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Update on Public Children (2020)

02 June 2020

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Update on public children (2020)

The law as stated during this webinar is up to date as of **02 June 2020**

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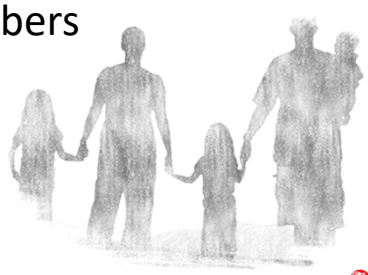
Speaker Name

Penny Howe QC
Barrister
Pump Court Chambers



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Here's what I won't be talking about…….

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No Coronavirus, just interesting decisions on important topics …..

•There's a lot going on in the Family Justice System, as we battle the Covid-19 pandemic together and struggle to keep the show on the road

•The range of authorities and guidance is fast developing and further "top tips"for case management are expected from the President in the week of 1st June 2020. Hybrid and socially distanced hearings are gaining currency

•If you were to access this webinar in a week or two from now, there is every chance its "lockdown" content would be dangerously out of date

•So this webinar will concentrate on good old-fashioned judgments that are completely Covid-free

•I'm covering cases from around mid/late 2019 to date (May 2020).

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Re A (Children: Findings of Fact) (No 2) [2019] EWCA Civ 1947

- A second appeal, from a re-hearing! The C of A permitted this appeal and remitted for a *third* hearing of the facts.
- A child had died with a ligature mark round her neck and genital bruising. At re-hearing, after the conclusion of evidence, Hayden J developed his own case theory (not advanced by any party) that the child had been subjected to attempted FGM on an earlier occasion than her strangulation and death.
- Hayden J permitted the lay parties to be recalled to give evidence about the suggestion of attempted FGM, but none of the experts were recalled
- In the C of A, Jackson LJ offered the following reminders from case law:
  - Findings of fact must be based on *evidence* not suspicion or speculation
  - It is open to the Court to adopt an alternative "case" from any put forward by the parties; and make findings no party has sought; but **it should be cautious**
  - No adverse finding should be made unless the person in question **knows of the allegation, has the substance of supporting evidence and a chance to respond**

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Re A (Children: Findings of Fact) (No 2) [2019] EWCA Civ 1947 (cont)

- As to how a court should approach a fact finding exercise, Jackson LJ:
  - Identified the questions for every fact finder to be: "*What, When, Where, Who, How and Why?*"
  - Each case is different; the answer to some questions may be obvious but others may be unanswerable
  - Conclusions *can only ever be provisional* until they have been checked against each other so as to arrive at a coherent outcome
  - "At each stage, regard is had to the inherent probabilities and improbabilities surrounding what are inevitably abnormal circumstances"

- The C of A could not impose substitute findings of fact as this was not a case with a "binary" outcome - there were too many possible permutations. A second re-hearing was required (despite delay and considerable impact on family) given the seriousness of the case, the interests of the children and the prospect of a valid conclusion on the evidence available.

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Re D (A Child) (Fact Finding Appeal) [2019] EWCA Civ 2302

- An appeal concerning a case where at first hearing Y (Mother's partner) had been found to have anally abused a young child. Y applied for a re-opening on basis of alibi evidence exonerating him. Judge confined re-opening solely to issue of perpetrator of harm. Was this approach flawed?

- Baker LJ on appeal:
  - Yes – although according to the case law the court should consider the "ambit of the review or rehearing", here the court had erred in compartmentalising its consideration of new evidence and its potential impact on the court's findings
  - In inflicted abuse **there is a relationship between perpetration and causation**. The fresh evidence had a potential bearing on whether anal injury had been inflicted on the child, if no perpetrator could be identified.
  - The trial judge failed to consider how the changed landscape of the evidence affected the integrity of his original findings across the piece

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Re C (A Child) (Interim Separation) [2019] EWCA Civ 1998

- An appeal from the decision of a Recorder to order placement into foster care of a baby when a Mother and Baby placement failed
- Peter Jackson LJ:
  - Inevitably at interim stage the evidence is incomplete and interim orders should only be made to regulate matters that cannot await final hearing
  - Removal at interim stage is a "*particularly sharp interference*" to Art 8 rights; particularly where it will affect parent-child bond
  - Interim separation will only be justified where necessary and proportionate. These "*exacting criteria*" must be satisfied in all cases
  - Separation will only be sanctioned where child's physical safety or psychological or emotional welfare demands it and where length and likely consequences are proportionate to the risk if separation was not ordered
  - **In order to justify separation the Local Authority is required to inform the court of all available resources that might remove the need for separation**
- A further Mother and Baby placement was available and the evidence did not support conclusion that supervision of M and B was unworkable

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C (A Child: Interim Separation) [2020] EWCA Civ 257

- Appeal concerning baby R. R and mother had been in a residential unit with mixed feedback. Following an accident in which R was unhurt, the unit terminated placement and interim separation was temporarily approved. At a further hearing the Judge sanctioned placement of R and mother at another residential unit. The LA appealed, supported by the CG.
- Peter Jackson LJ leading:
  - Appeal dismissed
  - Seeming approval of Re C [2019] criteria for separation as articulated by judge below : "***The test is whether the child's safety is at risk and, if so, any removal should be proportionate to the actual risks faced and in the knowledge of alternative arrangements which would not require separation"***
  - The judge had to evaluate the type of harm that might arise, its likelihood, its consequences and any resources that might reduce or mitigate the risk: *Re F (A Child) (Placement Order: Proportionality)* [2018] EWCA Civ 2761

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Re AV (A Child) (Expert Report) [2020] EWCA Civ 346

- A successful appeal from a case management decision (two in fact). Child AV was sole surviving sib following a house fire, still under investigation. M (via OS) and F accepted unlikely to resume care. Realistic options: GPs, FC or adoption
- Judge twice refused permission to instruct a child psychiatrist to assess impact of adoption on AV (a) where it would delay trial and (b) where it would not.

- Baker LJ leading:
  - *Both* decisions were wrong in the circs of the case
  - In many cases no expert instruction would be warranted; but AV had suffered a "*complex web of trauma"* – trauma of fire, death of siblings, potential understanding in future that parents responsible, possible survivors' guilt….
  - The CG and SW's expertise "*manifestly does not extend"* to the issues; psychiatric expertise was needed
  - The instruction could not be described as "*mere speculation or of academic interest"* (as trial judge had indicated)

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Re G (Children) [2019] EWCA Civ 1779

- Appeal from a decision that hinged on a Circuit Judge's view that she had no power to extend an injunction prohibiting the LA from removing children from M's care; it having been made by a s9 judge but being due to expire.

- Baker J leading:
  - Circuit Judge had fallen into error – she could, and should extend it
  - A long line of authorities support that the power to grant injunctions in these circs arises not under the inherent jurisdiction but the HRA 1998

- The power to grant relief under the HRA may be exercised by all courts as "public authorities"
- Section 7(1)(b) allows a person claiming to be a victim of unlawful infringement of rights by a public authority to rely on Convention rights in ongoing proceedings
- Section 8(1) allows a court to grant such relief or remedy of make such order within its powers as it considers appropriate

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A, B and C (Adoption: Notification of Fathers and Relatives) [2020] EWCA Civ 41

- Concerns 3 babies whose mothers had concealed pregnancy from the fathers and relatives. Should the fathers be notified before plans to place for adoption are affected?

- Peter Jackson LJ leading:
  - Paragraphs 84-89 are key reading
  - Welfare though relevant is not paramount in notification decision
  - The decision should be taken as soon as practicable
  - C of A provides procedural guidance for how to deal with the issue (para 88)
  - No single test but case law shows factors at paragraph 89 will be relevant : PR, Article 8 rights, substance of relationships, likelihood of a family placement, physical psychological or social impact on M or on others of notification, cultural and religious factors, availability and durability of confidential information, impact of delay, and any other relevant matters

- Confidentiality is exceptional and highly so where F has PR or Art 8 rights

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A, B and C (Adoption: Notification of Fathers and Relatives) [2020] EWCA Civ 41 (cont)

•The procedure for bringing such an application is set out in Part 19: see rule 19(2)(c).

•In any case where notification is being considered:

- Welfare though relevant is **not paramount** in notification decision
- The decision should be taken as soon as practicable
- C of A provides procedural guidance for how to deal with the issue (para 88)
- No single test but case law shows factors will be relevant : PR, Article 8 rights, substance of relationships, likelihood of a family placement, physical psychological or social impact on M or on others of notification, cultural and religious factors, availability and durability of confidential information, impact of delay, and any other relevant matters

- Confidentiality is exceptional and highly so where F has PR or Art 8 rights; but exceptionality is not a ”shortcut” test in itself

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Prospective Adopters v LB of Tower Hamlets [2020] EWFC 26

- Concerned parents' application for **leave to oppose the adoption of child**; leave being required by s47(5) ACA 2002. Mostyn J examines difference between this and criteria for **leave to apply to revoke a placement order** under s24 ACA 2002.
- Consideration of each is subject to a two- stage test; first limb is common to both: S47(7) ACA 2002 provides the court cannot give leave unless it is satisfied there has been a change in circs since PO made. S24(3) mirrors this.
- In s47 "leave to oppose" apps, case law provides that the child's welfare throughout life is the paramount consideration (eg Re B-S [2013] EWCA Civ 1146); but in s24 "leave to revoke" applications welfare is "*woven into decision making*" but not paramount.
- In s47 "leave to oppose" apps case law re the second limb of test suggests the app's prospect of success must have *"**solidity**";* whereas for s24 "leave to revoke apps" what is required is *"a real prospect of success"* (M v Warwickshire CC [2007] EWCA Civ 1084) - a lower hurdle?

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W (A child) [2020] EWCA Civ 16

- Concerned an app by parents for leave to oppose the making of an adoption order. LA opposed, CG supported. B, aged 2 yr 9 mths was placed with prospective adopters for 1 year at time of refusal of leave. Parents appealed.
- Peter Jackson LJ:
  - The proper approach remains as set out in **Re P (Adoption: Leave Provisions)** [2007] EWCA Civ 616 and **Re B-S** [2013] EWCA Civ 1146 – digested in this judgment at paras 8-14. Two stage test: change of circs and prospects of success applies; welfare throughout life is paramount.
  - "*The essence of the Court's task is to decide whether in all the circs it is in the child's interests for fresh and up-to-date consideration to be given to the question of whether parental consent to adoption should be dispensed with*" (para 40)
  - Re prospects of success; if "*no solid prospect of anything other than an adoption order being made*" the app will fail
  - Even if prospects are solid, other reasons connected to the child's welfare might lead the Court to refuse leave (eg destabilizing effect)

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W (A child) [2020] EWCA Civ 16 (cont)

- In the present case Judge erred because
  - To rule out possibility of birth family placement was premature. Professional opinion was divided and expert evidence was needed; the divided views should have alerted the judge to the need for full consideration
  - By excluding the poss of parents caring for B, the judge was inevitably prevented from weighing up all matters that are likely to be relevant to his long term welfare. Judge focused insufficiently on evidence of parental change enabling siblings to return home. **Even if B is to be adopted it is important for him to know in later life that he really could not have been cared for by his parents**
  - The negative aspects of a contested adoption hearing must always be taken into account but **in the absence of specific disadvantages, they cannot in themselves be given much weight**. **Nor, despite the judge's understandable concerns, can further short-term delay be very influential when seen alongside the lifelong significance of the decision about adoption**

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K, T & U (Placement of Children with Kinship Carers Abroad) [2019] EWFC 59

- The case concerned three children in care proceedings for 21 months with no welfare outcome. C and P, relatives in Bermuda, had been identified early on as potential kinship carers
- There followed a trail of disaster: flawed assessments, failed communication, erroneous legal advice, no basis for the Court to place under on any proper statutory basis and no passports for the children
- Recorder Samuels QC (sitting as a DHCJ) delivers a model judgment considering (at paras 40-131) the following key issues:
  - The landscape of advice and guidance from agencies and the C of A
  - The importance of early and regular cross-border communication
  - Proper assessments that must be reg compliant. To meet UK requirements may need to invite prospective carers to UK or send UK SW to co-work assessment
  - The important areas for expert evidence, from those with proper expertise
  - The consideration of appropriate orders to underpin any placement
  - The grant of party status to prospective carers to achieve fairness
  - The requirements for needs assessment and support plans

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Re C (Lay Advocates) [2019] EWHC 3738 (Fam)

- A case in which cognitive and capacity assessments of M and F opined that each needed a "lay advocate" to even be considered to have capacity
- Keehan J points to Article 6; and the unlawfulness of a public authority acting in a way which is incompatible (whether that be a Court or a public authority). He identifies HMCTS as a public authority "*with a duty to ensure that a party's right to a fair trial is not breached*"
- He points out that HMCTS routinely pays for intermediaries; appoints lay advocates for M and F; assesses the hourly rate to be "*entirely reasonable*", assesses the hours (50) likely required to support the parents including work *outside* the court room.
- Helpfully the "relevant Court Service budget holder" has agreed to pay!
- Questions: what next? A rush of cases? Directions without HMCTS consent? New guidance? Judicial review? And….why not call it an intermediary……?!

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Re Q (Fact- Finding Rehearing) [2019] EWFC 60

- At first care hearing, F was found to have perpetrated head injury to child Q; M was found to have perpetrated other injuries. M was later convicted at criminal trial of causing *all* injuries, so F applied to re-open/for re-hearing.
- This report concerns the outcome of the re-hearing before Baker J rather than the decision whether to order it, or its shape/scope

S11 Civil Evidence Act 1968

Convictions as evidence in civil proceedings.

(1) In any civil proceedings the fact that a person has been convicted of an offence shall … be admissible in evidence for the purpose of proving …that he committed that offence…..

•(2) In any civil proceedings in which by virtue of this section a person is proved to have been convicted of an offence by or before any court in the United Kingdom …..

(a) he shall be taken to have committed that offence unless the contrary is proved…..

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Re Q (Fact- Finding Rehearing) [2019] EWFC 60 (cont)

- Purpose of section 11 of Civil Evidence Act 1968 is to establish a rule of evidence to be applied where **criminal trial and conviction occur before the civil fact-finding process**
- "*The proper approach is not to rely on the conviction alone but rather to look behind the conviction at the evidence*". (para 99)
- The outcome of the criminal trial was heavily influenced by the way the prosecution decided to pursue its case
- The prosecution had accepted an account from F that Baker J had found "*unconvincing"* and this differing assessment of evidence could carry very little weight in the re-hearing
- There was no new evidence to justify any departure from original findings

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Re Q (Publication of Judgments) [2019] EWFC 70

- Same case – different issue. M wanted judgment exonerating her of injury for which she was later convicted published un-anonymised (save for child's name). F objected and said this risked identification of the child.
- Baker J sets out current guidance re publication at paras 1-3,.
- Baker J directed publication naming F because:
  - Was in public interest for judgments about cases involving serious and life-changing injuries to be published wherever possible
  - The facts were already well in public domain; names of parents and facts were already in the press. Withholding F's name no protection from ID of the child.
  - The fact that family court and Crown Court had reached different conclusions as to perpetrator of head injury **is itself a matter of public interest.** The Family Court should not restrict public knowledge or stifle debate of the wider consequences this might have.
- **Watch out for the P's "Transparency Review"** coming down the tracks! Evidence closed on 11 May 2020.

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Upcoming Family webinars

- Update on the law of cohabitants (2020)– 23rd June 2020
- Sharia Law (2020)– 21st July 2020
- No-fault divorces (2020)– 29th September 2020

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