



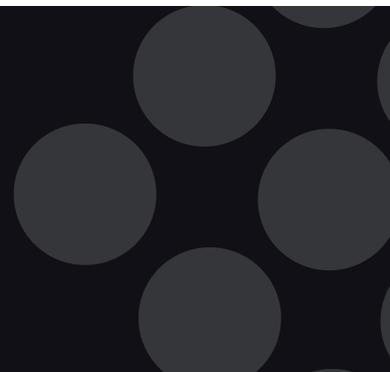
NINESTJOHNSTREET
FAMILY & MENTAL HEALTH

Public Law Update

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1. Cumbria CC v T (Discharge of Interveners) [2020] EWFC 58

Case link <https://www.bailii.org/ew/cases/EWFC/H CJ/2020/58.html>

Brief background M alleged that F, as well as the interveners in this case, had sexually abused the child. LA did not pursue findings against F or the interveners but pursued findings against M that either she had fabricated the allegations or held an unreasonable belief that the child had been sexually abused. M sought to pursue findings against F and the interveners of sexual abuse and filed a Scott Schedule to that effect.

When should the court determine a disputed fact?

MacDonald J set out the relevant case law:

- *A County Council v DP, RS, BS (By the Children's Guardian)* [2005] 2 FLR 103,
- *Re F-H (Dispensing With Fact-Finding Hearing)* [2008] EWCA Civ 1249, [2009] 1 FLR 349
- *Re W (Care Proceedings: Functions of Court and Local Authority)* [2014] 2 FLR 431
- *A Local Authority v X, Y and Z (Permission to Withdraw)* [2018] 2 FLR 1121

It is ultimately a matter for the court to decide what facts should be determined. MacDonald J confirmed that the principles set out in *A County Council v DP, RS, BS* [2005] continue to apply:

- i. the interests of the child (which are relevant but not paramount);
- ii. the time that the investigation will take;
- iii. the likely cost to public funds;
- iv. the evidential result;
- v. the necessity or otherwise of the investigation;
- vi. the relevance of the potential result of the investigation to the future care plans for the child;
- vii. the impact of any fact finding process upon the other parties;
- viii. the prospects of a fair trial on the issue;
- ix. the justice of the case.”

MacDonald J determined that it was not necessary to determine M's allegations as this would not assist in making the welfare decision the court was required to make. Further, even if it had been necessary, there were significant evidential difficulties in proving M's allegations. MacDonald J also had regard to the delay which would result, the cost to the public purse and "The Family Court Covid-19 – The Road Ahead" guidance which makes clear that parties will not be allowed to litigate every issue and an oral hearing will encompass only that which is necessary to determine the application before the court.

Should interveners be discharged when no findings were being sought against them however allegations would be put to them in the context of them appearing as witnesses?

MacDonald J sets out the relevant case law:

- *Re S (Care: Residence: Intervener)* [1997] 1 FLR 497 CA)
- *Re BJ (Care: Third Party Intervention)* [1999] Fam Law 613
- *Re H (Care Proceedings: Sexual Abuse)* [2000] 2 FLR 499
- *Re H (Care Proceedings: Intervener)* [2000] 1 FLR 775
- *Re T (Children)* [2011] EWCA Civ 1818

In short, it depends upon the facts of each individual case.

In this case, MacDonald J discharged the interveners having considered the Overriding Objective, Section 98 of the Children Act 1989, "The Family Court and Covid-19 – The Road Ahead" Guidance, the fact that LA did not seek findings against the interveners, that M was not permitted to pursue the findings she sought against the interveners and that their interests were sufficiently protected by LA and F. The case could be dealt with fairly without the need to maintain their intervener status.

2. K (Children: Placement Orders) [2020] EWCA (Civ) 1503

Case link <https://www.bailii.org/ew/cases/EWCA/Civ/2020/1503.html>

Jackson LJ reiterated the basic principles to be applied when determining whether to make care and placement orders and discussed the significance of lies in the context of welfare and the impact of lies when assessing the future risk of harm.

Brief background Proceedings had been ongoing for a number of years. LA initially issued care proceedings in December 2017 following an alleged non accidental injury to the child, followed by

dishonesty and lack of co-operation from the parents. M then fled the jurisdiction with the child and ultimately, following orders being made for the return of the child and publicity being given to the return order, M was located in USA when giving birth to another child, which she had concealed from LA. In 2018, the children were returned to the UK and placed into foster care. The parents continued to deceive professionals resulting in the court making a number of findings at 2 hearings, not only that one of the parents had caused the initial injury to the child but also in respect of their deceit, lack of remorse and remote prospects for positive change. J made care and placement orders, in essence due to the parents' deceit and irrational and extreme reactions to the involvement of the local authority.

Jackson LJ allowed the appeal on the basis that the judgment did not adequately identify the harm the children would be likely to suffer if returned to the care of the parents. The matter was re-mitted for a re-trial in respect of the welfare decision only. Jackson LJ warned the parents, however, that ultimately the welfare outcome may be the same.

Jackson LJ confirmed that adoption should only be considered as a last resort (*Re B (A child) (Care Proceedings: Threshold Criteria* [2013] UKSC 33) and that a rigorous and reasoned evaluation of all realistic options must be carried out before it can be concluded that adoption is necessary and proportionate (*Re B-S (Children)* [2013] EWCA Civ 1146).

Jackson LJ stated that lies must be strictly assessed for their likely impact on the child. The court must spell out why dishonesty creates a risk of significant harm and what weight should be given to that dishonesty in the welfare evaluation.

Jackson LJ reiterated the questions the court should ask itself when assessing risk of future harm, as set out in *Re F (Child) (Placement Order: Proportionality)* [2018] [2018] EWCA Civ 2761 :

1. What is the type of harm that might arise?
2. What is the likelihood of it arising?
3. What consequences would there be for the child if it arose?
4. What steps could be taken to reduce the likelihood of harm arising or to mitigate the effects on the child if it did?

The answers are then placed alongside other factors in the welfare equation so that the court can ask itself:

5. How do the overall welfare advantages and disadvantages of the realistic options compare, one with another?

6. Ultimately, is adoption necessary and proportionate – are the risks bad enough to justify the remedy?

3. In the cases of *Lancashire County Council v G (unavailability of secure accommodation) (2020) EWHC 2828 Fam* and *J (2020) EWHC 2395*

Case link <https://www.judiciary.uk/wp-content/uploads/2020/10/Lancashire-CC-v-G-Unavailability-of-Secure-Accommodation-judgment.pdf>

<http://www.bailii.org/ew/cases/EWHC/Fam/2020/2395.html>

The issue: S25 v The Inherent Jurisdiction:

In the cases of *Lancashire County Council v G (unavailability of secure accommodation) (2020) EWHC 2828 Fam* and *J (2020) EWHC 2395 Fam* the court utilised the inherent jurisdiction to overcome the hurdle of endorsing a secure placement in premises which were not approved.

Brief background In both cases the subject children were extremely vulnerable and for entirely different reasons, the court accepted that in the absence of a deprivation of their liberty, their respective lives were at risk.

Both young people required secure accommodation but owing to the lack of available approved premises, the local authorities had no alternative but to suggest they were accommodated in unapproved premises and thus deprived of their liberty. Therefore, s25 could not be applied and the court invoked the powers of the inherent jurisdiction. In both cases the court referred to the Presidents Guidance in relation to placements in unregistered children's homes in England and unregistered care home services in Wales.

<https://www.judiciary.uk/publications/practice-guidance-placements-in-unregistered-childrens-homes-in-england-or-unregistered-care-home-services-in-wales/>

Notes for practice:

- Placements cannot meet the criteria set out in s25 CA 1989 if they are not approved by Ofsted or CIW;

- Therefore, a party may need to invite the court to invoke its powers under the inherent jurisdiction (IHJ) when a placement is proposed which is tantamount to secure accommodation but where there isn't the availability of an approved premises and;
- There is an urgent need for accommodation;
- When making an application to invoke the IHJ to deprive a child of its liberty and place in an unapproved premises, the applicant needs to specify where or not the placement is registered;
- Inform the court if the placement is exempt from registration or if it is taking steps to become registered;
- The applicant must make state if and why it deems the placement safe and suitable.

4. K (Threshold – Cocaine Ingestion – Failure to give evidence) (2020) EWHC 2502 (Fam):

Case link <https://www.bailii.org/ew/cases/EWHC/Fam/2020/2502.html>

The issue: Failing to give evidence at a contested hearing:

Brief background The case involved the tragic death of a toddler as a result of Cocaine ingestion in the family home. During the course of the fact-finding process which lasted 4 weeks, the mother made the decision not to give evidence.

Williams J undertook a balancing exercise with specific consideration of the approach to be taken in relation to hearsay evidence and further, what weight could be attached to the mother's evidence notwithstanding the absence of her oral contribution. The court noted the following:

- Family proceedings are inquisitorial rather than adversarial;
- The legal framework permits the admission of hearsay evidence;
- There is a spectrum in relation to lies and the court must adopt a measured approach in relation to a Lucas direction.

Notes for practice:

- Explore the reason/s why a witness does not want to give evidence;
- Is there any available evidence to support their rationale? If not, can evidence be obtained?



- Can special measures be used to encourage the witness to give evidence;
- Can the witness prepare a statement dealing with their failure/inability to give evidence and/or amplify their position;
- Consider where on the spectrum of lies, where the witness falls and whether any inferences should apply.