1GC | Family Law

PUBLIC LAW CHILDREN CONFERENCE 19.11.19

Andrew Bagchi QC

- ***Fact-finding hearings:***
- ***In the face of judicial inconsistency, when is a Local Authority under a duty to put a positive case to a respondent parent against whom it seeks findings?***

- *"Putting a case".*
- Cross-examination:
- *"Cross-examination is the greatest legal engine ever invented for the discovery of truth."* John H. Wigmore, quoted in **Lilly v. Virginia,** 527 U.S. 116 (1999)

- The right to cross-examine in family proceedings
- FPR 2010 R 22.11:
- *A witness who is called to give evidence at the final hearing may be cross-examined(GL) on the witness statement, whether or not the statement or any part of it was referred to during the witness's evidence in chief.*

- ***Carmarthenshire CC v Y*** [2017] EWFC 36 Mostyn J
- *"the general rule is that oral evidence given under cross-examination is the gold standard".*

Re B [2018] EWCA Civ 2127

- Fractures of a baby x 3 – cd be on 1 occn.
- In care of only M and F during relevant period
- Who did it?
- M's case: it was not me; it must have been F.
- F's case: it was not me but I do not accuse M;
- LA's case: both in the pool – can't tell which one did it.

- F was xx on basis that he did it.
- M was not xx on the explicit basis that she did it.
- i.e. not put to M that she did it.
- Judge came to reasoned conclusion that it was probably M. [Main carer]

- M complained that it unfair that it not positively put to her that she did it.

- CA reviewed authority:-

Per Peter Jackson LJ §15

- *It is an elementary feature of a fair hearing that an adverse finding can only be made where the person in question knows of the allegation and the substance of the supporting evidence and has had a reasonable opportunity to respond. With effective case-management, the definition of the issues will make clear what findings are being sought and the opportunity to respond will arise in the course of the evidence, both written and oral*.

Citing Lord Neuberger in *Chen v Ng*

Specific factors to be taken into account:

- the importance of the relevant issue both absolutely and in the context of the case;
- the closeness of the grounds to the points which were put to the witness;
- the reasonableness of the grounds not having been put, including the amount of time available for cross-examination and the amount of material to be put to the witness;

- whether the ground had been raised or touched on in speeches to the court, witness statements or other relevant places; and,
- in some cases, the plausibility of the notion that the witness might have satisfactorily answered the grounds."

- *However, the rule is not an absolute one, and there will be cases in which it will be pointless to put formal challenges to a witness who knows perfectly well that his or her evidence is disputed, and where the challenge could in reality go no further than "I put it to you that you are lying".*

Per Lord Justice Newey: Howlett v Davies [2017] EWCA Civ 1696

- *where a witness' honesty is to be challenged, it will always be best if that is explicitly put to the witness. There can then be no doubt that honesty is in issue. But what ultimately matters is that the witness has had fair notice of a challenge to his or her honesty and an opportunity to deal with it. It may be that in a particular context a cross-examination which does not use the words "dishonest" or "lying" will give a witness fair warning. That will be a matter for the trial judge to decide. …"*

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

- Extraordinary case
- 10 yr old girl died in home from neck compression. Also had some injuries to genitalia
- LA said inflicted injuries in a sexually motivated murder by F, M and/or 2 teenage brothers all at the same time
- Parents said must be an accident by falling from top of bunk bed bed whilst wrapped in lace netting she slept with and injuring herself in the fall

- Experts said – not exclude unusual fall – not reconstruct it – non accidental most likely;
- Botched police investigation;
- In submissions judge raised possibility of 2 separate events – first: failed attempt at FGM on the afternoon, second: manual strangulation at night

- FGM discounted by police and LA
- No medical ev consistent with it.
- Family recalled – all against it. No one of current generations of female children in the family (20) had it.
- LA not pursue it – seeking pool finding
- Judge made the finding anyway

Court of Appeal

- Set aside the findings
- Refused to substitute pool finding;
- Not wrong in principle to develop own case theory but:
- *In such a vexed case, he was bound to consider all the possibilities but, as he himself said, there must be parameters. In particular, a judge who believes he alone may have discovered a path that has not been revealed to other experienced professionals is bound to reflect on why that might be so*

- Evidence should have been addressed to his theory
- Witnesses should have been questioned on it
- It should have been put to M
- It should have been put to others present at the time of alleged FGM

- It was wrong to drop the theory on the parties in the judgment without the proper procedural ground having been prepared.

How should LA approach pool findings ?

- Plead the case in the alternative
- Cover all bases.
- That M did it, or that F did it, or that they each did it (together) or
- That there is a real possibility that either did it but not possible to say which one probably did it.

And when we get to XX

- Put a positive case against both in XX
- Will probably get away with asking *“did you do it? ”* but not really satisfactory.

Should every allegation be explored?

- In injuries cases – yes
- In neglect cases – may be large number of smaller matters cumulatively establishing a picture
- Categorise them – pick 4 or 5 main ones in each category and put that.