static caravan – notwithstanding that it floats on a raft.

The caravan sits on a specially designed raft and is moored alongside a pontoon in a marina forming part of a flooded former gravel pit. It has wheels and can be rolled on and off the raft using a detachable ramp. When served with notice to quit by the marina's owner, the occupier of the caravan successfully argued before the First-tier Tribunal that she is entitled to the protections contained in the Mobile Homes Act 1983.

Rejecting the owner's appeal against that outcome, the UT acknowledged that, when taken together, the caravan and the raft constitute a houseboat. However, the fact that the caravan is afloat and forms part of a houseboat does not render it any the less a caravan, as defined by the Caravan Sites and Control of Development Act 1960. The occupier was entitled to live in the caravan by agreement with the owner.

It was, the UT noted, immaterial that the 'land' on which the caravan is located is covered by water. The site is 'protected', within the meaning of the 1983 Act, in that the occupier is authorised to live in the caravan all the year round by a certificate of lawful use and development previously issued by the relevant local authority.

Our expert lawyers can advise if you are at threat from eviction and wish to lodge a challenge.

**Partner Note**

*Tingdene Marinas Ltd v Jaffe [2023] UKUT 16 (LC)*

**What Can a Family Judge Do When Faced With a Parent's Absolute Defiance?**

In cases where even a succession of stiff prison sentences has failed to bring about compliance with court orders, what is a judge to do? A family judge faced exactly that quandary in the case of a father who defiantly refused to cooperate in arranging the return of his two daughters from Libya to England.

As long ago as 2015, the father flew with his three children to Tunisia on an agreed visit to see their paternal grandmother. Instead of returning to this country, however, he took the children to Libya, the country of his birth. He subsequently returned to England with his son, but his daughters had, so far as was known, remained in Libya ever since.

Although one of the daughters had attained adulthood – the other was approaching her teens – neither of them was permitted to leave Libya without their father's formal consent. At their mother's behest, various court orders were made requiring him, amongst other things, to give such consent and to use his best endeavours to procure their return to England.

His persistent refusal to comply with those orders resulted in findings of contempt of court being made against him on four separate occasions. He received prison sentences totalling five years. His continued defiance, however, did not deter the mother from applying to have him committed to prison yet again.

His lawyers realistically submitted no mitigation on his behalf. They argued, however, that a further prison sentence would have no coercive effect on him in that he was determined to do nothing to help procure his daughters' return to England. Even if granted further time for compliance, he would not alter his stance.

Had the father been prosecuted in a criminal court, his lawyers pointed out that the maximum sentence for child abduction is seven years' imprisonment. After a one-third deduction for a guilty plea, the maximum would be 56 months. He had already been sentenced to more than that for his successive acts of civil contempt.

Ruling on the matter, the judge noted that the maximum sentence for contempt of court is two years. However, it was possible for successive breaches of the same court orders to result in successive findings of contempt and successive terms of imprisonment which, in aggregate, exceeded two years.

In sentencing the father to a further 12-month jail term, the judge refused to overlook his wilful defiance and the appalling consequences of his conduct. Even if the sentence had no coercive effect, it was still an appropriate punishment. There was no basis for suspending the term in that he had given not an ounce of indication that that would achieve anything. The judge expressed the hope that his separation from his son during his period behind bars might prompt him to think again.

We can advise you on all aspects of family law. Contact **<<CONTACT DETAILS>>** for guidance.

**Partner Note**

*Borg v El Zubaidy [2023] EWCA Civ 148*

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