

SPRING 2021 edition of the AFA Cymru legal newsletter

Welcome to the spring edition of the AFA legal newsletter where we aim to provide Welsh specific legal advice and information.

SIBLING CONTACT AND CASE LAW

We know that the court's understanding of the importance of sibling / brother and sister relationships has developed over the last few years. The recent case of **T and R (Refusal of placement order) [2021] EWCA Civ 71** illustrates the Court of Appeal's commitment to the maintenance and development of that relationship.

The case involved six children from a family where both parents had traveller backgrounds. At the end of the care / placement order proceedings the local authority's care plan was for the four older children, aged 7,6,5 and 4, to be placed in long term foster care and the two youngest, aged 3 and 2, to be placed together in an adoptive placement. The plan was supported by the guardian. The psychologist instructed by the court originally recommended that all the children should remain in their current foster placements but was subsequently persuaded by the LA and guardian that the two youngest should be placed for adoption, given their age. However, the psychologist believed that contact for all six children, with each other, was central to their psychological development.

An independent social worker appointed by the court recommended that all six remained looked after if the youngest two could remain with the same foster carers (there was some disagreement over whether this was possible), but she favoured adoption for them if they had to move from that foster placement.

The guardian's final recommendation was 'finely balanced' in favour of adoption but only if there was to be sibling contact.

There were two issues the CA looked at in terms of the original decision. The first was sibling contact. Here the CA went back to the case law both before and following the introduction of the post adoption contact order in s51A ACA 2002 and reiterated the principle that 'the imposition on prospective adopters of orders for contact with which they are not in agreement is extremely, and remains extremely, unusual' (Wall LJ in *Re R* [2005]). The CA here held that:

'in the light of those previous observations, the judge's conclusion as to the difficulty in guaranteeing that post-adoption contact would take place was one he was entitled to reach in the circumstances of this case. There was plainly a risk that sibling

contact would not take place after adoption the judge was entitled to conclude in the interests of T and R that the risk was one which should not be taken.'

The second issue was whether the judge was entitled to attach importance to continuing contact between the two children and their birth parents, that contact 'representing the best prospect of maintaining and nurturing the children's understanding of their cultural history and their place in the world'. The CA upheld the judge's decision that contact with the parents would not happen in an adoptive placement as opposed to a foster placement.

The adoption social worker had told the court that she was optimistic that an adoptive placement could be found that would facilitate the sibling contact and that any prospective adopter who did not agree to the contact plan would not be seen as the right match. However, this did not appear to affect the judge's view. He said that the disadvantage of adoption was that there was no effective mechanism for it to be maintained other than

'in reality, by the agreement and good will of the adopters, upon whom everyone would have to rely in terms of keeping their word'.

The court did not seem able to trust this to the adoption agency and to any matched prospective adopters to commit to.

The judgment and CA decision looks at the children's cultural background and the need for their identity to be respected and promoted as well as contact. It is well worth a read.

These children, aged 2 and 3, had a choice made for them that seemed to accept that they had to sacrifice either the relationship with their siblings or the best available option for permanency throughout their childhoods and into adulthood. Practitioners will have different views on whether this was the 'right' decision but the fact is the decision should not have had to be made.

In the NAS good practice guides, conference and workshops we have looked in detail at the importance of sisters and brothers keeping in touch with each other, whatever the type of alternative permanent placement.

We need to encourage prospective adopters, right from the start of their process, to regard keeping in touch with birth family as positive and beneficial for the child's sense of narrative and identity; that outlook will consequently be positive and beneficial for the adoptive family as a whole. The discussions we have had with practitioners across the country have been very positive and there is a great deal of good practice to build on. However, if we are to keep adoption as a realistic permanency option we do need to address firstly, prospective adoptive parents' confidence in the decisions made and support offered in respect of post adoption contact and, secondly, the court's willingness to trust adoption agencies and prospective adopters in what they say can be agreed and implemented.

ADOPTION – the two stage process

There have been a couple of complaints to the local government Ombudsman on the processes relating to the two stage process (only introduced in Wales with the Adoption Agencies (Wales) (Amendment) Regulations 2020). These are both English cases but the regulations in England and Wales are much the same.

One of the complaints involves the process an adoption agency adopts before accepting a registration of interest. This complaint has not yet been completed and we will cover the decision in the next newsletter. The second complaint relates to a prospective adopter (a single applicant) who claimed that Stage 2 assessment information was gathered during the Stage 1 pre assessment process and the adoption agency decided, upon the basis of that information, that she was unsuitable to adopt.

Remember that the role of the Ombudsman is to determine on maladministration, not on whether a professional judgement is right or wrong.

The Ombudsman found that:

- 1) The council's (adoption agency) decision at the end of Stage 1 involved considerations appropriate to Stage 2, that is detailed information relating to child care experience, a discussion on future plans to have birth children, and that the PA might be carrying 'guilt or shame' over her parent's separation. The council should have accepted the PA onto Stage 2 and discussed these issues there.
- 2) The council failed to adhere to the Stage 1 agreement signed with the PA. It made a commitment to discuss and resolve any concerns in the Stage 1 agreement but did not keep to that commitment, making a decision on those concerns during Stage 1 rather than using the time to help improve the PA's level of suitability. The Ombudsman stated that the Council (and so any AA) will need 'compelling reasons' if it decides to reject an application at Stage 1 (based on Stage 1 information only).
- 3) The council failed to discuss all its reasons for wanting to refuse the PA's move onto Stage 2 with her. In fact they failed to have a face to face meeting at all.
- 4) They did not use the information provided by the applicant to inform their decision; the information addressed some of the concerns that led to the unsuitability decision. The decision, therefore, was not only made at the wrong stage but failed to take into account the information provided.
- 5) The council introduced information into its decision that was factually incorrect (this was because it was making a decision at Stage 1 but using Stage 2 information without a proper assessment and analysis).

- 6) The council applied their IVF policy to the PA, who in fact had not gone through any IVF but had frozen eggs which she had determined she did not wish to use outside the context of a relationship. The discussion of recovering from 'loss and trauma' was, therefore, not relevant. The council may well want to discuss her plans for birth children but this should have taken place during Stage 2.

So what do we learn from this report? That Stage 1 information is limited and restricted - that is why it is called the 'pre assessment stage'. Any information that is gleaned during Stage 1 that is in fact Stage 2 information should not be used to form an opinion that the PA is unsuitable to adopt at Stage 1. It requires the Stage 2 process to make a proper assessment of that information.

There is always the opportunity, once having got to Stage 2 and received information that leads to a conclusion that the PA is unsuitable, to take the application to panel for a brief report.

These principles also apply to fostering

Although these findings of the Ombudsman relate to the two stage adoption process, they are equally relevant to fostering assessments. The two stages may be run concurrently in fostering but decisions as to whether an applicant is unsuitable must be made purely on the basis of Stage 1 information; if any Stage 2 information contributes to that decision, the application must be taken to panel and decision maker, with either a brief or full report.

FOSTERING

Just to remind people of the **medical practice note**: [Adult-Health-Reports-practice-note.pdf](https://afacymru.org.uk/adult-health-reports-practice-note.pdf) (afacymru.org.uk). The note covers the regulatory for both new applicants to foster and approved foster carers.

Also a reminder on the **good practice guide** to the Fostering panels (Establishment and Functions) (Wales) Regulations 2018. We do not have a code of practice for the two stage assessment process but the good practice guide comprehensively covers the regulations. It can be found at [Fostering-Panels-regs-Good-Practice-Guide-final-2020.pdf](https://afacymru.org.uk/fostering-panels-regs-good-practice-guide-final-2020.pdf) (afacymru.org.uk).

The 'usual fostering limit'

This has come up as a query on our advice line on a number of occasions recently, particularly in respect of kinship carers.

It's quite reasonable to think that anything to do with the number of children a foster carer may be approved for is to be found in the fostering regulations. However, the 'usual fostering limit' is in fact found in s63(12) and Schedule 7 Children Act 1989. The purpose of the section and schedule is to ensure that the foster placement does

not (unintentionally) become a children's home. The following principles are set out in s63(12) and schedule 7:

- 1) The usual fostering limit of three can be exceeded in order for siblings to stay together.
- 2) The usual fostering limit may also be exceeded under Schedule 7 para 4 CA 1989 BY THE LOCAL AUTHORITY WITHIN WHOSE AREA THE FOSTER CARER LIVES (so this may or not be the fostering service provider's local authority, depending on where the foster carer lives). It is not a decision the FSP can make.
- 3) Schedule 7 para 4(2)(a)- (e) sets out a checklist for the relevant officer to decide whether to allow this exemption and any conditions to be applied.
- 4) The relevant LA in making this decision must have regard to:
4(2)
 - (a) the number of children proposed in the placement;
 - (b) the arrangements which the person (carer) proposes for the care and accommodation of the children;
 - (c) the intended and likely relationship between the FC and children;
 - (d) the period of time they are likely to foster the children;
 - (e) whether the welfare of the fostered children (and any other children) will be safeguarded and promoted.

The decision taken above, by the relevant LA, really needs to be made at head of service level or at the very least principal officer level. Clearly that decision will be aided by information from the fostering service provider.

There are also other procedural requirements in para 4 not set out here which need to be adhered to.

It is important to note that S63(12) and schedule 7 really only exempt the placement from becoming a children's home. This process does not replace a proper review of the foster carer and an amendment of their terms of approval and it is essential that the review takes place in accordance with the Fostering Panels (Establishment and Functions (Wales) Regulations 2018

THE USE OF SUPERVISION ORDERS

The Nuffield Family Justice Observatory has just published its findings following a survey on the use of supervision orders. The survey was carried out as questions have been raised in the past (and have in fact been around for the 30 years that the Children Act has been in force) about the usefulness of stand alone orders. Different local authorities and practitioners have their own views on whether supervision orders are worth making.

A summary of the findings:

- 90% of the professionals who answered the survey thought that supervision orders should be retained (the most useful being when children were being

returned home at the end of proceedings and where the threshold criteria (needed for a supervision order as well as a care order) were met.

- Concerns about supervision orders included the support identified not always being provided, they were not properly enforceable, they added little to the support that could be provided by a CIN or CP plan (in Wales a Part 4 care and support plan or a care and support protection plan).
- Proposals for improving the effectiveness of supervision orders were mainly surrounding the support to be offered and a robust reviewing process. Some thought there should be an independent element in the reviewing process (probably Cafcass or the IRO service) and the process for returning to court should be clearer for returning to court if the supervision order is not working. More funding for the implementation of orders should be available.

The findings do not come as a surprise – supervision orders can be very helpful in some circumstances. However, the bigger issue is that of having robust support plans with review structures attached to them – something which our Part 4 care and support plans should be able to provide.

SPECIAL GUARDIANSHIP

Those who know AFA (and previously BAAF) Cymru know that we have a firm and positive commitment to special guardianship. We have previously been involved in the Welsh Government technical group in updating the regulations and developing the code of practice. In consultation with colleagues across the country and with the help of Professor Joan Hunt from Cardiff University we have devised the National Fostering framework good practice guide for the assessment and support of kinship carers and in 2019 were commissioned by Welsh Government to devise a framework for the offer of special guardianship support. This was published just before the first lockdown last year.

We are currently undertaking a small research project, commissioned by Welsh Government and led by Joan Hunt, into special guardianship placement vulnerability and disruption. This research should help us to make use of the support offer in a targeted and positive way and will be available later in the year.

It has been brought to our notice that a power point presentation, which is old (2011), English and very sceptical of special guardianship as a permanency option has been attributed to AFA Cymru. Our work on and commitment to special guardianship in Wales should speak for itself but to be clear: this power point has not been created, used or replicated by AFA.

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