



SUMMER 2021 edition of the AFA Cymru legal newsletter

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

Special Guardianship

The recent case of *F v G* [2021] EWCA Civ 622, has looked at the relationship between care orders and SGO's. It provides some clarification on what happens when a care order is made when there is an existing SGO.

We know that the making of an SGO automatically discharges any pre existing orders (including an interim care order or care order).

What, though, of a situation where a special guardianship arrangement is in difficulty and the local authority seeks to obtain PR through an interim care order or care order?

The case of *F v G* looked at this scenario and decided (upon the basis of statutory interpretation) that the UK Parliament intended for the two orders to be able to co-exist. An amendment to the Children Act 1989 brought in by the Adoption and Children Act 2002 included special guardians in the section looking at the sharing of parental responsibility under a care order or ICO (s33(3)), demonstrating parliamentary intention that they should be able to co-exist.

In the case itself there was no sense in the SGO continuing as it had been of very short duration. However, the Court of Appeal stated that an SGO is designed to be an order of permanency. Of course there is sense in the SGO continuing where, for example, it fails with a much loved grandparent. Her continuing involvement in the child's life may be very important to the child, even though the child may need to become looked after.

The exercise of PR, under s33(3), as shared between LA, SGO and parents would need careful consideration but it is possible.

The judgment reiterated the Public Law Working Group and Family Justice Councils' view that the number of supervision orders made alongside an SGO should be small, and held that the same principle should apply for the making of carer orders alongside SGO's, but there is the option to do so should the circumstances require it.

The discussion surrounding the need for either supervision or carer order alongside an SGO brings us back to the importance of the support plan. AFA has recently

drafted an all Wales SGO support plan, which is currently with Welsh Government for consideration, alongside the research undertaken on SGO disruption.

Adoption

The CAR/B, consent to the provision of information and the young person

There has been some confusion over the 'advance agreements' to the sharing of information that birth parents and other adults involved with a child (for example foster carers) sometimes sign.

Although these agreements are attached to the CAR/B they do not actually relate to the information contained in the CAR/B itself. Consent from birth parents is NOT required for the sharing of information from the CAR/B with the adoptive parents and child.

The introduction of a set of regulations has caused additional complexity. These regulations, the Access to Information (Post Commencement Adoptions) (Wales) Regulations 2005 cover the process for deciding on the access to information from an adoption record / file for children who were adopted after December 2005. These regulations are only just coming into focus for us as the children adopted after that date reach 18.

In order to be clear about both consent in relation to the CAR/B and about the regulations, the following sets out the principles:

When the adopted person is under 18

The prospective adopter will have been provided with a copy of the CAR/B as well as other information (the trauma nurture timeline / understanding the child day notes / extracts or full expert assessments undertaken during the care proceedings) as part of the matching process.

This information, alongside the life journey work materials (life story book and later life letter) provide the adoptive family with the information they need to be able to 'layer up' the narrative for the growing child. By the time they reach 18 the child should have all of the information that the adoptive parents have.

It's important that this information is provided, because once the young person is 18, under the post commencement regulations, the adopted adult has the right to see ALL the information provided to their adoptive parents. Although the adoption agency can decide how to provide the information, for example over a number of sessions, it has to provide it all.

The way the CAR/B is drafted should take into account the fact that adoptive parents and adopted adult will read the document; the content and tone of the CAR/B will affect the way in which the young adopted person views their identity. It is, therefore, very important to ensure that the information contained in the CAR/B is written in a

balanced and empathic way, yet without missing the important evidence leading to the care plan for adoption being necessary.

It is difficult for a child care social worker to transfer information from statements filed during care proceedings, which serve a very different purpose in proving threshold, to a CAR/B and the content and tone may not provide a full picture of the birth parents. However, there are opportunities to revise and amend the CAR/B, coming up to family finding and matching, to ensure that information is accurate, proportionate and is relevant for the child and adoptive family.

The adoption agency also has the discretion, under reg 43(2) Adoption Agencies (Wales) Regulations 2005 to provide such access to its case records and disclose such information in its possession as it thinks fit for the purposes of carrying out its function as an adoption agency. For example, if the birth parents had another child following the child going to their adoptive placement (so it would not be contained in the CAR/B), then the agency could still provide that information, even without the birth parent's consent, as an adoption support service. It may be good practice to consult with and seek the views of birth parents, but the decision would be the agency's to make.

That leads us on to consider the role of birth parents in the content of the CAR/B. As stated above, it is good practice to consult birth parents over the information contained in the CAR/B, particularly when collating the 'soft' information that is so important for the child. However, birth parents are not required to give consent to any of the information that the adoption agency provides to the prospective adoptive parents and subsequently the adopted adult.

When the adopted person is over 18

A different set of rules apply once the young person is over 18 and the post commencement regulations come into play.

Firstly the adopted adult has the right to the CAR/B and other information provided to the adoptive parents.

Secondly, any other information the adopted adult (or anyone else) wants from the adoption record has to go through the process set out in the regulations. Reg 43 no longer applies.

For example, a young adopted adult asks: have I got any more brothers or sisters? In fact a further child has been born and the young adopted adult has no knowledge of that sibling:

- 1) If there is advance agreement to share information, the information regarding the sibling can be shared;
- 2) If there is no advance agreement, the adoption agency must take all reasonable steps to take into account views of the birth parents about providing that information. Having taken account of the views (or having taken all reasonable steps to obtain the views), the adoption agency must then decide whether to provide that information.

These advance agreements are rarely signed at present, perhaps because people are confused as to what they are signing up to, and perhaps because it is not the right time to ask birth parents to think about the future of their child when removed from them when they are still litigating to keep them. It is always possible to seek and obtain the consent at a later, more conciliatory time, perhaps in conjunction with adoption support for the birth parent.

This short note does not cover all of the provisions of the regulations, but is an attempt to clarify what can be shared with an adopted person, as child and as adult, and the issue of agreement by birth parents to sharing the information.

The Ombudsman and assessments prior to the Registration of Interest

Readers of the newsletter will recall that in the spring edition we discussed the Ombudsman's findings in respect of Stage 1 and Stage 2 of the adoption assessment process. The other report is now available (reference number 19 011 134) which looks at the status of an 'initial assessment' under the 2020 regulations. Under the old (2005) regulations it was custom and practice for many agencies to undertake a visit, or undertake an 'initial assessment', with a view to either inviting onto a preparation course and making an application, advising on a particular issue or 'counselling out' as a consequence of obvious unsuitability.

This is what happened in this (English) case. An initial assessment was followed by a refusal to accept a registration of interest on the basis of limited child care experience, the fact that the applicant had been a foster carer and had terminated a placement and her financial situation was not clear.

The Ombudsman found there was 'fault' in making a decision on unsuitability before accepting a registration of interest and commencing Stage1.

The arguments were based around the wording of the 2013 English statutory guidance, which of course does not apply in Wales. However, the regulations themselves are the same in Wales and England and the NAS good practice guide accompanying our regulations provides the same message as the statutory guidance:

'A decision to refuse to consider a potential prospective adopter for the pre-assessment process (ie Stage1) should only be made under exceptional circumstances and where there is clear evidence already that no reasonable adoption agency would consider them suitable to adopt.' (p5 NAS Good Practice Guide to accompany the Adoption Agencies (Wales) (Amendment) Regulations 2020

Practitioners should not, therefore, be undertaking any form of initial assessment before accepting a ROI – the Ombudsman has determined that this is maladministration.

Remember that it is always possible to accept a ROI on the proviso that certain checks will be undertaken first (eg DBS / PNC checks) during Stage 1.

In this case the reasons for stating this applicant's unsuitability were in fact Stage 2 material.

This Ombudsman's case should be read in conjunction with the case looked at in the spring newsletter, so that there is clarity in the process when:

- a) Accepting a ROI, and
- b) Taking or refusing to take a prospective adopter onto Stage 2.

Non agency foster carer applications for adoption

Re R (Care Proceedings Joinder of Foster Carers) [2021] EWCA Civ 875

This is a really interesting case as it goes to the heart of the decision making process when adoption is involved. Which decisions does the court make and which does the local authority / adoption agency make?

A baby was removed from their parents shortly after birth and placed with short term foster carers. During the early course of care proceedings no other family members were identified and the LA applied for a care order and placement order. the foster carers at that stage stated that they wanted to be considered as adoptive parents for the child.

Meanwhile the LA had identified, at a late stage, a family member (cousin) and partner as potential prospective adopters. They were fully approved as foster carers and then started their adoption assessment. The foster carers filed a notice of application for an adoption order (using the non agency route - the wrong process being used by them as they should have filed a notice of intention to adopt to the LA (s44 ACA 2002) before making an application to the court). However, this fault was overlooked by the court as the foster carers had no legal representation.

It was now clear that there were two sets of adopters – one set (unusually family members) who had gone through the agency route, and one who were applying through the non agency route (the child had been placed with them for over a year so they were entitled – they just used the wrong forms.

The LA position was that it was for them to decide who should adopt the child and that the care and placement orders should be made as soon as possible so that the match could be made and the child placed with the prospective adopters of the agency's choice. They submitted that the foster carers' application was irrelevant. The Guardian, however, disagreed and the judge agreed that this was an unusual situation. Usually when applying for a placement order there is no identified prospective adopter (though there may be some basic information as to the availability of suitable adopters in order to decide whether a match is a realistic prospect). Here there were two identified sets of people who wished to adopt R and neither care nor placement order had yet been made.

At a hearing the court made the foster carers a party to the proceedings, but not the family members, as they were to be updated by the mother's solicitor (the mother

supporting their application if she could not keep R). The court also listed the matter for a further hearing, the LA now undertaking the foster carer's suitability report.

The LA appealed this decision, stating that the care and placement orders should have gone ahead and they should have the decision to identify who was the most suitable to adopt R.

The Court of Appeal held:

- 1) The court was wrong to join the foster carers to the care proceedings. The 'exceptional circumstances' set out in previous case law, allowing foster carers or prospective adopters to be joined as parties, did not exist here;
- 2) The application for care should have been heard, looking at the LA's care plan for adoption, applying the re B and Re B-S test (ie 'nothing else but adoption will do');
- 3) If the care plan for adoption was accepted by the court, then the court should have gone on to look at the competing applications of the foster carers (with the non agency application for adoption) and the LA application for a placement order (with the plan to place the child with family members as prospective adoptive parents).

The CA rejected the LA's position that the foster carers' application was irrelevant and that the foster carers attempted to circumvent the statutory scheme. The ACA allowed them to make an application as the child had been placed with the for over a year. That application should be considered properly.

The case was sent back to the family court for the above hearings to take place in the correct order.

These circumstances were very unusual but the judgment does make clear that the non agency route to an adoption order must not be seen as second best to an agency route, or a way of 'getting round' the agency route, particularly for foster carers.

Looked after children

TT (Children: Discharge of Care Order [2021] EWCA Civ 742

Welsh practitioners will be interested in this case as it reviews the decision made in the GM v Carmarthenshire CC [2018] EWFC 36.

The case looks at what needs to be evidenced in order to discharge a care order under s39 CA 1989.

The Carmarthenshire case had held that in order to withstand an application to discharge a care order, the local authority would need to prove that 'something close to' threshold still existed and that an application for discharge of care order should not be refused unless the circumstances were 'exceptional'. The case undermined any notion of permanency for looked after children leaving open the prospect of children being returned to parents regardless of their welfare, if threshold could no

longer be proved The case also called attachment theory (in relation to the child in question and his relationship with his foster carers) 'only a theory'.

The Court of Appeal that:

- 1) Any decision made in respect of a s39 application must be done with reference to the s1 CA principles. The welfare evaluation must take into account the welfare checklist;
- 2) Once the welfare evaluation has been carried out, the court will cross check the outcome to ensure that it is compatible with the ECHR (necessity / proportionality etc)
- 3) It is for the applicant to bring evidence to support the application for discharge of the carer order and to shown that it is in the child's best interests that the order should be discharged;
- 4) The threshold criteria, established at the time of the making of the care order, is of no relevance to the discharge of the care order. The LA does not have to re-prove threshold to withstand the application as the evidence is all in the welfare evaluation based on current circumstances.

The court also reiterated that the 'nothing else will do' test ONLY applies to cases where there is a plan for adoption, not to s31 and s39 cases.

The CA also looked at the Carmarthenshire case and attachment theory, and although this was 'obiter', that is not directly relating to the case being heard, it is helpful to have the clarification that:

'It is one thing to find that a particular witness may not be qualified to give specific evidence about a child's attachment, but it is another thing to question the validity of attachment theory as a whole or to state that it cannot be admissible in evidence.'

So under the welfare checklist, in resisting an application for a discharge of care order, the LA can refer to the attachment the child has developed with the foster carers whilst being looked after. Who can give that evidence must be the subject of another discussion.

Fostering

Readers will no doubt have heard about the launch of Foster Wales, our new national framework for local authority fostering services.

See below for the link to the website with a lot of really interesting and inspiring information.

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