Family Law Group Update Spring 2018

A quarterly bulletin on important legal developments and points of interest from the Family Team at St Ives Chambers

The Legal 500 UK award for UK Silk of the Year (regions and Scotland) has been awarded to Elizabeth Isaacs QC

I am delighted that Elizabeth Isaacs has been awarded the UK Silk of the Year award for the regions. The care and compassion she has for her clients and her determination to challenge the law when needed is indicative of her incredible reputation within the family law arena. Family law is an important part of the work of St Ives Chambers and we continue to go from strength to strength.

Jeremy Weston QC

Following a landmark case in 2016, the process to amend The Human Fertilisation and Embryology Act 2008 is now underway

In 2016, Adem Muzaffer, Natalie Gamble (NGA Law) and myself challenged the law in relation to single parent surrogacy. The remedial order formed part of a Command paper issued on Wednesday 29th November 2017 and will result in Parliament reviewing The Human Fertilisation and Embryology Act 2008.

The case was brought by a single man who had fathered a child via a surrogate in the USA. When he applied to the Family Court for a Parental Order, as required through The Human Fertilisation and Embryology Act 2008, he was denied as the law required the application to be made by "two people".

We argued that this was discriminatory interference with a single person's rights to a private and family life via the European Convention of Human Rights and that if an individuals' marital status is 'single', this was a status within the meaning of article 14 of the Convention. In summary, The Human Fertilisation and Embryology Act 2008 was at odds with the European Convention on Human Rights and the Human Rights Act as it discriminated against single individuals.

Scrutiny of the law is an important part of the work that QCs and barristers undertake. We have highlighted a discrepancy between the UK and EU law which resulted in a biological father being legally estranged from his child. I am delighted that the remedial order and Command paper are being issued and brought up-to-date to mirror the diversity that exists within modern UK family structures.

Elizabeth Isaacs QC

Jeremy Weston QC

Elizabeth Isaacs QC

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Back to the Future: e-bundles

1. In the 1989 Hollywood classic "Back to the Future: Part II", Marty and Doc travel far into the future to discover the horrors that await. In the last few years, by far the most depressing aspect of that film was that the "future" was actually 2015; the most depressing at least until you realise that there is a populist, neo-political element to Biff Tannen that now strikes a little bit too close for comfort. He also has very questionable hair and narcissistic personality traits which would justify FPR Part 25 assessment. I am sure this is pure coincidence.

2. Another horrifying element of the future, post-2015, is that e-bundles have well and truly landed for us all. There is probably no point in moaning about it. They are here to stay, and we all need to adapt.

3. The fact that there appears to be so much resistance in the family jurisdiction is both surprising and not, in equal measures. On the one hand, lawyers are not known as a profession that embraces change, so some reticence is to be expected. On the other, our colleagues in the criminal courts have been "paperless" for a number of years now, and (some teething problems aside) reports are positive:

   (a) documents can be shared in an instant, without any need for photocopying; and

   (b) exhibits can be wirelessly transferred to large exhibit screens on the wall of the court, for witnesses and the jury to look at.

   Surely, if they are able to adapt, then, so are we?

4. The reality is that as more local authorities embrace e-bundling software systems, such as *Iken*, the prevalence of e-bundles will increase. It is folly to think that a local authority should put together a fully hyperlinked bundle only for it to be printed off.

Pros and cons

5. In the finest traditions of family law (well, since 2013 anyway), I will now undertake a balancing exercise of all the positives and negatives of using e-bundles.

6. The negatives are plain: it will require a wholesale change in the way in which we all practice. Paper bundles have been in place for decades. But then at one time, back-sheets made of vellum, and quills were considered essential equipment. Progress, albeit sometimes slow, is an inevitable part of the job that we all do.

7. However, the potential benefits are also significant:

   (a) the ability to be more productive;

   (b) to carry around the equivalent of 50 lever arch files on a small corner of your computer;

   (c) to navitgate hugh bundles in seconds: and

Back to the Future: e-bundles continues overleaf

(d) the cost savings cannot be ignored – one local authority is said to have saved tens of thousands of pounds in the first year of using e-bundling, due to less printing and staffing costs.

Conclusions

8. In order for the benefits to be truly apparent, it will require more than just the profession to be on board. We also need HMCTS and the judiciary to be fully invested in the process. It would be typical if all the time saving benefits of e-bundling were available for the advocates and the judge, only for the witness to be struggling to open paper bundle 16 of 27, which (incidentally) has a broken lever arch.

9. One thing is clear: I think e-bundles are here to stay. It is probably not the best time to invest in a wheelie-case manufacturing company.

Matthew Maynard
February 2018

Care Crisis Review – Participate!

1. The Care Crisis Review is funded by the Nuffield Foundation and facilitated by the Family Rights Group. More information can be found at: https://www.frg.org.uk/involving-families/reforming-law-and-practice/care-crisis-review

2. The declared purpose of the review is:

   (a) To identify specific changes to local authority and court systems and national and local policies and practices that will help safely stem the increase in the number of care cases coming before the family courts and the number of children in the care system.

   (b) To do so in a way that retains focus on achieving the best outcomes for children and families and takes account of the current national economic, financial, legal and policy context that impacts on families and on local authority and court practice.

3. This should be raising alarm bells for lawyers, and those who care about the proper functioning of the child protection system.

4. With ever scarcer resources, choices will have to be made. Stemming the increase in the number of care cases coming before the family courts is the objective. In principle, how can this be achieved? Investing more in families in an attempt to prevent conditions deteriorating to a level at which the threshold for issuing proceedings is crossed? Increasing the threshold at which proceedings are issued – either by encouraging local authorities to be less risk adverse or taking a decision as a society that we will tolerate poorer conditions for children? Changing the role of the family court – to more FDAC and Pause models and/or tribunals? Changing the mind-set of the care system from one of "permanence" in long term foster care back to one of review and attempts at reunification via the looked after child review process?

Care Crisis Review - Participate! continues overleaf

5. As a profession, we should not be blind to the possibilities. "Achieving the best outcomes for children" is a fluid concept, dependant on changing economic, financial, legal and policy context.

6. In the Bridget Lindley Memorial Lecture in March 2017, Lord Justice McFarlane reminded us:

   (a) *It is my belief that the degree to which we investigate potential child abuse within our family court system is on a wholly different basis and scale from that undertaken elsewhere. Across Europe the decision to take a child into care is largely an administrative determination overseen by tribunals and an administrative court structure. The idea of "fact finding" to determine whether or not abuse has occurred seems to be rare. The concept of 'permanency planning', which is at the centre of UK social work is, I understand, not a feature on the Continent.*

   (b) *'Social engineering' and 'child protection' plainly sit on the same continuum; discerning where the line is drawn between the two is far from plain.*

   (c) *The increased caseload is not cases of high-end gross abuse involving serious physical injury or sexual abuse; these have always come to the courts. The 'new' cases tend to be those involving long-term neglect as a result of inadequate parenting or other slow-burning, but none the less harmful, family dysfunction leading to emotional harm.*

7. While lawyers come to work with different political persuasions (and different motivations for working in this field), difficult choices will have to be made. Let's not be blind to the competing agendas behind the various options.

8. I urge practitioners to make their voices heard.

Gemma Bowes
February 2018

Ehlers-Danlos Syndromes: A Handy Guide for Family Lawyers

1. Ehlers-Danlos Syndromes ("EDS") is a group of conditions we often hear about in cases involving inflicted injuries to children such as the recent decision in ***Re D (A Child)*** **[2017] EWHC 3075 (Fam).** EDS is the collective term given to a series of rare genetic conditions that can affect connective tissue in tendons, ligaments, bones, blood vessels, skin and internal organs.

2. There are thirteen types of EDS, including:

   (a) *Hypermobile* EDS (or "hEDS") is the most common, with symptoms including joint hypermobility, joints that dislocate easily, joint pain, clicking joints, extreme tiredness, easy bruising, digestive problems, dizziness and bladder problems;

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(b) *Classical* EDS (or "cEDS"), with symptoms including joint hypermobility, joints that dislocate easily, stretchy skin, fragile skin (especially over the forehead, knees, shins and elbows), smooth velvety skin that bruises easily, slow-healing wounds that leave wide scars, hernias and organ prolapse;

(c) *Vascular* EDS (or "vEDS"), with symptoms including skin that bruises very easily, thin skin with visible small blood vessels, fragile blood vessels (with risk of internal bleeding), a risk of organ problems, such as the bowel tearing, the womb tearing (in late pregnancy) and partial collapse of the lung, hypermobile fingers and toes, unusual facial features, varicose veins and delayed wound healing; and

(d) *Kyphoscoliotic* EDS (or "kEDS"), which is very rare, with symptoms including curvature of the spine, joint hypermobility, joints that dislocate easily, hypotonia (weak muscle tone), fragile eyes, soft, velvety skin that is stretchy, bruises easily and scars.

3. As you can see, the different types of EDS share many of the same symptoms. Faults in particular genes causes the body's connective tissue to weaken, hence the different types of the condition. Sometimes these genes are inherited from a parent (or both parents) and sometimes the faulty genes can occur in the afflicted person for the first time without a family history of the condition. Some people with EDS have very mild symptoms and it may even go undiagnosed. However, it can also be life-threatening in rare and severe cases.

4. There are two main ways that EDS is inherited:

(a) *autosomal dominant inheritance* (in the case of hEDS, cEDS and vEDS), whereby the faulty gene is passed on by one parent and there is a 50% chance of the child developing the syndrome; and

(b) *autosomal recessive inheritance* (in the case of kEDS), whereby the child inherits the faulty gene from both parents and has a 25% chance of developing the condition.

5. The genetic basis for hEDS remains unknown and its diagnosis is based largely on physical criteria and consideration of a detailed family history. Molecular testing can be undertaken in respect of cEDS, vEDS and kEDS, but it can take several months.

6. EDS is often raised in cases where a child is alleged to have suffered an inflicted injury. However, it is not the case that EDS testing will be undertaken as a matter of course. The well-known test for expert evidence is that it must be 'necessary' in order to resolve the proceedings justly. For example, in a case where the parents accept the medical evidence that the injury is inflicted but the perpetrator cannot be identified, the Court is highly unlikely to entertain the idea of EDS testing.

7. In cases where there is a known family history of EDS or where EDS is heavily suspected by the treating clinicians, the Court is far more likely to order expert evidence. In those circumstances, a consultant geneticist would be the appropriate expert to instruct, such as Dr Arnand Saggar.

8. In the absence of such a family history or a clinical request, there would need to be some other reason capable or satisfying the 'necessary' test. Of course, each case is fact specific, but an example would be a case where significant doubt had been cast over the likelihood of the injury being an inflicted injury and there was no other explanation. In those circumstances, it is helpful to know that Professor Ann Dalton of the Sheffield Diagnostic Genetics Service can be instructed to undertake a barrage of various genetic tests.

Ehlers-Danlos Syndromes: A Handy Guide for Family Lawyers continues overleaf

9. It is not uncommon for the Court to find itself in a position of having to wait for EDS testing to be completed, which has already been commissioned (such as by the hospital or the police). In those circumstances, it can be argued that any factual determination of the injuries within the care proceedings should await the outcome of this testing and it may be a legitimate reason to extend the 26-week timetable for the proceedings.

10. You can find out more about EDS by visiting the Ehlers-Danlos Support UK website at www.ehlers-danlos.org.

Mark Cooper
February 2018

Immunisations for children in care: the correct approach

1. It is perhaps not commonly appreciated that the programme of immunisations for children in this country is not compulsory. A parent has the right to refuse for their child to be vaccinated. Where this issue becomes more contentious is where a local authority shares parental responsibility for a child.

2. It is not appropriate for a local authority to give its consent to the immunisations when faced with parental objection on this issue pursuant to s.33(3) Children Act 1989.

3. A recent case which sets out succinctly the correct approach when faced with this situation and the considerations for the court is ***Barnet London Borough Council v AL and others*** **(Fam D) [2017] 4 WLR 53**, also known as ***Re SL (Permission to Vaccinate)*** **[2017] EWHC 125 (Fam).** Keehan J also recently reaffirmed the principles set out within this case in a similar case which was before the High Court in December 2017 (published judgment awaited at the time of writing). The correct approach is as follows:

   (a) The local authority cannot simply apply for a specific issue order.

   (b) The correct approach is to apply under the inherent jurisdiction to the High Court for declaratory relief as to whether it is in the best interest of the child to receive the immunisations in question.

   (c) When applying under the inherent jurisdiction, the local authority must apply for leave to do so and the court must consider the criteria under s.100(4) Children Act 1989.

   (d) There will be a need for expert opinion as to the immunisations being sought, the risks they pose, possible side effects to the specific child and their circumstances and the benefits of the immunisations being sought.

   (e) The court must accord a significant degree of weight to the view of the parents given that ordinarily, this is not an issue upon which the State would intervene due to its non-compulsory nature.

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(f) The child's welfare and what is in their best interests is the court's paramount consideration.

(g) The court must be convinced that the benefits of the immunisation(s) outweighs the risks to the specific circumstances and/or health history of the child in question. It is important that any alleged contra-indications and risks are evidenced by the party alleging them, e.g. a family history of bad reactions to immunisations.

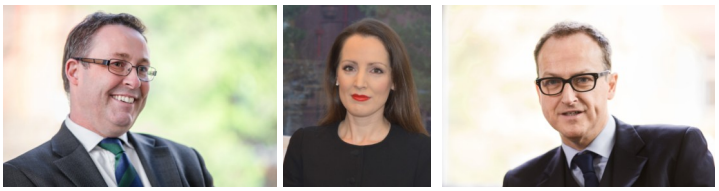
(h) A decision by the court to authorise immunisation in the face of parental objection is an interference with their Article 8 rights. Therefore, the court must be satisfied that such an interference is lawful, necessary and proportionate to protect the child's best welfare interests.

(i) Any declaratory order that the court makes should set out specifically the list of immunisations that the court has determined are in the child's best interests to receive.

Sarah Fahy
17th January 2018

Birmingham Law Society Awards

We are delighted that Jeremy Weston QC, Gemma Bowes and Jason Hadden MBE have been shortlisted for Birmingham Law Society - Barrister of the Year. Fingers crossed for Thursday 8th March!



From left to right Jeremy Weston QC, Gemma Bowes and Jason Hadden MBE

This year's annual charity quiz will be held at 5.30pm on Friday 4th May at The Studio in Birmingham.

This year we are supporting Birmingham Children's Hospital.

We'll see you there.