



PUMP COURT  
CHAMBERS

**Public Law Update 2021**

Catherine Ellis



- **Permanency Planning, including:**
  - Adoption by former partner (Re E);
  - Adoption by step-parents (Re L);
  - Discharge of care order – the legal test;
  - Leave to discharge SGO – the legal test;
  
- **Care Planning, Placement and Case Review, including:**
  - D of E Guidance 8<sup>th</sup> July 2021;
  - Re T (A Child) [2021] UKSC 35;
  - Recent DOLS authority;
  - SI 2021/161 (coming into force 9<sup>th</sup> September 2021).

- **Fact-Findings:**
  - Factors to be considered when deciding whether a fact-finding exercise is necessary;
  - Reopening findings.
  
- **Miscellaneous, including:**
  - Duty of care owed by LA's to children voluntarily accommodated;
  - Joinder of foster carers (Re R);
  - The law applicable to the issue of male circumcision of a child subject to an ICO;
  - Port Alerts;
  - Post-Brexit: transferring proceedings to countries within the EU;
  - ECHR - contact with a child in care.

- **Adoption by a former partner**

*Re E (Adoption by one person) [2021] EWFC 45*

- Application brought under s51 ACA 2002:

*“An adoption order may be made on the application of one person who has attained the age of 21 years if the court is satisfied that the person is the partner of a parent of the person to be adopted”*

- Who constitutes a “partner”? S144(7) ACA 2002

s144(4) ACA 2002 (“General Interpretation”):

*“In this Act, a couple means – (a) a married couple, or (aa) two people who are civil partners of each other, or (b) two people (whether of different sexes or the same sex) living as partners in an enduring family relationship.”*

# Who is a “partner”?

- Considered various authorities re s54(1) HFEA 2008;
- Importance of treating family legislation as dynamic;
- Theis, J in *Re X (Parental Order: Death of Intended Parent Prior to Birth)* [2020] EWFC 39; [2020] 2FLR 1326);
  - Particular reference to her conclusion that the statute should be “read down” in order to permit the order to be made;
  - “To do otherwise would be incompatible with the underlying thrust of the legislation being construed”
  - “The words sought to be implied “go with the grain of the legislation”
  - Cobb, J approached the ACA 2002 with the same perspective;

# “A Sensible Result”

- Cobb, J satisfied that *“the ACA 2002 should be construed in such a way as to achieve a ‘sensible’ result”*

- Court should take into account child’s best interests (and welfare) in deciding application but not a decision where the welfare is paramount;
- Fact that the parents had never married nor been civil partners should not be a disqualifying factor;
- What IS required is:

*“...an unambiguous intention to create and maintain family life, and secondly, a factual matrix consistent with that intention”*

Found to exist on the specific facts of this case.

- **Adoption by a Step-parent**

*Re L (A Child: Step-parent adoption) [2021] EWCA Civ 801.*

- **Leave to discharge a SGO – legal test**

*Re M (Special Guardianship Order: Leave to Apply to Discharge) [2021] EWCA Civ 442*

- Comparison with *M v Warwickshire County Council [2007] EWCA Civ 1084* – test for leave re revocation of placement order;
- Same structure applicable to SGO – 2 stage test:
  - Change in circumstances (necessary but not sufficient);
  - Evaluation weighing the welfare of the children and the prospects of success.

*“It must be remembered that at this stage the assessment concerns the effect on the child’s welfare of the application to discharge the SGO being heard or not heard: the question of whether it is in the child’s interests for the SGO to be discharged only arises if leave is granted, at which point welfare is undoubtedly paramount”*

- **Discharge of a care order – legal test**

*Re TT (Children: discharge of care order) [2021] EWCA Civ 742*

- Critical of comments made by Mostyn, J in *GM v Carmarthenshire County Council* [2018] 3 WLR 1126 regarding legal test for discharge of a care order;
- “Clear” legal principles set out at paragraph 31;
- “*the fundamental test to be applied to an application under s39 and to other applications under the Act, is as I have said, the welfare principle and not a test of necessity or some other test...*”
- Attempts to shift the focus away from welfare “*neither helpful nor necessary*”

- **Refusal of Placement Order**

*Re T&R (Children: Refusal of Placement Order) [2021] EWCA Civ 71*

- TJ’s refusal to make placement orders in respect of 2 children aged 3 and 2;
- Decision upheld on appeal.



# Care planning, placement and case review

- **D of E Guidance updated 8<sup>th</sup> July 2021**
    - Comprehensive pulling together of various statutes and SI's in the area;
    - Including LA duties towards young people in the CJS
    - Some helpful tables
  - **Care planning, placement and case review (England) (Amendment) Regulations 2021 (SI 2021/161)**
    - Coming into force tomorrow (9<sup>th</sup> September 2021);
    - Amends Reg 27:
      - *“an unregulated setting”* replaced with *“in accordance with other arrangements”* (in context of s22C(6)(d) CA 1989 )\*
- and
- *“...where that accommodation is not specified in regulation 27A, [Responsible Authority] must have regard to the matters set out in Schedule 6”*

\*Wording in heading to Schedule 6 is also amended in the same terms

- Also creates “Regulation 27A”:

## “27A Prohibition on placing a child under 16 in other arrangements

*A responsible authority may only place a child under 16 in accommodation in accordance with other arrangements under section 22C(6)(d), where the accommodation is –*

*(a) In relation to placements in England, in –*

*(i) A care home;*

*(ii) A hospital as defined in section s275(1) of the National Health Service;*

*(iii) A residential family centre as defined in section 4(2) of the Care Standards Act;*

*(iv) A school within the meaning of the Education Act 1996 providing accommodation that is not registered as a children’s home;*

*(v) An establishment that provides care and accommodation for children as a holiday scheme for disabled children as defined in regulation 2(1) of the Residential Holiday Schemes for Disabled Children (England) Regulations 2013”*

- **Supreme Court consideration of placement of children in unregistered accommodation**

*Re T (A Child) [2021] UKSC 35*

- Focus of the appeal: Children who:
  - LA consider require to be deprived of their liberty; and
  - Meet s25 CA 1989 criteria; and
  - LA propose to place somewhere other than in a secure children’s home approved for that purpose;
- 2 distinct categories of children within the group:
  - (i) Children who would be placed in a secure children’s home but there is no place available for them;
  - (ii) Children whose needs would, in the LA’s assessment, be better met in an alternative placement.

# Re T (A Child) [2021] UKSC 35

- “Unregistered” vs “Unregulated”
  - Children’s homes have to be registered;
  - “unregulated placement” is not an apt expression to describe an unregistered Children’s home (para 58).
- Exercise of HC inherent jurisdiction to authorise a child’s placement in unregistered secure accommodation:
  - Not prohibited by the CA 1989 Pt XII s100(2)(d);
  - Did not cut across s25 CA 1989 statutory scheme;
  - Would not constitute a breach of ECHR Art 5.

# Re T (A Child) [2021] UKSC 35

- Reference to Practice Guidance 12<sup>th</sup> November 2019 (and 1<sup>st</sup> Dec 2020 addendum):

**“Placements in unregistered children’s homes in England or unregistered care home services in Wales”**

*“...to ensure that where a court authorises placement in an unregistered unit, steps are immediately taken by those operating the unit to apply for registration (if the unit requires registration)”*

*(Emphasis in original)*

- Lady Black *“confirmed in my view that the focus should be on the accommodation itself and the purpose for which it is provided, rather than the regime in the accommodation”*

# Re T (A Child) [2021] UKSC 35

- Is it a permissible exercise of the inherent jurisdiction to authorise a LA to place a child in an unregistered children's home in relation to which a criminal offence would be being committed?

*“Ultimately, however, I recognise that there are cases in which there is absolutely no alternative, and where the child (or someone else) is likely to come to grave harm if the court does not act.” (para 145)*

- Where court authorises placement:
  - Registration must be sought expeditiously
  - Court must satisfy itself that steps are being taken to apply
  - Court must monitor the progress of the application
  - If registration not achieved, court must review continued approval of placement(As per Practice Guidance)
- Various procedural safeguards/guidance set out (paras 155 and 171-172)

- **Wigan MBC v W [2021] EWHC 1982 (Fam)**
  - Refusal to authorise continued deprivation of liberty of 12 year old – with very serious issues - on a hospital ward, despite there being no other placement available for him;
  - Conditions were so inappropriate that they constituted a clear and continuing breach of Y’s Article 5 rights – fact of no alternative could not, of itself, justify the arrangements.
  
- **North Yorkshire CC v C [2021] EWHC 2171**
  - 15 year old girl urgently in need for Tier 4 MH bed in medium secure unit;
  - 2 MH Trusts had available beds but refused admission;
  - MacDonald, J joined the two trusts and Sos for Health as parties to proceedings to investigate properly the obstacles to her admission and how to overcome them;
  - Unusual step for HC to adopt the role of mediator/facilitator between NHS England and two NHS Mental Health Trusts. Represented the *“best opportunity to break the impasse in this case and, finally, to secure for M the medium secure provision she has been assessed as urgently needing”*

- **Re H (Children) (Fact-Finding) [2021] EWCA Civ 1192**
  - 2 Appeals against case management decisions not to order fact-finding
  - Considered statutory provisions, FPR and administrative guidance;
  - *Oxfordshire County Council v DP [2005] EWHC 1593* remains good law but the factors identified:  
*“...should therefore be approached flexibly in the light of the overriding objective in order to do justice efficiently in the individual case.”* (para 22 – see for examples)
  
- **Re H-M (Children) [2021] EWCA Civ 748**
  - Appeal against refusal to reopen findings of fact made in family proceedings following criminal conviction;
  - Such applications must demonstrate a “solid” reason to believe that the findings need to be revisited;
  - Analysis of the evidence presented to the Crown Court – and highlighting where it differed from the evidence that had been before the family court is a necessary exercise.



- **Duty of care owed by LA's to children voluntarily accommodated**

*YXA v Wolverhampton CC [2021] EWHC 1444*

- Claim brought in negligence for failure to issue proceedings;
- No duty of care for purposes of negligence claim;
- (HRA 1998 claim proceeded).

- **Joinder of foster carers to care proceedings**

*Re R (Care Proceedings: joinder of foster carer) [2021] EWCA Civ 875*

- Save in exceptional circumstances, foster carers and prospective adopters should not be joined as parties to care proceedings.

- **Circumcision of a male child subject to an ICO**

*Re P (Circumcision: Child in Care) [2021] EWHC 1616*

- Highlighted different position as between FGM and male circumcision;
- Welfare of child (immediate and long term) is paramount and checklist is engaged;
- Religious upbringing of a child in care may be a matter of great importance – the significance of the issue will vary from case to case depending on the strength of the religious beliefs and observance of the child’s parents;
- Views of primary carers also carry significant weight.

- **Free-standing Port Alerts**

*A v B [2021] EWHC 1716 (Fam)*

- Mostyn, J considering whether the Family Court had the power to order;
- Family Court has no jurisdiction to order a Tipstaff Order (passport, location, collection);
- Port Alert is not a Tipstaff order – is supplemental measure;
- Family Court able to use the HC inherent jurisdiction to make incidental or supplemental orders to give effect to decisions which are within its own jurisdiction;
- Not expected to be used routinely.

- **Post-Brexit: transferring proceedings to countries within the EU**

*Re D (Care Proceedings: 1996 Hague Convention: Article 9 Request)*

- Application by G for court to make request to Swiss authorities for transfer pursuant to Article 9 1996 Hague Convention;
- Possibly one of the first occasions court considering transfer of public law proceedings under the 1996 Convention.

- **ECHR - contact with a child in care**

*RO v Norway (App no 49452/18) [2021] ECHR 595*

- 6 x pa contact for child in long-term foster care;
- ECtHR concluded a violation of Article 8 – did not find the reasons advanced by the DC demonstrated that the authorities had proceeded on the basis that they had a positive duty to take measures to reunite the family as soon as reasonably feasible.

Thank you for coming.

Catherine Ellis  
8<sup>th</sup> September 2021