St Ives Chambers Family Law Group Update
Spring 2019

Jeremy Weston QC updates his article 'Female Genital Mutilation (FGM): Its prevalence and the protection afforded by the present law'


Jeremy Weston QC

For Jeremy's CV, click here.

To mark the UN's 'International Day of Zero Tolerance for FGM' Jeremy Weston QC has updated his article providing clarity for healthcare professionals, teachers and social care professionals on the law as it relates to child Female Genital Mutilation (FGM).

Following the recent criminal conviction for FGM (the first in the UK), the need for clarity of the legal position is greater than ever. The article first appeared in the Archives of Disease in Childhood (a BMJ Journal) in 2017.

Click here to read the article. Please share this article with your colleagues and throughout your networks.

Dates for your diary

Private Law Children Spring Seminars 2019
Tuesday 19th March 2019: 'Pleading and Defending Serious Factual Allegations in Private Law Proceedings' presented by Charmian Jackson and Tom Harrill.
Wednesday 10th April 2019: 'Intractable Contact and Enforcement Proceedings' presented by Jason Hadden MBE and Matthew Fiddy.

Modern Families Conference
Friday 10th May 2019: A half day conference offering legal updates on the changing face of families in the 21st century, including surrogacy and LGBT representation.

Annual Charity Challenge Cup
Friday 7th June: Annual Family Team Quiz at The Studio Birmingham.

Annual Child Care Conference 2019
Friday 11th October 2019: Annual conference at Park Regis Hotel Birmingham.

Judicial Appointment

We are delighted that Adem Muzaffer has been sworn in as a District Judge by The Honourable Mr Justice Lewis, Presiding Judge for Wales (pictured below). Congratulations from all of us.

Emergency Out of Hours Appeal Applications

Tracy Lakin

Introduction

1. In December 2018, I had to make an application for the stay of an order removing children from the care of their mother in care proceedings to a Lord Justice of Appeal. The necessity for such applications is thankfully rare.

2. In this article, I set out the procedure and what to expect practically in the hope that it is useful to practitioners. Ultimately, the appeal, which was heard extremely quickly (within eight days of the original decision), was successful: ***Re:M (Children)* [2018] 12 WLUK 427**. The decision is currently only summarised on Lawtel, with a full transcript of the judgment awaited. The application for a stay was also successful albeit not completed until 11.20pm at night.

Procedure

3. The decision to remove the children occurred shortly after 5pm in the evening. Permission to appeal and an application for a stay of the order removing the children was opposed on behalf of the local authority and refused by the judge.

4. Ordinarily, the court below should give serious consideration to making an order that affords the aspiring appellant a narrow opportunity to approach the appeal court for a stay e.g. by delaying implementation until the end of the next working day. This would then require any appellant to make an urgent application for permission to appeal to the relevant court coupled with an application for a stay of the order but at least within working hours.

5. If a judge refuses a short stay to allow a prospective appellant to make an urgent application, then the practitioner has to very carefully assess whether the nature of the case requires an application using the out of hours procedure. Using the procedure in cases where there is no urgency is strongly deprecated. See ***President's Guidance in relation to Out of Hours Hearings [2011] 1 FLR 303***.

6. However, in ***Re: S* [2007] EWCA Civ 958**, the Court of Appeal criticised the parties in the case for not using the out of hours procedure to achieve a stay in an interim removal case. Within that case the Court of Appeal set out very clearly what should occur in respect of urgent appeal applications which include an application for a stay. In addition, it is also of assistance to consider ***Practice Direction 12E Urgent Business*** *(Family Procedure Rules 2010)*.

7. The first matter to evaluate is, to which court are you appealing, as this will determine who you contact with regard to an out of hours application. If your appeal is to a Circuit Judge, clearly you ring the local Care Centre who will have an urgent and out of hours procedure. In the event your appeal is to a judge of the High Court or to the Court of Appeal, the procedure is as follows:

   a. Within working hours, phone 0207 947 6000.

   b. Out of working hours, contact the security officers at the Royal Courts of Justice on 0207 947 6260.

   Both of these options will allow you to make contact in the first instance with a clerk responsible for out of hours business who will in due course, if appropriate, refer you to the appropriate member of the judiciary. They are likely to ask you to explain what the nature of the urgency is along with a brief summary of the issues. Thereafter, they are likely to ask you to provide any documents you can in support of your application by email and within the email confirmation that you undertake to pay the relevant application fee (currently £528) within 48 hours.

Emergency Out of Hours Appeal Applications cont.

8. Once the judge has considered the email documentation, you are likely to receive a telephone call from the relevant judge with regard to the necessity of a stay. The judge is also likely to make urgent orders as to the filing of an Appellant's notice (in ***Re M*** it was within 48 hours).

9. In terms of the relevant criteria for a stay, consider the case of ***NB v Haringey LBC*** **[2011] EWHC 3544 (Fam)** where Mostyn J applied established civil case-law and held that in determining whether to grant a stay:

   a. the court must take account of all the circumstances of the case;

   b. a stay is the exception rather than the general rule;

   c. the party seeking a stay must provide cogent evidence that the appeal will be stifled or rendered nugatory unless a stay is granted;

   d. the court must apply a balance of harm test in which the likely prejudice to the successful party must be carefully considered;

   e. the court must take into account the prospects of the appeal succeeding. Only where strong grounds of appeal or a strong likelihood of success is shown should a stay be considered.

For Tracy's CV, click here.

10. Nevertheless, any application for a stay must be seen through the welfare prism which overarches all children proceedings. Crafting any brief oral submissions in accordance with the above principles will greatly assist in your chances of success.

ICOs: fair hearings and the status of findings

Matthew Maynard

Introduction

1. In ***Re G (Children: Fair Hearing)*** **[2019] EWCA Civ 126** M appealed on the basis of:

   a. Improper judicial pressure to concede the ICO.

   b. The impression that the judge had pre-judged the case.

   c. The judgment also contains helpful guidance on the status of findings made at the interim stage.

The facts

2. The family were known to LA.

3. On 21 January D aged 4 years had been retained by F after contact. M went to F's house late at night, caused a fracas (it was alleged) and removed D. The Police were called and made a police protected all children. The local authority issued proceedings.

4. The case was urgently listed for an ICO before the expiry of police protection.

5. M intended to contest the ICO.

6. Judge's comments to M's counsel included:

   a. If the case was heard, findings would be made.

   b. Those findings would "stick" to M during the proceedings.

   c. The position of M was risky and precarious.

   d. The mere fact of removal in these circumstances amounted to significant harm.

   e. Any findings made would be sent to the Police and the CPS for their consideration.

   f. F was sensible in his decision not to contest the ICO.

7. Following the above, M then conceded the ICO. Judge did not consider the issue of whether the children could go home or apply the test for a continued removal.

8. By the time the appeal was heard the LA had agreed to a contested ICO hearing before a different judge.

Held

9. Where inappropriate judicial pressure is alleged the right course is an appeal, not a re-hearing.

10. Judges can, and frequently do, indicate a provisional view. That is entirely proper. However, Judges must not place unreasonable pressure on a party to change position or appear to have pre-judged the matter.

11. What occurred in this case fell well outside the proper exercise of the Court's powers.

12. The LA position at the appeal hearing (seeking to uphold the Judge's position) showed a failure to understand the nature of the overriding objective or the requirements for a fair hearing.

Status of findings at ICO stage

13. These comments may be *obiter dictum*, but are nevertheless useful, and may be subject to further argument in future cases:

   a. There is a fundamental difference between Sections 31 and 38 CA 1989.

   b. s38(2) does not require a court to make findings of fact to the ordinary civil standard, nor to be satisfied that the main threshold is proved.

   c. It requires the court to be satisfied that there are "*reasonable grounds for believing...".*

   d. Courts should be very cautious before making reference to the significance of conclusions drawn at ICO stage as such comments may appear to parents to be a form of pressure.

   e. If the Court is satisfied that there are reasonable grounds it will say so, but in doing so, the Court is NOT making final findings pursuant to sec31 on matters that must be proved to the requisite standard in due course.

To view Matthew's CV, click here.

1. The ALC commissioned research into the fairness and efficacy of settlement conferences (SCs) in public law cases.

2. This was a limited study involving interviews with 19 advocates involved in 61 SCs in the initial five pilot areas.

3. This study runs to 145 pages. This is a VERY brief synopsis.

    a. There was no consistency in case selection by the Court.

    b. There was some evidence of the procedure being "imposed" on parties, including vulnerable parents, parents with limited capacity, some who didn't understand the procedure and some reported as bewildered.

    c. Most judges were found to adopt a calm, patient, facilitating manner towards parents. Informality, when overly friendly, risks subtle disarming and manipulation of parents; some approaches could be patronising; BUT a small number of judges were described as brutal, harsh, blunt and insensitive with parents.

    d. Advocates felt that there was pressure on parents to consent to an order, both direct and forceful OR subtle and disarming, so that refusal to agree was difficult. Evidence of pressure on LAs to change position was rare.

    e. Where the issue was adoption advocates were "very uncomfortable" with the approaches of some judges and most felt these cases were unsuitable for SCs.

    f. There were concerns over Art 6 and Art 8 rights.

    g. In some courts the role of the advocates was marginalised, potentially leaving the parents exposed.

    h. The role of young people and competent young adults has not been sufficiently thought through. There were concerns that the views and voice of the child were not being truly heard or relayed.

Was the procedure fair?

4. Mixed picture.

    a. 2/19 said unreservedly fair.

    b. 5/19 said NOT.

    c. 8/19 =mixed experience – some SCs were fair some not.

    d. 3/19 fair in the main but pockets of concern.

Key concerns were:-

    a. Timing – SCs being rushed and chaotic.

    b. Variations of judicial approach.

    c. Lack of criteria for case selection.

IRH

5. Most advocates thought that a properly conducted IRH, with sufficient time allocated, could have reached the same result.

Conclusion

6. Most advocates thought that the procedure was appropriate for few public law cases BUT with amendments might be appropriate for private law cases, placement disputes between family members and contact issues.

   Accordingly:

   a. Findings to date do not support a roll out of SCs in their current form.

   b. Further evidence/research is required.

Editorial Note

7. Many of us had grave reservations about this initiative, feeling that the imbalance between the position of the parents and the Judge would inbuild pressure and a disregard for Art 6 and 8 rights.

8. The upshot of this survey appears to be that the advocates involved viewed SCs as inappropriate for cases where:

   a. There is a dispute about threshold or fact finding.

   b. Adoption is the issue.

   c. Parents have:

      i. mental health difficulties

      Ii. learning difficulties

      Iii. communication, language or comprehension limitations

   d. To which I would also add vulnerable parents.

9. These categories cover most care cases. So it seems to me that SCs, as currently formulated, are likely to be appropriate for a very small number of care cases.

For Ann's CV, click here.

1. This case highlights the inadequate provision in the UK for children with a serious mental disorder.

2. X was made subject to a Care Order just before her 17th birthday. She was detained, pursuant to a Detention and Training Order imposed by the Youth Court, in a secure unit.. The Care Order was made notwithstanding that;

   "The *local authority has not yet been able to articulate any workable care plan for X, let alone to identify where she might be accommodated and what services should be made available for her"*

3. In his third judgment Munby P stated that:

   The nation will have "*blood on its hands"* if an NHS hospital bed cannot be found within days for a teenage girl who is at acute risk of taking her own life. He said he felt *"ashamed and embarrassed"* that no hospital place had been found that could take proper care of X when she was due to be released from youth custody in 11 days' time.

4. The President explained that X, has made a large number of "*determined attempts"* on her life.

   She "had to be restrained 117 times in the last six months and has committed 102 "significant" acts of self-harm and 45 assaults on staff in that time. Her chances of recovery, and indeed of staying alive, clearly require her to be in the right place once she leaves detention on 14 August. But at the moment X's situation looks bleak; .What X needs, as a matter of desperate urgency – this is clearly the best option for her – is placement in a Tier 4 (adolescent) low secure unit for some 18-24 months"

5. The Judge added:

   "*We are, even in these times of austerity, one of the richest countries in the world. Our children and young people are our future. X is part of our future. It is a disgrace to any country with pretensions to civilization, compassion and, dare one say it, basic human decency, that a judge in 2017 should be faced with the problems thrown up by this case and should have to express himself in such terms."*

6. In his fifth judgment (17 August 2017) it was confirmed that X had been detained under section 47 of the Mental Health Act 1983 and had moved to a specialist unit (ZZ).

7. X's plight gained much attention due to the President speaking out so forcefully. However, X is not the first young person in an extremely vulnerable mental state to be denied potentially life-saving care because of services being woefully inadequate to meet rising need. Sadly, she is unlikely to be the last.

8. If you are met with this situation it is recommended that you seek to have the case transferred to the High Court ASAP.

To view Angela's CV, click here.

When is it necessary for a Local Authority to notify a father about the birth of his child? *Re C* [2018] EWHC 3332 (Fam)

Eleanor Marsh

Introduction

1. Cohen J was concerned with a six month old baby, C, who was the subject of care proceedings as a result of her mother making it clear at birth that she was unable to care for the child and wished for her to be adopted.

2. The issue to be determined was whether the local authority should inform the father and his family about the child's birth.

3. The mother was only 13 years old when she became pregnant. The father was approximately one year older. Their relationship was extremely brief. The birth of C was a complete surprise for the mother and her family, and C was discharged into the care of foster carers by way of a section 20 agreement. No more than eight people, in addition to the professionals involved, knew about the birth of C.

Analysis

4. Cobb J at paragraph 19 of ***Re A (Relinquished baby Risk of domestic abuse)*** **[2018] EWHC 1981 (Fam),** summarises the previous authorities as follows:

   a. Each case is fact-sensitive;

   b. The outcome contended for here is "exceptional";

   c. The paramount consideration is the welfare of A;

   d. The court must have regard to the welfare checklist in section 1(4) ACA 2002;

   e. It is a further requirement of statute that the court has regard to the wishes and feelings of the child's relatives;

   f. Respect can and indeed must be afforded to the mother's wish for a confidential and discreet arrangement for the adoption of her child, although the mother's wishes must be critically examined and not just accepted at face value; overall the mother's wishes carry "significant weight" albeit that they are not decisive;

   g. Article 8 rights are engaged in this decision; however, in a case where a natural parent wishes to relinquish a baby, the degree of interference with the Article 8 rights is likely to be less than where the parent/child relationship is to be severed against the will of the parent;

   h. Adoption of any kind still represents a significant interference with family life, and can only be ordered by the court if it is necessary and proportionate;

   i. A high level of justification is still required before the court can sanction adoption as the outcome, and a thorough 'analysis' of the options is necessary ; 'analysis' is different from 'assessment' – a sufficient 'analysis' may be performed even though the natural family are unaware of the process .

   j. As I said in Re RA at [38]:
   "in order to weigh up all of the relevant considerations in determining a relinquished baby case it may be possible (it may in some cases be necessary) and/or proportionate to perform the analysis without full assessment of third parties, or even their knowledge of the existence of the baby. The court will consider the available information in relation to the individual child and make a judgment about whether, and if so what, further information is needed".

5. Cobb J's analysis was adopted by Cohen J, but the following was added:

   a. The remedy sought by the mother is exceptional and therefore the circumstances needed to justify the remedy have to be exceptional. There does not, however, have to be one exceptional factor. A combination of circumstances, none in themselves exceptional, may satisfy the test when aggregated.

   b. All of the circumstances must be considered holistically, including an assessment, regardless of its imperfections, of what the paternal family is likely to be able to offer.

   c. The mother could, if she had known, have declined to name the father, which would have avoided the need for the court to consider the issue. Whilst not a relevant factor, its impact on the mother may be relevant.

6. Cohen J concluded that it would not be appropriate for the father to be informed of C's birth, due to a number of factors including, but not limited to:

   a. The very young age of the mother and the effect upon her life,

   b. The probability of the knowledge spreading around the mother's community which may lead to her education being terminated / social isolation,

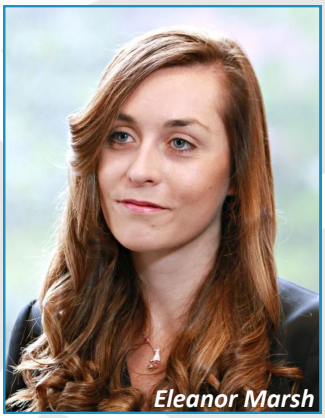
   c. The psychological vulnerability of the mother,

   d. The mother's genuinely held fears of what the father might do,

   e. The impact upon the mother's family,

   f. There being no ground for a realistic belief that the paternal family could offer C a safe and secure home,

   g. And the court having sufficient knowledge of the paternal family which could enable future life story work.



To view Eleanor's CV, click here.