Neutral Citation Number: [2021] EWFC 105

Case No: SE21P00182

IN THE FAMILY COURT AT SHEFFIELD

Sheffield Family Court,

West Bar, Sheffield, S3 8PH

Date: 15 December 2021

Before:

MR JUSTICE POOLE

- -

Between:

Re: A (Jurisdiction: Family Law Act 1986) (Application for Amplification)

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- -

Ms Marlene Cayoun (instructed by Expatriate Law) for the Applicant

Dr Charlotte Proudman (instructed by Nelsons Law) for the Respondent

Hearing date: 30th November 2021

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JUDGMENT

This judgment was delivered in private. The anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

Mr Justice Poole:

Introduction

1.
This is a judgment on the preliminary issue of whether this court has jurisdiction to hear an application for a child arrangements order under s.8 of the Children Act 1989 when the child and parents concerned all live abroad. The Applicant is the father and the Respondent the mother of two children: J, aged 15, and A, aged 10. The parties and their children are all British citizens. The parties married in August 2013 in Nottingham but separated three years later and divorced, the decree absolute having been made by the Family Court in Newport, Gwent, in August 2017. Currently, J lives with the father in Country B, whilst A lives with the mother in Country C. Both countries are in the Middle East and neither are signatories to the 1996 Hague Convention. The application before the court is the father's dated 30 September 2021 for an order that A should live with him in country B.

By order of HHJ Lynch on 2 November 2021, the matter was listed for a hearing of the preliminary issue of jurisdiction.

2.
The parties agree that,

i)
The matrimonial proceedings between the parties ended with the decree absolute in 2017.

ii)
The father's application is for an order under s.8 of the Children Act 1989 which falls within the category of orders within s.1(1)(a) of the Family Law Act 1986 (FLA 1986).

iii)
Neither child is habitually resident or present in the jurisdiction of England and Wales.

iv)
The father's application was made after Britain left the European Union and Council Regulation No. 2201/200 ("Brussels II") has no application to the present case.

3.
Accordingly, the preliminary issues which require determination are:

i)
Does the question of making the order arise "in connection with" matrimonial proceedings (s.2(1)(b)(i) of the FLA 1986)?

ii)
If so, are the proceedings "continuing" (ss.2A(1)(a)(ii) and 42(2) of the FLA 1986) notwithstanding the decree absolute?

iii)
If the court does have jurisdiction under the FLA 1986, would it nevertheless be more appropriate for the application to be determined outside the jurisdiction of England and Wales such that the court should direct that no order should be made (s.2A(4) of the FLA 1986)?

4.
The direction given on 2 November 2021 was for a hearing "on the question of jurisdiction only, to be heard on submissions." No provision was made for evidence to be filed and served. Dr Proudman, for the mother, urged the court to determine the third issue, which is one of appropriate forum, but Ms Cayoun, for the father, cautioned that the court should require evidence, for example as to the operation of family law in Country C, before determining that question.

Background

5.
The background to the father's application is as follows:

i)
Both parties were born in England. They began co-habiting in 2006. They married in Nottingham in 2013. In 2014 they moved, with both children, to Country D where both taught at an international school. They separated in 2016. The father commenced divorce proceedings in the Newport Family

Court, Gwent, which proceeded by consent and ended with the making of the decree absolute in August 2017.

ii)
Following the parties' separation, both children initially lived with the mother but in early 2018 J moved to live with the father. Later that year both parties and the children returned to live in England after the teaching contracts ended, but the mother applied to the Family Court at Chesterfield for permission to remove A from the jurisdiction to live with her in Country C. As recorded in the order of HHJ Bellamy on 13 August 2018, the father believed that it was in A's best interests to move to Country C to live with the mother. The court recorded that it had jurisdiction on the basis of habitual residence. In effect, the court allowed the mother to take A with her to live in Country C where they both remain. The mother is employed as a teacher in that country. It is not disputed that A is habitually resident there.

iii)
From August 2018 to August 2019 J lived with grandparents in Scotland before moving to live with the father in Sheffield. The father maintains that on a visit to him during the Christmas holiday in 2019, A disclosed to him that the mother had physically abused her. This is denied by the mother and I have received no evidence on the matter beyond the father's assertion. The father and J decided to move to the Middle East, specifically to Country B where the father had an offer of a job. He says that the intention was to be closer to A. He applied to the Family Court at Sheffield for permission to remove J from the jurisdiction to live with him in Country B. By consent of the parties, HHJ Lynch made orders on 22 July 2020 permitting the father to relocate with J to Country B, and providing for J to live with the father, A to live with the mother, and for each child to spend time with the parent with whom they were not living. Although the child arrangements orders were in respect of both children, the court recorded that it had jurisdiction in relation to J on the basis of habitual residence but did not make any recording of its jurisdiction in relation to the orders concerning A. The mother was represented by solicitors for the purpose of the proceedings and the consent order.

iv)
In July 2021 the father and J visited Country C. The father alleges that A disclosed abuse of her by the mother. Again, this is denied and I have received no evidence on the allegation beyond the father's assertion. He alerted the Country C's police and child protection services but this resulted in no action being taken against the mother. Indeed, the mother made a complaint of harassment against the father and he signed a document which he now understands was an agreement not to make allegations against the mother, in order to allow him to leave Country C. The father's contact with A has been very restricted, he says, and concerned for her welfare, he has made his application to this court for an order that she should live with him.

The Statutory Provisions

6.
The relevant provisions of the FLA 1986 are:

1 Orders to which Part I applies.

(1) Subject to the following provisions of this section, in this Part "Part I order" means—

(a) a section 8 order made by a court in England and Wales under the Children Act 1989, other than an order varying or discharging such an order…

There is no dispute that the father's application is for such an order.

2 Jurisdiction: general.

(1) A court in England and Wales shall not make a section 1(1)(a) order with respect to a child unless —

(a) it has jurisdiction under the Hague Convention, or

(b) the Hague Convention does not apply but—

(i) the question of making the order arises in or in connection with matrimonial proceedings or civil partnership proceedings and the condition in section 2A of this Act is satisfied, or

(ii) the condition in section 3 of this Act is satisfied.

As noted, the 1996 Hague Convention does not apply and therefore does not confer jurisdiction in this case. Given the agreement that A is neither habitually resident nor present in this jurisdiction, the condition under section 3 of the Act does not apply. Hence, the relevant provision is at s.2(1)(b)(i).

2A Jurisdiction in or in connection with matrimonial proceedings or civil partnership proceedings.

(1) The condition referred to in section 2(1) of this Act is that the proceedings are proceedings in respect of the marriage or civil partnership of the parents of the child concerned and—

(a) the proceedings—

(i) are proceedings for divorce or nullity of marriage, or dissolution or annulment of a civil partnership, and

(ii) are continuing;

The parties agree that the matrimonial proceedings were in respect of their marriage, they are the parents of the child concerned, A, and the proceedings were for divorce. There remains an issue of whether the proceedings are "continuing".

42 General interpretation of Part I.

(2) For the purposes of this Part proceedings in England and Wales or in Northern Ireland for divorce, nullity or judicial separation in respect of the marriage of the parents of a child shall, unless they have been dismissed, be treated as continuing until the child concerned attains the age of eighteen (whether or not a decree has been granted and whether or not, in the case of a decree of divorce or nullity of marriage, that decree has been made absolute).

Submissions and Caselaw

7.
The first issue for the court is whether the question of making the s.8 order which the father seeks arises "in or in connection with matrimonial proceedings". The parties agree that there were matrimonial proceedings but they ended with the decree absolute in 2017. The father does not seek to argue that the question of making the s.8 order now sought arises "in" matrimonial proceedings, even if they are regarded as "continuing" proceedings under s.42(2) of the FLA 1986. Hence, the issue is whether it arises "in connection" with the concluded matrimonial proceedings.

8.
For the father, Ms Cayoun relies on the Court of Appeal decision in Lachaux v Lachaux[2019] 2FLR 712. In that case the mother was British, the father, French. The parties had divorced in Dubai and the father was granted custody of the child. The French courts refused to recognise the Dubai divorce. The mother petitioned for divorce in England and applied for a child arrangements order. At first instance Mostyn J recognised the Dubai divorce and set aside the mother's petition. In any event he would have dismissed her application for a child arrangements order on the basis that the English court did not have jurisdiction under s.2(1)(b)(i) of the FLA 1986. The Court of Appeal held that Mostyn J had been entitled to recognise the Dubai divorce but had been wrong in his interpretation of s.2(1)(b)(i) of the FLA 1986. Moylan LJ said at [185] that the relevant statutory provisions,

"were included in the 1986 Act specifically to replace the jurisdiction which previously been provided by s 42 of the 1973 Act. They were not made redundant by the repeal of ss 41 and 42, as Mostyn J determined, but were introduced to replace the latter. This was expressly considered by the Law Commissions and, for the reasons given, it was recommended that this jurisdiction should continue. In my view, the reasons they gave, and which were clearly accepted, remain equally valid today. It would be difficult to justify the court having financial remedy jurisdiction but not, even potentially, having parental responsibility jurisdiction".

And at [187]

"The courts should take a broad view as to whether the question arises in or in connection with the other proceedings. In broad terms all that is required is that the parties to those proceedings are 'the parents of the child concerned', that the proceedings are taking place or did take place in England and Wales, and that one or other or both of the parents seek a s 1(1)(a) order because their marriage or civil partnership is being or has been dissolved. The reason the court can take a broad view is because this provision only applies if neither BIIA nor the 1996 Hague Convention apply and because s 2A(4) balances the broad scope of s 2(1)(b)(i) by giving the court the power not to exercise this jurisdiction."

9.
Prior to the FLA 1986, the Law Commission and The Scottish Law Commission Report (Law Com. No. 138) (Scot Law Com, No. 91) Family Law, Custody of Children – Jurisdiction and Enforcement within the United Kingdom, recommended that where a United Kingdom court has jurisdiction in relation proceedings for divorce, it should retain jurisdiction to make "custody orders" in those proceedings. The report then addressed the implications of that principle for concluded matrimonial proceedings:

"4.8 The practical application of this general principle raises a problem as to when, for the purpose of custody jurisdiction, proceedings for divorce, nullity or judicial separation should be regarded as coming to an end. The effect of existing law in all three United Kingdom countries is that once the court is duly seised of the matrimonial dispute, it retains jurisdiction to deal with questions relating to custody of and access to the children. This jurisdiction is retained however long ago the divorce was granted, however distant the connection of the child with the country in which the divorce took place, and however close and long-standing the child's connection with some other part of the United Kingdom. The question we have to answer is whether, for the purposes of our scheme, the jurisdiction of the divorce court to make custody orders should continue so long as the child is within the appropriate age limit, i.e. 18 in England and Wales and Northern Ireland and 16 in Scotland.

"4.9 We have reached the conclusion that a court dealing with divorce, nullity or judicial separation proceedings should remain entitled to exercise custody jurisdiction until the child attains the

appropriate age, even where the child or his parents are or have become habitually resident elsewhere in the United Kingdom. Our main reason for reaching this conclusion is the impossibility of devising any general rule to the contrary effect which would not sometimes operate against the interests of the child's welfare or against those of the parents.

"4.10 Nevertheless, we recognise that in some cases it will be advantageous for issues as to custody and access to be determined by a court in a United Kingdom country other than that in which the proceedings for dissolution of the marriage are brought …

"4.11 We therefore recommend as follows-

Where a court in the United Kingdom has jurisdiction in proceedings for divorce, nullity of marriage or judicial separation, that court should continue to have jurisdiction to make custody orders in the course of those proceedings."

10.
The report's recommendations were accepted, as Moylan LJ noted in Lachaux, and enacted in the FLA 1986. Ms Cayoun submits that applying the broad view referred to by Moylan LJ, the question of making the s.8 order for which the father now applies is "in connection with" the divorce proceedings, notwithstanding that they were concluded over four years ago. The parties are the parents of the child concerned, the divorce proceedings took place within the jurisdiction of England and Wales, and the father now seeks s.1(1)(a) order (under the FLA 1986) because the marriage has been dissolved.

11.
For the mother, Dr Proudman submits that the father's application is not now made "because the marriage has been dissolved." His application is not connected with the previous, concluded matrimonial proceedings. There is no causal link between them. She submits that there must be a temporal link between the matrimonial proceedings and the question in the current proceedings. I understood her to mean that there must be a degree of proximity in time between the s.8 application and the earlier divorce. Dr Proudman referred to J v U (Child Arrangements Order: Jurisdiction)[2016] EWHC 2481 (Fam), [2017] Fam 235, [2017] 2 WLR 760 in which Bodey J said:

"[16] Since the words in question ("in or in connection with") remain in the section, I must clearly apply them and Mr Scott is not suggesting otherwise. That said, his submissions are persuasive as to the fact that, if the mere existence of divorce proceedings here can clothe the court with jurisdiction to make child welfare orders in respect of children habitually resident elsewhere, then it would drive a coach and horses, or at least a coach, through the now generally accepted approach to the issue of jurisdiction. Clearly, if Parliament had wanted to say that, whenever there are pending matrimonial proceedings here, this court should without more have jurisdiction in respect of issues regarding the parties' children, then it could have done so. But it did not; and yet the criterion for jurisdiction remains "in or in connection with" matrimonial proceedings.

"[17] It is self-evident on the face of the petition that the application which the mother now wishes to make is not "in" her matrimonial proceedings, because no application is nor could have been made there. But what does "in connection with" actually mean? Mr Hale submits it merely means that if there are pending divorce proceedings, then any application regarding the children is automatically connected with them; but I cannot accept that. I consider, as did Judith Parker J obiter in AP v TD[2011] 1 FLR 1851, paras 122–123 that there must be some nexus more than just the mere existence of the two sets of proceedings and the fact that the parties to them are the same. It is not entirely easy to see what nexus there can or could be between proceedings seeking quite different

reliefs; but it may be that the question is simply one of fact and degree. As a proposition which I put to Mr Scott and he accepted (and from which Mr Hale did not dissent), one can envisage a petition which raises the same issues as a Children Act application made at about the same time (for example "unreasonable behaviour" allegations against the respondent involving his behaviour towards the children). Such issues would be "connected" both as to content and in point of time. But that is not the case here. The mother's application regarding the children arises out of events in June 2016 and raises issues wholly unrelated to the issues in the divorce proceeding issued nine months previously in September 2015. As Mr Scott submits, her application relating to the children could have been made if the parties had not been married or, indeed, if they were not getting divorced; it is freestanding."

12.
In J v U, the mother's application was for permission to relocate with the parties' two children, then living in Bosnia, to Serbia. Bodey J noted that issues relating to arrangements for divorcing parties' children are no longer required to be dealt with within the divorce, but by way of free-standing applications for child arrangements orders under the Children Act 1989. In his view, the mere fact of divorce proceedings could not, without more, provide the necessary connection between those proceedings and a s.8 application.

13.
In TK v ML[2021] EWFC 8, Mostyn J, seeking to apply the Court of Appeal's decision in Lachaux held that,

"41. On this analysis the residual jurisdiction can, at any rate in theory, be invoked years after the divorce provided that the applicant parent can earnestly claim that the child arrangements application is being made "because" the marriage has been dissolved.

"42. I agree that there must be a clear causal link demonstrated between the child arrangements application and the divorce. A causal link requires the facts giving rise to the present application to be fairly traceable to the now concluded divorce. This must be so because any other interpretation would make a mockery of the statutory requirement that the question of making the child arrangements order arises "in connection with" divorce proceedings. I would suggest that taking "a broad view" of the words of the statute does nonetheless require fidelity to their plain intention.

"43. In this regard I completely agree with Parker J in AP v TD [2010] EWHC 2040 (Fam) at [122] where she stated:

"Therefore I conclude that section 2(1)(b)(i) does qualify section 42(2) and does require a connection, probably a temporal connection, to be established between "the question of making the order" and the matrimonial proceedings, but how that connection is to be defined is more difficult. In the light of the Explanatory Note to the Rules introducing the amendments consequent on Brussels II Revised, a purposive construction of Section 2(1)(b)(i) would support an interpretation of the provisions bringing it into line with the provisions of Brussels II Revised, and away from the UK based "continuing proceedings" jurisdiction. The time frame of the revoked FPR 2.40 is similar to the time frame for continuing jurisdiction based on divorce in Brussels II and Article 12 of Brussels II Revised. In my judgment to fall within the residual jurisdiction there must be proximity between the divorce proceedings and the court being asked to determine a question of making an order in relation to children.

In any case it may be that essentially the same application or issue has been before the court, unresolved, for some time, but once an order has been made, then in my view the connection with the

matrimonial proceedings would terminate." I see the criterion of temporal proximity as being the prime (but not only) metric for establishing whether there is a causal link between the child arrangements application and the earlier, now concluded, divorce.

Relying on these cases, Dr Proudman says that there is no temporal or causal link between the divorce and the question that arises in the father's application.

Conclusions on Jurisdiction

14.
During the hearing I asked Counsel whether any point was taken about whether the father's s.8 application fell within s.1(1)(a) of the FLA 1986. Counsel agreed that it did. A s.1(1)(a) order is "a section 8 order made by a court in England and Wales under the Children Act 1989, other than an order varying or discharging such an order." The father's s.8 application is a fresh application made in different circumstances than those that pertained at the time of the last order in July 2020. It is not an application within the same proceedings. It is not an application to vary or discharge that order.

15.
Although the passages in the Moylan LJ's judgment in Lachaux dealing with s.2(1)(b)(i) of the FLA 1986 are obiter dicta, they provide the most authoritative statement of how the court should interpret and apply the test of "in connection with" under that provision. I therefore adopt the "broad view" approach. Can it be said, taking a broad view, that the question in the current s.8 application arises "in connection with" the divorce proceedings?

16.
Moylan LJ explained that if the parties to the earlier proceedings (here the divorce proceedings) are the parents of the child, and the earlier proceedings were in England and Wales, then "all that is required" is that the s.1(1)(a) order is being sought "because" the marriage is being or has been dissolved. That has been interpreted by Mostyn J in TK v ML as a requirement for a "clear causal link" but Mostyn J also agreed with Parker J's view that a temporal connection was probably required to establish the necessary connection with the divorce proceedings. In J v U, Bodey J referred to the question of a connection being one of "fact and degree" without specifying requirements for a close temporal or causal link. Likewise, more recently, in FA v MA [2021] EWHC 3024, Williams J held,

"34. It seems to me that it must be right that the phrase 'in or in connection with' must mean something more than the mere existence for a child arrangements order being made whilst a divorce petition is continuing. The Court of Appeal in Lachaux refers to the application being made because the marriage is being dissolved. Thus one is looking for something which creates some nexus or connection even perhaps a tenuous connection in order for the wording of the statutory provision to be fulfilled. Ms Halsall emphasised that the Court of Appeal had supported a broad construction of the phrase not a narrow one. Ultimately it is probably a question of fact."

And when applying that approach at [47] he held:

"Although I accept that the Court of Appeal decision in Lachaux supports the court taking a broad approach [to] this issue I do not read the decision as amounting to a boundless discretion where the mere existence of a divorce petition at the same time as applications in respect of children satisfy the condition."

17.

I do not accept the mother's submission that there must be a close temporal connection between the divorce and the s.8 application in order for the "in connection with" test to be met. The question of whether the matrimonial proceedings are "continuing" is dealt with later in this judgment, but the FLA 1986 enacts the proposals of the Law Commission and Scottish Law Commission report: the Act provides for the possibility of the s.8 application being "in connection with" divorce proceedings which have concluded many years earlier. It is not for the court to interpret "in connection with" as imposing a requirement that the s.8 application must have been made within a certain time after the divorce proceedings when s.42(2) of the FLA 1986 provides that matrimonial proceedings are "continuing" even after decree absolute, for so long as the child concerned is under the age of 18. Nevertheless, in my judgment, the time between a decree absolute and the later s.8 application may be one of a number of relevant factors to take into account when determining whether the application is "in connection with" the divorce.

18.
A more difficult question is whether "in connection with" requires a causal link between the question arising in the application and the divorce or other proceedings. Paragraph 4.11 of the Law Commission and Scottish Law Commission's report recommended that where a court has jurisdiction in relation to divorce proceedings, as here, it should continue to have jurisdiction to make custody orders in the course of those proceedings. Accordingly it might be contended that if the divorce proceedings are regarded as "continuing" (see s.42(2) of the FLA 1986), then the mere fact that there are divorce proceedings in England and Wales would be sufficient to provide jurisdiction for what we would now call child arrangements orders. If the relevant provisions of the FLA 1986 faithfully enact the recommendations, then the use of the term "in connection with" in s.2(1)(b)(i) was used simply to distinguish cases where there were ongoing matrimonial proceedings from those where the matrimonial proceedings had come to an end, albeit they were to be treated as "continuing" by operation of s.42(2) of the FLA 1986.

19.
On the other hand, Moylan LJ's use of the word "because" might imply a causal link between proceedings, as Mostyn J held in TK v ML. If a causal link were a requirement for jurisdiction to be established, then that might produce a narrow test, rather than allowing for a "broad view". As Bodey J's analysis in J v U shows, a causal connection may be difficult to find because divorce proceedings and a child welfare applications seek "quite different reliefs." He gave an example of a divorce being based on unreasonable behaviour by reason of conduct towards a child. In such a case the connection is not causal but is created by an overlap in the content or subject matter in the proceedings, particularly when the proceedings are close in time. At [186] of his judgment in Lachaux, Moylan LJ gave the example of parents wanting the courts of England and Wales to exercise jurisdiction "for a number of reasons" where there is a connection, stating that it would be regrettable if there was no scope to accommodate such a case.

20.
Hence, discarding the notion that a close temporal link is a necessary condition, there appear to me to be three different approaches that might be taken to determining whether the issues in the application arise in connection with the divorce proceedings:

i)
There must be a clear causal link between the issues raised and the divorce proceedings.

ii)

There needs to be some connection between the issues raised in the application and the divorce proceedings that goes beyond the mere fact that the divorce proceeded in this jurisdiction. The connection may exist due to one or more factors such as proximity in time, an overlap in the relevant facts or subject-matter, a causal link, or some other matter. However, there is no necessary condition and the sufficiency of any factors to establish a connection will be a question of fact and degree.

iii)
All that is required is that there are issues of child arrangements raised by the application and the courts of England and Wales have previously assumed jurisdiction in divorce proceedings between the parties who are parents of the child or children concerned.

For the reasons that follow I adopt the second of these three approaches.

21.
On the face of it, “in connection with” is a different requirement from “caused by”: it does not connote a causal link between the divorce proceedings and the later application. Nor do I read Moylan LJ’s use of the word “because” as importing a requirement of a causal link. To do so would be contrary to the “broad view” approach he advocated. For the reasons given by Bodey J in J v U, it will almost always be difficult to find a causal link between divorce proceedings and a later s.8 application – they are applications for different forms of relief. In my judgment, Moylan LJ was simply highlighting that there must be some form of connection: the term “because of” merely highlights the need for there to be a reason for the application that is connected with the matrimonial proceedings. The object of the statutory provisions, enacting the recommendations of the report of the Law Commission and the Scottish Law Commission, was to preserve the jurisdiction of the courts to make “custody orders” (welfare orders) in proceedings for divorce, including until the child is 18, and even if the parents or child become habitually resident outside the jurisdiction. As the report stated,

“Our main reason for reaching this conclusion is the impossibility of devising any general rule to the contrary effect which would not sometimes operate against the interests of the child’s welfare or against those of the parents.”

If, notwithstanding the fact that there are or were divorce proceedings, those divorce proceedings have no connection at all with the question raised by the s.8 application, then s.2(1)(b)(i) is not satisfied. The mere fact that jurisdiction as to welfare issues is preserved in proceedings for divorce, and that welfare issues concerning a child are the basis for the s.8 application, does not mean that the reason for the s.8 application can be found in the divorce. In particular, if, during a period of years since a decree absolute, child arrangements have been settled by consent or court order, then the connection between the divorce proceedings and the s.8 application is likely to have been broken. In such circumstances, the reason for any welfare application is not connected to the matrimonial proceedings: the s.8 application has not been made “because of” those proceedings.

22.
The requirement for a clear causal link is too stringent and not consistent with the broad view advocated by Moylan LJ in Lachaux. On the other hand, the words “in connection with” do require something more than the bare fact that there are or have been divorce proceedings within the jurisdiction involving the parents of the child concerned. There must be one or more factors that establish a sufficient link between the divorce and the s.8 application, be they temporal, factual, causal, or something else. The reason for the application should be connected to the matrimonial proceedings. The implications of there being no requirement for a link between the welfare

application and the matrimonial proceedings was discussed by Mostyn J at first instance in Lachaux, by Bodey J in J v U, and by Parker J in AP v TD[2010] EWHC 2040 (Fam).

23.
Since the dissolution of the marriage in the present case, there have been two further court orders regarding arrangements for the children. In each case the court recorded that it had jurisdiction on the basis of the habitual residence of the child or children. As noted, A was not habitually resident in England and Wales when the child arrangements order affecting her was made, by consent, in 2020. No point was taken in 2020 that the court did not have jurisdiction with respect of A because the application was not “in connection with” the divorce proceedings. However, it appears to me that the point was not considered in part because the parties had come to agreement as to child arrangements and the main reason for the father having made the application at that time was for permission to remove J from the jurisdiction to Country B. In the circumstances the mother should not be prevented now from contending that the court has no jurisdiction just because she did not take the point, about A, in 2020.

24.
Those two previous court orders nevertheless highlight how much has happened within this family since the decree absolute. At the time of the divorce the parties and the children were living in Country D, but the parties were domiciled in the jurisdiction of England and Wales, which gave the Family Court in Newport jurisdiction. Subsequent to the decree absolute the parties and children returned to England, J then went to live in Scotland for a year, the mother and A moved to Country C, and then the father and J moved to Country B. These events over the past four years have followed the breakdown of the parties’ relationship but they are not related to the divorce proceedings themselves. On the facts of the present case, it does not appear that the children are necessarily living abroad on a temporary basis. They might well remain living in the Middle East for the remainder of their childhoods. The father’s s.8 application is very much a free-standing application made because of changes of circumstances, and because of his concerns for the welfare of his daughter. The divorce four years ago is not the context within which the application is now being made. It is not the reason or basis for the application. In 2018, the court recorded the father’s agreement that it was in A’s best interests to live with the mother in Country C. It is the alleged subsequent disclosure of abuse, long after the decree absolute, which has triggered his current application.

25.
I accept that a broad view should be taken of “in connection with” in particular because s.2A(4) of the FLA 1986 balances the broad scope by allowing the court to choose not to exercise its jurisdiction. However, in the circumstances I find that the question of making the order sought by the father in his s.8 application does not arise in or in connection with the matrimonial proceedings. There is no factual, temporal, causal or other connection. The application has not been made because the marriage has been dissolved. It does not offend against the principle that the power to make welfare orders within divorce proceedings should be preserved, to find that there is no connection between the divorce proceedings and the application in this case.

26.
I can deal more concisely with the second issue I have identified, namely whether the divorce proceedings are continuing. This question is answered by a plain reading of s.42(2) of the FLA 1986. The divorce proceedings are treated as continuing for the purposes of the Act until the child concerned reaches the age of eighteen. A is under the age of eighteen and therefore the divorce

proceedings are treated as continuing for the purposes of the Act notwithstanding the decree absolute.

Appropriate Forum

27.
Given my judgment on the question of jurisdiction, I do not need to determine whether it would be more appropriate for the application to be determined outside the jurisdiction of England and Wales. A is habitually resident in Country C and the father's application is for her to live with him in Country B, therefore the practical difficulties in obtaining evidence for an English court in relation to her wishes and feelings, and other matters relevant to her welfare, are obvious. On the other hand, evidence of the existence and operation of systems and laws of child protection in Country C would be relevant to the question of forum. So too might evidence of the involvement of the authorities in Country C. Had I determined that the court did have jurisdiction, I would have given directions for evidence to be filed and served to assist the court to determine the appropriate forum. The mother wished me to decide that issue now in order to save costs, but I could not have done so justly.

28.
For the reasons given I find that the Family Court does not have jurisdiction to hear the father's application.

"Application for Amplification"

29.
A draft of the judgment above was circulated with the usual embargo against disclosing it or its substance and a request for corrections. In response, the father submitted an "Application for Amplification [of] Reasons" purporting to be a request in accordance with the principles in English v Emery Reimbold and Strick[2002] EWCA Civ 605[2002] 3 All ER 385. The applicant:

i)
Requested the court to "review the decision that the question of making the order sought by the father in his s.8 application does not arise in or in connection with the matrimonial proceedings."

The applicant further submitted that:

ii)
Given that the divorce petition issued by the Applicant on 21 February 2017 – attached to the application for amplification – included a request for a financial order to be made in respect of both himself and the children, and Form A has not yet been issued, the financial remedy proceedings are "latent" and "ancillary to the divorce proceedings and therefore are either the same as those for divorce or fall under the generic umbrella of "matrimonial proceedings"."

iii)
Financial remedies, including child maintenance and support, would be directly affected were the Applicant's s.8 application to be successful.

iv)
"The Father fully intends on issuing Form A as soon as the Children Act jurisdiction issue has been resolved."

v)
The matrimonial proceedings are "pending".

vi)
The Court “has failed to give sufficient consideration to the fact that the financial remedy claims have been applied for albeit not yet commenced.”

vii)
There is a clear connection between the unresolved financial remedy questions and those being brought by the Applicant under the Children Act 1989: “These financial qua divorce qua matrimonial proceedings and consequent ancillary, extant unresolved claims are therefore pending and propel the children matters into the realm of being in connection with them. The court did not investigate this matter and indeed asked no questions during the hearing at all. Had it done so on this issue, junior counsel for the applicant would have explained this connection fully.”

viii)
The court should consider how paragraphs 21 to 25 of the draft judgment sit with the submission made by junior counsel during the hearing that the underlying welfare issues that prompt the Father’s s.8 CA 1989 application derive from the divorce in that “ (a) the mother’s behaviour towards A mirrors her behaviour towards the Father during he relationship which prompted the Father to petition for divorce, and (b) the fact that the divorce and separation means that A is no longer protected from that behaviour by the Father.”

ix)
The Court did not consider whether there was further jurisdictional basis to proceed namely the parens patriae jurisdiction.

30.
On receipt of this application I had several immediate concerns:

i)
The application for amplification does not in fact state that the reasons given in the draft judgment were inadequate and require amplification. An advocate has a duty to give the court the opportunity of considering whether there is a material omission (FPR PD30A) but it is another matter to seek to create an omission by making new submissions that the court had not previously received and therefore had not considered. The father’s new application invites the court to reconsider its decision on the basis of new arguments not made at the hearing. It is not therefore an application made in accordance with the principles in English v Emery Reimbold and Strick (above) – see [24] and [25] of the speech of Lord Phillips MR.

ii)
The application was signed by both Leading Counsel and Junior Counsel even though Leading Counsel was not involved in the hearing before me.

iii)
Submissions before me did not touch on the question of an application for a financial order; indeed, the petition itself was not within the bundle of documents relied upon by either party. The Applicant’s counsel did not inform the court that there had been no financial settlement or order before the decree absolute. The Applicant father’s statement, which was the only witness evidence before the court, did not mention any financial matters, let alone his intention to issue Form A upon resolution of his s.8 application. Hence the matters set out at 29 (ii) to (vii) above were entirely new submissions based on assertion or evidence which whilst available was not previously put before the court.

iv)
The court was sitting as the Family Court hearing a s.8 Children Act application. There was no application under the inherent jurisdiction for the court to exercise its parens patriae jurisdiction. There was no evidence directed to that issue and no submissions as to whether the jurisdiction should be exercised.

31.
Having received the application for amplification I delayed handing down judgment and permitted the Respondent to submit a response before determining how to address the application. I also asked for an explanation of the involvement of Leading Counsel in the period between the circulation of the draft judgment and handing down of the final judgment.

32.
In response, Dr Proudman noted that the application raised new arguments, not made at the hearing, to which her client has had to respond, causing her additional expense. She submits that:

i)
An application for a financial order would not fall within the meaning of “proceedings for divorce” under s.2A of the FLA 1986.

ii)
Even if a financial order application were to be regarded as “proceedings for divorce” it is not pending. The divorce proceedings ended with the decree absolute and no Form A has been issued.

iii)
The parties’ financial positions have changed significantly since the divorce was concluded. Whilst Dr Proudman addresses communications between the parties and between their lawyers as to financial matters I do not regard it as appropriate for me to take those matters into account. There has been no evidence adduced in relation to those matters. However, it is clear that the parties have adopted separate lives, each financially independent, in different countries.

iv)
There is no connection between any financial order application and the grounds for the father seeking a child arrangements order, which are the conduct of the mother and the best interests of the parties’ daughter.

v)
The divorce petition (which both parties now invite me to consider) relied upon the moodiness and lack of communication of the mother. Those allegations have no connection whatsoever with the allegations now raised by the father in relation to the mother’s treatment of their daughter.

vi)
There is no application for the court to exercise its parens patriae jurisdiction and in any event this is not a case in which the court should exercise that jurisdiction. The circumstances are not exceptional – there is no evidence before the court that the child concerned requires the court’s protection. There is a significant difference between accepting that it might be in a child’s best interests to live with the other parent and accepting that the circumstances justify the exercise of the parens patriae jurisdiction.

33.

I have been informed that Leading Counsel was instructed by the solicitors for the father after the circulation of the draft judgment to provide advice and representation on the issue of jurisdiction. Ms Cayoun has told me that she was not aware of the instruction to Leading Counsel at that time.

34.
In my view, the father's application for amplification is in fact a request for the court to reconsider its decision on the basis of new arguments not made at the hearing. No complaint has been made about the inadequacy of the reasons for the decision as set out in the draft judgment. The court had previously directed a preliminary hearing on jurisdiction and the applicant should have made his case at the hearing. No new evidence emerged following the circulation of the draft judgment that was not previously available, and in such circumstances it is not acceptable practice to use the opportunity afforded by an invitation to submit corrections to a draft judgment, to request the court to reconsider its decision or to make new arguments - Egan v Motor Services (Bath) Ltd[2007] EWCA Civ 1002, [2008] 1 All ER 1156, Gosvenor London Limited v Aygun Aluminium UK Limited[2018] EWHC 227 (TCC), Re O (a child) (judgment: adequacy of reason) FD v A local authority and others[2021] EWCA Civ 149, and WM v HM (Financial Remedies: Sharing Principle: Special Contribution)[2017] EWFC 25, [2018] 1 FLR 313 per Mostyn J at [39].

35.
In the circumstances, it would have been open to the court to disregard the new submissions. However, the mother asks the court to seek to avoid further unnecessary litigation and if the father's new arguments are not addressed, he may be more likely to seek to make them on appeal. Hence, I shall briefly address those new arguments, none of which persuade me to reconsider my decision in this case.

36.
Form A is used to give notice of intention to make an application for financial provision. On its face it states that it is for use when applications for financial provision are made "in connection with" matrimonial or civil partnership proceedings (divorce, dissolution etc)." The father has not yet used Form A and the assertion that he intends to do so is not supported by evidence from the father himself. There has been no opportunity to the mother to test the assertion and it appears to be opportunistic. Hence, even if an application for a financial order were capable of constituting "proceedings for divorce", as the applicant now claims, no notice of intention to make such an application has been given and so no such application is "pending" or "extant". A prayer within divorce proceedings which have been concluded with a decree absolute does not, in my judgment, mean that there is an extant or pending application for a financial order unless or until notice of an intention to apply for an order, using Form A, has been issued.

37.
In any event, if I am wrong and there is an application for a financial order which is extant or pending and which should be regarded as proceedings for divorce within the meaning of s.2A of the FLA 1986, and therefore "matrimonial proceedings" within the meaning of s.2(1), the father's application for a child arrangements order is not "in connection with" those proceedings. The prayer for a financial order does not, without more, create a connection with the application for a child arrangements order. I repeat the reasoning at paragraphs 21 to 25 above – the application for a financial order does not alter that reasoning or my conclusions. I regard the father's attempt to engineer a connection between the applications as unconvincing and opportunistic. It does not, in my judgment, have substance.

38.
The father now draws the court's attention to parts 5 and 6 of the petition in which he set out the alleged factual basis for his application for a divorce. It is submitted that the mother's conduct towards A – the basis of the s.8 application – "mirrors" her conduct towards the father as set out in the petition. I do not agree: the father's current allegations of abuse of A, including physical abuse, against which he cannot protect her, bear no relation to the allegations in the petition that the mother was moody and uncommunicative.

39.
There has been no application, nor previously any submission, that the court should exercise its parens patriae jurisdiction. The father made a s.8 Children Act application in the family court and the jurisdiction to make s.8 orders was listed for hearing as a preliminary issue. I do not accept the criticism that a family court should, on its own initiative, have invited further submissions on the exercise of the parens patriae jurisdiction. The circumstances do not obviously raise the question of whether that jurisdiction should be exercised. The mother has had no opportunity to submit evidence directed to that issue and it would be wrong for me to make any determination on it. There are clearly factual disputes about A's circumstances and welfare. I have had no opportunity to hear A's voice. However, I note the judgment of Moylan LJ in Re M (A Child)[2020] EWCA Civ 922, [2020] 3 WLR 1175 that the court should proceed with great caution before exercising the parens patriae jurisdiction and must identify sufficiently compelling circumstances before doing so. I also note that in the present case the application is not for an order for the return of A to this jurisdiction but for an order that A lives with the father in Saudi Arabia. Whilst I do not decide the issue, it is clear that there would be very considerable obstacles in the way of any application by the father for the court to exercise its parens patriae jurisdiction.

40.
By addressing the further submissions made on behalf of the applicant, I do not seek to condone the practice of making new arguments, or inviting the court to reverse its decision, in response to receipt of the draft judgment. It is wasteful of the court's time and has led the respondent to incur further, avoidable expense. Nor do I regard it to have been appropriate for the solicitors for the father to have shared the draft judgment with newly instructed Leading Counsel without first seeking the permission of the court