**Case Law Updates**

**Judgments handed down in September 2014**

**PRIVATE LAW**

***K (Children) [2014] EWCA Civ 1195***

***Private law dispute involving a ‘conditional residence order’ which evolved into public law proceedings when ICOs made - appeal against orders made separating two siblings, one placed with foster carers under an interim care order and the other residing with his father pursuant to a child arrangements order***

Two boys A and B, aged 14 and 12, had been living with their M and stepfather. Private law proceedings had been between their parents for 10 years. Contact between the boys and their F had repeatedly broken down amid significant acrimony between the adult parties.

In March 2014, a recorder had concluded that a consent order made in 2012 was the 'solution' to the contact problem and had made orders accordingly. He had also made a 'conditional' residence order which allowed for a temporary change of residence along the lines of the decision of Coleridge J in *Re A (Suspended Residence Order)* [2010] 1 FLR 1679.  That order provided that, should the M and stepfather fail to comply with the order for contact between the boys and F, the boys' residence would be temporarily transferred to F for the summer.

Contact had broken down again in April 2014 and at a hearing on 23 May 2014, the recorder sought to activate the conditional residence order as of 25 May. The boys, however, absconded from F’s home in the early hours of 27 May and were found with a previous childminder.

When the matter came before HHJ Marshall on 3 June 2014, she made orders removing both boys from M’s care. A was placed with foster carers under an ICO and B was placed with F pursuant to a child arrangements order. By the time of that hearing the case had lost the benefit of the psychiatrist who had previously been appointed on behalf of the children and who had written to the court to say that the circumstances of this case were now outside of his experience. Further, the children's guardian had requested that she be replaced by a guardian with experience in public law proceedings (this was not known to HHJ Marshall when the matter came before her).

Ryder LJ, giving the leading judgment; appeal allowed in part. Case remitted to be heard by a High Court judge. Interim care orders were made in respect of both boys who were returned to the care of M with B having s.34(4) staying contact with F on alternate weekends.

The Court of Appeal identified five errors that made the judgment of the family court wrong:

1. The nature and extent of the applications made by the parties, the orders that could be made in consequence and in particular the welfare options underlying those orders, were not identified with sufficient or any clarity;
2. There was no sufficient welfare analysis of the options that were available;
3. The proportionality of the removal of A on the grounds of 'safety' from the care of either or both of his parents was not justified;
4. The separation of the boys from each other was neither considered nor justified; and
5. The determination of the court was inappropriately influenced by a discussion between the judge and the boys.

Beyond a brief description in the judgment of the applications and the parties' positions, there was no analysis of the purpose of the hearing, that is, the ultimate order(s) / decision(s) to be made and the problem to be solved. In an urgent hearing such as this, which takes place without the benefit of a case management hearing, it is essential to go through a case management exercise within the hearing itself so that the issues to be determined can be properly identified and analysed. Otherwise, the identification and analysis of the key issues is likely to be flawed which is what happened in this case.

Although it was accepted that the threshold for making an interim care order was satisfied, the judge had failed to identify the threat to A's 'immediate safety' that justified his removal to foster care, as required by *Re L-A (Care: Chronic neglect)* [2010] 1 FLR 80 CA. Consequently, the analysis required by the test in *Re L-A* could not be performed and therefore the court could not have correctly applied that test.

As far as the separation of the siblings was concerned, the sibling relationship is one to which both Article 8 and s. 1 of the Children Act soundly apply and the absence of a proper analysis of the implications of separating the two boys was a fundamental flaw in this decision.

**PUBLIC LAW**

***O (Minors) [2013] EWHC B44 (Fam)***

***Fact finding in care proceedings in respect of two children of whom one had a Vitamin D deficiency; no findings of non-accidental injury made against either parent***

The court was concerned with F (born in 2011) and L (born in 2013). There was no previous history of any childcare concerns until 8.4.13 when L was found to have a fracture of his right clavicle. On 10.5.13 he was found to have a fracture of his left seventh rib posterolaterally and small bruises were also found on L (on the centre of his anterior chest wall, under his left jaw and over his lower spine). L had been suffering from a significant Vitamin D deficiency and had a raised parathyroid hormone. F also suffered from a Vitamin D deficiency.

M was unable to explain how it was that L sustained the fractures. M had previously raised concern about her epilepsy having read that she might unknowingly have had a seizure whilst caring for L. There was also a question of whether or not M's epileptic medication might have had an effect on her own levels of Vitamin D. As to the bruising, M pointed to the evidence that F was jealous of L and prone to pinching him.

The local authority originally requested findings including that the injuries were non-accidental and perpetrated by the acts or omissions of M and/or F . The ”broad canvas" evidence in respect of both parents was favourable to them. This was reflected in the decision to return F to the care of his parents and in the extensive level of contact afforded with L.

The medical evidence was that L suffered a displaced fracture of his right clavicle and a fracture of the anterior aspect of his left seventh rib. He suffered bruising. Although L suffered from Vitamin D deficiency, the view of the experts was that this deficiency was not sufficient to cause bone fragility in L such as is likely to have caused fractures in the course of normal handling or rough play. The presence of Rickets was discounted. There was no explanation as to how the injuries were caused and no memorable or witnessed event which suggested an accidental explanation. The medical experts therefore concluded that the fractures and bruising were the result of inflicted non-accidental injury (although an honorary consultant paediatrician thought the bruising to chest and chin less worrying and might have been caused by F). The judge referred to the need for the court to guard against the danger of reversing the burden of proof.

A consultant in neurology was the last witness. He distinguished between what he described as partial epileptic fits and full epileptic fits. In his opinion it was possible that M could have had a partial fit, during which she injured L, but remembered nothing of it. Further he thought it possible that M would experience no symptoms, before or after a partial fit, that would lead her to remember that she had suffered such a fit.

It was because of this evidence that the local authority reconsidered its position and no longer sought any public law orders, coming to the conclusion that the most likely cause of the fractures was M having a partial fit on the afternoon of 7.4.13 whilst F was asleep.

By the end of the case the positions of the parties were:

 • Local authority: public law proceedings should be dismissed and L returned home (upon the basis that M may have unconsciously injured L while having an epileptic fit). A finding was sought that L had normal bone strength.

 • Parents: Agreed with local authority save that they sought a finding that the court could not be satisfied that L had normal bone strength.

 • Guardian: L had normal bone strength and had suffered inflicted non-accidental injury by one or other of the parents. L should nevertheless be returned home to the care of his parents.

HHJ Bond, sitting as a judge of the High Court, could not be satisfied that L's bones were "normal" and would not have fractured as a result of normal or rough handling. He agreed that L did not suffer from Rickets. He thought that the true condition of L's bones remained a mystery. The local authority invited the court to make a finding that although L suffered from Vitamin D deficiency this was not sufficient to produce abnormally fragile bones; the judge was not satisfied as to this. The medical evidence had to be seen in the context of the entire evidential jigsaw.

Before he had heard the oral evidence of the consultant in neurology, the judge had come to conclusions set out at paragraph 175 of the judgment, including that L suffered both fractures at sometime between 13:00 and 18:00 hours on 7.4.13, and that he suffered both while in the care of M. He also found that the parents were loving, attentive and co-operative. He was unable to make a finding as to the cause of the bruises. He further found that there were too many uncertainties to make a finding against either of these parents that one or other had caused either of L's fractures by inflicted non-accidental injury. The evidence of the consultant in neurology imported a further area of doubt and difficulty into the case.

Following submissions, L returned home under an ICO with a direction under s.38(6) Children Act 1989. That position was maintained whilst the judgment was written. As a result of the judgment the application for public law orders was dismissed.

***N-D (Children) [2014] EWCA Civ 1226***

***Appeal against care and placement orders on the basis that the judgment had failed to provide adequate reasoning behind the welfare determination***

A care order was made in respect of a 15 year old child and care and placement orders were made in respect of his two siblings aged 4 and 19 months. The parents had been convicted in the Crown Court of serious physical abuse against the 15 year old; the F received a term of imprisonment and M a suspected sentence supervision order. The care order in respect of the 15 year old with a plan of foster placement was not appealed by the parents.

The parents appealed the care and placement orders in respect of the two youngest children and were granted permission to appeal on the basis that the judgment contained no analysis of the threshold under s.31 of the Children Act 1989, no welfare analysis of the risks to the children having regard to s.1(3)(e) of that Act, no adequate welfare comparison of the options for the children and, accordingly, a flawed proportionality evaluation.

Ryder, LJ giving the leading judgment; appeal allowed in respect of failure to reason the welfare determination. Care and placement orders set aside and re-hearing before a different circuit judge directed for the following reasons:

1. The scant nature of the 4 and a half page judgment was unacceptable in particular given that it was following a 6 day hearing and a 1 month delay for judgment.
2. The origin of the problem in the case was that the threshold document had been agreed between the parties which resulted in the judge failing to analyse it with care so as to separate out the facts relating to each child and the consequent risks.
3. The judge had described the witnesses she accepted and rejected without setting out what she accepted and rejected from each witness' evidence.
4. The judge failed to set out an analysis of the benefits and detriments of the two options available, having heard from a number of experts who had competing recommendations and having failed to justify why she preferred some of the experts' conclusions over others.
5. A re-hearing was required as it is not appropriate for the Court of Appeal to make value judgments about the welfare factors and the options available from the transcripts. This is the function of the first instance judge who has heard the witnesses and evaluated the quality of their assessments by reference to the direct evidence of the parents.

*Criticism was made of the parties' representatives on the basis that they should have asked the judge for further or better particulars of her judgment so that the reasoning behind it became clear.*

***Re B (Children: Long Term Foster Care) [2014] EWCA Civ 1172***

***Appeal against care orders in respect of two boys***

This case concerned two boys, A and B, who were age 11 and almost 10 respectively at the time of the appeal hearing. The appeal was brought by M against the decision of HHJ Scarratt, on 30 October 2013, to make final care orders in respect of both boys.

The judgment describes the concerns about the children as ‘diverse’, including domestic violence between the parents, poor home conditions, poor school attendance, trouble caused by family members, the children being out unsupervised at night and M being stabbed by a neighbour. The local authority had initially sought ICOs but subsequently accepted that the boys could remain at home during the proceedings under ISOs. The evidence at this time acknowledged that M had been able to make improvements and work with professionals for the benefit of the children.

During the course of the proceedings, M continued to show some positive engagement although fresh issues also arose which gave the local authority and the Guardian cause for concern. However, the local authority evidence reflected its plan for the boys to remain at home under interim supervision orders. The local authority changed its plan to one of foster care prior to a hearing on 5 September 2013. This was due to the ongoing concerns and their view that 'only minimal improvements' had been made despite the support and the ongoing reports of fresh incidents of concern. Further incidents occurred between the local authority's final evidence and the final hearing in October 2013.

At that hearing, HHJ Scarratt preferred the evidence of the local authority and Guardian and made the care orders sought. M’s grounds of appeal were distilled into the following propositions:

 • That the judge failed to scrutinise properly the local authority's change of position from July 2013 to August 2013;

 • That the judge wrongly accepted the local authority's evidence about two of the incidents in September when the witnesses to those incidents had neither given statements nor attended to give oral evidence.

Black LJ giving the leading judgment; appeal allowed and case remitted for re-hearing.

The Court of Appeal found that the judge had failed to carry out a sufficient analysis of the alleged incidents that had given rise to the change of position and had failed to make findings about what had occurred.

The local authority had confused the criminal record of M’s new partner, Mr SB, with that of his brother. It was difficult to ascertain from the judgment what the judge had made of the supposed convictions of the partner as his reasoning was unclear. Further, the judge had not determined whether M had ended her relationship with this partner and whether that showed an ability to put the needs of the children first. His reasoning about the M’s association with Mr SB was therefore described as 'decidedly shaky'.

In relation to a finding that the judge had made, namely that M’s partner had assaulted A, the judge had not carried out sufficient analysis of the evidence before him to justify that finding given the significance of that alleged incident in the proceedings overall.