

# A case law update- a selection of the non-COVID-19 cases published during the pandemic

1. The Covid-19 pandemic has produced a number of new cases which tie together the guidance produced by the senior judiciary and are essential reading for all practitioners in this new world of remote working. Natalie Cross has helpfully provided an update on the most recent decisions here <https://www.stiveschambers.co.uk/remote-hearings-an-overview-of-the-most-recent-case-law/>. This article alongside *A Local Authority v The Mother & Ors [2020] EWHC 1233 (Fam)* and the very similarly named *A Local Authority v The Mother & Ors [2020] EWHC 1086 (Fam)* are key reading for practitioners conducting remote/hybrid hearings.
2. Covid-19 decisions aside, there have been a number of new judgments which clarify the law in relation to a number of contentious areas recently published. This article will be a whistle-stop summary of some of the new cases of interest. Though I aim to set out the interesting and salient points from those decisions, there is of course no substitute for reading the decisions in full.

## **S (Child in Care. Unregistered Placement) [2020] EWHC 1012 (Fam) (28 April 2020)**

<https://www.bailii.org/ew/cases/EWHC/Fam/2020/1012.html>

### **The ongoing issues of a lack of registered placements for vulnerable children**

3. This decision by Mr Justice Cobb is unfortunately another decision regarding the lack of availability of suitable placements for children subject to Deprivation of Liberty applications. Samantha is aged 15 and described as an extremely vulnerable young person with complex needs. She is subject of an interim care order and at the time of judgment was living as the only young person in a holiday cottage in rural North Yorkshire. The property had been rented by the Local Authority for the purposes of accommodating her. She is supervised day-to-day by up to three employed staff. The placement is unregistered and therefore unregulated by Ofsted.

4. The tenancy is due to expire and if not renewed, quite shockingly, this will be Samantha's 16<sup>th</sup> move in the last 12 months.
5. As Cobb J emphasises, this case is all too familiar to those working the Family Court and he opines it is a nationwide problem [3]. With the agreement of the parties, a number of suitably redacted documents were sent to the Children's Commissioner who indicated she would like this case to be raised directly with the Secretary of State for Education; it will be.
6. The matter was before the court for directions and to consider the authorisation of Samantha's deprivation of liberty. The court sets out the background of the case at paragraph [5]. It highlights the difficult upbringing of Samantha, her complicated needs and how her placement in this unregistered placement came about.
7. This judgment is essential reading for all practitioners or those interested in family law. At [16] the wider context is considered, the startling statistics set out demonstrate the seriousness of the situation that faces vulnerable children in need of registered placements. Sadly, the court emphasises that this is not a new issue and one that the Department for Education is aware of [20].
8. In relation to the facts surrounding deprivation in this case, the law is set out at [20]. The judge was satisfied of the conditions in this case and authorised the continued deprivation.
9. Again, as startling as the "*wider context*" at [16], are the efforts this Local Authority has made to find a suitable and secure placement for Samantha. The efforts have been daily, extensive, varied and completely without success. The court emphasised that the onset of the Covid-19 will no doubt affect the provision for secure accommodation but further states that the problems raised in this case are not related to the pandemic [27].
10. The court copies in full the response of the children's commissioner at [28] onwards.

11. The conclusions of the case are found at [29]. It is a sad situation that Samantha and many other children in her situation face but one that is all too familiar.
12. The draft judgment was sent to the President of the Family Division who entirely shared the concerns expressed in respect of Samantha's situation. It is a sad reflection that the message of this judgment echoes that of *Re T [2018] EWCA Civ 2136*, a case which is now some 18 months old. It is positive to see this judgment has been sent, along with a number of agreed documents, to the Secretary of State for Education, the Chair of the Residential Care Leadership Board, the Minister for children and the Chief Social Worker.

**Re L (Adoption: Identification of Possible Father) [2020] EWCA Civ 577 (30 April 2020)**

<https://www.bailii.org/ew/cases/EWCA/Civ/2020/577.html>

**Sibling testing and the need to notify fathers when children are placed for adoption**

13. This is a decision by the President of the Family division, Lord Justice Peter Jackson and Lady Justice Nicola Davies. Lord Justice Jackson gave the lead judgment. The decision is a subsequent decision to *A, B and C (Adoption: Notification of Fathers and Relatives) [2020] EWCA Civ 41*, which considers the approach to be taken where a mother wants a baby to be placed for adoption without notice being given to the putative father.
14. This appeal raises two questions:
  - a. *To what extent does the same approach apply where there is uncertainty about the child's paternity?*
  - b. *What should the response of the court be to a proposal that paternity should be investigated by carrying out DNA testing on other children of the mother without reference to the possible father? "sibling testing"*
15. The case involves a mother with three children. Two of the children share a father, Mr C, the third was initially a concealed pregnancy at a time when she was separated

from Mr C. The mother had told her family and a midwife that Mr C was the father, but had asked that the child be placed for adoption at birth and that he is not told. The mother refused consent for the social worker to contact the putative father. Two days after the child's birth, the mother signed s.20 agreement and was adamant that Mr C would not be given details about the baby. It should be noted that at this point that Mr C was having contact with his other children, though the mother doubted his commitment. In December of 2019 the child had been in foster care since it was two days old, the mother consented to the child being adopted.

16. Belatedly the Local Authority applied for two incongruent orders. Firstly, a declaration that it need not take further steps to locate the child's father and secondly for a DNA test of Mr C. The judgment notes the two differing applications is due to a breakdown in communication at the Local Authority [6].

17. The matter was listed for a directions hearing and the mother provided a witness statement stating that she was concerned at Mr C's response and the potential unpleasant behaviour he would exhibit towards her [should he be told of the new child]. The mother further stated she was fearful of a violent uncle. At a further hearing, the judge ordered the mother to provide Mr C's contact details and directed the Local Authority to contact him and inform him of the child's birth. It would not endorse sibling testing, nor was the court willing to give the declaration sought by the Local Authority in the absence of the father's knowledge. The mother obtained advice to appeal- at this point it is noted that she shifted her position to suggesting sibling DNA testing was sufficient to establish if Mr C was the father. On appeal, a stay was granted, some six days before the substantive *A, B and C judgment*.

18. The appeal concerned three issues:

*(1) The failure [of the court] to give the mother's counsel the promised opportunity to make further submissions was a serious procedural irregularity that rendered the decision unjust and was in breach of the mother's rights under Article 6.*

*(2) The decision was wrong as being an unnecessary breach of the mother's Article 8 rights in circumstances where the other children could be tested.*

*(3) If a balancing exercise was called for, the judge failed (as a result of not hearing more extended submissions) to take adequate account of the mother's allegations of abuse and the effect of disclosure on her, the fact that A, B and C concerned children whose paternity was not in issue, and the fact that Mrs C does not have parental responsibility for K or family life with her.*

19. Ground 1 of appeal was addressed at [20]. Although the ground was not pursued at appeal, it is interesting to note that one of the factors cited by the judge for overlooking the fact that he had promised the mother further opportunity to make submissions was judicial workload. This is a reoccurring theme; it being mentioned in the recent decision of *B (Children)(Remote Hearing: Interim Care Order) [2020] EWCA Civ 584*. The point was taken no further, the ground having not been pursued.
20. The case helpfully sets out the legal test in respect of sibling testing at [23] onwards. It noted that the court should be extremely cautious before approving testing of siblings as a mean of clarifying parentage of a child whose mother seeks adoption [24]. The objections to sibling testing are likely to only be ethically overcome where paternity testing is not an acceptable option and clarification to parentage is necessary.
21. In this case the court concluded that the judge in the first instance was correct to resist the proposal of sibling testing. Jackson LJ suggested that if it did so, the children would unwittingly become involved in the secrecy requested by the mother. The first instance decision was upheld and the refusal to endorse adoption without clarification of paternity was correct. The judge at first instance was correct to find that the overriding factor was that of the child and should know throughout her life whether she has siblings and whether her father is her father.

22. The appeal was dismissed. Davies LJ and Sir Andrew McFarlane P agreed. This case is important as it sets out the necessary balance that the court needs to make regarding the rights of children, siblings and parents. Furthermore, this case clearly turned on the fact specific matters; it will be interesting in future cases to see whether different circumstances in respect of a father may elicit alternative outcomes for the court's approval of sibling testing.

**A City Council v M & Ors [2020] EWHC 947 (Fam) (7 May 2020)**

<https://www.bailii.org/ew/cases/EWHC/Fam/2020/947.html>

**Technology pre-lockdown and the issue of failure to protect**

23. This case is a decision by Mrs Justice Judd and is interesting to see how, in a pre-Covid-9 era, technology in international element cases has been utilised. The judgement is the result of a multiday fact find hearing containing issues of domestic violence, control and neglect. The case also contains an international element. The father became a British citizen in 2008 and the mother is a non-British national. The parents married in 2015 in an Islamic marriage and moved to England in 2017.

24. The subject child, C, was a ward of the court and placed in foster care following her return to the United Kingdom in September 2019. The local authority had been involved with the family since April 2019 following an alleged assault at Stanstead airport. What followed was that in June 2019, the family decided to take a holiday to Turkey, the mother having been warned of the risk of doing so by the Local Authority. The family failed to return from their holiday and the social worker reported them missing on 18<sup>th</sup> June 2019. There was then a series of messages from the father to the social worker explaining that the maternal grandmother had become critically ill and they had returned to "X" country. The father returned to the UK on 28<sup>th</sup> July 2019 and told the SW that M and C were in "X", he had returned to renew the mother's visa.

25. Whilst the father was in the UK, the mother contacted the Social Worker and police to suggest that C had been removed from her and she was in hiding in "X". On 28<sup>th</sup>

August 2019 the LA applied to make C a ward of court and the father was ordered to return the child to the jurisdiction. He did and as set out at the start, the child was placed in foster care. Since that date, the mother has had contact with the child via Skype on account of the mother remaining in "X".

26. The mother remains in "X" on account of her visa having expired and because she is subject of proceedings in X in which she is accused of adultery. She had spent a period in custody between October and December 2019 due to the proceedings. Since her release she has been staying in a confidential address.
27. The findings sought by the Local Authority are set out at [8] onwards. They are in respect of violence to the mother (physically and verbal abuse), that the father was violent to C, that the father stranded the mother in "X" by failing to renew her visa and that the child suffered a burn during the time in which she was in the fathers care. Interestingly the Local Authority also sought a finding that the mother failed to protect C from domestic violence and by going to "X" in breach of the Child Protection Plan. Of note is that the Local Authority findings are largely based on the evidence of the mother. This is particularly interesting given that assessing the credibility of witnesses remotely is a hot topic in present times and this hearing had to take place in a hybrid situation pre-Covid-19. The father resisted the findings, denying he has been violent or controlling. His case was that it was mother who abandoned the marriage in "X".
28. The law in respect of the findings of fact will be familiar to all practitioners but is helpfully set out at [13] onwards.
29. In respect of the mother's evidence by skype, the court assesses the success of such evidence at [17]. The court praises the clarity of the call and the success of the evidence given via video link from "halfway across the world" - it was described as being "as good as if mother was next door".

30. The analysis of the evidence is found at [25] onwards. It is the mother's ability as a historian and her consistency which is compelling to the judge. In contrast, the father's version was said to make little sense [28]. The case emphasizes that practitioners should not take a broad-brush approach assuming that credibility is not capable of assessment in respect of video witnesses. This case exemplifies that the perceived "disadvantage" of remote evidence can be extinguished by clear and effective evidence, especially when a witness in person is so unconvincing.
31. The court made many of the findings sought by the Local Authority in respect of abuse to the mother and C. On the issue of the failure to protect, the court was unwilling to find this fact [38]. The mother's circumstances (the fact she has been a victim of domestic abuse, her vulnerability and her inability to speak the language) were taken into account when assessing whether this finding could be made. As a result of her circumstances, the mother's ability to stand up for herself was compromised. This judgment emphasizes the need for those who plead failure to protect to look at the facts surrounding a finding. Just because a party fails to intervene or stop something from happening, one should not assume that is of itself enough to prove the failure to protect.
32. This case is interesting for a number of reasons, specifically the way in which the court can weigh up credibility via "e-hearings". In the present pandemic, there are obvious difficulties with the fact that hearings are being dealt with by all parties "zooming" in or in hybrid hearings. Unfortunately, it seems that it is the technology (especially when more than one device is relied upon) that provides many of the difficulties in remote hearings.
33. This case does not describe the technological set up in any great detail, however one would imagine given the fact it was conducted "pre-lockdown" and that it was anticipated. This would have resulted in better arrangements being put in place ensuring the trials success. At present we are in a reactionary phase to the present situation. The court is having to respond and test the technology, perhaps without the "breathing space" to adequately ensure everyone is "set up" to participate

effectively. Furthermore, no doubt it will be easier to consider the credibility of one witness on one screen relying on two internet routers as opposed to everybody, on separate screens all relying on their own connection to be able to question, respond and assess all at one.

**AS v CPW [2020] EWHC 1238 (Fam) (18 May 2020)**

<https://www.bailii.org/ew/cases/EWHC/Fam/2020/1238.html>

**Return orders and Gillick competent children**

34. Mr Justice Mostyn gives this decision in respect of a return order for a 14 ½ year old boy from Sierra Leone. This case focusses on the law surrounding return orders, especially where the child is Gillick competent.

35. In short, this child (whose two siblings were also subject to a CAO application) had been placed in Sierra Leone with the mother's family. There were a number of concerns in respect of B prior to his placement abroad, they include (but were not limited to) his permanent exclusion from school, his disruptive behaviour and the fact he was a known member of a gang believed to be involved in county lines drug dealing. It is to that background that the mother, contrary to the father's wishes, moved the child to Sierra Leone. The father issued an application for an inward return order and B was made a ward of the court.

36. What is interesting is that the court (in very strong terms) expressed that B's placement was "*completely unacceptable conduct and an extremely poor example of unilateral self-help. It was a wrongful abduction...*" [10]. By the time of the hearing, B was settled in Sierra Leone and attending a local school to complete his GCSE's. During the course of proceedings, B was spoken to by a CAFCASS officer via the British High Commission in Freetown, Sierra Leone. B was said to have made his views clear and he spoke spontaneously and freely. B was clear that despite missing his family, he wished to remain in Freetown until summer 2022.

37. At paragraph [17] onwards the court helpfully summarises the law in respect of wishes and feelings of children and specifically when they become decisive. Furthermore, it assesses the history up until the decision of *Gillick* and the impact of *Gillick* competency on proceedings. The court drew on a number of examples where children of different ages have been clear in their views, and others where the court will wilfully and knowingly ignore a child's views in keeping with their best interests. This assessment will be particularly helpful for practitioners advising parents in private law disputes. It potentially draws a line in the sand for a client wishing to know when and when not to listen/follow the expressed wishes and feelings of a child.
38. The court decided that B should remain in Sierra Leone and was critical of the suggestion (by the father) that the view of a competent 14 ½ year old boy could be ignored in these circumstances. The court then went on to assess the appropriateness of the children remaining a ward of the court and whether it is necessary for return order cases to be automatically allocated to the High Court [30].
39. The court emphasised the need (in keeping with earlier decisions) for return orders to be formulated as specific issue orders, thus High Court allocation is not required [45]. As practitioners are aware, specific issue orders are the daily work of courts dealing with private law matters. Intervention of the High Court should be reserved in return order cases to cases requiring special expertise [48]. The case assesses the appropriateness of allocation say when a tipstaff order may be required.
40. As a side note, the court emphasised that there should not be an automatic presumption that when there are wardship proceedings in private law cases that the existing private law proceedings should be stopped and moved alongside the High Court proceedings [34].
41. The court then moved on to analyse whether or not the child in this case should have been separately represented (it was not) [51]. The court focusses on the *Gillick* competence of the child, FPR PD 16A and *Re LC (Children) [2014] UKSC 1*. It found

that in this case, the criterion was squarely met, and the child should have been afforded representation.

42. Finally, Mostyn J, urges practitioners to correctly set out “*penal notices*” within orders. He calls for a quietus in the practice of over complicating orders or attaching notices where the heave already been set out clearly at the start of an order.

**GEORGE SMITH**

**St Ives Chambers**

**27 May 2020**

