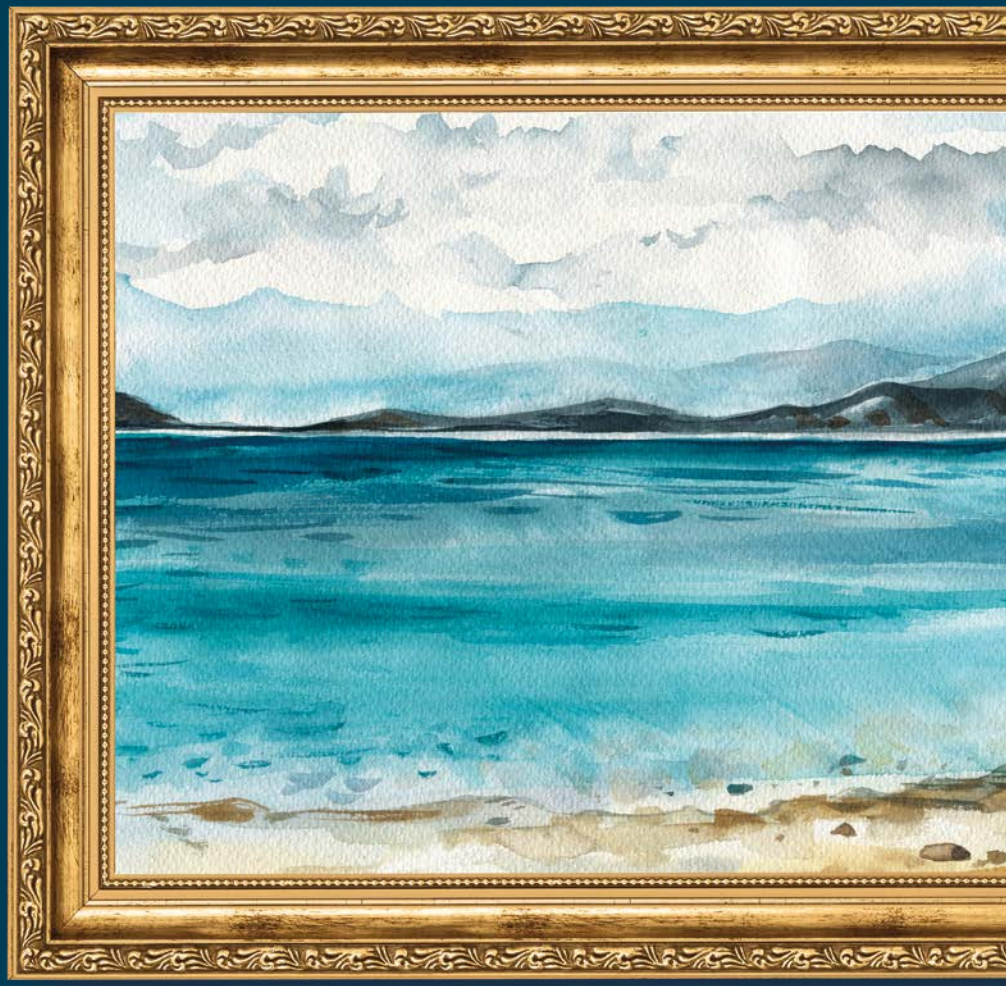
THE MOST IMPORTANT

FAMILY LAW

CASES OF 2020



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A picture of family law

It goes without saying that 2020 was a very strange year. And that applies equally to what was going on in the family courts. With the advent of social distancing in response to the Covid-19 pandemic most hearings ceased to take place in courtrooms and moved online, taking place remotely.

And whilst remote hearings kept family justice ticking over, many cases were delayed, as the system was not able to deal with its usual case volume, and some hearings could not be conducted remotely.

Nevertheless, there was no shortage of important decisions handed down in family law cases. The following is a selection of the most important, at least in relation to private law cases (i.e. cases not involving social services).

Note that these cases do not necessarily decide anything new. Sometimes they just provide important confirmation of what we already knew. Whatever, we think that they are all decisions that will be of interest to readers.

Introduction

Austin Kemp are one of the prominent family law companies based in England. Austin Kemp work with high net worth individuals, specialising in divorce and separation, finances, children and international cases.

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A salutary warning

We begin with a salutary warning for anyone tempted to interfere with evidence in a family law case (or, indeed, in any court case).

In Z (A Child: committal proceeding) the father applied for a child arrangements order, seeking contact with his child. The mother had always promoted contact, but was concerned about the father's history of cocaine addiction.

A welfare report was prepared, and recommended that the father have contact, on the basis that he provide evidence of drug-free abstinence by way of hair strand testing, over the course of 12 months. Hair strand testing involves supplying hair samples, which are then tested to see if there is any evidence of drug abuse. They are particularly useful for giving an indication over time, as hair 'stores' information on drug use as it grows, and can therefore give an indication of drug use over time.

The father produced a report, purportedly from the hair testing company, which indicated that he was drug-free. However, the mother had suspicions, in particular because the length of the hair sample referred to in the report did not accord with her observations of the father's hair length during contact handovers.

The matter was investigated, and it transpired that the father had falsified the report. He had provided a hair sample, but that confirmed that the result was positive for cocaine. The father subsequently admitted falsifying the report.

Needless to say, the court took a very dim view of the father's actions. It therefore committed him to prison for contempt for a period of 12 months, suspended for two years.

Two parental alienation cases

Parental alienation is one of the most talked-about issues in disputes between parents over arrangements for their children. It is a very serious issue and, if proved, can have grave consequences for all concerned especially, of course, the children.

This was clearly demonstrated by two cases last year, which together serve as a lesson for any parent attempting to alienate their child against the other parent.

The first case was Re T (Parental alienation), which concerned a 5 year-old girl who sadly had been the subject of legal proceedings between her parents for almost her entire life. She had lived with her mother after her parents separated and for all that time social workers and psychologists had been grappling with the problem of why her relationship with her father had been so difficult to establish and maintain.

Having exhausted all other avenues to promote a good and loving relationship with his daughter, the father applied to the court for an order that she should live with him.

Initially the mother opposed the application. However, she was eventually forced to change her position when evidence emerged to the effect that she had been alienating the child against her father, causing the child emotional harm. Accordingly, the court granted the father's application, and ordered that the child should live with him.

The facts in the second case, S (Parental Alienation: Cult: Transfer of Primary Care) were somewhat unusual. As that case title suggests, the mother, with whom the child lived, was a member of a cult. It was found that the mother's adherence to the teachings of the cult had the effect of alienating the child from her father, as he was not a cult member, and did not live his life in the way advocated by the cult.

The father applied to the court for an order transferring the care of the child to him.

The court gave the mother the opportunity to make a break with the cult, but subsequently found that the steps that she took to that end were so limited that were the child to remain in her care the process of estrangement from the father would continue, and that ultimately the child's relationship with the father would be terminated.

Accordingly, the court ordered the transfer of the child to the father.

Hopefully, these two cases, demonstrating that alienating a child could lead to having the child removed from your care, will serve to discourage parents from attempting to turn their child against the other parent.

The importance of obeying the court

The next case brings another important lesson: you cannot pick and choose what court orders to obey.

It is a feature of financial remedy proceedings that often a party is reluctant to engage with the proceedings, or to obey the orders of the court. They do not believe that the other party is entitled to anything from them, and they take exception to the proceedings being issued.

The case Negahbani v Sarwar, however, shows the folly of failing to obey the will of the court.

The case concerned what the judge called "a long-running struggle by Ms Negahbani to obtain financial support from Mr Sarwar", following their relationship and alleged marriage in Dubai, and the birth of a child in 2012.

Ms Negahbani's commenced proceedings in Dubai for a declaration of marriage and of paternity, along with proceedings in the UK for a declaration that Mr Sarwar was the father of the child and, in 2017, a petition for divorce, along with an application for financial remedies.

In May 2018 the English court made orders for a declaration of parentage and for Mr Sarwar to pay maintenance pending suit to Ms Negahbani, and in December made a financial remedy order ordering Mr Sarwar to pay.

Mr Sarwar sought to appeal against these orders. He was granted permission to appeal, but this was subject to conditions, as Mr Sarwar never attended court in this jurisdiction, had not complied with the order in respect of financial support, and Ms Negahbani had had no support for their son for over six years. The judge said that he had no doubt that Mr Sarwar was in contempt of court. He therefore ordered that Mr Sarwar pay interim maintenance of £91,500 and £160,300 towards Ms Negahbani's legal costs, by the 31st of July 2019. The appeal would not be set down for hearing until the sums were paid.

Following this, on the 19th of February 2020 the court made an order requiring Mr Sarwar to pay a further £67,000 to cover Ms Negahbani's costs of the appeal hearing, which was listed for the 16th of March. That sum was to be paid by the 26th of February, failing which the appeal would be dismissed.

Mr Sarwar did not make the payment, but still sought to proceed with his appeal. However, the court held that the appeal had been automatically dismissed on the 26th of February, pursuant to the order of the 19th of February.

The moral is clear: you cannot expect to proceed with your own application, when you have failed to comply with previous orders of the court.

Unnecessary applications

Next, a judgment that the judge involved admitted did not contain any significant legal point. It did, however, contain a noteworthy message, that is of particular importance in these times of overworked courts.

At the end of his judgment in B (A Child) (Unnecessary Private Law Applications), which concerned what he called "unnecessary litigation", His Honour Judge Wildblood QC, sitting in the Family Court in Bristol, said this:

"...the message in this judgment to parties and lawyers is this, as far as I am concerned. Do not bring your private law litigation to the Family court here unless it is genuinely necessary for you to do so. You should settle your differences (or those of your clients) away from court, except where that is not possible. If you do bring unnecessary cases to this court, you will be criticised, and sanctions may be imposed upon you. There are many other ways to settle disagreements, such as mediation."

A useful message that anyone contemplating making an application to the Family Court should heed. Most minor family law disputes can be settled by agreement, whether directly, though solicitors, or via mediation. Court proceedings should always be a last resort.

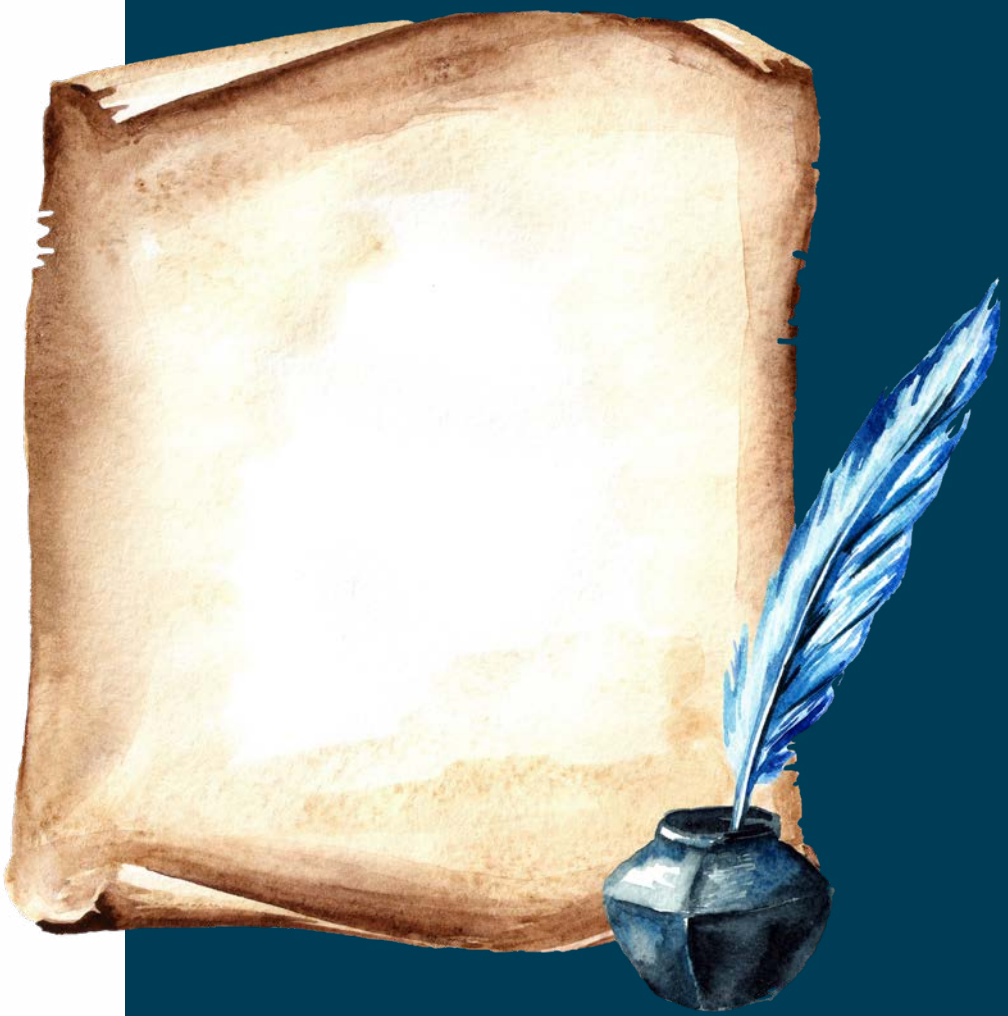
Are arbitration awards final?

Arbitration is becoming quite a popular way to resolve family disputes, particularly disputes over finances on divorce. Arbitration involves the parties agreeing to have their case decided by a trained arbitrator, rather than the court. Its primary advantage is that it can bring the matter to a conclusion far more quickly than the court, especially in these days of ever-lengthening court lists.

The important word there is 'conclusion'. Obviously, an arbitrator's award must be final and binding, in a similar way to an award made by a court. If the award is not final then arbitration would be pointless. This issue was the subject of two important judgments in 2020, one handed down by the High Court, and one by the Court of Appeal.

The judgments were quite technical, and space does not allow going through them here in detail. In the first case, R v K, the husband was unhappy with the arbitration award and sought to have it set aside. However, the High Court refused to set it aside. In the second case, Haley v Haley, the Court of Appeal allowed an appeal by a wife against an arbitration award.

What both cases illustrated, however, was that arbitration awards are quite similar in status to court awards. Just like court awards, they can be appealed, but subject to that they are really just as final and binding as court awards (note that arbitration awards are normally made into court orders in any event).



Short marriages

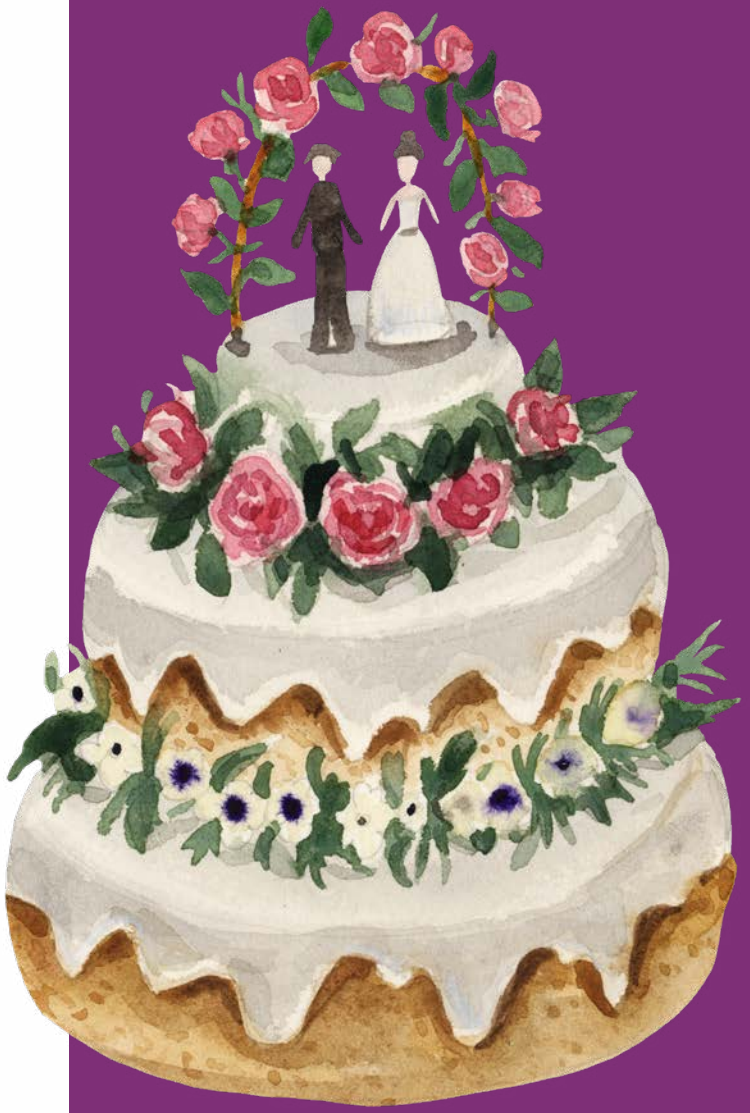
The vast majority of reported cases are of judgments handed down by judges of the higher courts: High Court judges, Court of Appeal judges and Supreme Court Justices. Circuit judges, who sit in county courts, are generally the lowest level of judge whose judgment may be reported.

But most family court decisions are actually made by a lower level of judge: the District Judge. It was therefore interesting and instructive to see a District Judge's judgment published in June.

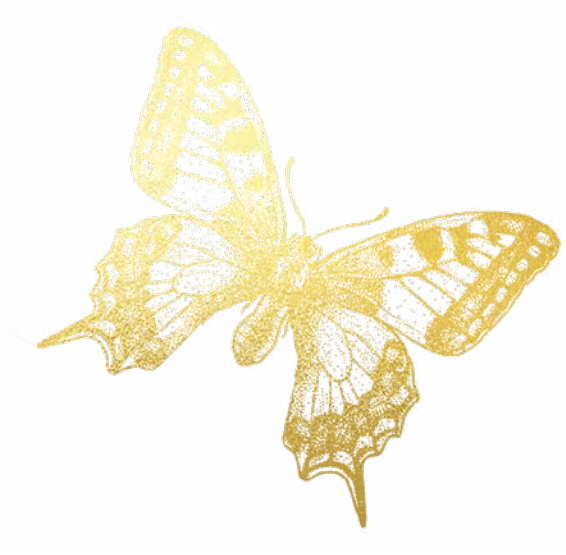
The judgment in D v D (financial remedy case) concerned a point that crops up quite often: what should be the effect upon a financial award on divorce, if any, of the fact that the marriage was short?

The answer given by the District Judge was a useful illustration of the effect of a short marriage.

He found that the marriage, in which the main asset was the former matrimonial home owned by the husband, lasted some 8 months, including pre-marital cohabitation. This, he held, warranted a departure from the usual equal division of assets, even taking into account that the wife had given up a secure tenancy prior to the marriage. The appropriate division, he found, was 20% of the assets to the wife, which would be sufficient for her to rehouse herself, and the balance to the husband.



Judicial bias



It is not uncommon in family cases, especially those involving arrangements for children, for a party to allege that the judge dealing with the case is biased against them.

In such circumstances the aggrieved party may apply to the court for the judge to 'recuse' themselves, i.e. have nothing further to do with the case. Such applications, it should be said, are only rarely successful.

There were two reported cases on the issue of judicial bias/recusal in 2020.

The first was C (A Child). The case involved care proceedings in respect of a 16 month old child. The judge, dealing with the case via a remote hearing because of the pandemic, was concerned that the child's mother was trying to avoid questions, for example by pretending to have a cough.

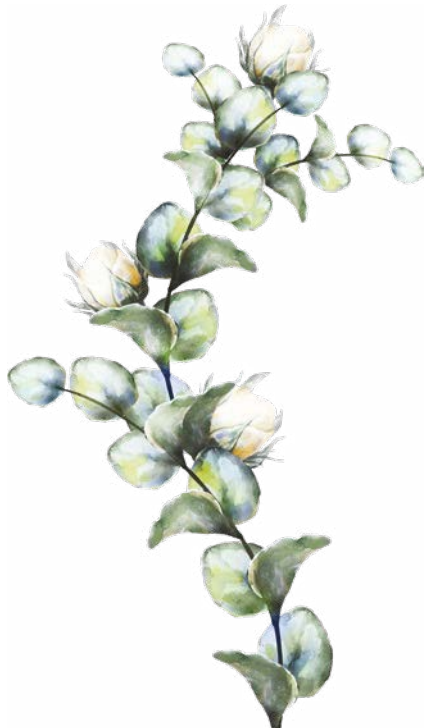
Unfortunately, after a break in the hearing the remote link on the judge's laptop remained open, and she was overheard having a private conversation on the telephone with her clerk, during the course of which she articulated her frustration about the mother, and made a number of pejorative comments about the mother.

The mother applied for the judge to recuse herself, but the judge refused the application. The mother appealed, and the Court of Appeal found that the judge's comments demonstrated a real possibility of bias. The mother's appeal was therefore allowed, and the case passed to another judge.

The other case, W (Children: Reopening/recusal), concerned a father's application to enforce a contact order. The mother alleged that the father had engaged in a pattern of abusive, violent and aggressive behaviour within his personal relationships and that he had behaved in this way towards her and towards two subsequent partners. The judge found some of those allegations proved.

The case was later to go back before the judge, but the judge recused herself, because of a family connection between herself and the mother in the case (her son and the mother were members of the same local hockey club). The question then arose whether the judge's findings against the father should be set aside due to possible bias.

The Court of Appeal held that they should not, primarily because the judge had not found out about the family connection until after she had made the findings.



Costs in children cases

The general rule as to costs in most types of court case is that the loser pays the winner's legal costs.

However in cases concerning disputes over arrangements for children the rule is that there should be no order for costs. In other words, each party should pay their own legal costs.

The primary rationale behind this rule is simple: it is not generally considered appropriate to think in terms of winners and losers in children cases. In fact, it would often be impossible to say that one parent has 'won', or that the other has 'lost'.

But that is not to say that the court cannot make costs orders in children cases.

Two cases decided last year demonstrate the approach of the court.

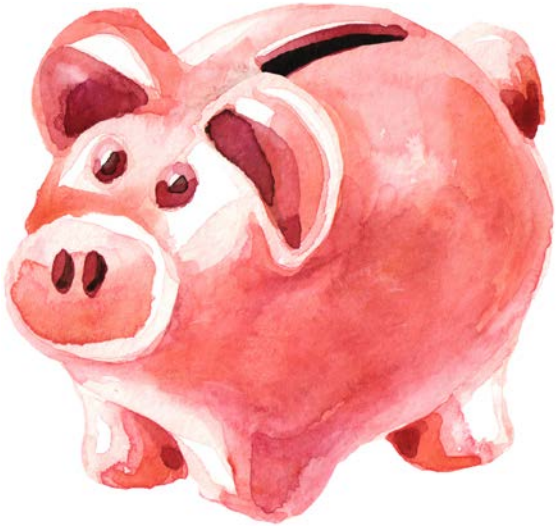
In the first case, which the judge called Father v Mother, the father had applied for an order that his two children be summarily returned from Dubai. However, at lunchtime on the first day of a three day hearing the father conceded that his application for summary return should not be granted, and instead asked for an order for contact with the children.

The mother claimed that the contact application was a matter which could have been dealt with at a far lower emotional and financial cost, and therefore sought an order for costs against the father.

The judge explained that the court can order costs if it considers the parties have engaged in reprehensible or unreasonable conduct, and that there may be other circumstances where it is appropriate and just to order costs. However, this was not one of those cases.

The other case, A v R, however, was different. The father applied for a contact order, and for an order permitting him to take the child abroad for the purpose of holidays. The application was successful, and the father then applied for an order that the mother pay his costs.

In this case the court found that the mother's conduct had been unreasonable. She had barely made any effort to engage in the proceedings, causing the father to incur additional costs. Accordingly, the court ordered the mother to pay a contribution of £15,000 towards the father's costs.



Vaccination of children

And finally, a case that may not be especially important, but that is certainly topical.

As the name suggests, M v H (Private Law: Vaccination) concerned the issue of the vaccination of two children, aged 6 and 4. The father wanted them to be vaccinated in accordance with the NHS vaccination schedule, and applied to the court for a specific issue order to this effect. The mother opposed the application.

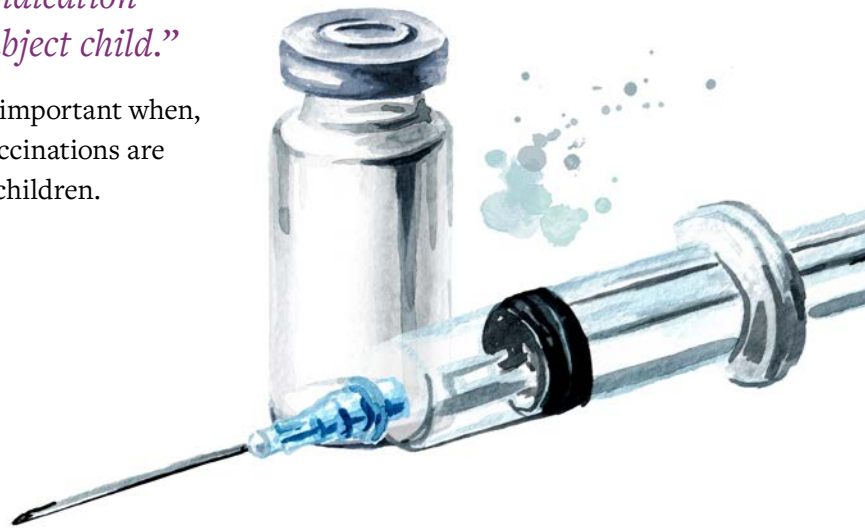
The father's application had initially concerned the MMR vaccine, but ahead of the hearing of the application the question before the court was widened to include each of the childhood vaccines that are currently included on the NHS vaccination schedule.

The court was obliged to follow a decision of the Court of Appeal from earlier in the year. In the course of that decision, which concerned the vaccination of a child in care, the Court of Appeal found (amongst other things) that all the evidence presently available supports the public health advice and guidance that unequivocally recommends a range of vaccinations as being in the interests of both children, and society as a whole.

In the circumstances the judge was satisfied that it was in the children's best interests to be given each of the vaccines that are currently specified on the NHS vaccination schedule, and made an order accordingly. He concluded his judgment with this:

"...the observations of the Court of Appeal ... make it very difficult now to foresee a case in which a vaccination approved for use in children, including vaccinations against the coronavirus that causes COVID-19, would not be endorsed by the court as being in a child's best interests, absent a credible development in medical science or peer-reviewed research evidence indicating significant concern for the efficacy and/or safety of the vaccine or a well evidenced medical contraindication specific to the subject child."

Clearly, this may be important when, and if, COVID-19 vaccinations are approved for use in children.



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