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

Welcome to the autumn edition of the newsletter which focuses on the topics discussed at this year's Child Care Conference.

At the beginning of October, we brought together child care specialists presenting on current topics alongside members of our family group for informative updates and lively debate. We were delighted to welcome Her Honour Judge Thomas to provide the keynote address and, our experts, Dr Andrea Goddard discussing FII and Hilary Kennedy presenting the use of Video Interaction Guidelines (VIG).

The Child Care Conference is one of the highlights of our year. As always, feedback from delegates was interesting to read and will inform our planning for next year – here is just a flavour:

"This was the best I have been to in recent years for childcare."

"Very good - the conference is always a very helpful update."

"Very good, excellent topics, excellent notes and reasonably priced."

Child Care Conference 2017: HHJ Thomas presenting the keynote address

The Legal 500 recommendations were published earlier in the month and we're delighted that members of our Family group were recognised as well as the group as a whole:

"The St Ives Chambers family group is 'one of the best in the region', with 'high-calibre advocates' handling family finance and children law. Members have expertise in difficult cases of abuse, serious injuries, child deaths and fabricated/induced illness, while fertility law is a growing area of practice…."

In September, we offered tenancy to three of our pupils – Angela Houston, Alex Pritchard-Jones and Lucinda Wilmott-Lascelles and in October welcomed new pupils Eleanor Lake and Gareth-Lee Smith.

Jeremy Weston QC
Elizabeth Isaacs QC

New Members: (left to right) Angela Houston, Lucinda Wilmott-Lascelles and Alex Pritchard Jones

New Pupils : Eleanor Lake and Gareth-Lee Smith

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5 Top Tips

1. Local authorities seeking a placement order should file with the court:

   a. the child's permanence report; and
   b. the agency decision maker's record of decision,

   because these documents contain important and informative analysis and reasoning.
   It is poor practice not to do so. See ***Re S-F (A Child)* 2017 EWCA Civ 964**.

2. In ***A v Cornwall Council* [2017] EWHC 842 QBD**, a local authority was entitled to take the following matters into account when considering a parent's contact with a child in its care, bearing in mind the impact of these views on the child's development:

   a. the parent's blog and publicised opinions expressing views against abortion and homosexuality;
   b. the strength of his views; and
   c. whether he would tolerate any dissent from his son.

3. In cases involving injuries to children there are very often medical records compiled by many different professionals. Parents often dispute the accuracy of such records. The records amount to hearsay evidence. The civil rules on hearsay apply to family proceedings and the court will always want to analyse the cogency and weight of any hearsay evidence. However, a local authority is not able to call as a witness every nurse and doctor who has made a note in order to get the best evidence. The local authority should assess the manner in which it considered it could most efficiently, fairly and proportionately establish its case. See ***Westminster CC v M, F and H* [2017] EWHC 518 (Fam).**

4. Local authorities may arrange for a child subject to an interim care order to be vaccinated, against the express wishes of the child's mother, provided that the local authority can demonstrate to the court that it is in the child's best interests. See ***Barnet LBC v AL and 9 others* [2017] EWHC 125 Fam**.

5. Appeals: Remember, in private law cases, all appeals from a Circuit Judge are now made to a High Court Judge using Form FP161, rather than to the Court of Appeal. Guidance is given on Form FP202. However, in public law cases, all appeals from a Circuit Judge are still made to the Court of Appeal.

Mark Cooper
For CV, click here

HRA Claims

At our recent Child Care Conference, Tom Harrill spoke on the subject of Human Rights claims.
Here are some key points from his presentation.

1. There is a 1 year primary limitation period so those acting for claimants need to do so quickly.

2. All the following are potentially actionable as unlawful:
   a A local authority failing for an unacceptably long time to:
      (i) conduct a proper assessment of the needs of a child;
      (ii) prepare and put in place a proper care plan for a looked after child;
      (iii) meet the assessed needs of a looked after child; or
      (iv) issue proceedings.
   b. A local authority failing to:
      (i) identify and put in place appropriate support for a looked after child;
      (ii) promote contact between a looked after child and their siblings and/or parents;
      (iii) involve the child's parents in its decision-making process and inform them of its decisions;
      (iv) review its decision-making in proceedings;
      (v) analyse and disclose relevant evidence; or
      (vi) via the independent reviewing service, challenge the authority's conduct.

3. HRA claims are governed by the Civil Procedure Rules 1998 and whether heard within proceedings or as a freestanding claim, claims for declarations and/or damages should be:
   a. issued formally under Pt. 8 of the CPR;
   b. not on Form C2; and
   c. not introduced via a skeleton argument or position statement.

4. A child is a protected party under CPR Pt. 21 and requires a litigation friend, however:
   a. the children's guardian, appointed in specified proceedings, may give advice about the appropriateness of pursuing a HRA claim but may NOT act as litigation friend or 'front' the HRA claim itself; and
   b. Cafcass cannot authorise its officers to act as litigation friends to minor claimants and its general policy does not support children's guardians acting as litigation friend.

5. There are funding difficulties – check with the Legal Aid Agency. Also, if damages are awarded the statutory charge MAY apply.

HRA Claims continues overleaf...

6. In order to succeed in a claim for declarations and/or damages, the claimant must:
   a. prove that the local authority (or other public body) has acted, or failed to act, in a way which is incompatible with a Convention right;
   b. prove that they are the 'victim' of that unlawful act; and
   persuade the Court that declarations (and damages moreover) are 'necessary' to afford them 'just satisfaction'.

7. The making of declarations for breaches does not mean that an award in damages will follow because it is a discretionary remedy.

To read the full text of the presentation click here.

Tom Harrill
For CV, click here

NAI OR NOT?

1. The recent case of ***Re Effie Stillwell (A Child) (sub nom. Re F (A Child); F v Buckinghamshire CC)*** **(Family Court) Her Honour Judge Venables 26.4.2017** highlights how parents can be believed to have inflicted serious physical injuries on their child when, in fact, there is an underlying rare genetic condition causative of the injuries in the course of normal handling.

2. E was presented at hospital in August 2016 aged approx. 6 months by parents who reported a collapse. E was unresponsive and had difficulty breathing. On examination she was found to have subdural and retinal haemorrhages and encephalopathy—the well-known triad of injuries associated with shaken baby syndrome.

3. However, there were no external injuries of note and none of the injuries frequently found in children who have been shaken or suffered abusive head trauma, such as:

   a. Bruising to the body;
   b. Rib fractures; or
   c. Focal contusions to the skull.

4. E was removed to foster care under an Emergency Protection Order and the father was arrested.

NAI or NOT? Continues overleaf

5. The parents denied inflicting any injury and they:

   a Were in a committed relationship;
   b. In previous engagement with medical services had shown that E was a precious baby adored by them;
   c. Had acted entirely appropriately at the time of collapse;
   d. Sought timely medical assistance;
   e. Had worked openly with doctors on E's admission to hospital;
   f. Worked well with professionals since E's reception into care;
   g. Had shown maturity and restraint (they were in their 20s); and
   h. Were committed to caring for E.

6. On further medical investigation and genetic testing it was established that E suffered from **Ehlers-Danlos Syndrome Type IV ('EDS IV')**. Patients with this condition have a collagen deficit which results in vascular fragility. The condition is associated with easy damage to tissue and easy bleeding.

7. Medical evidence was presented to the court from six medical experts, all of whom were leaders in their field. Their collective evidence was such that EDS IV was the cause of E's symptoms on admission to hospital.

8. Buckinghamshire CC sought permission to withdraw its application for a care order. The court confirmed that the paramountcy principle applied. The paramount consideration was whether the withdrawal of proceedings would promote or conflict with F's welfare. The court had to consider each case on its facts to see whether there was some 'solid advantage to the child to be derived from continuing the proceedings'.

9. Her Honour Judge Venables found that E's collapse was most likely the consequence of a naturally evolving disease (see in particular paragraphs 154-160 and 169-176 of the judgment). Buckinghamshire CC's application for withdrawal of the care proceedings was granted.

Carol Binnion
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Adoption Update

Adoption – Procedural Unfairness

1. Judicial review CAN be used as a mechanism for reviewing a LA's decision making in respect of adoption where there has been procedural unfairness. In *R* ***(on the application of EL) v Essex County Council*** **[2017] EWHC 1041 (Admin)**, the Mother's JR application was allowed and the decision to place the child was quashed; M had established that the LA had not acted fairly in accordance with the decision of the Court of Appeal in ***Re F (Placement Order)*** **[2008] 2 FLR 550** relating to the need for a LA to act fairly when making a decision to place a child for adoption pursuant to a placement order.

2. ***Re F*** has two parts:
   a. it addresses the construction and effect of s24(5) ACA 2002, which provides when an adoption agency needs the leave of the court before placing a child for adoption in respect of whom a placement order has been made; and
   b. it addresses the decision-making process of the relevant adoption agency when making a decision to place without the leave of the court.

3. The Court of Appeal made considerable efforts to ensure that its decision was circulated. It was highly critical of the approach taken by the adoption agency in *Re F* to the making of the decision to place and made it very clear that:
   a. a parent could seek JR of a decision to place a child for adoption that was not made in accordance with good practice and so, in administrative law terminology, was unfair; and that
   b. in those proceedings, and perhaps others, an interim injunction to prevent a placement for adoption could be sought.

Adoption – Welfare Checklist

4. In ***Re W-C (Children)*** **[2017] EWCA Civ 250**, the Court of Appeal set aside a placement order in respect of a two year old child where the judge had erred in failing properly to address the guardian's argument that the child should be placed in long-term foster care with her aunt, reaching his conclusion before evaluating the appropriate checklist under s1(4) ACA 2002 and applying the wrong test for dispensing with parental consent under s52(1)(b).

5. The LA had commenced care proceedings in respect of 2 children, C and D, and had recommended that they be placed for adoption, while the guardian sought their placement in long-term foster care with their maternal aunt under a special guardianship order. The judge found that leaving the children with their mother was not a realistic option and that C should be placed with his maternal aunt. He then considered whether D should be placed for adoption, and concluded that she should, later referring to the welfare checklists in s1(3) CA 1989 and s1 ACA 2002. He held that dispensing with parental consent was in D's best interests and ordered her placement for adoption.

6. The Court of Appeal allowed the appeal by the Guardian:
   a. In considering the choice for D of adoption or long-term fostering, the judge had erred in failing to refer to the relevant authority and in failing to identify the factors for and against fostering and adoption respectively.
   b. The judge had erred in considering the welfare checklist in the 1989 Act. Where the issue was a choice between long-term fostering and adoption, the s1(3) welfare checklist was not relevant and he had simply considered D's welfare in the context of adoption, failing to evaluate the option of long-term fostering.
   c. The judge had announced his decision that D should be adopted before considering the checklist in s1(4) ACA 2002. It was not possible for the court to decide on adoption unless and until the s.1(4) checklist had been considered.
   d. The judge had erred in dispensing with parental consent to adoption on the basis of the wrong test. The correct test under s52(1)(b) ACA 2002 was that the court had to be satisfied that the child's welfare required the parents' consent to be dispensed with. "Required" in that context meant that adoption was necessary for the child's welfare, following an evaluation of its proportionality in accordance with Article 8.
   e. There had been a wholly inadequate analysis of the issue of whether D should be placed for adoption or long-term fostering.

Adoption – Welfare Decisions

In ***Re W (A Child)*** **[2017] EWHC 829**, the President was dealing with care proceedings in relation to a child born in 2012, which resulted in care and placement orders and the child being placed with prospective adopters.

7. There were ongoing proceedings and appeals by the father who cared for the child's three half-siblings. Permission was granted to the local authority to withdraw the care proceedings since it was no longer in the child's best interests for them to continue.

8. It was in her best interests for an adoption order rather than a child arrangements order to be made because:
   a. the risk of moving the child from her adoptive placement was great;
   b. she was likely to suffer immediate and significant levels of trauma; and
   c. she also had no meaningful relationship with her birth family.

Adoption Update continues overleaf

9. Direct contact would safeguard her psychological well-being, but it was left to the adopters, as her parents, to determine when and how it should take place. The court dispensed with the birth father's consent and made an adoption order.

10. The father subsequently applied to set aside the adoption order and prevent the removal of the child from the jurisdiction by her adoptive parents – reported as **Re W (No 4) [2017] EWHC 1760 (Fam).**

Elizabeth Isaacs QC

For CV click here

Kinship Assessments

1. In ***Cheshire East Borough Council v NA and others* [2017] EWFC 20**, MacDonald J was required to determine issues in relation to care proceedings regarding an 11-month old girl (X) who had suffered serious head injuries caused by her mother and significant emotional harm as a result of her parents' volatile relationship.

2. The maternal aunt and her partner and the paternal great aunt and her husband both wished to care for the child and both sets of potential carers had been assessed.

3. McDonald J found that the first step was to identify key issues for the protection of the child, which for X was a potential carer's ability to protect her from the harm presented by her parents.

4. He found:-

   a. The social worker's assessment of the maternal aunt and her partner was fundamentally flawed because the social worker had made no professional effort to assess whether the maternal aunt's partner constituted a protective factor.

   b. The assessment of the paternal great aunt and her husband was also wholly inadequate and f fundamentally flawed. It comprised nothing more than a statement that they had successfully raised children before and would be able to promote X's identity.

c. In both cases there was no assessment of the central question of their ability to protect X against the risk of harm presented by her parents.

The court also confirmed that the statutory guidance in Working Together to Safeguard Children (March 2015) set out the principles and parameters of good assessment.

5. Overall, it made clear that the aim of an assessment was to use all the information to:
   a. identify difficulties and risk factors; and
   b. develop a picture of strengths and protective factors.

   An assessment concerned with establishing capacity to protect against an established risk of harm had to include a process that ensured that the subjects of the assessment were aware of the precise nature of the risk of harm.

6. Having been made so aware, each of those being assessed had to be the subject of a comprehensive evaluation of their understanding of and attitude towards that risk in order to establish the extent to which they had, or did not have, that capacity to protect.

7. The assessments in this case did not permit the court to reach a properly informed or fair decision as to which of the placement options best met X's identified welfare needs or, indeed, whether either was capable of doing so.

8. Ultimately, the court ruled that it was not possible to conclude the final hearing fairly without further assessments and the final hearing was, therefore, adjourned. The maternal aunt's application was granted and a further assessment of the paternal aunt and her husband was ordered to be undertaken by an independent social worker.

   The local authority was ordered to pay the costs of the further assessment.

Elisabeth Richards
For CV, click here

Child Care Conference 2017 in pictures

Elisabeth Richards and Mark Cooper

Dr Andrea Goddard

Greg Rogers

Jeremy Weston QC introduces Hilary Kennedy

Elizabeth Isaacs QC

Tom Harrill

Jeremy Weston QC with conference delegtes

Some of the members of St Ives Chambers Family Group: From l to r Elisabeth Richards, Mark Cooper, Timothy Bowe, David Walters, Nina Bache, Sarah Robinson, Nick Burdon, Annabel Hamilton and Sarah Fahy.