



Jeremy Weston QC joined by Forward UK's Naana Otoo-Oyortey at our FGM seminar in July



For Jeremy's CV, click [here](#).



We are delighted that Naana Otoo-Oyortey MBE (Executive Director of Forward UK) will be joining Jeremy Weston QC at the FGM seminar on Wednesday 10th July. She will be talking about the work of Forward UK.

There are now only a few places left for the seminar 'FGM: The facts and is the law fit for purpose?'. This seminar is an update of Jeremy Weston's article published in February 'Female Genital Mutilation (FGM): Its prevalence and the protection afforded by the present law'. The article provides clarity for healthcare professionals, teachers and social care professionals on the law as it relates to child Female Genital Mutilation (FGM).

Naana Otoo-Oyortey MBE is the Executive Director of Forward UK, the lead organisation in the UK tackling FGM. She provides expert advice to the UK government on women and girls and the European Parliament on FGM and has over 30 years' experience on gender and women's human rights and previously worked with the International Planned Parenthood Federation and Commonwealth Secretariat.

For more details contact Ayka Ali at ayka.ali@stiveschambers.co.uk or David Walters at david.walters@stiveschambers.co.uk.

A date for your diary

Annual Child Care Conference 2019

Friday 11th October 2019

Park Regis Hotel, 160 Broad Street, Birmingham, B15 1DT

Our Annual Child Care Conference is a firm fixture in the legal year. Further details will be available on our website soon.



Modern Families Conference

Ann Chavasse



To view Elizabeth's CV click [here](#).



To view Natalie's CV click [here](#)



To view James' CV click [here](#).



To view Tom's CV click [here](#).

On May 10th St Ives held its innovative Modern Families Conference in Birmingham. We believe that we are one of the first sets of Chambers in the country to hold such a conference, focusing on this developing area of Family Law.

We were particularly pleased to welcome Natalie Gamble as a speaker. Natalie is a leading specialist solicitor in UK fertility law and a founding partner of Brilliant Beginnings, a UK based not-for-profit surrogacy agency.

Speakers from St Ives were Elizabeth Isaacs QC, James Picken and Tom Lawal.

In the context of how families have moved on it was thought-provoking to hear that as recently as 1977 the House of Lords had stated in **Re D** "Homosexuality ...remains unnatural and society continues to disapprove of it. It is most dangerous for a young person to come into contact with it".

Tom Lawal in his overview reminded us that Article 14 of the Human Rights Act 1998 set out that the rights and freedoms enshrined in the Convention "shall be secured without discrimination on any ground such as, sex, race, colour, language, religion....." **Salgueiro Da Silva Mouta v Portugal ECHR 2000** made it clear that Article 14 included sexual orientation. Coupled with section 149 of the Equality Act 2010 this is a powerful combination when looking at the duties of local authorities and the courts.

James Picken gave an insightful view into Transgender Issues, including the case law involving contact and residence issues when one of the parents has undertaken gender reassignment surgery. On the whole the courts have taken a pragmatic view stating that children need to know sooner rather than later about the parent's change of identity, in a way that will not damage them, with professional help if necessary. We still await the judgment in the TT and YY case as to registration of a child's birth where the father and mother are the same person as a result of gender reassignment.

Modern Families Conference continues overleaf

James then set out many areas where the law lags behind societal changes and amendments are needed to legislation.

Natalie Gamble from NGA Law spoke about the many legal pitfalls, many as yet unresolved, for those parents using alternative methods of conception including fertility clinics and surrogacy arrangements. She has been instructed in many of the leading authorities on fertility law, surrogacy, Human Fertilisation and Embryology Act 1990, multiple parent families and legal parenthood. She ably demonstrated how legislation lags well behind rapid developments in parenthood.

She has made detailed recommendations to the Law Commission on these issues. There will be a public consultation process from summer 2019.

Elizabeth Isaacs QC spoke about the intricacies of surrogacy law. Commercial and Altruistic surrogacy, what is legal and what is not permitted in our jurisdiction. The complications of legal parenthood and PR once the child is born. Liz was involved in the recent Court of Appeal case where the whole issue of Parental Orders was reviewed and, frankly, the legislation was found to be inadequate. She set out models for change, from pre-conception, at birth, and post-birth, to simplify the process for birth parents and surrogates and to provide for the best interests of the child.

As a delegate I can say that it was an excellent afternoon, addressing some of the cutting-edge issues currently facing us as family lawyers.

Ann Chavasse (May 2019)

Some of our training materials from the Modern Families Conference are now available to download from the Legal Training Materials page of our website – www.stiveschambers.co.uk



To view Ann's CV click [here](#).

NAI - Who should be in the Pool of Perpetrators?

Tom Harrill

1. The Court of Appeal in ***Re B (Children: Uncertain Perpetrators) [2019] EWCA Civ 575*** has modified the language for the test of whether a person should be included in the pool of perpetrators. There is now a three-stage test (see para. 49):
 - a. Is there a list of people who had the opportunity to cause the injury?
 - b. Can the court identify the actual perpetrator on the balance of probability (it should seek, but not strain to do so, per ***Re D (Care Proceedings: Preliminary Hearing) [2009] EWCA Civ 472***)?
 - c. Only if the court cannot identify the actual 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 of the inflicted injuries?'* Only if the answer is 'yes' should A or B or C be placed into the pool.

NAI - Who should be in the Pool of Perpetrators? Continues overleaf.

2. Notwithstanding ***Lancashire County Council v B [2000] UKHL 16*** and ***North Yorkshire County Council v SA & Ors [2003] EWCA Civ 839***, the extension does not stretch to *'anyone who had even a fleeting contact with the child in the circumstances where there was the opportunity to cause injuries'* 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 (see para. 50).

Facts of ***Re B***

3. The father ('F') successfully appealed the decision of the first instance judge to include him in the pool of perpetrators.
4. His four children, all aged under 10 years old, were taken into care because the three girls had tested positive for gonorrhoea. F was tested twice and the mother ('M') was tested also - both returned negative results (para. 9).
5. The expert, Dr Ahmos Ghaly, consultant in genitourinary medicine, reported that sexual abuse was the most likely explanation and infection through dirty towels, underwear or toilet seats was a remote possibility (para. 12). The family had been living in temporary accommodation in a hotel for 2 days followed by a 28-day period across two separate caravan sites (para. 6). Other unknown males who may have had access to the children were not tested. The community paediatrician examined the girls and noted a normal genital examination with no signs of hymenal injury (para. 8). None of the children made any allegations of sexual abuse in interview (para. 14). Each of the parents denied the allegations and expressed their shock.
6. Giving the lead judgment, Jackson LJ allowed the appeal, set aside the findings and remitted the matter for rehearing. The judge at first instance had incorrectly applied the uncertain perpetrator test. By *'not straining to exclude'*, the judge made F's task in extricating himself from the pool all the harder (para. 54) and the judge did not require the local authority to make out a positive case before reaching a conclusion in the light of all the circumstances. Instead, he reached his decision on the narrow but important basis that the children had the infection and the father had the opportunity (para. 55).
7. A further difficulty with the judge's threshold finding, made against F and *'other unknown males who may have had access to the children'*, had very low forensic value and would be unusually difficult to interpret at the welfare stage (para. 60). The pool of perpetrators is a departure from the norm and every effort must be made to ensure that the departure operates in a principled way. Here, the risk of unfairness was increased by the failure to investigate. The judge was aware of the gaps in the evidence but he did not give any weight to them.



To view Tom's CV click [here](#).

1. This problem has been re-visited by the Court of Appeal in two recent cases – **Re T-S Children [2019] EWCA Civ 742** and a Birmingham case **Re T [2018] EWCA Civ 650** where St Ives barrister Nina Bache was acting for the child through his guardian.
2. These cases give guidance when the judge and the LA cannot agree over the care plan. The following points are pertinent: -
 - a. The judge and the LA have different spheres of responsibility.
 - b. The responsibility for making orders rests with the court.
 - c. The responsibility for preparing and then implementing Care Plans is the LA.
 - d. Before a CO can be made the LA has to satisfy the court that the section 31 criteria are satisfied.
 - e. The court has then to be satisfied that a CO is in the child's best interests. In order to do that the court must rigorously scrutinise the care plan, because once the court has made a CO the responsibility for implementing and managing the order passes to the LA.
 - f. Where the judge accepts that a CO is in the child's best interests but does not agree with the care plan e.g. because the LA plan is long foster care and the judge believes that the child should be placed with a family member, the judge should analyse the welfare issues raised by the evidence and the LA care plan and adjourn (probably with a further ICO) to allow the LA time to reconsider.
 - g. The court and the LA must use their best endeavours to achieve sufficient common ground in relation to the care plan and final orders.
 - h. There is a need or mutual respect and engagement between the court and the LA.
 - i. The court should give appropriate directions for the next hearing and may wish to ask for further statements/evidence to be filed in response to his/her analysis of the welfare issues.
 - j. The court might require the ADM or other senior member of the SW team to attend the adjourned hearing.
 - k. If after this process, the impasse remains, the court may have to choose between the "lesser of two evils" OR contemplate a formal challenge to the LA decision making through Judicial Review.

Impasse! Where the Court and the Local Authority disagree of the Care Plan continues overleaf.

Impasse! Where the Court and the Local Authority disagree of the Care Plan cont'd.

3. In practice in this impasse situation: -
 - a. To make no order would leave only the parents with PR, when the court has found that would not be in the child's best interests and probably would expose the child to risk.
 - b. To make CAO supported by a SO would not provide the child or the placement with the support required to maximise the stability of the placement.
 - c. To make a CO, when the court does not agree that the plan is the right one for the child, exposes the child to possible risk and goes against the section 1 CA criteria.
4. A further point emerges if the LA care plan is adoption, but the court finds that the test for adoption "nothing else will do" is not made out.
5. That was the situation in **Re T** where the LA plan was for the child to be placed for adoption but the judge found that the best outcome was that he should live with his paternal grandmother, under a CO. When the LA failed to change the plan the judge made a placement order. The CA observed that such an order would result in the child being sent for adoption as a result of a decision of a non-court body (the Panel supported by the Agency Decision Maker) an "outcome unprecedented in modern times"
6. On appeal by the grandmother, the Court of Appeal allowed the appeal and ordered a re-hearing before a new judge, limited to a consideration of the grandmother's position.
7. Other useful authorities are: -
 - a. **Re T (A Minor) (Care Order: Conditions) [1994] 2 FLR 423**
 - b. **Re CH (Care or Interim Care Order) [1998] 1 FLR 402**
 - c. **Re W (A Child) (Care Proceedings: Court's Function) [2013] EWCA Civ 1227**
 - d. **Re S and W (Care Proceedings) [2007] EWCA Civ 232 2 FLR 275**

Rebecca Cross (June 2019)



To view Rebecca's CV click [here](#).

1. In the light of recent issues with the breakdown and failure of SGOs, including the deaths of some children, and the decision of Munby J in *Re P-S (Children) [2018] EWCA Civ 1407*, the Family Justice Council (FJC) has issued Interim Guidance, approved by the President, on the management of SGOs. Further guidance will be issued later.
2. Its primary purpose is to address cases where an extension of the 26-week time limit is sought to more fully assess potential SGs in public law proceedings.
 - a. Alternative potential carers should be identified at an early stage, and where possible, pre-proceedings.
 - b. Family Group Conferences are recommended as important if identifying alternative family and friends' carers.
 - c. All parties to proceedings (including the children's guardian) should file and serve position statements before the 1st CMH including details of proposed alternative carers to be assessed by the LA.
 - d. Proposed carers **should not** be governed by parents' views of approval or disapproval, but focused on the children's best interests.
 - e. Where the initial viability assessment is negative the LA must notify that person, and how to challenge the assessment, including seeking leave under section 10 (9).
 - f. Any challenge or application must be pursued promptly and listed for urgent directions.
 - g. There are cases where more time is required to complete an appropriate assessment and an extension of the 26-week period may be necessary, including: -
 - i. Where potential carers are identified late.
 - ii. Where it is "necessary to enable the court to resolve the proceedings justly" section 32 (5) CA 1989.
 - iii. If the proposed carers live in another country.
 - iv. Where the court has undertaken the welfare evaluation in terms of possible arrangements for the children, but further time is required to ensure the stability of the placement.

3. Where the viability is positive and a full assessment is to be undertaken: -
 - a. The court should consider and make orders for the children to spend time with the proposed carer as part of the full assessment.
 - b. An SGO assessment which does not include this is likely to be regarded as incomplete.
 - c. The court should consider the appropriate legal framework. If an ICO is not available, then consider a section 8 CAO plus an ISO to provide support for the placement.

4. In an accompanying document the FJC looks at the **Timescales for Full Family and Friend's Assessments (FFAs)**.
 - a. In the context of the 26-week limit 12 weeks is normally required for a full FFA.
 - b. Any assessment will need to balance the strength and value of a pre-existing relationship against the prospective carers capacity to meet the assessed needs of the child throughout minority, including any need for reparative therapy and care.
 - c. Assessments are required by regulation to consider prospective SG's: -
 - i. Current and past relationship with the child.
 - ii. Parenting capacity.
 - iii. Understanding and ability to meet the child's particular needs, including reparative care.
 - iv. Ability to protect the child from current or risk of future harm, posed by the parents, or other relevant persons.
 - v. Ability to care until 18 years of age.

5. LAs should consider presenting their full SG assessment in a format which also serves as a report to Fostering Panel.

6. The document then sets out requirements for achieving a comprehensive FFA, including: -
 - a. Enhanced DBS checks in **all** household members over 16 years. These take at least 8 ½ weeks, so early application is crucial.
 - b. Medical assessments.
 - c. LA checks on all household members.
 - d. Reading court documents and SW files on all relevant persons and their children.
 - e. References from schools, nurseries and childminders for any children in the household.

Special Guardianship - Interim Guidance cont'd.

- f. References from employers.
 - g. Health and safety checks on the home and any animals.
7. Ideally the assessment process should be long and interactive enough for prospective carers to assimilate information and consider any changes that might be necessary.
 8. It should be remembered that assessment happens at a time of emotion, stress and rapid change and therefore prospective carers require flexible, creative and relationship-based social work, plus time, in order for the assessment to be comprehensive and fair.
 9. To avoid delay, time should be allocated as early as possible for: -
 - a. Observation of contact.
 - b. Direct work with the children of the prospective carer.
 - c. Interviews with: -
 - i. Significant family members.
 - ii. Any significant ex-partners.
 - iii. Three referees.
 10. Prospective carers need time and opportunity to read the report before filing and provide any comment.
 11. After filing prospective carers should be given an opportunity to seek independent legal advice.
 12. Timescales need to reflect the general complexity of the task of FFAs and where unexpected complexities arise these should be identified to the court as part of any consideration of an application for an extension.



To view Elisabeth's CV click [here](#).

Elisabeth Richards (June 2019)