St Ives Chambers Family Law Group Update

Spring 2021

It is very great pride that we are sending you the latest version of the St Ives Family Group Newsletter. These continue to be extraordinary and unprecedented times for all of us, but we are so proud of all our members who continue to go from strength to strength and are working harder than ever. We are also proud to introduce our three newest pupils – Eloise Marriott, Queenie Djan and Feargus Campbell – who are eagerly getting ready to get on their feet! Particular thanks to our fantastic clerking and business management team without whom it would simply not be possible for us to continue to provide the high level of service we know you have all come to expect. We can't wait to see you all again in person!

Elizabeth Isaacs QC

The facts

1. This case involved an appeal against findings of fact made in public law proceedings. Following a finding of fact hearing, the trial judge had found that the father had sexually abused his daughter.

2. The initial allegations of sexual abuse were made by the mother in 2018. The mother had alleged that the father had sexually abused the child during contact. These allegations were investigated by the local authority and no further action was taken. The social worker conducting the investigation expressed concerns that the mother and the maternal grandmother may be projecting their anxieties about contact on to the child.

3. Private law proceedings were issued by the father and orders were made for unsupervised contact to take place between the father and the child in the community. Only two sessions ultimately took place: 22 and 29 July 2019. On 2 August 2019, the mother noticed blood on toilet paper after wiping the child's bottom. The mother arranged for the child to be seen by the GP, who made a referral for her to be examined by a paediatric forensic paediatrician on 5 August 2019.

4. The paediatrician identified signs that the child had suffered penetrative anal abuse. Following the examination, the mother claimed that the child had made further allegations about the father. The mother asked the child a number of questions about these allegations and made notes of the conversations. Despite this, the child made no allegations against the father when she was interviewed by the police.

5. Care proceedings were issued by the local authority and directions were made for a report to be filed by a consultant paediatrician. The expert said that she would have expected the signs of any sexual abuse to have healed by 2 August 2019 had the abuse taken place on 27 July 2019. Her evidence was summarised as follows in the judgment:

   I think it was the anal laceration that I found particularly unusual not to have presented with some signs of bleeding before 2 August, and certainly if this had been one injury on 27 July I would have expected there to be a lot more healing by 5 August, I'd have to postulate that something had happened on many occasions for the changes to have been so obvious on 5 August.

6. At the finding of fact hearing, the local authority alleged that the child had been sexually abused by either the father or the mother. The judge went on to find that the injuries identified on 5 August 2019 had been caused by the father. As a result of this finding, the judge went on to find that the abuse alleged by the mother in 2018 had been caused by the father as well.

The Appeal

The Court of Appeal allowed the father's appeal against the findings:-

1. The judge's reasoning was considered to be insufficient.
2. The judge failed to take into account some material factors.
3. The judge looked at the evidence in compartments and did not have regard to each piece of evidence in the context of the totality of the evidence before reaching his conclusions.
4. The judge's findings against the father were inconsistent with the medical evidence (accepted by the judge) set out above.
5. The judge had failed to deal with the argument put forward by the father that it was inherently improbable that he had anally penetrated his daughter whilst spending time with her in the community at busy places such as a swimming pool and restaurants.

The duty to request further reasons

8. In allowing the appeal, the Court of Appeal rejected the submissions made on behalf of the local authority and the mother that the father should have requested amplification of the judge's reasons.

9. Baker LJ (giving the lead judgment) went through the requirement for trial advocates to seek additional reasons for a judge's decision before applying for permission to appeal. This duty is well-established and can be found in a number of authorities, in particular ***Re A and another (Children) (Judgment: Adequacy of Reasons) (Practice Note)* [2012] 1 WLR 595**. Munby LJ (as he then was) described the advocate's duty in the following way:

First, it is the responsibility of the advocate, whether or not invited to do so by the judge, to raise with the judge and draw to his attention any material omission in the judgment, any genuine query or ambiguity which arises on the judgment, and any perceived lack of reasons or other perceived deficiency in the judge's reasoning process.

10. The duty is also now set out in Practice Direction 30A to the Family Procedure Rules 2010.

11. Baker LJ, however, outlined the following qualifications to this rule:

First, it must never be used as an opportunity to re-argue the case. As Mostyn J observed in ***WM v HM [2017] EWFC 25*** *(at paragraph 39):*

> *"I would observe that the demands by [Counsel] for correction and amplification of the draft judgment went far beyond what is permissible, and amounted to blatant attempts to reargue points which I had already rejected. This practice is becoming commonplace and should be stopped in its tracks in the interests of efficiency and the conservation of the resources of the court. Suggested corrections should be confined to typographical or plain numerical errors, or to obvious mistakes of fact. Requests for amplification should be strictly confined to claimed "material omissions" within the terms of FPR PD 30A para 4.6."*

Mostyn J's observations were endorsed by King LJ in ***Re I 2019 EWCA Civ 898*** *(at paragraph 40) subject to the proviso:*

> *"that the term "material omission" found in paragraph 4.6 is taken to embrace the totality of the matters included in paragraph 16 of Munby LJ's Practice Note …."*

Secondly, there are cases where the deficiencies in the judge's reasoning are on a scale which cannot fairly be remedied by a request for clarification. As King LJ said in Re I (at paragraph 41):

> *"It is neither necessary nor appropriate for this court to seek to identify any bright line or to provide guidelines as to the limits of the appropriate nature or extent of clarification which may properly be sought in either children or financial remedy cases."*

But where the omissions are on a scale that makes it impossible to discern the basis for the judge's decision, or where, in addition to omissions, the analysis in the judgment is perceived as being deficient in other respects, it will not be appropriate to seek clarification but instead to apply for permission to appeal.

12. In this case, Baker LJ concluded:

The present case falls clearly into the latter category. On receiving the application for permission to appeal submitted on behalf of the father, the judge very properly considered whether the application was, in reality, an application for clarification of his reasons. In doing so, he was complying with good practice as stipulated in the case law and, within the family court, PD30A paragraph 4.8. It is notable that he did not consider the grounds of appeal, which closely mirrored those relied on before this Court, as amounting to a request for clarification. They amounted to a more fundamental challenge to the reasons for his decision.

13. A short judgment was also given by Peter Jackson LJ, who agreed with Baker LJ, and added:

It is of course the responsibility of the trial judge to give sufficient reasons. But all judgments are capable of improvement and where there has been what the Practice Direction refers to as "a material omission from a judgment" the court is required to "provide additions", either on its own initiative or on request. That will be particularly suitable where an issue has escaped attention or where a part of the reasoning is not fully clear or needs amplification. Where the line is to be drawn will depend on the circumstances, but there will come a point where what would be required would not be additions but foundations.

14. The appeal was therefore allowed and the matter remitted for a new finding of fact hearing.

Conclusion

15. The decision in ***Re O*** provides some guidance on when it is appropriate and indeed necessary to invite a first instance judge to give additional reasons before seeking permission to appeal. Whilst this will be something an advocate is often required to do, there are some circumstances in which the request does not need to be made. In particular, when the judge is being asked to provide 'foundations' rather than 'additions' to the judgment, there is nothing to stop the advocate from applying for permission to appeal without entering into a dialogue with the judge.

16. Advocates should also remain mindful of the parameters of PD30A and under no circumstances should confuse the duty to request amplification with an opportunity to re-argue the case.

Matthew Fiddy

To View Matthew Fiddy's CV click here

Although this case concerns a profoundly deaf M, the judgement gives useful guidance about good practice for LAs when parents have disabilities.

In her erudite and detailed judgment in Re A and B (Children) (deaf parent: assessment and practice) [2021] EWFC 10, Elizabeth Isaacs QC, sitting as a Deputy HCJ, addressed the following key facts:

1. The case concerns A aged 2 years 4 months and full sibling B aged just 1 year.
2. Both children were removed at birth and are placed together in FC
3. M is profoundly deaf. She has had other children permanently removed from her care
4. Her relationship with the F of those children was volatile and violent
5. Her relationship with the F of A and B was similarly violent and abusive
6. The LA commissioned a psychological assessment of M from Dr Allen, who concluded that M lacked capacity, amongst other conclusions
7. Later Dr Sally Austen, a psychologist with experience of working with deaf parents, provided a report which disagreed substantially with the conclusions of Dr Allen
8. Dr Austen stated that :
    a. M does not have a learning disability and therefore does not lack capacity
    b. M is bilaterally deaf, but uses spoken language to communicate.
    c. Her speech is difficult to understand
    d. She does not use British Sign Language
    e. She does use lip-reading, spoken English and has some right sided residual hearing supplemented by occasional drawing, writing role-play and gesture
    f. Importantly Dr Austen concluded that those used by the LA to assess M's parenting lacked the necessary skills to assess her needs as a deaf parent
    g. In particular in several interactions with M the LA had failed to use a lip-reader
9. As a result of Dr Austen's report and upon her recommendation, Dr Andrew Cornes (who has a particular expertise in working with the deaf) was instructed to carry out a parenting assessment.

10. As a result of the inadequacies of the LA's handling of M's situation, Isaacs DHCJ highlighted the following issues with respect to how communication with and assessment of M should have been organised:-
    a. The LA should have ensured that the SWs working with M as a deaf person, were aware of their obligations under the Equality Act 2010
    b. M was wrongly identified in most, if not all, of the court orders as "hearing impaired". All parties should have ensured that M's disability as a deaf parent was accurately recorded
    c. There should have been a joined-up approach between Adult Services and Children's services before A (the elder child) was born, to identify M's needs as a deaf parent, particularly in light of the clearly identified potential safeguarding issues and M's increased vulnerabilities as a deaf person reporting domestic abuse and to identify the extent of the LA's duties to M as a parent with protected characteristics under the Equality Act 2010.
    d. The LA should have ensured that the pre-birth assessment incorporated expert advice about the extent of M's needs as a deaf person, and should have been carried out by professionals with the skills to understand and analyse the impact of M's deafness on her parenting
    e. The LA should have ensured that all SWs and contact supervisors working with M received adequate and timely deaf awareness training
    f. Using F to communicate with M was not appropriate for matters of substance
    g. Using text messages to communicate with M (whilst her preferred mode of communication) and appropriate for regular contacts was NOT appropriate for matters of substance.
    h. The LA should have ensured that there was a lip-reader available to support M at ALL meetings as soon as the need was confirmed by Dr Austen
    i. The LA should have provided information to M in an accessible format, interpreted into simple English using a lip-reader
    j. The LA should not have arranged supervised contacts without:-
        i. Providing deaf awareness training for the contact supervisors
        ii. Using a lip-reader of intermediary to assist M
        iii. Holding any review with the contact supervisors of the progress of contact

k. The LA should have provided deaf awareness training to the FC who was involved in providing information to M at the start of contact sessions

l. The LA should have ensured that the SWET explicitly identified how they fulfilled the requirement to communicate adequately with M as a deaf person in order to ensure that the procedure was fair.

11. It can be seen from the above that the LA in this case fell far below the standard that is required in dealing with a parent with significant disabilities.

12. However, mainly as a result of the assessment of Dr Cornes, the Judge found that the M's preferred plan of long-term FC for the children was not in their best interests and approved a plan of adoption for both children, which had been urged by the LA and the Guardian.

Tom Harrill

To view Tom Harrill's CV click here.

In the first week of March the Family Justice Council held its annual conference over 4 nights online. This was coupled with the Bridget Lindley Memorial Lecture presented by Baroness Hale entitled "What do we Mean by a Family Now" – an erudite and insightful review of how the concept of "family" has developed form the latter part of the 20th C until now. Impossible to precis this, but you can access it at https://www.judiciary.uk/announcements/family-justice-council-2021-bridget-lindley-memorial-lecture-what-do-we-mean-by-a-family/

I would like to highlight some of the issues raised in the body of the conference on the subject of Adoption and possibilities for the future.

On Tuesday March 2nd there were 3 presentations from John Simmonds (JS) , Andrea Borman (AB) and Lucy Reed (LR).

JOHN SIMMONDS

JS emphasised the need for children to have a family for life and how all the research points to this need. He explored the issue of attachment and how a permanent family for life provides trust, continuity and a sense of belonging. He showed a graph on recent trends for children leaving care:-

IN		2015		2020
Decrease in Adoptions	-	from 5360	to	3440
Increase in Special Guardianship	-	from 3550	to	3700

JS states that adoptions are predicted to continue to decrease.

90% of SGOs are to kinship carers – a different solution from adoption, for providing a secure family placement for children.

ANDREA BORMAN

AB, a social worker, adopted her daughter (D) aged 5 years. D had lived at home until age 4 years so had a clear recollection of her birth family. After placement AB came to realise that D had experienced huge loses in terms of her birth family. D wanted to see her sibling and to know that her parents were OK. So AB found D's parents and D was reunited with her birth family whilst remaining AB's adopted daughter.

In her presentation AB reviewed all the various papers/research on adoption from 1999 to date. She highlighted the following:-

1. The lack of adult adoptee voices and views
2. Contact, with birth families, is low on the adoption agenda – it's complex and maybe expensive to manage
3. There remains the concept of "saving" children from their birth family.
4. Most people influencing research/attitudes are adopters who inevitably tend to promote the cause
5. The "marketing" of adoption is increasing

Solutions

1. Adopted adults should be central to discussion and reform
2. There should be a right for the adopted child to the history of, and correspondence with, the (extended) birth family
3. It is difficult to accept that every birth family is so dangerous that total severance is necessary
4. In the case of D's family, members proved to be loving and interesting with some very positive role models
5. So much negativity is given to adopters about the birth family, which colours the adopters attitude to issues of contact and confidentiality

LUCY REED

LR spoke with the permission of her husband H.H was born in the US where relinquishment and adoption (by step parents) are more common than in the UK. He grew up with his mother and therefore knowing his maternal family plus the family of his adoptive stepfather, who he regarded as his father. As time went on H wanted to know about his father's family, but his mother didn't want to talk about them.

Eventually the need to know grew, both emotionally and practically eg his F's medical history became relevant to H as he aged and to his children. The unanswered questions about his identity and his paternal birth family were really important to H.

H found a DNA matching service, for a cost of just £60.00. As a result a first cousin was identified who led H to his paternal grandmother. Sadly his father, a Vietnam veteran, had died in the 1990s, but the family in the US have sent books, a quilt and a photo of his father in uniform.

We need to consider:-

1. The potential for DNA testing services and social media is not yet appreciated – it should inform how adoption is managed in relation to contact with the birth family
2. The potential to find and be found is increasing
3. This could unfold when the adopted child and adoptive family are not ready or prepared
4. The need to know where you come from is lifelong. Unanswered questions accompany adoptees throughout their lives

Can confidential adoption survive?

1. Adopters are recruited without looking at all the options
2. More funding should be provided to gather information about the extended birth family. So much is positive that can be provided with skilled support

How can identity be built into the process?

1. Life story book is NOT the solution, because there is so much more
2. How birth parents/family are presented is often very negative and unfairly so

Contact

1. How to change the marketing of adoption
2. Adopters must remember that this is someone else's child
3. Better to recruit SGs than adopters

Sibling Relationships

1. It is well known that sibling relationships are the most important relationship throughout life. On adoption its an area of significant loss
2. Sibling contact for adoptees gets lost as SWs change and move on

These topics were picked up by the President and Baroness Hale in discussion after the Bridget Lindley Lecture. It was a wide ranging discussion, prompted by questions sent in by attendees.

1. The family courts recognise the importance of brothers and sisters, and this is a real issue in separate adoption. Maybe the sibling relationship should be given more prominence in statute.
2. Social media does affect the landscape, so maybe we need a different model of adoption OR abolish it in favour of SG.
3. Should we stick to 2 parents in law? Should there be legal recognition of other "parents" eg step parents, birth parents, adoptive parents, psychological parents.

4. Legal framework needs to cater for what a particular child needs in terms of identity, contact etc.
5. The court cannot impose solutions – only chose between those advanced
6. Resources for contact in care cases are always a problem, and worse now because of lockdown SO there should be caution in separating children and parents at the interim stage of care proceedings
7. When looking at the implementation of the CA, all the studies show:-
    - great regional variations in practice
    - different threshold levels in different parts of the country
    - amount of effort in NOT removing children differs regionally

    Consistency across LAs would help
8. More resources required into supporting children in their birth families obviating the need to remove at all.
9. Adoption removes children from the whole birth family. Is the next frontier shared parenting? More than 2 parents and more than one family of kin -more inclusivity.
10. Some countries do have different levels of adoption:
    - Simple model- similar to SGO
    - Full model- (presumably with exclusivity)

There could be a range of placement options.

Ann Chavasse

To view Ann Chavasse's CV click here.

Public Law Working Group

The final report of the Public Law Working Group was published at the beginning of March. The Group was set up by The President and chaired by Mr Justice Keehan. An earlier report was published in the summer of 2020.

It is a lengthy and detailed report, that was contributed to, by a wide range of stakeholders in the child care and family justice system.

The report makes recommendations on:-

- Support and work with families pre-proceedings
  - This with a view to attempting to reduce the number of applications
- The form of application for a public law order
- Case management
- Supervision Orders
  - With a view to making SOs more robust
- Section 20/section 76 accommodation
- Special Guardianship Orders
  - Published last summer