

Autumn 2023 edition of the AFKA Cymru legal newsletter

Welcome to the autumn edition of the AFKA legal newsletter where we aim to provide Welsh specific legal advice and information on all matters relating to permanence planning for children.

Care orders at home

JW (Child at Home under Care Order) [2023] EWCA Civ 944

We have known for some time that practice across different parts of England and in Wales has differed when it comes to the legal framework for children remaining at home or returning home following care proceedings. In Wales we have tended to prefer care orders, with the application of 'placement with parents' regulations now found in Part 4 of the Care Planning, Placement and Case Review (Wales) Regulations 2015.

Some parts of England have had the same approach, but others rarely have a care order for a child living at home and tend to opt for a supervision order.

In the case of JW in the Court of Appeal, which was originally heard in the family court in Swansea, the President draws a line from Hull to Bristol – anything to the East opts for supervision orders and anything to the west is likely to prefer a care order. The President describes this as a '*hot potato*' and resolves to address the difference in practice in this judgment, stating that the current state of affairs cannot continue. He refers to the Public Law Working Group's Best Practice Guidance on supervision orders (see this spring's newsletter) and endorses the Guidance in his judgment. He also helpfully reduces the PLWG recommendations and BPG to the following points:

- a) a care order should not be used solely as a vehicle to achieve the provision of support and services after the conclusion of proceedings;*
- b) a care order on the basis that the child will be living at home should only be made when there are exceptional reasons for doing so. It should be rare in the extreme that the risks of significant harm to a child are judged to be sufficient to merit the making of a care order but, nevertheless, as risks that can be managed with the child remaining in the care of parents;*
- c) unless, in an exceptional case, a care order is necessary for the protection of the child, some other means of providing support and services must be used;*

d) where a child is to be placed at home, the making of a supervision order to support reunification may be proportionate;

e) where a supervision order is being considered, the best practice guidance in the PLWG April 2023 report must be applied. In particular the court should require the local authority to have a Supervision Support Plan in place.

The President acknowledges that there ‘*may be grounds for extending the 26 -week deadline to some extent*’, where the plan is for reunification, but it has not yet taken place. However, an extension of the care proceedings timetable would not be acceptable for circumstances where children have already returned home or have remained at home throughout proceedings.

It will be interesting to see over the next few months and year or so what the ‘exceptional reasons’ will amount to, particularly as the President points out there will be few circumstances where the risks identified necessitate a care order and yet those risks can still be managed with the child living at home.

The importance of passports for children who are looked after

We have discussed the importance of identifying nationality and immigration issues before the making of an adoption order in previous newsletters.

The making of an adoption order in the UK courts does not automatically grant British citizenship to a child (if they didn’t have it before the making of the adoption order AND their adoptive parents are not British citizens).

It’s therefore important to identify, at an early stage during the child’s looked after status, if a passport can be obtained for them. This is something that should be picked up at the second review. An application can be made by the local authority so long as they have parental responsibility for the child (under the terms of an interim care order (s38) or care order (31)) Children Act 1989. S76 SSWB(W)A 2014 voluntary accommodation will not suffice.

The Independent Reviewing Mechanism

Claire Sharpe, the manager of IRM Cymru, has been attending the AFKA special interest groups to bring everyone up to date with developments in the IRM (Independent Reviewing Mechanism).

For those who aren’t sure of the role of the IRM, it is a Welsh Government body, administered currently by Children in Wales. It provides a second and independent panel for

- prospective adoptive parents where the regional adoption or VAA agency decision maker has made the ‘qualifying determination’ that they are not suitable to adopt;
- prospective foster carers where the fostering service provider decision maker has made the ‘QD’ that they are not suitable to foster;
- existing foster carers where the FSP decision maker has made the QD that they are no longer suitable to foster;

- existing foster carers where the FSP decision maker has made the QD that the foster carer's terms of approval should be amended.

The IRM also has a function in looking at decisions made as to the disclosure of information from adoption records for children who were adopted after December 2005. This is an area which is likely to grow as the number of children adopted after 2005 reach adulthood, but to date there has not been an application on this area.

The IRM is not an appeals process – the IRM panel cannot overturn an adoption agency or fostering service provider decision. What it does is provide a fresh set of eyes (a national panel drawn from experienced people across the country) to make a fresh recommendation to the adoption ADM or fostering DM. The ADM or DM then makes a decision, taking into consideration the recommendation of the IRM panel. They do not have to follow that recommendation.

The majority of applications to the IRM are fostering related. It may be that some FSP's are not aware of their duties to inform applicants, once a QD is made, of their right to apply to the IRM (or alternatively the ability under the fostering regulations to make a referral back to the original panel for a fresh consideration).

IRM Cymru has produced a model letter which adoption agencies and FSP's should either adopt or ensure that they have all the information accurately replicated on their own pro forma. The model letter is to be found here:

[Model Letter - Fostering.docx.pdf \(childreninwales.org.uk\)](#)

The Public Law Working Group: adoption sub-group

This sub-group of the PLWG has published a large interim report on a number of adoption related matters. This report also acts as a consultation exercise, which closes on 30 November.

The topics covered are:

- Adoption and contact
- Access to records
- Practice and procedure
- Adoption with an international element
- Adoption by consent

The PLWG is well represented by Welsh colleagues and there is reference to Welsh good practice in the document.

To take the topics in turn:

Adoption and contact

The emphasis in this chapter is very much based on the current research:

'the group suggests a change in social work practice and training for all involved in the process (including prospective adopters) to give more focus to contact and the benefits that it can bring for many (although not all) adopted children'.

This very much reflects the NAS good practice guides, which are termed as '*a useful reference point for good practice nationwide*'.

The group does not recommend any change in legislation or practice in terms of the use of post adoption contact orders (s51A Adoption and Children Act 2002), but a general education of all those involved on the benefits of openness and direct contact, when it is in the child's best interests. The recommendations are already being enacted in Wales through NAS central team, the regions and VAA's and a piece of work is currently taking place to look at a 'risk and benefit' analysis of post adoption contact, to help the development of a sound post adoption contact plan. One element that we need to consider further is the digitalisation of letterbox / indirect contact as there is so much more that can be done to make this kind of contact less stressful and more meaningful for all those involved.

Access to records

The below are some, but not, all of the recommendations in this very complex area:

- The need for practitioners to have a real understanding of the lifelong nature of adoption;
- Better and more accessible information to be made available and greater clarity and focus on the need for counselling and intermediary services;
- Better training for all staff;
- A national register of court files to be compiled and maintained;
- Wales to review post commencement applications to ensure that anomalies or inconsistencies are identified and addressed (that is applications made in respect of adoptions made after 29.12.05) and consider the role of the intermediary service within post commencement applications.

Practice and Procedure

This chapter goes into some detail on the nuts and bolts of adoption work as it relates to the court. It does not consider the leave to apply for revocation of placement order applications by parents, which we know can cause a great deal of uncertainty and delay at the time of matching and introductions. It states that these:

are cases where it is entirely proper for the parents to be able to challenge the placement of their child'.

It does, however, look at applications for leave to oppose the making of the adoption order, but has postponed making any recommendations, waiting to see if the recent availability of legal aid to parents (no means / no merits test) will bring down the numbers of applications, given that parents will have received realistic advice on the likelihood of a successful application. The group suggests waiting for a year before making any firm recommendations. We will await that information, suspecting that the availability of legal aid will not have resulted in a decrease in applications, but will have provided sound support for parents in making the application they feel they must make, in order to be able to tell their child in later life that they did everything possible to prevent the adoption order being made.

A recommendation in the meantime is to provide a clearly written leaflet and additional help for parents to be able to fill in the Form FP2 (seeking leave to oppose the making of the adoption order) with headings specifically directing them to the need for evidence in a change in their circumstances since the making of the placement order.

Other recommendations concern the inevitable replication of material in the formulation of the child's adoption report, the Annex B and the Annex A and the possibility of bringing these reports into a single format. In Wales we have had the CAR/B for a number of years now (it is not liked universally) but it does provide one document for two functions (agency should be placed for adoption decision and placement order application).

The chapter also looks at the case management of adoption applications and celebration hearings.

Inter country adoption

This chapter acknowledges the immense complexity of this area and the need for on single Act to deal with all aspects. It recommends better written guidance (from Welsh Government)

Adoption by consent

Here the group recommends that a national strategy for training and for dealing with cases where there is consent should be developed. Each agency should establish a plan. It also recommends better access to legal aid before birth so that issues such as informing the birth father and other family members may be considered. The courts need to understand why these cases sometimes need to be listed as a matter of urgency.

The group also states that early permanence should be considered. The Welsh Early Permanence framework addresses the benefits but also the challenges of using WEP where there is consent (or appears at present to be consent). Prospective WEP carers should be made aware of the heightened uncertainty in a great many of these cases.

English pilot on meeting between child care social worker(s) and Cafcass Guardians

The DfE in England has set up a pilot to see whether a meeting between the local authority social worker in care proceedings and Cafcass guardian, after the issue of proceedings but before the first case management hearing, would help to prevent delay.

This would seem a sensible step, given that so much now takes place in pre-proceedings. The meeting / discussion happens sometimes on an informal basis, but if the pilot is successful, it would put it on a more formal footing. It would give the child's social worker and guardian the opportunity to discuss what has already taken place in terms of the identification of realistic options within the family and other

assessments that may still need to be undertaken within proceedings, in order to be ready for the CMH, rather than discussing the need for an assessment and then having to identify who is to do that (be it local authority or independent social worker).

The pilot, which involves 25 English local authorities in England, ends in December.

Sharing information and safeguarding

The Information Commissioners Office (ICO) has just published a 10 step guide to sharing information to safeguard children. This should be read in conjunction with the All Wales Safeguarding Procedures but gives some helpful additional information on sharing information and data protection. It makes very clear that there is nothing to stop information sharing in the context of safeguarding a child. The guide can be found on the ICO's website.

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