

# 1KBW

## *PUBLIC LAW MONTH*

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### *Session One*

**Victoria Green and Joseph Landman**

**THURSDAY 2 MAY 2024**

*Leading in family law*

## Session One: Thursday 2 May 2024, 3pm

### Local Authorities, Parental Responsibility and Duties of Care

**Speaker: Victoria Green**

#### Overview

- There are many decisions that local authorities make for looked after children under their parental responsibility. But, where are the boundaries, and what are the implications of parental responsibility when it comes to a duty of care? What decisions can a local authority make without a parent's agreement, and when does there need to be agreement or an order from the court? This talk will explore some of the issues that can arise.



Victoria has been a specialist family practitioner for many years, having previously also practised in criminal law. She has appeared at all levels of tribunal and against both junior and leading counsel. In public law children cases, Victoria has experience of dealing with cases in which there are the most serious allegations of harm to children.

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

'Victoria is a skilled advocate with an abundance of knowledge of international children's matters. She has a wonderful manner with clients and is well-prepared and listens to her clients, and effectively delivers arguments.' – Legal 500, 2024

### Unregistered Placements

**Speaker: Joseph Landman**

#### Overview

- The shortfall in the availability of secure accommodation for children remains, meaning that the authorisation of children within unregistered placements is still a common occurrence. This talk will cover the practical and legal points relating to the placement of children in unregistered placements, especially in light of the revised guidance issued by the President of the Family Division in October 2023. What are the key issues when dealing with an application involving a child being placed in an unregistered placement? What is the impact of the October 2023 guidance on these applications?



Joseph is a family law specialist accepting instructions in all areas of family law. He has been instructed on a range of matrimonial finance, private children, public children, and international matters. He has experience appearing as sole counsel in the High Court, and has assisted members of chambers up to the Court of Appeal.

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**Local Authorities,  
Parental Responsibility  
and Duties of Care  
- Victoria Green**

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**Section 33(3) CA 1989**

(3) While a care order is in force with respect to a child, the local authority designated by the order shall –

- (a) have parental responsibility for the child; and
- (b) have the power (subject to the following provisions of this section) to determine the extent to which
  - (i) a parent, guardian or special guardian of the child; or
  - (ii) a person who by virtue of section 4A has parental responsibility for the child may meet his parental responsibility for him.

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## LA in loco parentis

Manchester City Council v P (Refusal of Restrictions on Mobile Phone) (Rev1) [2023] EWHC 133 (Fam) - MacDonald J:

- “In my judgment, it is not appropriate for the court to authorise the removal of, or the restriction of the use of P’s mobile phone, tablet and laptop and her access to social media in an order authorising the deprivation of her liberty for the purposes of Art 5(1) of the ECHR”.
- Appropriate legal framework - under s.33(3)(b) CA 1989, by way of an exercise of the local authority’s PR.

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## Manchester CC v P cont.

- “A decision by the local authority in the exercise of its shared parental responsibility under s.33(3)(b) of the Children Act 1989 to confiscate P’s mobile phone or other device where she would otherwise be at risk of significant harm is a relatively uncontroversial exercise of parental responsibility, even in circumstances where P is 16 years old. It is not one that in my judgment constitutes a step of such magnitude that it requires recourse to the court before the local authority could take such steps using its powers under s.33(3)(b) of the Children Act 1989. The same is true in my judgment of a decision by a local authority in the exercise of parental responsibility under s.33(3)(b) to supervise or place restrictions on the use of P’s phone short of confiscation”.
- NB. where there may be circumstances that contemplate the use of physical restraint or other force to remove a mobile phone or other device from an adolescent, that would require sanction by the court, not least because such actions would likely constitute an assault.

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## Exceptions to the Rule

S.33(9): “The power in subsection (3)(b) is subject (in addition to being subject to the provisions of this section) to any right, duty, power, responsibility or authority which a person mentioned in that provision has in relation to the child and his property by virtue of any other enactment.”

Parents may enter into a PR agreement, and the LA cannot prevent that – *Re X (Minors) (Care Proceedings: Parental Responsibility)* [2000] 1 FLR 517

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## Ongoing exercise of PR by a parent with care

Section 33(5):

Nothing in subsection 3(b) shall prevent a person mentioned in that provision (i.e. a parent / other PR holder) who has care of the child from doing what is reasonable in all the circumstances of the case for the purpose of safeguarding or promoting his [the child’s] welfare (s.33(3)(b))

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## Specific limits on local authority PR

While a care order is in force the local authority may not:

- (a) cause the child to be brought up in any religious persuasion other than that in which he would have been brought up if the care order had not been made (s.33(6)(a))
- (b) cause the child to be known by a new surname s.33(7)(a);

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## Specific limits continued

- c) remove him from the United Kingdom for more than one month (s.33(7)(b) and s.(8)(a)) (*save arrangements under para 19 of Schedule*).
- d) agree or refuse to agree to the making of an adoption order, or an order giving parental responsibility prior to an adoption abroad (s.33(6)(b)(ii)); or
- e) appoint a guardian for the child (s.33(6)(b)(iii)).

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## Child's Rights

A child may exercise a right of veto, to refuse to be involved in certain courses of action proposed by a LA in accordance with the Gillick principle

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## Medical Treatment

The LA may override a parent's PR with regards to 'routine' medical treatment, but cannot use their PR to give consent to significant decisions in respect of a child's medical treatment.

- Re B (Medical Treatment) [2008] EWHC 1996 (Fam):
- Declaratory relief sought by NHS trust – not to subject child to intensive resuscitative treatment in specific circumstances
  - Child suffering from a metabolic condition not amenable to treatment

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## Medical Treatment cont.

- A Local Authority v SB [2010] EWHC 1744 (Fam);
  - Child suffered from rare but progressive brain disease
  - Epilepsy surgery recommended by hospital, to which parents did not agree
  - Judge indicated that the care order sought by the LA (as they viewed surgery in the child's best interests) not the proper forum for the decision
  
- Re Jake (A Child) (Withholding of Medical Treatment) [2015] EWHC 2442 (Fam);
  - Gravely ill 10 month old subject of an ICO
  - Decisions made by the court regarding end of life treatment

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Re P (Circumcision: Child in Care) [2021] EWHC 1616 (Fam),  
[2021] 3 FCR 235, [2022] 1 FLR 605.

- Child subject to an ICO, aged 21 months
- About to be placed with maternal family as SGs
- Muslim family; M sought permission for circumcision
- Opposed by LA & CG at this time
  
- LA not to take any step to change child's religious upbringing (s.33(6) CA 1989), but opposition to circumcision did not breach.
- Cobb J: "I am satisfied that s.33(3)(b)/(4) of the CA 1989 does not give the local authority absolute authority to oppose the procedure"

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## Re P cont.

- Guiding principles:
  - Male circumcision is different to FGM;
  - The paramountcy principle applies in the immediate and long term
  - The welfare checklist is engaged
  - Religious upbringing is important to a child in care and s.33(6) applies;
  - The fact circumcision is irreversible is significant
  - The medical risks and benefits must be reviewed
  - Religious views and wishes of parents and primary carers carry significant weight, but the court is not bound by them
  - Environment the child is to be raised in is important
  - Where there is a disputed issue of non-therapeutic circumcision it should be referred to the court.

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## Vaccination

Re H (A Child) (Parental Responsibility: Vaccination) [2020] EWCA Civ 664.

- A local authority with a care order can arrange and consent to a child in its care being vaccinated where it is satisfied that it is in the best interests of that individual child

Re C (Looked-After Child) (Covid-19 Vaccination) [2021] EWHC 2993 (Fam), [2022]

- And the same applies to Covid vaccines – not be regarded as ‘grave’ decisions, such that the permission of the court would be required

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Re WSP (A Child) (Vaccination: religious objection) [2023]  
EWHC 2622 (Fam)

- Application by mother - court to exercise inherent jurisdiction to prevent the Local Authority from exercising its parental responsibility under s.33(3) CA 1989 to arrange for the child to undergo “routine” vaccinations.
- M considered vaccinations to be contrary to her Muslim faith
- M maintained - vaccinating the child without her consent would violate her rights under Article 9 ECHR both alone and when taken together with Article 14.
- M - concerned as to the emotional or psychological harm that would be done to the child as a result.

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Re WSP cont.

- Paul Bowen KC, DJHC cited King LJ *In Re H (A Child)* [2013] Fam 133: “an application to invoke the inherent jurisdiction or to seek an injunction with a view to preventing the vaccination of a child in care is unlikely to succeed unless there is put before the Court in support of that application cogent, objective medical and/or welfare evidence demonstrating a genuine contra-indication to the administration of one or all of the routine vaccinations”.
- New Issue: the objection was on religious grounds

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## Re. WSP cont.

- Article 9 protects 2 rights:
    - The right to *hold* (and change) any religious belief, which is absolute and unconditional, and
    - The right to *manifest* one's religious freedom in 'worship, teaching, practice and observance', which is a qualified right because its exercise may have an impact on others.
  - The upbringing of a child is a 'manifestation' of religious belief - "although '*the law will tolerate things that society as a whole may find undesirable*', some aspects of the upbringing of children that are done in the name of religion are not protected by Article 9 and the state may lawfully prevent them".
  - In matters of religion, as in all other aspects of a child's upbringing, the interests of the child are the paramount consideration.
  - "A parent's decision to consent or refuse to have their child vaccinated on religious grounds is another 'manifestation' of religious belief that may be regulated by the state and its Courts without breaching Article 9".
  - In the absence of cogent, objective medical and/or welfare evidence demonstrating a genuine contra-indication to the administration of one or all of the routine vaccinations, the mother's objections on religious grounds did not otherwise outweigh the child's welfare interests in receiving vaccinations.
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## Change of Nationality

Re Y (Children in Care: Change of Nationality) [2020]  
EWCA Civ 1038

- 2 children, aged 9 and 11 – Indian nationals, born in the UK
  - Children in LA care
  - LA sought British citizenship for children to secure immigration status – effect would remove Indian nationality
  - In the absence of a parent's consent, it would require a decision of the High Court under the Inherent Jurisdiction
  - The decision was of a magnitude that the LA could not rely upon their statutory powers
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## Change / Choice of Name

### *Re C (Change of Forename: Child in Care)* [2023] EWHC 2813 (Fam)

- Application by LA to change an 8 month old boy's forename; he had been registered as 'Mia Adonis'
  - LA concerned - risks of harm from the gender connotations - being known as 'Mia'
  - LA sought to change child's first name to the second name he had been given by the mother, but retaining 'Mia Adonis'.
  - Application supported by F, and PGM (who sought to care for the child) - they suggested the name 'Mia' should be dropped entirely, and replaced by 'Jacob'.
  - Guardian supported the application - concerned as to the intra-familial conflict regarding the name, that could cause a risk of harm if the child was placed in the paternal family, (by then the local authority's plan).
  - M opposed any change of name.
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## Re C. cont

- The 'route to judicial intervention' = that set out by King LJ in *Re C* [2016] EWCA Civ 374,
  - M's Article 8 rights meant the LA could not simply exercise its PR to interfere with a mother's choice of forename.
  - Cobb J held that the following principles emerged from the case law:
    - "only in a "most extreme" case should the court exercise its power to prevent a parent from registering a child with the name chosen by that parent for the child".
    - whether the court has the power under the inherent jurisdiction to interfere with a parent's choice of forename, depends on whether the court is satisfied that the parent's choice would be likely to cause that child significant harm.
    - The giving of a particular name to a child (such as 'Cyanide' in *Re C*) can give a court reasonable cause to believe that, absent intervention, the child is likely to suffer significant emotional harm.
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## Re C cont.

- The changing of any name of a child is a matter of importance, and s.1(1) and 1(3) and of CA 1989 apply.
- The decision will be highly fact specific.
- Registration of a name is important but not decisive. The weight to be given to it will depend on the other relevant factors.
- The principles to be applied are the same, regardless of whether a change of forename or surname are sought, and forenames are as important as surnames.
- The attitudes and view of the parents or proposed carers are only relevant as far as they may affect the conduct of those persons and therefore indirectly affect the welfare of the child.
- The sharing of a forename with a parent or grandparent, or one which readily identifies the child as belonging to his particular background, can be invaluable to a child throughout his life.

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## Re C cont.

- It would be a significant interference with a parent's Article 8 rights to prevent them from giving their child a name of their choice.

### ➤ Application for name change permitted

- Not for reasons re gender identity,
- But because unfair / unrealistic to require the prospective carer (PGM) to use that name
- 'Mia' would however remain a critical part of the child's evolving identity, and M's choice of names should not be expunged from the register

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## Duty of Care

- With PR comes a duty of care
- Care Planning, Placement and Case Review (England) Regulations 2010 – place a duty on a LA to prepare a care plan, which must be reviewed regularly.
- *F v Lambeth London Borough Council* [2002] 1 FLR 217 – Munby J held an LA had failed parents & children due to a failure in care planning which had to the children drifting in care for years, causing significant harm.
- Breaches of ECHR rights – the court has the power to review the operation of a care plan under HRA 1998.

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## *Re KD (A Minor) (Access: Principles)* [1988] 2 FLR 139

“Parliament has conferred upon local authorities far-reaching powers to order the lives of minors for whom they are given statutory responsibilities, powers in some cases which, although reviewable by the process of judicial review, are otherwise largely unsupervised by the courts. It is the utmost importance that such powers should be exercised not only with responsibility but with sensitivity which is required by the impact which their exercise inevitably has upon the naturally strong emotions of the people affected”

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## HXA v Surrey County Council [2023] UKSC 52

- Distinction to be made between accommodation under s.20 and under s.31
- In order for duty of care to arise – necessary to consider whether the local authority has assumed responsibility to protect child from a harm
- The fact that a LA has statutory duties or powers neither automatically creates nor automatically excludes a potential duty of care.
- the provision of temporary respite care by the local authority, did not mean that the local authority had assumed responsibility to use reasonable care to protect YXA from abuse in his home

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## HXA v Surrey CC cont

- YXA's parents had retained parental responsibility for him, and there was no assumption of responsibility by the local authority when the local authority returned YXA to his home, as they were duty bound to do.
- there had been no relevant assumption of responsibility by the LA in these cases, and consequently no duty of care owed to protect these children from abuse in their respective home environments.
- It is nonetheless possible for a local authority to assume responsibility to protect a child from harm, in particular where a child is in the care of the local authority whether under a care order pursuant to s.20.

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## Unregistered Placements

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## Introduction

*Re X (Secure Accommodation: Lack of Provision) [2023] EWHC 129 (Fam), Sir Andrew McFarlane*

*“The primary purpose of this judgment is for the court, once again, to draw public attention to the very substantial deficit that exists nationally in the provision of facilities for the secure accommodation of children.”*



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## Introduction

*Re X (Secure Accommodation: Lack of Provision)* [2023] EWHC 129 (Fam), Sir Andrew McFarlane

*“Courts are regularly told that, on any given day, the number of those needing a secure placement exceeds the number of available places by 60 or 70.”*



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## Unregistered vs Unregulated Placements

- Children’s homes have to be registered.
- A children’s home which should be registered, but is not, is still a regulated placement.
- Sometimes, reference is made to ‘unregulated’ when ‘unregistered’ is the proper term.
- Oftsed has powers to enter and inspect premises which are used, or believe to be being used, as a children’s home.

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## New Guidance – October 2023



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## Key Case

### **In the Matter of T (A Child) [2021] UKSC 35**

The inherent jurisdiction of the High Court can be used to authorise a Local Authority to deprive a child of his/her liberty, including placing a child in an unregistered placement, subject to the following requirements.

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## Inherent Jurisdiction

The court has the power to authorise a placement in an unregistered children's home if:

- (i) there is absolutely no alternative;
- (ii) where the child (or someone else) is likely to come to grave harm if the court does not act;
- (iii) registration is sought expeditiously;
- (iv) the court has information about the proposed placement;
- (v) a timetable is put in place for guidance and monitoring.

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## Inherent Jurisdiction

Section 25 Children Act 1989

- Procedural safeguards are the same
- Section 25 criteria should be satisfied

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## Key Case

### **Re A Mother v Derby City Council [2021] EWCA Civ 1867**

- Care Planning, Placement and Case Review (England) (Amendment) Regulations 2021 (Came into force on 9 September 2021)

Notwithstanding the 2021 regulations, the inherent jurisdiction may be used to authorise a deprivation of liberty in an unregistered children's home, so long as the requirements set out by the Supreme Court in *Re T* are met.

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## New Guidance from the President of the Family Division



October 11, 2023: Revised Practice Guidance on the Court's Approach to Unregistered Placements

Replaces the 2019 Practice Guidance and the 2020 Addendum

*What has changed?*

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## Revised Guidance: October 2023

*“It is not for the Court to become a regulatory body or the overseer of the regulatory process.”*

- This is properly for Ofsted and CIW
- The courts are not the regulatory body

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## Revised Guidance: October 2023

*“The Court’s role in deprivation of liberty applications, is to exercise its inherent jurisdiction to ensure that any deprivation of liberty is not itself unlawful, whether as an unlawful detention under the common law, or a breach of Article 5 of the ECHR”*

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## The Guidance Compared

### BEST PRACTICE FOR AN APPLICATION

#### (1) Confirmation of registration status

- The LA should make the court explicitly aware of the registration status of those providing or seeking to provide the care and accommodation for the child.
  - LAs can contact Ofsted to confirm whether a person is registered or not.

**NEW GUIDANCE:** The court should enquire whether the proposed placement is registered or unregistered.

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## The Guidance Compared

### BEST PRACTICE FOR AN APPLICATION

#### (2) Is registration required if it is not registered?

- If the person is not registered, the court should be made aware of
  - the reasons why registration is not required; or
  - the reasons for the delay in seeking registration.

When registration is not required, LA still needs to ensure that the premises and support is safe and suitable.

**NEW GUIDANCE:** The court should enquire as to why the local authority considers an unregistered placement is in the best interests of the child.

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## The Guidance Compared

### BEST PRACTICE FOR AN APPLICATION

#### (3) If registration is required, then what?

- The court will need to be satisfied that steps are being taken to apply for the necessary registration.
  - Has the provider of the service confirmed that they can meet the needs of the child?
  - What steps are the LA taking in the meantime to assure itself that the premises, those working at the premises and the care being given are safe and suitable?

**NEW GUIDANCE:** The court may order the Local Authority to inform Ofsted/CIW within 7 days if it is placing a child in an unregistered placement.

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## The Guidance Compared

### BEST PRACTICE FOR AN APPLICATION

#### (4) If an application for registration has already been submitted to Ofsted...

- the court should be made aware of the exact status of that application.

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## The Guidance Compared

### BEST PRACTICE AFTER AN ORDER HAS BEEN MADE

#### (1) Registering with Ofsted

- The court order should provide that an application for registration should be submitted to Ofsted within 7 working days from the date of the order.
- Included in an order is a requirement on the LA to immediately notify Ofsted that the child has been placed in an unregistered placement. The LA should provide a copy of the order and judgment to Ofsted.

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## The Guidance Compared

### BEST PRACTICE AFTER AN ORDER HAS BEEN MADE

#### (2) Informing the Court

- The court will need to be advised by the LA within 10 working days of the order being made that the application has been (i) received by Ofsted, (ii) confirmed as complete, (iii) fee has been paid, and (iv) capable of determination by Ofsted.
- If the LA does not inform the court that registration is complete, then the court should list the matter for a further immediate hearing.

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## The Guidance Compared

### BEST PRACTICE AFTER AN ORDER HAS BEEN MADE

#### (3) Informing the Court if application rejected or withdrawn

- The LA should advise the court urgently if registration is refused or the applications for registration are withdrawn.

## The Guidance Compared

### BEST PRACTICE AFTER AN ORDER HAS BEEN MADE

#### (4) Review Registration Status

- In addition to any review that the court requires of the case, the registration status of those carrying on and managing the children's home will be reviewed by the court in a further 12 weeks.

## Concluding Thoughts

- Diminished role for the court in the review of the placement of children in unregistered placements
- Regulatory rather than judicial oversight

What does the updated guidance mean for *Re T* and *Re A*?

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