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Public Law Update 2022

Andrew Grime / Penny Howe QC

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Statistics & Guidance

- Statistics:-
- Family Court Statistics Quarterly: October to December 2021
- *4,111 new cases: down 7% compared to equivalent quarter 2020. Disposals 3,618, down 9% on same period.*
- Adoption down 17% - effect of pandemic thought to have played a part.
- Average time for care and supervision cases to reach disposal is now 47 weeks. An increase of 5 weeks on the same quarter in 2020 – highest average since 2012!
- Annual trend – 16,394 public law cases in year to 31.12.21 (drop of 9%)
- Average time to reach disposal was 45 weeks, increase of 6 weeks on 2020.

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- Department for Education – Children looked after in England including adoption 2020 to 2021:
- Year ending March 2021 – 80,850 looked after children – AN ALL TIME HIGH!;
- NSPCC – 8% increase in child protection referrals by police to local authorities (almost 245,000) –NSPCC news 01.02.22).
- Average of 669 police child protection referrals per day
- Record numbers of children affected by domestic abuse – NSPCC helpline saw 53% increase on pre-lockdown average.
- The Association of Directors of Children's Services research showed that the number of children who are looked after has increased by 33.33% since 2008 whilst local authorities have seen their budgets reduce by 50% over the same period! (See: https://adcs.org.uk/care/article/comment-on-dfe-children-looked-after-statistics)
- Fostering Network's State of the Nation's Foster Care 2021 report found critical shortage in foster placements accusing the government of relying on the goodwill of carers to supplement the state.
- Number of children living in unregulated accommodation has increased by 89% between end March 2010 and end March 2020.

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Statistics & Guidance

- House of Commons Library research paper, 12.11.21 'Looked after children: out of area, unregulated and unregistered accommodation (England) (See: https://commonslibrary.parliament.uk > cbp-7560) – notwithstanding provision under the Children Act 1989 for looked after children to be '*accommodated within the local authority's area*' unless this is '*not reasonably practicable*', seen an increase of 41% (period end March 201 to end March 2020) of looked after children being accommodated out of area with consequent trauma that follows from being placed far from home.
- Always look on the bright side of life! – In the Autumn Budget and Spending Review 2021 the Government announced £104M by 2024-2025 '*to take forward reforms to unregulated provision in children's social care, improving safeguarding standards for some of our most vulnerable children and young people*'.
- **GUIDANCE**
- Make Every Hearing Count' Case Management Guidance in Public Law Children Cases: March 2022 (See: https://www.judiciary.uk/wp-content/uploads/2022/03/Case-management-guidance-March-22.pdf)
- The President understood the desire of judges to '*manage every element of the future care plan*' but said that they must narrow their focus to the core issues of whether the child is to live with parents, another family member or friend, or be placed under the LA's care.

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Statistics & Guidance

- AIM: not to pile more work on the shoulders of practitioners but to remove unnecessary time and work from each case.
- Two Goals: '(i) Reduce the volume of applications by ensuring that an application is only made by a local authority for a care order after a thorough assessment process and where it is clear that a care order is necessary in that case; and (ii) allowing the court to engage immediately, and efficiently, with the determination of an application that has been made because of the soundness of the pre-proceedings assessment and process.'
- Annex: Public Law Working Group: Training & Implementation Top 10 Tips
- Local authorities to prepare 'short and focused' thresholds;
- Case management hearings to be timetabled to provide parents with a 'realistic opportunity' to take legal advice and respond substantively to threshold before the hearing.
- Applications for ISW or psychological assessments should be avoided unless they are required to help the court resolve proceedings justly.
- **PORTAL CASES**
- Protocol Governing Orders and Applications in Portal Cases Portsmouth, HHJ Andrew Levey, dated 13 June 2022 (copy appended to notes).

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Fact-Finding Hearings

- **Lincolnshire County Council v. CB & Ors [2021] EWHC 2813 (Fam)** – factors to be taken into consideration when making a case management decision regarding the need or otherwise of a separate fact-finding hearing.
- XE was aged 11 years when he died. He had cerebral palsy, could not walk, move, hold his weight and was non-verbal. Threshold allegations went way beyond the child's death and included drug use, emotional harm and failing to need the needs of the children including a lack of supervision, domestic abuse and neglect.
- There was no dispute that XE had died from drowning. However, the issue of XE's death was live and before the court as Lieven J stated in para 10*:*

  'It is apparent from this account that there are only two areas of factual dispute between the parents: what precisely DE said to the Mother in the kitchen before he went out, and who left the taps on. The police have now decided not to charge either parent with murder or manslaughter, but a decision has not yet been made as to whether they will be charged with drug related offences'
- LA and the Guardian argued that a 5 day composite final hearing was appropriate whilst the parents sought a separate 20 day fact finding hearing.

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Fact-Finding Hearings

- Lieven J confirmed that this was a case management decision and therefore the court had a broad discretion. The starting point is FPR 2010 and she also referred to the recent Court of Appeal decision **Re H-D-H(Children)[2021] 4 WLR 106** which confirms the continued applicability of the principles set out by MacFarlane J, as he then was, in **A County Council v. DP [2005] EWHC 1593(Fam), [2005] 2 FLR 1031**, in particular at [24]-[25]
- *'[24] The authorities make plain that, amongst other factors, the following are likely to be relevant and need to be borne in mind before deciding whether or not to conduct a particular fact finding exercise:*

  a. the interests of the child (which are relevant but not paramount)

  b. the time that the investigation will take

  c. the likely cost to public funds

  d. the evidential result

  e. the necessity or otherwise of the investigation

  f. the relevance of the potential result of the investigation to the future care plans of the child.

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Fact-Finding Hearings

- g. the impact of any fact finding process upon the other parties
- h. the prospects of a fair trial
- i. the justice of the case.
- *'[25] I am well familiar with the concept of 'necessity', arising as it does from ECHR Art 8 and, indeed, from the pre Human Rights Act 1998 case law to which I have been referred. It is rightly at the core of Mr Tolson's submissions in this case and, without overtly labouring the issue by including substantial descriptive text in this judgment, it is at the forefront of my consideration of the point. Amongst the pertinent questions are: Is there a pressing need for such a hearing? Is the proposed fact finding hearing solely, as Mr Tolson put it, 'to seek findings against the father on criminal matters for their own sake? Is the process, which will be costly and time consuming, with potentially serious consequences for the father if it goes against him, proportionate to any identified need?'*
- Lieven J held that delay was a particularly weighty factor in the instant case but that the welfare of the children was not paramount in this consideration. Further, the impact on court resources and other cases was a relevant consideration but the true question was: Is a fact-finding hearing 'truly' necessary?

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Fact-finding Hearings

- *'[22] As the President of the Family Division set out in The Road Ahead (both 2020 and Addendum in 2021), in current circumstances the Family Courts do not have the resources to undertake hearings which do not meet the test of strict necessity. It is therefore essential that this test is properly applied, with appropriate scrutiny by the Court, even if the parties themselves do not argue against a fact finding hearing. The Court must be careful to ensure that there is a proportionate and effective use of court time. It is well known that the family justice system has come under very severe pressure during the Covid pandemic. Delays in the hearing of cases have become very much more lengthy and only through more rigorous case management will the delays be materially reduced.'*

  '[23] The outcome in the present case is in my view clear cut. The factual dispute between the parents in relation to XE's death is a very narrow one, namely what DE said in the kitchen to the Mother and who left the taps on. Only the parents were witnesses to these two events, save possibly for A, and none of the other witnesses who the parents seek to call can give direct evidence on the matters in dispute. There is body worn camera footage and recordings of the 999 calls so the Judge will have the direct, and thus best, evidence of the Mother and DE's immediate responses at the time of the incident.'

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Fact-Finding hearings

- **Re L (Fact-Finding Hearing: Fairness)[2022] EWCA Civ 169** per Baker LJ
- Mother had 3 children, including a 2 year old L, by three different fathers. LA been involved with the family since 2017. The two older children were currently living with their respective fathers who were each seeking CAO's.
- Threshold concerns initially related to Z (father of L) exerting coercive control (incl verbal abuse, controlling behaviour) over the mother and various specific incidents were noted. Parenting assessments of M and Z were broadly positive and the LA filed final evidence proposing the child remain with M and Z subject to a child protection plan.
- One week later the LA submitted a revised threshold alleging arguments in front of the children, that Z used M's money for gambling and that he used cannabis regularly. The Recorder decided that a fact-finding hearing was necessary and he proceeded to hear evidence over 3 days and made the finding sought, concluded threshold had been crossed and made additional findings.
- M and Z appealed on the grounds (i) the Recorder had been wrong to make findings outside the scope of the final threshold document and (ii) wrong to find the threshold was made out given a lack of adequate linkage between events found.

PUMP COURT
CHAMBERS

Fact-Finding Hearings

- Baker LJ makes clear that a judge can make findings that fall outside the scope of the local authority's threshold document '*known parameters*'.
- The totality of the evidence was plainly sufficient to support findings of coercive control over the mother.
- No party had been unfairly disadvantaged by the process by which the findings were ultimately made.
- The Recorder had good reason, based on the authorities, to depart from the LA's threshold document. Whilst coercive control had not been expressly pleaded in the final version of the threshold it was a concept that had featured prominently in the proceedings from the outset and had been addressed in written evidence. Whilst it would have been better for the parties to have clarified at the outset that coercive control was potentially part of the argument on threshold they knew the point was live and had the opportunity to address it while evidence was being taken.
- The Recorder's treatment of hearsay evidence was balanced and proportionate. Although a number of witnesses had been unavailable for cross examination, this had been taken into account.
- There was no merit in the second ground of appeal.

PUMP COURT
CHAMBERS

Vulnerable Parties & Fairness of proceedings

- **M (A Child)[2021] EWHC 3225 (Fam)**
- Judd J granted an appeal against a fact-finding judgment in private law proceedings, stressed the importance of the court complying with FRP 2010, rule 3a and PD3AA.
- Parents met online in 2015. M had been living in eastern Europe providing online sexual services. F had been a client. M moved to UK to live with F and became pregnant very shortly thereafter. They separated a few weeks after the child was born and disputes arose in respect of contact and money. In December 2019 M returned to her home country with the child; F made applications under the Hague Convention and the CA89 and M was ordered to return the baby which she did in February 2020. M applied for leave to remove and F sought a CAO. M made serious allegations of domestic abuse, incl. rape on three occasions, one in circumstances where she alleged she was unconscious and not consenting.
- Whilst both parties had been represented, at no stage was an application made, or consideration given to participation directions or a ground rules hearing.
- Judd J referred to S.63 of Domestic Abuse Act 2021 which provides that where a person is, or is at risk of being, a victim of domestic abuse, the court **must** assume

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Vulnerable Parties & Procedural Fairness

- (contd) that their participation and evidence would be diminished by reason of vulnerability. This triggers FPR rule 3A and PD3AA. If a vulnerable witness is to give evidence there **must** be a ground rules hearing to consider how the evidence should be given
- '*this was a case which cried out for participation directions and a ground rules hearing, not just for the sake of the mother, but for the integrity of the court process itself*'
- The judge identified particular matters for consideration in such a ground rules hearing including:
- (a) visual shielding
- (b) topics to be covered in cross examination;
- (c) restriction of questioning of M to what was necessary for a fair trial
- Judd J allowed the appeal in relation to both the failure to consider or implement participation directions/special measures, and in relation to the failure to balance the evidence property looking overall at the allegations

PUMP COURT
CHAMBERS

Vulnerable Parties & Procedural Fairness

- **Re S (Vulnerable Party: Fairness of Proceedings)[2022] EWCA Civ 8 (Baker and Whipple LJJ and Francis J)**
- Appeal from a fact-finding concerning injuries sustained by a child J, who was not subject of the proceedings, but was a child who had spent periods of time in the care of the subject child's parents. At the fact-finding hearing the judge concluded that two injuries to J were inflicted by M after he had returned to her from X and Y and that she had attempted to demonstrate that X and or Y had inflicted those injuries knowing that she had caused them herself and that her use of ketamine was higher than she had admitted.
- J's mother had never met her counsel in person, had given instructions over the telephone and attended the fact-finding hearing remotely. She appealed against those findings and applied for permission to add a new ground of appeal based upon procedural irregularity and unfairness.
- Subsequent to the hearing, two psychologists reported on M's cognitive difficulties and low IQ and recommended regular breaks, the repeat of information and an intermediary in formal meetings and interviews.

PUMP COURT
CHAMBERS

Vulnerable Parties & Procedural Fairness

- Granting permission to amend the grounds of appeal and to adduce evidence relating to cognitive difficulties, allowing the appeal and remitting the proceedings to the Family Liaison Judge for consideration as to whether there should be a rehearing as to the cause of J's injuries for the following reason:
- (i) the express provisions of FPR Part 3A and PD3AA ("these comprehensive provisions are of fundamental importance to the administration of family justice" per Baker J) and the overriding objective make clear that it is the duty of the court to identify 'at the earliest possible stage' a party or witness who may be vulnerable. The duty to identify a vulnerable party or witness would almost invariably fall on the party's representative rather than the court. The failure to identify J's mother's cognitive difficulties and to make appropriate participation directions to ensure the quality of her evidence was not diminished as a result of vulnerability amounted to a serious procedural irregularity and, consequently, the outcome of the hearing was unjust.
- Baker J acknowledged that the requirements of remote hearings during the pandemic made the identification of vulnerability more difficult and he expressed sympathy for judges hearing complex care cases during the public emergency.
- Importantly, unlike Re M (supra) this case concerned new material which had an obvious bearing on the M's credibility. The trial judge's assessment of M's character had been of central importance to the findings made and thus her evaluation could have been different had she been aware of M's vulnerability.

PUMP COURT
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Disclosure

Re L (Third Party Disclosure Order: Her Majesty's Prison and Probation Service)[2022] EWHC 127 (Fam)

- The case concerned public law proceedings scheduled for final hearing in February 2022. In 2015, F was convicted of offences under the Terrorism Acts 2000 and 2006. He was sentenced to 8 years imprisonment.
- In April 2021 he was released on licence. The central issue in the case was the potential risk posed to the children by having contact with him, given his proven engagement in terrorist activities. M and F remained married and wished to live together with the children. The children were having supervised contact with F in the community.
- At a case management hearing, Cobb J directed disclosure from 'HMPPS' in relation to the circumstances of F's offences, his current attitude to those offences and his conviction and ideology. An SJE psychologist was instructed to undertake a risk assessment of the risk posed by F and M's capacity to protect the children. Subsequently, the SJE requested further disclosure from HMPPS and a further direction was made by consent.

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CHAMBERS

Disclosure

- Whilst the Secretary of State for Justice complied with the disclosure order, they indicated through counsel their wish to make wider submissions as to the process by which disclosure was ordered in the instant case and in future cases.
- HELD: providing guidance on third party disclosure orders against HMPPS and similar bodies connected with the criminal justice system, whether or not they give rise to potential national security issues, should proceed as follows:
- (a) The Applicant for a third party disclosure order should serve the application on the SSJ by the Government Legal Department through the new proceedings inbox Newproceedings@governmentlegal.co.yk;
- (b) the application should be served in the usual way;
- (c) any request for disclosure on a rolling basis should be made explicitly clear in the application and/or order;
- (d) any correspondence should continue to be addressed exclusively to HMPPS;
- (e) any requests to third-party disclosure which are not accompanied by an order or application should, as now, be sent to the person or body believed to hold the material in question and not to the GLD.

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Threshold

- ***Re W [2021] EWHC 2844 (Fam) Hayden J***
- This case concerned a 12 year old boy with profound disabilities arising from a genetic defect who required one-to-one care throughout the day with two-to-one care for moving and handling.
- Proceedings arose after the private care company responsible for delivering the care package stated they were no longer able to do so as a result of what they perceived to be interference and resistance from the child's parents.
- An SJE psychologist and psychotherapist was instructed to prepare a psychological assessment of the parents. Her ''*landmark report*' was instrumental in the resolution of the dispute and an agreed way forward in the case.
- HELD: focusing on that part of the S.31(2) test as to whether the care provided is "*not being what it would be reasonable to expect a parent to give*" under S.31(2)(b)(i). He emphasised that this is not to be regarded as an abstract or hypothetical test but must be evaluated by reference to the circumstances that the parent is confronting and the individual child, rather than some achievable gold standard or parenting. Above all, it requires recognition that '*in a challenging situation many of us behave in a way which might not objectively be viewed as reasonable*' (see para [19])

PUMP COURT
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Covid 19 Vaccination

- **Re C (Looked After Child)(Covid-19 Vaccination)[2021] EWHC 2993 (Fam) Poole J**
- This case concerned a boy, now 13, who had been in care since 2015. In September 2021 M contacted the LA to object to her son receiving the vaccination. Subsequently, during supervised contact, the child told his mother, and confirmed with his social worker, that he wished to receive the winter flu and Covid 19 vaccinations. M sent the LA a signed 'vaccine refusal declaration'. F supported the child's wishes.
- The LA considered that it was in the best interests of the child to have both vaccines and that pursuant to S.33 CA 1989 they had the right to exercise parental responsibility by arranging for and consenting to the two vaccines being administered. They sought confirmation from the court.
- HELD: Pursuant to S.33(3)(b) the LA with a care order could arrange and consent to the child being vaccinated, notwithstanding parental objections given that the vaccinations were part of an ongoing national programme, that the child was Gillick competent and consented and that the LA were satisfied that it was necessary to safeguard and promote his welfare. The principles in **Re H (A Child: Parental Responsibility: Vaccination)[2020] EWCA Civ 664, [2020] 2 FLR 753** applied.

PUMP COURT
CHAMBERS

Proportionality

Re H-W (Children: Proportionality)[2021] EWCA Civ 1451

- This case concerned a mother with six children. The LA had been involved with the family throughout M's life due to long standing concerns relating to sexual abuse and neglect. Earlier care proceedings resulted in findings being made about the eldest child's sexual behaviour and although the children were made the subject of child protection plans in 2018 the matter had been closed by the LA in October 2019.
- Shortly thereafter, concerns re-emerged when M allowed A, aged 20 years, to say in the family home for 2 weeks during which time he sexually assaulted his sibling, then aged 6 years. M did not report this assault for 3 days and permitted A to remain staying in the family home.
- Two substantial judgements followed. The first focused upon the risk posed by A and the second, a welfare hearing, concerned the LA's care plan for the removal of the three younger children to separate foster homes with the youngest child (aged 18 months) being placed for adoption. The SJE, Dr Judith Freedman, psychiatrist and the Children's Guardian supported the LA care plans.

PUMP COURT
CHAMBERS

Proportionality

- Dr Freedman concluded that although matters had repeatedly involved the local authority, definitive changes had not been made by M. The children had struggled in education and M was unlikely to recognise and protect the girls from sexual harm. The parenting assessment undertaken by the allocated social worker was negative.
- At first instance the trial judge held that the mother loved all her children and that they wanted to stay with her but that it was not safe for them to remain; each girl was at risk of significant sexual harm and E had suffered actual and significant sexual harm. Whilst acknowledging the risks with foster care, he considered that both parents lacked insight and made final care orders in respect of C, D and E, effectively ruling them out as their future carers. An interim order was made in respect of the youngest child with a care plan that she be wither placed with her sister or in a foster to adopt placement.
- M, supported by one of the father's, was granted permission to appeal on the basis that the current risks to the children had not been properly considered and that the court's orders were disproportionate to those risks.

PUMP COURT
CHAMBERS

Proportionality

- HELD: Dismissing the appeal:-
- (i) There had been no identifiable error in the judge's approach including 'impeccable legal self-directions';
- (ii) The system for making and supervising difficult decisions such as those in the instant case required conscientious and diligent judges in the family court, bringing all their experience to bear, making multi-faceted assessments of the evidence and making decisions within a well-defined legal framework. In such circumstances, the appellate court had to take the greatest care to resist the temptation to disagree with the decision of the fact-finder. It could only interfere if the decision had been wrong and in marginal cases it was all the more important to trust to the wisdom and discretion of an experienced family judge.
- Lewison LJ concluded that in the instant case he was 'in the uncomfortable position of reviewing a decision which I cannot say was right or wrong'.
- Peter Jackson LJ provides a compelling list of reasons why the appeal should be allowed including the question of proportionality. Did the trial judge truly evaluate the harm the children might suffer and properly balance up the positives and

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CHAMBERS

Proportionality

- (Contd) and negatives of the removal of the children from their mother's care in considering the final item of the welfare checklist namely '*the range of powers available to the court under this Act in the proceedings in question*' and the opportunity this provides to explore what might be achieved under different possible orders.
- Nevertheless, Lewison and Laing LLJ also provided compelling reasons for their majority judgment in the matter, in particular stressing the history of the decision making regarding the family (eg. 9 day fact-finding hearing and a 6 day welfare hearing). They recognised the competing factors and, as Lord Nicholls stated in **Re B (Adoption: Natural Parent) [2001] UKHL 70, [2002] 1 FLR 196** '*There is no means of demonstrating that one answer is clearly right and another clearly wrong*'.
- Lewison LJ drew on **Re B (A Child)(Care Proceedings: Threshold Criteria)[2013] UKSC 33** where Lord Neuberger concluded that when the appellate judge cannot say whether the trial judge's conclusion on proportionality is right or wrong '*the appeal should be dismissed*'.
- BUT…

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Proportionality

- **Re. H-W (Children)(N0.2)[2022] UKSC 17 per Dame Siobhan Keegan**
- M and F3 appealed to the Supreme Court who refined their grounds of appeal into two questions. Firstly, in order to decide whether those orders were proportionate, was it necessary for the judge as a matter of law to assess the likelihood that if left in M's care, (a) the children would suffer sexual harm; (b) the consequences of such harm arising; (c) the possibility or reducing or mitigating the risk of such harm; an (d) the comparative welfare advantages and disadvantages of the options presented. Secondly, whether the judge erred in law by failing to make any or any proper assessment of those matters.
- HELD: Appeal allowed and remitted for rehearing. The real issue in this case was not whether the judge reached a conclusion that was wrong, but the adequacy of the judge's ***process of reasoning*** (my emphasis) in reaching his conclusion.
- Supreme court had '*no hesitation*' in concluding that the judge was required to assess all four of those matters (a)-(d) above.
- In respect of whether the court must consider the possible reduction or mitigation of the risk which pertains and the welfare advantages and disadvantages of imposing an order, the court was clear in para 54:-

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CHAMBERS

Proportionality

- *'[54] Again it is clear that this question should be asked when a court is considering whether to make a care order. That is because a court must look to determine whether any order is necessary by virtue of the Act; section 1(5), and whether or not the most interventionist order is necessary; article 8(2) of the Convention.*
- *[55] in addition, point (g) of the welfare checklist specifically refers to the range of powers available to the court under the Act. Consideration of the range of orders obviously includes the ability of the court to consider in a care order case a supervision order or other orders and options.'*
- Insofar as the second issue before the Supreme Court, concerning whether the judge erred in lay by failing to make a proper assessment of those matters and in particular matters (c) and (d) '*mitigations and options*'. The judge failed to mention the efficacy of the injunction against F" and the non-molestation order made against A:-
- '[*60] …one looks in vain for the critical side-by-side analysis of the available options by way of disposal, and for the evaluative, holistic assessment which the law requires of a judge at this stage. Whilst the judge has identified the risk of sexual harm as satisfying the threshold criteria for intervention, there is no evaluation of the extent of the risk of significant harm by way of sexual harm, nor of any …*

PUMP COURT
CHAMBERS

Proportionality

- *'[60]cont'd.. available means by which the risk might be reduced for each child. Nor is there any comparison of the harm which might befall the children if left at home with the harm which would be occasioned to them if removed, and separated not only from the parents but from each other.'*

- Thank you for attending this seminar
- If you have any questions arising out of this presentation please do not hesitate to contact me by email at a.grime@pumpcourtchambers.com

J. ANDREW GRIME

23rd June 2022