

Autumn 2019 Edition of the AFA Cymru Legal Bulletin

Welcome to the Autumn 2019 newsletter where we aim to keep those interested in permanency planning for children across the spectrum up to date with Welsh related topics.

SPECIAL GUARDIANSHIP SUPPORT

AFA has been commissioned by Welsh Government to devise a framework for the offer of special guardianship support services across Wales. We have had a fairly long consultation process, which is now in its final stages. Anyone who has not already been involved and has a particular interest in SGO support is welcome to consider the draft, before it is finalised in January. Please contact the Cardiff office for a copy.

In order to bring the framework (and in fact the amended special guardianship regulations and new code of practice) to the attention of everyone involved with special guardianship we are holding a conference on support in Wrexham on 5 March next year. If you are interested in attending please contact the Rhyl office. We are welcoming children's social workers and children's guardians as well as fostering and family and friends teams to join us. More details will be distributed shortly.

SPECIAL GUARDIANSHIP AND PARENTAL RESPONSIBILITY

During the course of the consultation we have had a number of meetings with special guardians. One of the (many) issues arising was a fairly widespread misunderstanding of the nature of the parental responsibility a special guardian has. On numerous occasions, across the country, we were told that special guardians believed (i.e. had been told by the local authority) that they had '51%' parental responsibility, the birth parents having the remaining 49%. Special guardians consequently felt that they were unable to exercise proper control over a number of matters.

We are not sure where this fundamental misunderstanding has arisen. The 51/49% allocation is wrong in law. **The Children Act 1989 states:**

S14C(1)(a)– a special guardian(s) has parental responsibility for the child, and

S14C(1)(b) is entitled to exercise parental responsibility to the exclusion of any other person with parental responsibility, apart from another special guardian.

So the wording is 'exercise parental responsibility to the exclusion of any other person with PR'. This is far more than 51%, and if practitioners want to use a percentage (we do not think it particularly helpful), then the appropriate percentage would be 90%. The few limitations on a special guardian's PR are set out in the Children Act:

- (i) S14C(2)(b): a special guardian cannot consent (or refuse consent) to the child's adoption;**
- (ii) S14C(3)(a): a special guardian cannot cause a child to be known by another surname, without the written consent of all those with PR or the consent of the court, although the court may give leave for the child to be known by a new surname at the same time as making the special guardianship order;**
- (iii) S14C(3)(b): a special guardian cannot remove a child from the UK for more than three months without the written consent of every person with parental responsibility or leave of the court.**

Apart from these three limitations and any order made by the court (a s8 child arrangement order), the special guardian has the discretion to exercise their PR as they see fit.

This is one of the most important aspects of SGO's and it is crucial that practitioners get the advice on PR to special guardians correct.

RECENT RESEARCH ON NEW BORN BABIES IN CARE PROCEEDINGS IN WALES

The Nuffield Family Justice Observatory have published findings which show that in 2018 the most likely outcome for newborn babies, at the end of care proceedings, was a care order. This contrasts with the numbers in 2012, where the most likely outcome was adoption and contrasts with England where care orders are used less.

Nuffield say that the reason is not clear why this change has taken place. Having considered the matter of special guardianship support above, are some of these babies being placed with kinship foster carers under care orders when they could have been the subject of SGO's if everyone was satisfied on the level of support to be provided? Also, do we have more numbers of children placed at home with care orders than England? This may be speculation, but at a time when a priority is to reduce the number of looked after children in Wales, we need to look for these reasons and address them. Special guardianship support must surely be a factor. You can access the report [by clicking here.](#)

THE SETTLED STATUS FOR CHILDREN, INCLUDING LOOKED AFTER CHILDREN FOLLOWING BREXIT

The Children's Commissioner for England has issued, on behalf of all four UK Commissioners, some very useful advice on what local authorities should be doing to ensure that looked after children obtain 'settled status', if they are EU nationals, in the event of us leaving the EU. The advice can be accessed [here](#).

RECENT CASE LAW

ZH v HS &Ors (Application to Revoke Adoption Orders [2019] EWHC 2190 (Fam))

Don't panic! This was a highly unusual case where the adoption order should never have been made and the procedure followed by both the local authority and court was wrong in every aspect.

This was a non-agency adoption, where the mother and child were separated upon entry into the country. The mother was refused entry but the child (a baby) came in separately and was subsequently placed in England (by an agent of the mother) with paternal aunt and uncle. In order to attempt to legitimize the child's status the aunt and uncle, without proper legal advice, made an application for an adoption order straight to the court.

What didn't happen that should have happened?

See the ACA 2002 and Practice Direction (PD) 14C Family Procedure Rules 2010 (the rules that set out what should be in the Annex A)

- The application should not have been accepted as the child had not been living with the aunt and uncle for three years and they had not sought the leave of the court to make the application
- No notice of intention to adopt had been given to the LA as directed with a non-agency adoption. In fact, the LA were so out of the loop that the social worker visited the adopters to share the Annex A a week after the adoption order had been made!
- Most spectacularly, there was no consent, or dispensing with consent, to the adoption order being made, with either mother or father. The local authority took father's agreement to the child being cared for by aunt and uncle as 'full support' for adoption. The mother was deemed to be 'missing' with no real attempt to find her and seek, dispense with, consent
- Both parents should have been made parties and been given notice of the application and they were not

- The child was not made a party and consequently a guardian was not appointed
- There was no indication that the hearing where the order was made was actually going to be the final hearing (hence the LA not knowing)
- The Annex A itself was defective (no current medical summary of the child or aunt and uncle, no DBS checks and no application of the ACA welfare checklist)

Of itself, the lack of consent by parents would have been enough to render this adoption order unlawfully made and therefore subject to revocation.

It is difficult to understand how such a tale of woe came about and we can all say that it wouldn't happen in our local authorities / adoption agencies / courts. However, we know that mistakes can happen, as with this case, where there was no proper legal advice given to the aunt and uncle in the first place and no interpreters available at court. The judge, Theis J, stated that non agency adoptions should always involve some legal advice (probably from the local authority).

In non agency adoptions, which are not as straight forward as agency adoptions, it is a reminder that we need to go back to the Act and PD14C to ensure that all the requirements are being met.

Theis J ordered the local authority to file with the court a statement setting out the local authority's revised procedure, which was agreed by all the Parties in the case. It is appended to the case as she thought it may be useful for other authorities to consider. The case and procedure can be found [here](#).

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