St Ives Chambers Family Law Group Update
Spring 2020

After a relaxing Christmas, we have hit the ground running and we are ready for an exciting and busy 2020! We have spent January making plans for this year's events and seminars and we have a lot to look forward to. The Private Law Spring Seminar Series will be taking place throughout March, April and May and is already proving very popular. This year's Charity Quiz will be raising funds for The Kaleidoscope Plus Group, who work to support positive health and wellbeing. This will also be in an exciting new venue for 2020 – The Alchemist at Brindley Place on Thursday 9th July. We will be returning once again to the Park Regis Hotel on Friday 16th October for our Annual Childcare Conference after its huge success last year so save the date and we hope to see you all there.

Jeremy Weston QC, Elizabeth Isaacs QC

To view Jeremy's CV click here.

To view Elizabeth's CV click here.

2020 - Dates for your diary…

Private Law Spring Seminar Series on these dates:

Tuesday 31st March

Tuesday 28th April

Tuesday 19th May

Annual Family Quiz
Thursday 9th July

Annual Child Care Conference
Friday 16th October

For more details on events please click here to visit our website.

Re B (Secure Accommodation) [2019] EWCA Civ 2025 represents a significant re-examination of secure accommodation orders, placing s25 Children Act 1989 in the context of the wider jurisprudence concerning deprivation of liberty and defining a new approach to the relevant criteria within the statutory test. In doing so the Court goes a long way to reconciling s25 with the hitherto starkly contrasting approach taken by the Court of Protection, or where the Inherent Jurisdiction of the High Court is invoked.

The Court in **Re B** adopted the definition of secure accommodation proposed by Lady Black in **Re D (A Child) [2019] UKSC 42 (Supreme Court)** that is: accommodation 'designed for or having as its primary purpose the restriction of liberty'.

The Court then noted that while welfare is not paramount in s25 applications, it is nevertheless an important factor, before going on to confirm that, as s25 engages both **Articles 5 and 8 of the Human Rights Act**, a court in deciding a s25 application must therefore address the test of proportionality.

The Court then set out a new approach incorporating the proportionality test:-

(1) Is the child being "looked after" by a local authority…?

(2) Is the accommodation where the local authority proposes to place the child "secure accommodation", i.e. is it designed for or does it have as its primary purpose the restriction of liberty?

(3) Is the court satisfied either;

(a) that (i) the child has a history of absconding and is likely to abscond from any other description of accommodation, and (ii) if he/she absconds, he/she is likely to suffer significant harm

or (b) that if kept in any other description of accommodation, he/she is likely to injure himself or other persons?

(4) … has the accommodation been approved by the Secretary of State for use as secure accommodation…?

(5) Does the proposed order safeguard and promote the child's welfare?

(6) Is the order proportionate, i.e. do the benefits of the proposed placement outweigh the infringement of rights?

If the above factors are satisfied, then the 'relevant criteria' under s25(3) will be met and pursuant to s25(4) the Court must make an order authorising the child to be kept in secure accommodation and specify the relevant period.

The new test has the effect of endorsing secure accommodation as a measure of 'last resort'. Furthermore, as the need to evaluate welfare and proportionality will necessarily involve an evaluation of other accommodation available to the child, the new test in effect imports the principle of the "least restrictive option" commensurate with the child's welfare, which is central to the authorisation of DoLS, in the Court of Protection or when using the Inherent Jurisdiction.

The court commented that there may be circumstances in which a local authority will not make a s25 application or the court will not approve such an order because one or more of the relevant criteria as set out above is not met. In those circumstances it would be open to the court to consider invoking the Inherent Jurisdiction to regulate the child's circumstances. However, to invoke the Inherent Jurisdiction where a local authority has made a s25 application and the relevant criteria are met would cut across the statutory scheme.

This robust approach contrasts with the more pragmatic view taken by The President in **T (A Child) [2018] EWCA Civ 2136** where, having highlighted the alarming frequency with which the Inherent Jurisdiction was being invoked, Sir Andrew McFarlane recognised the adverse practical implications of denying its use where there is a lack of available approved secure accommodation placements. It remains to be seen how Courts and Local Authorities will respond to the challenge.

Justine Lattimer

February 2020

To view Justine Lattimer's CV click here.

Amendment of LA Plan, Post Final Orders - What Can Parents Do?

Natalie Cross

Many of us are familiar with the case of **GM v Carmarthenshire County Council v LLM [2018] EWFC 36** - a case relating to the discharge of a care order and whether a child can be rehabilitated to family following a period in foster care. Yet what happens when a LA subsequently changes its final care plan from placement at home to removal when the final order has already been made?

Strictly speaking, with the existence of a care order and accompanying parental responsibility, the LA has the legal authority to carry out its plan. However, the approach to be taken by any parent faced with such a change in care planning is clear.

The case of **Re DE (Child) (Care order: Change of Care Plan) [2014] EWFC 6** lays down a protocol where parents seek to challenge a change to a care plan where the earlier plan (i.e. remaining at home) has already been approved by the court when the final order was made:

a) Where a care order is made with a child remaining at home, there should be a term in the care plan and a recital in the order that the LA agrees to provide not less than 14 days notice if the plan changes to removal, save in the case of an emergency *(it is crucial to ensure these provisions are properly inserted).*

b) Where the plan is removal, the LA must have regard to the fact that permanent placement outside of the family should be the last resort, that nothing else will do, and there should be a rigorous analysis of all realistic options. Parents **must** be properly involved in the decision-making process.

c) Alongside an application to discharge the care order (which is a remedy for the parents), a parent should consider whether to apply for injunctive relief under **section 8 Human Rights Act 1998.** This is because the discharge application would not provide interim relief, whilst an injunction would prevent the LA from removing in the interim. If so, that application should be issued at the same time as the discharge application.

d) If the LA receives a discharge application, it must consider again whether welfare necessitates immediate removal, the same test as in **Re LA (Children) [2009] EWCA Civ 822**. There should be a written record and justification for this (and this should be requested should it be omitted from the social work statement). Consultation must again take place with the parents. If the LA removes a child where immediate removal is not warranted, or has not properly considered or consulted the issues, it may be acting contrary to **Article 8 of the European Convention on Human Rights.**

e) When the court receives a discharge application, the gatekeeper should consider whether injunctive relief has been, or is likely to be, sought. This is because automatic legal aid is not available to parents on discharge applications and so they may be acting in person. Combined, these factors may require careful thought as to allocation and the listing of an early hearing.

f) Where the court hears an application for an injunction, it should normally grant it unless the child's welfare demands the need for immediate removal (emphasis added).

For local authorities, it is essential the procedure is followed to avoid criticism. The procedure has more recently been affirmed in **Re S [2018] EWCA 2512 (Civ).**

Similarly for parents' practitioners, it is vital that protection is afforded at the conclusion of the substantive proceedings, as well as casting a watchful eye over the way in which the LA has decided and then acted upon the change in care plan in order to ensure the proper approach has been followed (subject of course to a practitioner either securing legal aid after the final order or working pro bono).

Natalie Cross

(Law correct as of 12th February 2020)

To view Natalie Cross's CV click here.

The case of **London Borough of Bexley v B and A : Ref ZE 19 C00405** contains some very useful observations about Placement Applications and a good analysis of the case law.

HHJ Lazarus was adjudicating upon the LA application for a placement order in respect of a 4 year old girl, A, who sadly had significant and complex developmental, educational and physical needs. The parents had struggled to cope with her needs and about 6 months before the hearing they requested a LA foster placement for her.

A was part of a large, functional family with relatives in both this country and abroad. Her parents attended contact regularly, A was manifestly pleased to see them and the parents were supportive and cooperative with the FCs. The wider family were also involved in good quality contact.

The parents did not speak English but could communicate with A in their own language. The family had a rich family life and a cultural and religious heritage that was very important to them.

The LA care plan, supported by the Guardian, was adoption with minimal direct contact and some indirect contact.

HHJ Lazarus identified many deficiencies in the LA's care planning and the lack of important considerations including:-

- A's rich, national, ethnic, linguistic, cultural and religious identity and heritage
- Indirect contact would become meaningless to A as she lost her access to the language spoken by her parents and some of the wider family
- Harms and losses to A of losing all legal connection and meaningful contact with her birth family
- Close and meaningful relationship that A had with the extended family
- The family's commitment to A and support of the FCs
- The LA presented an almost entirely negative view of the birth family and the current arrangements.

In cross examination the SW conceded that the CPR did not adequately analyse these issues which were relevant to A's welfare and disproportionally focused on the negatives relating to her family without a balanced approach.

The Judge found that:-

- The LA evidence failed to balance the positives as well as the negatives in the available options.
- The LA planning had hardly gone further than "Given her age, the only permanency option viable for A is adoption". It was a skewed and highly partial approach.
- The SW had failed to focus on A's needs and characteristics as opposed to generalised assertions about the advantages of adoption for A, devoid of analysis and not backed up with evidence.
- The SW's reaction to the suggestion that family contact would promote her welfare was that it would narrow the pool of prospective adopters.

In addition the SW who completed the CPR did not have the qualifications required by the **Adoption Reports Regulations 2005 Reg 3** The Judge found the LA assertion that she had been supervised by a manager with the appropriate qualifications unconvincing.

The ADM's decision was also devoid of analysis.

Practitioners may find the analysis of the case law by HHJ Lazarus, relating to Placement Applications, useful when preparing to oppose such applications. In addition, the Judges criticism of the LA's negative approach to the family and failure to highlight the positives that the family had to offer, may resonate with practitioners when looking at the approach of some SWs to care planning.

Ann Chavasse
February 2020

To view Ann Chavasse's CV click here.

In **JH v MF 2020 EWHC 86 Fam** Ms Justice Russell adjudicated on an appeal from the decision of HHJ Tolson QC. This is a private law case, but deals with issues relevant to all CA cases where domestic abuse may be involved.

The court was concerned with C a child who had been born in January 2015. Prior to his/her birth F, who was 6 years older than M, had a significant history of violent behaviour and familial abuse.

During 2015 and 2016 there were several occasions when M contacted the police complaining of his domestic abuse. The records of these complaints were before Judge Tolson.

In late 2016, M left F taking C with her to a refuge, after a violent incident of sexual assault by penetration. Her ABE interview was available to Judge Tolson. There was also evidence from neighbours who had reported to the police, threats and harassment by F.

F reported to the LA that M was unable to care for C. The matter was investigated and no concerns in M's care of C were found.

2 years went by and then F applied for a CAO, seeking contact. He was acting in person.

M's case was that F was aggressive, intimidating, controlling and emotionally abusive during the relationship and that she was subjected to DA including verbal abuse, physical and sexual assaults, at times when C was present in the house.

Accordingly a fact-finding hearing was ordered.

Russell J found the following problems with Judge Tolson's decision:-

1. There was significant evidence before Judge Tolson that M was a vulnerable witness as a result of her experiences. However he refused M's application for screens and ordered that she give her evidence from Counsel's bench, which meant that she was proximate to where F was sitting in court, contrary to **Part 3A of FPR 2010**

2. Judge Tolson permitted F to give evidence from the same location, and did not prevent F receiving assistance from his McKenzie friend during evidence. M's Counsel's concerns about this arrangement were dismissed without reasons.
3. The Judge failed to apply the relevant definitions in **FPR 2010 PD 12 J** of DA including, coercive and controlling behaviour; eg dismissing the throwing of objects as characteristic of controlling and coercive behaviour.
4. The Judge dismissed or ignored the police evidence concerning the F's previous violence and the complaints of the neighbours and others and concentrated only on the oral evidence that he had heard.
5. Counsel for M was restricted by the Judge in making her final oral submissions.
6. The Judge made findings about M's psychological state of mind without any forensic expert evidence.
7. The Judge attributed M's anxious demeanour in court to her being neurotic, and failed to consider the impact of the F's proximity in court and his previous abuse of her.
8. The Judge's attitude to M's sexual assault allegations and the issues of consent were completely at odds with current jurisprudence and what is currently acceptable socio-sexual conduct. The logical conclusion of the Judge's approach is that it is both lawful and acceptable for a man to have sex with his partner regardless of her enjoyment or willingness to participate.
9. The Judge's finding that C had not been harmed by F was unsafe when he also found that F had used "more force than normal" when changing C's nappy.
10. The Judge found that M had been guilty of aggressive behaviour herself, when this was never put to M in cross-examination and did not appear to be part of F's case.
11. The Judge ignored threatening text messages from F to M, which occurred during the hearing, dismissing them as "sexting"
12. During his judgement, the Judge ordered a section 7 report and invited the CAFCASS officer to consider a CAFCASS managed contact intervention, when this issue had not been addressed at all during the fact-finding hearing and M's Counsel had not been given an opportunity to address the court on the issue.
13. At a later hearing the Judge directed CAFCASS to investigate child protection issues in M's care of C. Again this was never raised as an issue during the FF hearing. The evidence in the safeguarding letter stated that there were no welfare concerns about M's care of C.

Serious Allegations of Domestic Abuse continued...

It is clear from the above that this Mother was badly let down by the way in which the Judge conducted the hearing. As a result Russell J ordered a re-hearing.

Ann Chavasse

February 2020

To view Ann Chavasse's CV click here.