



Winter 2022 edition of the AFA Cymru newsletter

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

All Wales Special Guardianship support plan

As part of its work for Welsh Government on special guardianship, and as a consequence of the findings of the research undertaken by Professor Joan Hunt into special guardianship disruption in Wales in 2020, AFA has devised a draft SGO support plan and is currently consulting as widely as possible on its format and contents.

You may have already been contacted and provided with the consultation documents. If you haven't and would like to comment on the plan, we would be very glad to hear from you and provide:

- 1) Joan Hunt's research paper
- 2) The draft SGO support plan
- 3) The consultation questions

The consultations held so far have led to a recommendation that the first plan and review are held as separate documents, with the relevant guidance. It's also recommended that finances are addressed, in so far as each LA sets out its plan for financial support and the way it calculates payments. A commitment to support for helping with legal fees in future contact / discharge of SGO applications by parents should also be included (see the item below for a discussion on kinship care and legal costs).

The consultation response needs to be returned to AFA by mid February.

Parliamentary inquiry to examine access to legal support for kinship carers

Legal support / legal aid is not a devolved matter and we therefore have to look to Westminster for improvements in financial help with legal costs for kinship carers. The All Party Parliamentary Group on Kinship Care has launched an inquiry into access to legal aid for kinship carers and potential kinship carers.

The Parliamentary taskforce found in 2020 that:

- Three quarters of kinship carers felt they didn't have enough information about legal options to make an informed decision when considering taking on a child's care;
- 30% of carers felt that their kinship child was not subject to the right legal order to meet their needs;
- 58% incurred legal costs and 40% of 58% received no financial help;
- Many carers accrue substantial private debts in order to secure a legal order for the child and give them a safe home.

The last finding was certainly borne out in the consultation AFA did for the SGO offer guide. A number of special guardians reported spending large amounts of money on defending contact/ child arrangement applications.

The Ministry of Justice did make a commitment to extending the scope of legal aid to cover SGO's in 2019, following a change in legislation in 2013 that removed nearly all private law matters from the legal aid scheme. However, that commitment has not been acted upon.

Practitioners will be aware that prospective kinship carers often have to rely on 'one off' legal advice at the start of, or during care proceedings. They aren't necessarily aware that, if they become parties, they can have access to legal aid (subject to the means test), as these are public, not private law proceedings.

The inquiry will be seeking advice from kinship carers, legal practitioners and, hopefully, local authorities.

You can find out more about the inquiry from the Family Rights Group website

Criminal law changes

Just a reminder for all adoption and fostering preparation groups that you can reinforce the message on smacking children with the information that, from 21 March 2022, the 160 year old defence of 'reasonable chastisement' to a charge of common assault upon a child will no longer be available.

We have to thank Sally Holland, our Children's Commissioner, in large part for this ground breaking change in legislation. We thank Sally for the support she had given to the permanency planning sector during her years as Commissioner and wish her all the best for the future. Welcome to Rocio Cifuentes, the new Commissioner.

Thresholds for intervention – clearing up a muddle

In some recent training AFA has done we came across some misunderstandings about the status of s130 Social Services and Well-being (Wales) Act 2014:

130 Duty to report children at risk

(1) If a relevant partner of a local authority has reasonable cause to suspect that a child is a child at risk and appears to be within the authority's area, it must inform the local authority of that fact.

(2) If the child that the relevant partner has reasonable cause to suspect is a child at risk appears to be within the area of a local authority other than one of which it is a relevant partner, it must inform that other local authority.

(3) If a local authority has reasonable cause to suspect that a child within its area at any time is a child at risk and is living or proposing to live within the area of another local authority (or a local authority in England), it must inform that other authority.

(4) In this section, "a child at risk" is a child who—

(a) is experiencing or is at risk of abuse, neglect or other kinds of harm, and

(b) has needs for care and support (whether or not the authority is meeting any of those needs).

(5) For the purposes of this section a relevant partner of a local authority is—

(a) a person who is a relevant partner of the local authority for the purposes of section 162;

(b) a youth offending team for an area any part of which falls within the area of the authority.

(6) For provision about a local authority's duty to investigate children at risk, see section 47 of the Children Act 1989.

Wales is the only nation in the UK to have this statutory duty, placed upon partner agencies, to report a safeguarding / child protection concerns. Of course the other countries have statutory guidance (in the form of 'Working Together to Safeguard Children' in England) but we are the only nation to have this as a statutory duty. The duty applies to organisations as opposed to individual employees.

The duty to report under s130 has a different threshold to the one contained in s47 Children Act 1989. Under s47 enquiries should be made if there is 'reasonable cause to suspect that the child is suffering, or is likely to suffer, significant harm'. The term 'risk' in s130 SSWB(W)A may have the same general definition of 'harm' in the Children Act but there is the additional word 'significant' contained in s47. Therefore there may be some children who are referred to children's services under s130 who may not meet the threshold for a child protection investigation under s47. However, the provisions of Parts 3 and 4 of the 2014 Act may still come into play when a care

and support assessment and plan may be needed, or a review of the plan may be required.

To recap, s130 is about reporting where there is suspicion of 'risk'; the threshold for a s47 investigation is 'significant harm'.

The Part 5 Code of Practice: Working Together to Safeguard People gives more detail on handling individual cases.

Recent case law

YP (Adoption of 18 year old) [2021] EWHC 3168 (Fam)

This case will be of interest to adoption practitioners who have struggled with the concepts of 'home' and 'enduring family relationship' when assessing both agency and step parent adopters.

The case is unusual in that it concerned an 18 year old (the application having been lodged the day before his 18th birthday). It also involved homes in London and Switzerland and, potentially, considerable sums of money in relation to inheritance. However, the more relevant factors for practitioners are the following:

- 1) Where two people who are unmarried and not in a civil partnership, whether of different sexes or the same sex, apply to jointly adopt a child, or where there is a 'step parent' adoption application, it has to be proved that the couple are in an 'enduring family relationship' (s144(4)(b) Adoption and Children Act 2002). The court held in this case that, even though the couple had married, divorced and then become a family unit after the applicant had divorced a subsequent spouse, did not live with each other but had a 'mutually supportive relationship' and 'a long-standing commitment to one another', that amounted to an enduring family relationship for the purposes of the Act. The applicant had established a father / son relationship over approximately 15 years and the three had established a family unit despite living in different countries.
- 2) In a step parent adoption it must be established that the applicant has lived with the child 'at all times during the period of six months preceding the application' (s42(3) ACA 2002). Here the judge found that the concept of 'home', which is not defined in the Act itself, will never be seen merely in a physical or geographical context, but where there is an emotional connection. This part of the judgment is worth a read as

'There is now a new way of building a home, an emotional connection with another person, by e mail or more likely WhatsApp or other multi media video calls and the like. In this case this occurred several times a week..'

The way in which these legal concepts are explored and expanded in this unusual case should not necessarily be relied upon as precedents for the more usual type of adoption applications, involving much younger children. This young adult's wishes and feelings in wanting the adoption order were very influential in the decision making. However, for those practitioners wanting to explore these legal definitions, particularly of an enduring family relationship, the judgment is worth a read.

RE R-E (Contact: Support from local authorities in Wales) EWFC B95

Thanks to Julie Doughty from Cardiff University for pointing this case out. Julie is trustee of the Transparency Project, which is working towards more transparency and openness in the family courts.

This case is unusual as it involves Welsh law and Welsh law does not very often reach Bailii, the free legal website where judgments are available. It is a private law case, involving a contact / child arrangement dispute between mother and father concerning a four year old girl with a diagnosis of autism and developmental delay. Her parents were locked into a battle over contact with the father; the difficulty was finding a way of facilitating that contact given the severity of her autism.

The important part of the judgment is here:

59 R-E is a Welsh child who is entitled by statute to have her well-being promoted. Section 2(3) in the 2014 Act is clear that 'well-being' includes 'welfare', the latter being as interpreted for the purposes of the Children Act 1989. R-E is a disabled child with challenges that prevent a standard contact approach and package being put in place. A view from a local authority that it will not facilitate or observe contact between father and child is simply too narrow a perspective and is not in-keeping with the spirit - let alone the provisions - of the 2014 Act. I remind the relevant local authority that as a Welsh local authority, it is bound by the provisions of the 2014 Act, which is itself underpinned by the United Nations Convention on the Rights of the Child that was ratified in Wales in 2011. That is how legislation is now formulated in Wales. The United Nations Convention on the Rights of Persons with Disabilities is also relevant and was ratified by the United Kingdom in 2009 with the purpose of protecting and promoting the human rights of disabled people. There is now a commitment for the latter Convention to be incorporated into Welsh domestic Law and it is not restricted based on age. It is perhaps beyond comprehension to believe that it is not possible to readily assist a disabled child in Wales in 2021 in being able to communicate with all facets of their individual world, including their family. For a local authority to view this as a request for, or to observe, contact simply misses the point in my judgment.

60. What this family requires – all three of them – is support and assistance under the 2014 Act. If this can be provided by a children with disabilities team or another team, and whether under the auspices of a Care and Support Plan, or otherwise, the net result would be that R-E's welfare - and in turn her wellbeing - would be promoted and supported. In my judgment, this case goes beyond whether there should be an order for contact following a relationship breakdown due to domestic abuse. That is an important part of the background circumstances, but it should not define this child.

Of course it is always difficult to tell from a judgment what some of the history from the local authority's perspective is (and they were not a party to these proceedings). However, it is useful for us to see, in a judgment, what the court expects of a local authority in respect of its duties to children in need of care and support under the 2014 Act.

Julie's blog can be found here:

<https://www.transparencyproject.org.uk/local-authority-support-services-in-wales-and-private-law-contact-disputes-re-r-e/>

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