

# 1KBW

## ***PUBLIC LAW MONTH***

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Session Three

Speakers: Anna McKenna KC and Martha Holmes

**THURSDAY 16 MAY 2024**

***Leading in family law***

## Topic: The ever changing world of digital & technical forensic



**Anna McKenna KC**

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Anna is a KC specialising in private and public law children cases. Anna deals with domestic and international relocation and contact issues and adoption, disputes as to living arrangements and all aspects of parenting including disputes relating to medical, religious, education, and name or identity issues. In her public law work Anna is renowned for successfully managing complex cases involving child deaths, NAI, FII, Child Trafficking and sexual abuse and is highly experienced acting for parents, children and local authorities.

Anna has a wide experience acting for high profile private individuals, public bodies, victims and perpetrators of sexual and physical abuse and CAFCASS.

[Click here to view Anna's full profile](#)

*"Anna has an incredible court presence. She knows what will and won't work with judges and knows how to push home a point in support of a client's position."* - CHAMBERS AND PARTNERS, 2024

## Topic: Discharging Placement and Adoption Orders



**Martha Holmes**

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Martha is an experienced child law specialist, covering both public and private law. She represents parents, Local Authorities and Guardians at all levels of court and undertakes Direct Access work. For the first five years of practice, she also undertook criminal work and feels that the cross examination and witness handling techniques she learnt then gave her a good grounding for her family work; she has further trained as a mediator and collaborative lawyer and so brings strong client handling and negotiation skills to her cases.

[Click here to view Martha's full profile](#)

*"Martha is an excellent barrister. She is a strong and confident advocate who robustly advocates for her clients."*

- Legal 500, 2024

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## The Ever Changing World of Digital and Technical Forensic Evidence

- Anna McKenna KC

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## The Ever Changing World of Digital and Technical Forensic Evidence

And how to get the best out of your expert witness

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## A Journey Through Time

Amateur Sleuth



Complex Digital Analysis



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## Digital Forensics

It is a new science

Mobile or electronic devices

Use of acceptable methods which are forensically sound

Subject to Codes of Practice and Conduct, set by the UK Forensic Science Regulator

The Code is admissible in court – relevant to whether an expert acted in accordance with it

The Code provides mechanism for the court to understand the risks associated with non-compliance with the Code

What is your responsibility?

(1) make sure you are using a competent expert

(2) assess the impact of multiple experts conducting the same or similar tests

(3) be clear about what it is you are seeking to evidence

(4) ask if what you seek can be evidenced securely

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## A word on Regulation

### House of Lords -

The delivery of justice depends on the integrity and accuracy of forensic science evidence and the trust that society has in it. These failings must be recognised and changes made. Such action is now urgent and the Committee makes recommendations including:

- (1) a forensic Board
- (2) Expand the Remit of the Forensic Science Regulator
- (3) Legal Aid Agency to liaise with the market regulation arm to set new pricing schemes
- (4) Return the UK to position of world leader

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## Core Disciplines

Mobile Phone forensics

Computer forensics

Cell site analysis

Social media investigation and analysis

Ambition of any expert (should be)

Imaging, examination and presentation of evidence from digital media for use in court in a palatable way.

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## Key Tasks

(1) identify what devices exist

(2) ascertain level of usage

- What are you dealing with?
- NAI?
- Time of death?
- Illicit communication?
- Movements?
- Financial activity?

(3) Beware of fishing

Computers

Mobile device evidence

Tapes

Cameras

CCTV examination

Media cards

USB memory sticks

Gaming consoles

Sat Nav devices

Email accounts

Social media

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## Inherited evidence

Case Example

Moral of the case example - don't accept what you are provided with by the police at face value

What is needed:-

- (1) look at the images
- (2) look at social media conversations
- (3) understand what was AND what was not tested by the police
- (4) were search terms used – which ones?
- (5) what further tests are required?

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## Your expert report (or inherited report)

Need to know:-

- The identity of the tester
- The testers qualifications and experience
- What the terms of reference were that they worked to
- What methodology was used

Need to be clear

What you are testing

Why you are testing it and what you hope the results will tell you

Is it communication information to demonstrate association, contact, deeds

Is it location information eg secret meetings in breach of agreements

Are we looking at words used, photos, or search terms used

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## What evidence might exist?

Communication – recovery and analysis of text and voice messages

Call history

Voicemail

Interrogating Chat Applications

- Chats – Instagram/whatsapp/native messages
- § Specify the search between which devices/which dates
- § Request a PDF of messages between specified dates
- § Make sure date and time on device is set at the same time as the server – ask the expert
- § Need to understand when message sent, received, and read
- § Need to understand whether there was an attachment
- § Editing of messages, eg whatsapp editing for 15 mins after any message has been sent – ask whether any message has been edited (most are declared as edited) and whether the original message can still be seen.
- § Snapchat disappears after 24 hours – can they be recovered? Have they been saved at the other end purposely or in download?
- § Belt and braces – examine both devices – sender and receiver

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## Can the device history be recovered?

### Location Data

#### Recovered data can include

- Calendar
- Contacts
- Installation of applications
- Maps
- Passwords
- Call logs
- deleted data – can be recovered – but the device memory does not work in a linear fashion, last search not necessarily come back first

- Chats – Instagram/whatsapp/native messages
  - Specify the search between which devices/which dates
  - Request a PDF of messages between specified dates
  - Make sure date and time on device is set at the same time as the server – ask the expert
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## Tracking the movement of the device

### Cell Site Analysis & Mobile Phone Mapping/Tracking

### More on location data

- o Wifi can be identified
- § When near to wifi connection is automatically connects – location data will tell you if there has been a connection to the wifi of x,y,z location
- shows short range 20-40 metres
- o GPS coordinates will be show what are called 'breadcrumbs trails' (if turned on) can give very detailed information, can show movement on a date and at a time of interest
- o Wifi will show 50 metres

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## Obstructions to the analysis

- o if pin locked or if device has been lost
- A lot of devices update to cloud
- Apps update to the cloud
- They may need login credentials and passwords in order to
- Download data for that account
- A google account has years of history including location history
- Friends list
- Account activity
- Login history

o Even if no log in/password credentials and no phone —your expert may be able to access – **Call data Results** – Need to get this from the police or if Police not interested via a court order vs the network

Call data records are still accessible – held by networks, for 12 months

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## Volume of images & a final word

Storage

'Cache' - thumbnail images

Android

Google caching

Evidence of sharing? - relevant to the case example as there was no sharing outside of the parents to this child

Wider canvass

Risks – if we search for individuals involved in our cases - what are the consequences?

- Algorithms are in operation
- Algorithms suggest associations
- We become associated with the persons we are seeking information about
- We may be suggested as 'friends' for them – we cannot control ourselves being suggested as a friend

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Discharging Placement and Adoption  
Orders

- Martha Holmes

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## Discharging Placement and Adoption Orders

This talk will look at:

- What is the test and how do we apply it?
- How to tackle an application from either a parent or local authority perspective.

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## THE ADOPTION AND CHILDREN ACT 2002, s24

### Revoking placement orders

(1) The court may revoke a placement order on the application of any person.

(2) But an application may not be made by a person other than the child or the local authority authorised by the order to place the child for adoption unless—

- (a) the court has given leave to apply, and
- (b) the child is not placed for adoption by the authority.

(3) The court cannot give leave under subsection (2)(a) unless satisfied that there has been a change in circumstances since the order was made.

(4) If the court determines, on an application for an adoption order, not to make the order, it may revoke any placement order in respect of the child.

(5) Where—

- (a) an application for the revocation of a placement order has been made and has not been disposed of, and
- (b) the child is not placed for adoption by the authority,

the child may not without the court's leave be placed for adoption under the order.

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## **Re P (Adoption: Leave Provisions) [2007] 2 FLR 1069**

The first case to establish the test and still a useful starting point

- **Has there been a change in circumstances?**
  - A threshold test. Focus on the parent.
- **Should leave be granted?**
  - A broad evaluation. Focus on the child.
- If satisfied there has been a change, the two stages are intertwined and degree of change will impact on the welfare evaluation.

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## **NSH v Kingston upon Hull City Council and MC [2008] 2 FLR 918**

Case shows it is occasionally proper for the court to grant parent with leave to revoke a placement order.

- Child had failed to thrive and plan for adoption abandoned
- Had a real prospect of success and in the child's interests.
- The judge needed to consider whether there was a real prospect that the placement order should be revoked not whether the mother had real prospect of return to her care.

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## **Re C (Children) (Placement Order: Revocation) [2020] EWCA Civ 1598**

M was granted leave to apply by consent so that her substantive application for revocation continued to a fully contested hearing. VERY unusual.

- Final hearing for revocation application took place over 5 days 17 months after the application had been filed. Dismissed M's. application.
- The judge's conclusion was stark – near certainty of placement breakdown and rehabilitation to M was not a realistic option.
- Statements of principle about making placement order plainly have a bearing on applications to revoke a placement order.
- However, the question (as put by trial judge and endorsed by court of appeal) is not

**'why shouldn't the placement orders remain? BUT  
'what does the welfare of these children *now* require?'**

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## **Re N (Children: Revocation of Placement Orders) [2023] EWCA Civ 1352**

Application heard over 4 days with judgment on 1 September 2023. M not able to provide permanent home at present. SW and G agreed that the children needed skilled parenting M not able to provide and the children had been waiting for 2.5 years.

- Burden of proof on the applicant.
- Evidence before the court at a revocation hearing will differ in quantity and focus than in the care and placement proceedings.
- Court has already made findings, so evidence needs to be closely focussed on events since then and crucially on the future.

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## **M (A Child: Leave to Oppose Adoption) [2023] EWCA Civ 404**

- Where a placement order has been made, the local authority **MUST** obtain a transcript of the judgment, unless a written version is handed down or a note agreed and approved. Also where final care order is made.
- Re-iterated 2 stage test.
- Change in circumstances does not need to have been unforeseen or unexpected.

Prospect of success is important but not a test in itself. The question to ask is:

***"Taking account of all the circumstances and giving paramount consideration to the child's lifelong welfare, should the Court revisit the plan for adoption that it approved when making the placement order?"***

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## **Re H (Children: Placement Orders) [2023] EWCA Civ 1245**

- HHJ Tolson KC revoked placement order.
- Court of appeal pointed out that the boys had been waiting for 2.5 years for determination. Already said goodbye and had been prepared for adoption. Would need to have high degree of confidence in rehabilitation.
- Judge had ignored issues of overload and the children's special needs.
- Unduly influenced by it being unusual for older children to be adopted and younger child is not. Appeal allowed.

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## Some conclusions.....

- The chances of success are vanishingly low.
- Impact on parents of getting hopes up, going through further assessment.
- Impact on the child and potential adopters.
- In reality, the second limb is of overwhelming importance – however impressive the changes made by the parent, the time that has passed is going to tip balance in favour of placement and adoption
- Should not be a complete re-run of care proceedings
- Local Authority assessments should be brief, robust and to the point
- Solicitors need to be brutally honest with parents

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