Chapter 12 update: September 2021

These are linked to the main text as follows:

- **12.4.1 Section 47 Investigations**
- **12.5.3 The threshold criteria**
- **12.5.5 The Care Plan**
- **12.5.6 Effect of a Care Order**
- **12.7 Interim care and supervisions orders**

12.4.1 SECTION 47 INVESTIGATIONS

On p 849 of the main text, we quote s 43 of the CA 1989, which is the court's power to make a child assessment order. This is a relatively-little used provision of the Act, and has never been the subject of significant argument within court proceedings until *Re I (Children: Child Assessment Order)*.[1] The father of five children was involved in extremist activity associated with the so-called Islamic State, and had been convicted of terrorism offences. Though the children were doing well in all observable respects, there was significant concern that they were being exposed to radicalisation by the father, while the mother's protective capacity was in doubt. The local authority sought a child assessment order to ascertain whether the children were indeed at risk or not. The application was opposed by the parents and the older children (who were separately represented), but supported by the guardian.

The High Court refused to make the order, where Newton J held that the local authority could not rely on s 43 in this case because the local authority already had sufficient information to conclude that the children were suffering, or were likely to suffer, significant harm, and indeed the local authority had taken steps already to seek to protect them. Consequently, the kind of assessment provided for in s 43 was no longer the appropriate response to the situation, where the local authority was already beyond having 'reasonable cause to suspect'. The Court of Appeal rejected this approach:

Re I (Children: Child Assessment Order) [2020] EWCA Civ 281

PETER JACKSON LJ:

21. With respect to the judge, I consider that he was wrong to reach this conclusion for these reasons:

[1] [2020] EWCA Civ 281.

> (1) Section 43 must be read in the context of the legislation as a whole. … [T]he scheme of the Act points to the child assessment order as forming part of the initial stages of investigation and assessment. … [T]he purpose of the section is to enable proper assessment to establish whether there is a need and justification for any further action. This is also the effect of the statutory guidance quoted above.
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> (2) The condition at ss (1)(a) provides a relatively low threshold of reasonable suspicion. This is a threshold to be crossed, not a target to be hit. The normal rule of statutory construction applies to this provision as to any other. The reason given for departing from it, namely that the court is examining the local authority's state of mind, has no logical foundation.
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> (3) The only restriction on the use of s 43 where the threshold is crossed is that provided by ss (4) which prevents the making of a child assessment order when an emergency protection order should instead be made.
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> (4) The condition in ss (1)(b) plainly exists to ensure that an assessment can only be ordered if it is required, i.e. necessary. However, a determination of whether a child is suffering or likely to suffer harm is not confined to a 'yes' or 'no' answer. The assessment is designed to provide a range of information, identifying not only whether harm may exist, but also describing its nature and extent. Nothing less will allow the local authority to understand the child's situation and determine how best to proceed. The narrow interpretation of the provision accepted by the judge overlooks the essential qualitative character of the assessment process. It also fails to connect with his own description of the underlying question as being "under what circumstances might the parents' religious views and activities result in harm to the children's physical and emotional health and wellbeing?" That was the question to which the assessment would be directed.
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> (5) The suggested interpretation does not provide "the sensible approach to child protection" spoken of by Baroness Hale.[2] It conflicts with good social work practice and needlessly limits the flexibility with which the powers under the Act should be exercised. It is clear from the guidance that it is not the intention of the legislation to push the local authority into making an application under Part IV in order to obtain an assessment. That might then lead to substantial litigation and an application for the proceedings to be withdrawn, as happened in the radicalisation cases *A Local Authority v A Mother* [2017] EWHC 3741 (Fam) and *In re A (Children) (Withdrawal of Care Proceedings: Costs)* [2018] EWHC 1841. This would fly in the face of the principle of proportionality and if it were correct it would effectively render s 43 redundant.

The court went on to consider the merits of the application before making some general

[2] *Re B (Children) (Care Proceedings: Standard of Proof)* [2008] UKHL 35, [39].

comments about the scope and use of s 43.

35. Drawing matters together, a child assessment order allows for a brief, focussed assessment of the state of a child's health or development, or the way in which he or she has been treated, where that is required to enable the local authority to determine whether or not the child is suffering, or is likely to suffer, significant harm and to establish whether there is a need and justification for any further action. The purpose of the assessment is to provide a range of information, identifying not only whether harm may exist, but also describing its nature and extent. It is part of the process of gathering information so that any child protection measures can be appropriately calibrated. It is the least interventionist of the court's child protection powers and is designed to enable information that cannot be obtained by other means to be gathered without the need to remove the child from home. It is not an emergency power and it may be particularly apt where the suspected harm to the child may be longer-term and cumulative rather than sudden and severe. The order is compulsory in relation to parents but not for a competent child who refuses to participate. The views of an older child are an important consideration when a decision is taken about making an order, but it cannot be said that opposition makes an order unlikely: it depends on the facts of the case and the nature of the risk and the assessment.

36. Seen in this light, the circumstances of this case might be seen as a paradigm example of a case for which s.43 was intended. More than that, I would conclude that the evidence so clearly pointed to the making of a child assessment order that the judge's contrary conclusion cannot stand. The outcome, by which the local authority was told to go away and think again after a process that had already hung over the family for a full year since the father's release, fails to address obvious risks that now require careful assessment. The only remaining way in which the assessment can be made without the issuing of care proceedings is by means of a child assessment order. There is no purpose in remitting the decision, and I would therefore allow the appeal and make the child assessment order in the terms now helpfully drawn up by the parties.

12.5.3 THE THRESHOLD CRITERIA

‘Is attributable to the care given to the child not being what it would be reasonable to expect a parent to give to him’

Within this lengthy section starting on p 872 of the main text, we include discussion about parents or other carers who are not *proven* to be the perpetrators of harm to a child, but are said to be within the ‘pool of possible perpetrators’. The Court of Appeal has offered further guidance on this issue – in particular, as to what is *not* permissible under this approach – in the case of *Re B (Children: Uncertain Perpetrator)* [2019] EWCA Civ 575.

The family had four children, a boy and three girls. The local authority brought care proceedings after the three girls were found to have gonorrhoea. The local authority suggested that the father was responsible and that this was a case of sexual abuse; the parents argued that, as the family lived in shared accommodation, the girls could have been infected either from a shared toilet or from one of two other men living in the property. The trial judge put his conclusions about this issue in this way:

> 81. … Although I am not able to say definitely that [the father] was responsible for the infection of the children, I am not able to exclude him as there must remain a real possibility of him having caused this infection in some way…
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> 82. Accordingly, I find nothing more than that the father is within a pool of possible perpetrators with other unknown males who may have had access to the children, or at least one of them, including the two young men in the family home.

The parents appealed, and the Court of Appeal allowed the appeal on the basis that the judge's approach to the issue of the 'pool of possible perpetrators' was flawed.

Re B (Children: Uncertain Perpetrator) [2019] EWCA Civ 575

PETER JACKSON LJ:

ANALYSIS

46. Drawing matters together, it can be seen that the concept of a pool of perpetrators seeks to strike a fair balance between the rights of the individual, including those of the child, and the importance of child protection. It is a means of satisfying the attributable threshold condition that only arises where the court is satisfied that there has been significant harm arising from (in shorthand) ill-treatment and where the only 'unknown' is which of a number of persons is responsible. So, to state the obvious, the concept of the pool does not arise at all in the normal run of cases where the relevant allegation can be proved to the civil standard against an individual or individuals in the normal way. Nor does it arise where only one person could possibly be responsible. In that event, the allegation is either proved or it is not. There is no room for a finding of fact on the basis of 'real possibility', still less on the basis of suspicion. There is no such thing as a pool of one.

47. It should also be emphasised that a decision to place a person within the pool of perpetrators is not a finding of fact in the conventional sense. As is made clear in *Lancashire* at [19], *O and N* at [27-28] and S-B at [43], the person is not a proven perpetrator but a possible perpetrator. That conclusion is then carried forward to the welfare stage, when the court will, as was said in *S-B,* "consider the strength of the possibility" that the person was involved as part of the overall circumstances of the case. At the same time it will, as Lord

Nicholls put it in *Lancashire*, "keep firmly in mind that the parents have not been shown to be responsible for the child's injuries." In saying this, he recognised that a conclusion of this kind presents the court with a particularly difficult problem. Experience bears this out, particularly where a child has suffered very grave harm from someone within a pool of perpetrators.

48. The concept of the pool of perpetrators should therefore, as was said in *Lancashire*, encroach only to the minimum extent necessary upon the general principles underpinning s.31(2). Centrally, it does not alter the general rule on the burden of proof. Where there are a number of people who might have caused the harm, it is for the local authority to show that in relation to each of them there is a real possibility that they did. No one can be placed into the pool unless that has been shown. This is why it is always misleading to refer to 'exclusion from the pool': see *Re S-B* at [43]. Approaching matters in that way risks, as Baroness Hale said, reversing the burden of proof.

49. To guard against that risk, I would suggest that a change of language may be helpful. The court should first consider whether there is a 'list' of people who had the opportunity to cause the injury. It should then consider whether it can identify the actual perpetrator on the balance of probability and should seek, but not strain, to do so: *Re D (Children)* [2009] EWCA Civ 472 at [12]. Only if it cannot identify the perpetrator to the civil standard of proof should it go on to ask in respect of those on the list: "Is there a likelihood or real possibility that A or B or C was the perpetrator or a perpetrator of the inflicted injuries?" Only if there is should A or B or C be placed into the 'pool'.

50. Likewise, it can be seen that the concept of a pool of perpetrators as a permissible means of satisfying the threshold was forged in cases concerning individuals who were 'carers'. In *Lancashire*, the condition was interpreted to include non-parent carers. It was somewhat widened in *North Yorkshire* at [26] to include 'people with access to the child' who might have caused injury. If that was an extension, it was a principled one. But at all events, the extension does not stretch to "anyone who had even a fleeting contact with the child in circumstances where there was the opportunity to cause injuries": *North Yorkshire* at [25]. Nor does it extend to harm caused by someone outside the home or family unless it would have been reasonable to expect a parent to have prevented it: *S-B* at [40].

Whether Peter Jackson LJ's suggestion of a change of language takes hold or not remains to be seen, but this judgment nonetheless offers an important clarification to the law in a number of respects. In particular, the re-emphasis on the fact that there cannot be a 'pool' of just one possible perpetrator is crucial: if there is only one possible perpetrator and the local authority has not proved on the balance of probabilities that that individual did, in fact, cause the harm, then that person cannot be kept 'in the frame' by stating instead that he is part of a 'pool of possible perpetrators'. That analytical tool applies only where (i) harm has been established and (ii) there are two or more possible perpetrators who are sufficiently involved in the child's care to 'count' within s 31, and (iii) the court is unable to determine, on the balance of probabilities, which of those persons was responsible for the harm, yet none can be discounted by the evidence either.

12.5.5 THE CARE PLAN

On pp 891-2 of the main text, we discuss the court's use of HRA 1998 injunctions to prevent children being removed from their families by a local authority in circumstances where a care order has been made, but the care plan provided for the children to remain living at home. The main authority that we cite in this regard was the High Court's decision in *Re DE (Children Under Care Order: Injunction Under Human Rights Act)*.[3] The same issue arose in *Re G (Discharge of Care Orders: Injunction Under Human Rights Act)*, where the Court of Appeal was called on to consider an appeal against a judge's refusal to issue such an injunction on the basis that she considered that she did not have the jurisdiction to do so, and her subsequent decision to discharge the care order entirely to ensure that the children were not removed.

Re G (Discharge of Care Orders: Injunction Under Human Rights Act) [2019] EWCA Civ 1779

BAKER LJ:

22. The power to grant relief under the Human Rights Act may be exercised by all courts since under s.6(3) all courts are "public authorities" under the Act. Under s.7(1)(b) of the Act, a person claiming to be a victim of an unlawful infringement of human rights by a public authority may rely on the Convention rights in any ongoing legal proceedings. Under s.8(1), a court can grant such relief or remedy or make such order within its powers as it considers appropriate. It has been held in the family law field that the court has the power, in appropriate circumstances, to grant injunctions under the Human Rights Act in the course of care proceedings to prevent a local authority unlawfully interfering with Article 8 rights: see *Re S, Re W* [2002] UKHL 10, *Re V (Care Proceedings: Human Rights Claims)* [2004] EWCA Civ 54 and *Re S (Care Proceedings: Human Rights)* [2010] EWCA Civ 1383. Judge Cronin was clearly under the mistaken impression that she was not authorised to hear an application under the Human Rights Act. … Had she realised that she did have that power, it seems to me highly likely that she would have exercised it. She was concerned the local authority was proposing to remove the children without carrying out an essential further assessment. She thought that taking that course was unjustified. In those circumstances, it is highly likely that she would have concluded that the removal of the children was an unlawful interference with the family's Article 8 rights so as to justify extension of the injunction. In that way, the court could have ensured the children remained at home until the discharge application was ready for final decision.

[3] [2014] EWFC 6. Baker J's decision was approved by the Court of Appeal in *Re S* [2018] EWCA Civ 2512.

12.5.6 EFFECT OF A CARE ORDER

On pp 893-4 of the main text, we note the (obiter) view of Sir James Munby P in *Re AB (Medical Treatment: Care Proceedings)* that a local authority will be 'ill-advised' to rely on its parental responsibility under s 33 of the CA 1989 to make major decisions about a child's upbringing, such as authorising serious medical treatment, where that issue was not part of the court proceedings that led to the making of the care order in the first place. That view raises a number of complications, not least of which is: what constitutes a major decision requiring the local authority to apply to the court?

The issue arose in relation to whether children who were in local authority care should receive routine vaccinations. The court had previously held that vaccination constituted a significant decision which required the court's involvement,[4] but at first instance in *Re H (Parental Responsibility: Vaccination)* Hayden J had held that there was no need for the local authority to seek a court order, and it was free to rely on its own parental responsibility. The parents appealed, but Hayden J's decision was upheld by the Court of Appeal.

Giving the judgment of the court, King LJ set out the history of concerns about vaccinations from a medical perspective, concluding that unless there was some new, reputable development in the medical research then 'the proper approach to be taken by a local authority or a court is that the benefit in vaccinating a child in accordance with Public Health England guidance can be taken to outweigh the long-recognised and identified side effects'.[5]

Turning to the position of local authorities, King LJ quoted the earlier judgment of Sir James Munby P in *Re AB (Medical Treatment: Care Proceedings)*,[6] which we refer to on pp 893-4 of the main text. The then-President had said that a local authority would be 'ill-advised' to seek to rely on its own parental responsibility to authorise serious medical treatment against the opposition of the parents where that issue was not the reason why the child was in local authority care in the first place. King LJ noted that this conclusion may have been presented in too sweeping a way:

Re H (Parental Responsibility: Vaccination) [2020] EWCA Civ 664

KING LJ:

67. It must be borne in mind that Sir James had not heard argument on the s.33(3)(b) issue and was making, at first instance, an "observation". It is unclear whether, in making his general

[4] *Re SL (Permission to Vaccinate)* [2017] EWHC 125.

[5] Ibid

[6] [2018] EWFC 3.

observation, he meant to include all medical treatment of whatever nature, or only of the type with which he (and all the other cases in this section of the judgment) were concerned, namely a desperately ill child. In the unlikely event that Sir James' view that a local authority should not use its powers under s.33(3)(b) CA 1989 related to *any* medical treatment, then, with the greatest of respect, I would disagree . . .

Is the giving of a vaccination to be regarded as a 'grave' issue?

85. I cannot agree that the giving of a vaccination is a grave issue (regardless of whether it is described as medical treatment or not). In my judgment it cannot be said that the vaccination of children under the UK public health programme is in itself a 'grave' issue in circumstances where there is no contra-indication in relation to the child in question and when the alleged link between MMR and autism has been definitively disproved.

The Court of Appeal went on to make a number of important points about the local authority's ability to seek orders when it did not have the child in its care already, which we consider in our update to Chapter 10 in relation to the limitations on the exercise of parental responsibility.[7]

Peter Jackson LJ (McCombe and King LJJ agreeing) built on the decision in *Re H* when considering another issue which the local authority might have wanted to use its PR to decide regarding a child in its care, namely an application to change a child's nationality, in *Re Y (Children in Care: Change of Nationality)*.[8] Whereas vaccinations were said to be so non-significant that the local authority could proceed over the objection of the parents without need for a court order, Jackson LJ held that 'that s.33 CA 1989 does not entitle the local authority to apply for British citizenship for these children, in the face of parental opposition and where that may lead to a loss of their existing citizenship, without first obtaining approval from the High Court'.[9] Given the significance of nationality in terms of both legal rights and statuses, and in terms of a person's sense of identity, this conclusion is unsurprising, and the difference between *Re H* and *Re Y* in this regard is clear. There will, however, be cases in between these two examples there the line is far more blurred, and where local authorities are likely to struggle to know whether they are required to seek a court order or not.

12.5.7 CONTACT WITH A CHILD IN CARE

The court's power to make interim orders while care proceedings are underway is clear and generally uncontroversial. However, an unusual question of law arose in *Re Q (Children: Interim Care Order: Jurisdiction)* [2019] EWHC 512. The case involved a number of children,

[7] See also R George, 'Parental Responsibility, Vaccinations, and the Role of the State' (2020) 136 LQR 559.
[8] [2020] EWCA Civ 1038.
[9] Ibid, [24].

but the issue arose in relation to the oldest, who was approaching her 17th birthday at the time the question of whether an interim care order could be made arose.

12.7 INTERIM CARE AND SUPERVISION ORDERS

The court's power to make interim orders while care proceedings are underway is clear and generally uncontroversial. One key issue, addressed by the Court of Appeal in *Re C (Interim Separation)* [2019] EWCA Civ 1988 concerns the circumstances where, even though the court may technically have the *power* to make an interim care order because the s 38 threshold is met, nonetheless it is not *proportionate* to exercise that power. On the facts, the case concerned a decision of the Family Court to remove a 5-month old child from his mother's care, which the Court of Appeal said had failed to 'assess the necessity and proportionality of separation'. In other words, the court must keen in mind the Article 8 rights of both the parent(s) and the child(ren) when considering removal under an interim care order, just as it must in relation to a full care order.

The Court of Appeal returned to the issue in *Re N (Interim Order / Stay)* [2020] EWCA Civ 1070, where Jackson LJ set out some general principles.

Re N (Interim Order / Stay) [2020] EWCA Civ 1070

PETER JACKSON LJ:

28. The power to make interim orders in cases involving children allows the court to regulate matters that cannot await the final hearing. Common examples are interim contact orders in a private law case or interim care orders in a public law case. When exercising interim powers the court is inevitably acting on incomplete information and often has to act with urgency. The principles of child welfare, family rights and procedural fairness will apply in the context of the provisional nature of the court's task.

29. Here, the interim threshold was accepted to have been crossed and the court was making an interim welfare decision. The issue for the judge was the balance of risks and benefits for the children of remaining in their mother's care. …

30. A court considering an interim application in proceedings concerning children is required to undertake a level of investigation that is appropriate to the issues that need to be decided and sufficient to enable it to make a fair and effective evaluation of the advantages and disadvantages for the children of making or not making the interim order. Acting within the framework of the relevant substantive and procedural law, the court has a wide and flexible discretion as to how its investigation and evaluation should be conducted at the interim stage.

There have been a number of cases through 2020 where the court's struggles to conduct fair hearings in the context of the Covid-19 pandemic have been apparent. While in many areas of family law, cases were largely adjourned, care proceedings – particularly urgent, interim cases where local authorities argued for immediate removal to safeguard children's welfare – continued. The remote hearings necessitated by the pandemic created serious challenges for the courts, but do not change the fundamental legal duties owed by the courts and by local authorities to act in compliance with Article 8 rights.

A more unusual question of law arose in *Re Q (Children: Interim Care Order: Jurisdiction)* [2019] EWHC 512. The case involved a number of children, but the issue arose in relation to the oldest, who was approaching her 17th birthday at the time the question of whether an interim care order could be made arose.

By s 31(3) of the CA 1989, the court cannot make a care or supervision order (including an interim order) after a child's 17th birthday (or their 16th birthday in the event they are married). The question was: can the court make an interim order when the child is 16 which will *continue to have effect* after the child is 17? Because an interim care order can now last until the disposal of the main care proceedings, however long that may be (as opposed to the pre-2014 position where an interim order could last no more than 8 weeks and the be renewed for periods of no more than 4 weeks at a time), this issue took on greater practical importance than it might previously have done. While the issue was subject to passing comment by Williams J in *Re A (Wardship: 17-year-old: Section 20 Accommodation)* [2018] EWHC 1121, the question had not been subject to full argument and decision by the court prior to *Re Q*. Giving judgment, Gwyneth Knowles J noted a number of elements to consider, including the autonomy of older children, and continued:

Re Q (Children: Interim Care Order: Jurisdiction) [2019] EWHC 512

GWYNETH KNOWLES J:

23. I have had regard to all the above in interpreting the provisions of section 38. The following matters seem to me to be highly pertinent to that exercise. First, a child is defined in the Act as any person under the age of eighteen yet Parliament specifically chose to curtail the court's jurisdiction to make final and substantive public law orders in respect of children who had reached the age of 17. Insofar as an exception applies to the jurisdiction to make public law orders, it is a downward revision of the age limit to sixteen years in the case of a child who is married. Second, the Act consistently emphasises the age of sixteen in recognition of a child's developing autonomy hence (a) the provision that section 8 orders may only be made in exceptional circumstances if a child is aged 16 and (b) the provisions of section 20 which provide for a child aged 16 to consent to accommodation even if a holder of parental responsibility objects. The downward revision of the age at which substantive public law order can be made reflects the fact that, in marrying, a child has taken a step to establish their own

family separate from the care and control of a parent. Third, whilst the ability of a parent, local authority or court to impose arrangements under the Act on an unwilling child diminishes as the child approaches adulthood, it is important to bear in mind that, in the case of a sixteen or seventeen year old who lacks capacity, they are capable of being subject to powers exercised by the court under the Mental Capacity Act 2005 [section 2(5) of that Act].

…

27. I endorse [counsel's] submissions that Parliament chose in passing the [Children] Act to demarcate seventeen or sixteen (if married) as the age after which a child could not be placed in the care or supervision of a local authority without a full disposal of the case having been achieved. That was a recognition of the growing autonomy of the individual child. Likewise, the ability of a final care order to persist until the age of eighteen is a recognition of the obligations placed on a local authority, once parenting has been established to fall below the reasonable standard expected, to ensure a child is not left without appropriate care before becoming an adult. …

28. All the above brings me to the conclusion that no interim care or supervision order will endure beyond the date of a child's seventeenth birthday or the date of a child's marriage if aged sixteen. To be clear, interim care and supervision orders made for a period during which the child turns either seventeen or gets married (if aged sixteen) are impermissible. If, prior to the 2014 amendments, interim public law orders were being made which extended beyond the child's seventeenth birthday, they should not have been given (a) the absence of an explicit power to continue such orders beyond a child's seventeenth birthday and (b) the age thresholds set out in the Act. …

It may be noted that Knowles J's reference to the difference in approach in relation to older children finds some parallel in private law proceedings, where the court's power to make orders for children over the age of 16 is limited, but does not necessarily sit comfortably with the approach of courts to child protection matters, where often ways are found for the court to take action in relation to older children thought to be at risk.[10]

[10] See, eg, our discussion of *Re W (Secure Accommodation Order)* [2016] EWCA Civ 804 on pp 843-4 of the main text.