**Late Summer 2022 edition of the AFA Cymru legal newsletter**

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

## Vaccinations for looked after children

This item was featured in a previous newsletter, but there has been a number of queries on the advice line about this and so it seems worthwhile, particularly with a difficult autumn and winter probably on its way, for practitioners to be clear on the local authority's exercise of parental responsibility when it comes to immunisation (now including covid vaccinations where appropriate).

For a number of years there has been a question over the ability of a local authority to either consent to routine childhood vaccinations in the absence of a parent's consent or to override their refusal to vaccinations. This has left local authorities needing to seek the leave of the court, under the inherent jurisdiction of the High Court, in order to override parents' parental responsibility.

A 2020 case has clarified this. It was held in Re T [2020] EWHC 220 (Fam) and on appeal in Re H (A Child) (Parental Responsibility: vaccination) [2020] EWCA Civ 664 that local authorities may use their parental responsibility, under s33(3) Children Act 1989, to override a parent's refusal for routine vaccinations, under either an interin care order or full care order. There is no need to apply to the court for permission to vaccinate.

The High Court held that vaccinations are not '*complex questions of treatment' where it is appropriate to seek permission from the court'*, but that *'they lie at the least intrusive end of the scale of intervention',* and are *'a facet of public preventative healthcare'*. It is a proper use of s33(3) to arrange vaccinations for a child subject to a care order, even if parents object.

The Court of Appeal dismissed the parents' appeal:

*'… in my judgment, 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.'*

*'Parental views regarding immunisation must always be taken into account but the matter is not to be determined by the strength of the parental view unless the view has a real bearing on the child's welfare.'*

To refresh memories, s33(3) states:

*'While a care order is in force with respect to a child, the local authority designated in the order shall –*

*(a) have parental responsibility for the child; and*
*(b) have the power (subject to the provisions of this section) to determine the extent to which a parent or guardian of the child may meet his parental responsibility for him.'*

These provisions do have restrictions. S33(4) states:

*'The authority may not exercise the power in subsection (3)(b) unless they are satisfied that it is necessary to do so in order to safeguard or promote the child's welfare.'*

The Court of Appeal has, therefore, made it clear that vaccinations are a proper use of s33(3) and that the safeguard of s33(4) is met.

Note that this judgment only applies to children who are subject to care orders and interim care orders. So far as other arrangements are concerned, see below:

Children who are accommodated under s76 SSWB(W)A 2014

This is a purely voluntary arrangement and parents retain full parental responsibility. They will have signed an agreement as part of the placement plan at the beginning of the placement to cover consent / delegation of PR on issues such as vaccinations. In the absence of any written agreement consent should be obtained for vaccinations. Only one parent needs to consent to the vaccination (s2(7) CA).

Children who are subject to a placement order under s21 Adoption and Children Act 2002

Before placement: The AA/LA exercises its PR granted under s25 ACA. S25(4) states that the AA may determine that the parental responsibility of the parent may be restricted to the extent specified in the determination (i.e. the AA /LA chooses how the parent exercises their PR). The AA/LA is, therefore, lawfully exercising their PR in consenting to vaccinations.

Following placement: The AA /LA may decide how both parents and prospective adoptive parents exercise their PR (s24(4)). The new all Wales form for the allocation of parental responsibility to prospective adoptive parents gives them PR in respect of consenting to vaccinations.

Children who are subject to an adoption order under s46 ACA 2002

Adoptive parents acquire full PR following the making of the adoption order and can make decisions all decisions independently of the AA/LA or birth parents.

Children who are subject to special guardianship orders under 14A CA 1989

Under s14C(1) special guardians may exercise their PR to the exclusion of any other person with PR (apart from another special guardian). The small number of exceptions to this exercise of PR do not concern medical consent and so a special guardian can consent to vaccinations without recourse to parents.

## S76 or care orders for unaccompanied asylum seeking children / young people?

Which is the right care plan for a young asylum seeker.

Again this is an area where we have had some interest, with the suggestion that there may be existing guidance that UAS children who are over 14 should not be subject to care proceedings. Neither AFA nor CoramBAAF is aware of such guidance (if anyone has sight of it let us know) and we believe that any such (non statutory) guidance which seeks to 'fetter the discretion' of a local authority in the exercise of its duties under Part 1V Children Act (care proceedings) would most probably be unlawful.

The best reference for these decisions is J (Child Refugees) (Rev 2) [2017] EWFC 44 (23 January 2017) (bailii.org) where Jackson J looks at the advantages and disadvantages of each option and, of course, it comes down to the individual circumstances of each young person.

Remember that our s76 SSWB(W)A is s20 Children Act in England and a child in need plan is a care and support plan in Wales.

> *19. I will … take advantage of the thought that has gone into the presentation of this case by referring to a schedule of the advantages and disadvantages of section 20 accommodation and care orders in so far as they might apply in cases of this sort. I do so in case, firstly, to carry forward the work and in case it should be useful to others.*
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> *20. Starting with accommodation under section 20, I the benefits that flow are: firstly, the provision of accommodation; secondly, the possibility of a child in need plan; thirdly, the availability of support under the leaving care legislation when the child reaches maturity; and fourthly the availability of looked after child reviews and an independent reviewing officer.*
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> *21. Turning then to the benefits that may arise under a care order, they are these: firstly, as above, the provision of accommodation; secondly, by distinction, support under a formal care plan that has been approved or at least considered by a children's guardian and by a court; thirdly, again, the children would be entitled to leaving care legislation and support; fourthly, they would be entitled again to looked after reviews; fifthly, the children would have priority in relation to the obtaining of specialist therapy or medical care. They would undoubtedly be a first call on the Local*

*Authority's resources if subject to a care order and, depending upon the education legislation, quality for priority in the allocation of educational resources. Next, the Local Authority will have parental responsibility for the children, allowing it to make and carry through decisions about care, medical treatment, education and so forth. Next, if the children were to leave their placement, the Local Authority would be under a duty to find them with whatever measures were to hand. Next, the Local Authority holding a care order would be obliged to take an active role in relation to the asylum applications of such children, and finally, a care order would be most likely to provide the children with a plan for a permanent and established family life. Considering the benefits, it will easily be seen that the advantages of a care order may particularly apply to younger children or to children with unusual or particular needs.*

22. *The disadvantages of each option are to some degree the other sides of the coin of advantage, firstly as to section 20: (1) no one has parental responsibility or is able to exercise it; (2) there is a risk that the children will fall down the queue for such services as may be available; (3) although section 20 can be used in cases where children have been abandoned, that is not its core function; (4) living under section 20 throughout one's middle and later childhood may lead to a lack of purpose in planning for the future and looser responsibilities should the children, for example, abscond. Without a care order or the presence of just section 20 accommodation, there may be more uncertainties than need be.*

23. *As against that, the disadvantages of a care order are few. It may potentially stigmatise the children to be accompanied by such an apparatus, and secondly, as a matter of principle it is a more interventionalist order that accordingly needs to be justified.*

Jackson J does discuss age but in a general way and the judgment certainly doesn't amount to any general advice that over 14's should not be the subject of care proceedings.

**Foster carers' delegated authority, respite care and the '24 hour rule'**

We have had a number of queries recently on this topic

We need to be clear on these provisions:

Delegated authority, as set out in paras 245 – 259 of the Part 6 ode of practice, concerns the delegation of parental responsibility to the foster carer, in order to act, as a reasonable parent would, in the best interests of the child concerned.

Paragraph 255 sets out a list of factors to take into consideration when permitting a looked after child to 'stay overnight with a friend, to have a holiday with their friends or with relatives of their foster carers…'

It is the function of the child's looked after review to consider whether the local authority (child's social worker) **and** foster carer need to decide on the exercise of this delegated authority or whether the foster carer may decide this for themselves. This should be recorded in the placement plan and reviewed on a regular basis.

Foster carers are to be given 'maximum appropriate flexibility' (para 246). However, the context of the child's placement should determine this 'appropriate' flexibility. For example, in a long term placement where there are established relationships and the child regards the family member as a member of his or her fostering family, then it may be appropriate, having considered the factors set out in para 255, for the child to have a holiday or spend time with that relative. However, if the child has just become looked after or is the subject of care proceedings, then it will not be appropriate for foster carers to have the authority to decide on any kind of care away from their care, without the child's social worker's approval.

The answer rests in whose interests the arrangement is being made. The code of practice does not cover an arrangement that is for the benefit of the foster carer. Any agreed respite care, with either approved respite carers or relatives who need to be agreed as respite carers, should be part of the foster care agreement and discussed at the foster carers' reviews.

If we ask the question 'for whose benefit is this arrangement being made?', then we should find the right answer. If there is doubt, then the arrangement should be seen as one benefiting the foster carer and be defined as a respite arrangement, not one for the use of delegated authority.

What about the 24 hour 'rule'?

If contact is to take place for the benefit of the child, it does not need to be restricted to less than 24 hours. The idea that contact can only take place for less than 24 hours comes mistakenly from the provision setting out that, when a child first becomes looked after, they need to be placed in a regulated placement within 24 hours. This is set out in s74 Social Services and Well-being (Wales) Act 2014 and **only** applies to when the child first becomes looked after. It was originally drafted this way in the Children Act 1989 to ensure that, once a child became accommodated by the local authority, they would be properly 'looked after' within 24 hours, with all the protection that that entails. The 24 hour rule does not, therefore, apply to subsequent contact arrangements/ school trips or other activities. If that was the case, no looked after child would be able to go on a school, or any other organised, trip.

## Adoption and the child's nationality – the need to be vigilant

There may be an expectation on the part of practitioners that an adoption order made in the UK automatically confers British nationality on the child. This is not necessarily the case.

If the **child already has British nationality** (if one of their birth parents has British nationality), then **the child will retain their British citizenship** despite adoptive parents not having British citizenship

**If at least one adoptive parent has British citizenship, then the child will acquire that citizenship** through the making of the adoption order.

**The problem arises where neither adoptive parent nor child has British citizenship. The making of the adoption order here does not change the child's nationality status.** The child will not gain British citizenship.

It is, therefore, so important, right from the start of care proceedings, for the child's social worker, children's guardian, IRO, ADM and family finding team, to be vigilant about the child's status and apply, as soon as possible for British citizenship. It is very complicated, difficult and expensive to resolve the issue once the adoption order has been made, and adoptive parents have found that they have been refused British passports for their children and they cannot leave the country as a family, for holidays, family visits etc. This is particularly important for adoptive parents whose family of origin (and the adopted child's new extended family) live overseas.

The Inter Country Adoption Centre (IAC) can give advice on these matters (there is an agreement between the IAC and NAS for the provision of advice and information). However, once the adoption order has been made, usually the only way forward, if there is one at all, is through specialist, independent legal advice.

There should be a note on every child's file, at the start of care proceedings denoting nationality and immigration status. That should then trigger the timely action to sort out an application for British citizenship, should the care plan dictate that.

A word of warning – this advice is given in a very general sense – the law is much more complicated and will often require specialist advice. This advice is just to flag this up as something to address sooner rather than later within proceedings

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