

AFKA Cymru Legal Newsletter

Spring 2024

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

Recent Case Law

Contact During Care Proceedings

Re T (Interim Care Order: Arrangements for Contact) [2024] EWCA Civ 469

It's been quite a long while since the matter of contact during care proceedings has been considered by the Court of Appeal.

This case involved a three and a half year old little girl (T) whose mother had been charged with offences relating to the use of sexual images of her online and sexual assault of a child under 13. The mother was jointly charged with her partner, who pleaded guilty to the offences, but she pleaded not guilty. Her bail conditions stated that she should not have any contact with T except as ordered by the family court.

T was firstly accommodated on a voluntary basis but the local authority subsequently commenced care proceedings.

T had not had any contact with her mother for six weeks when the LA put forward a plan for the careful introduction of contact, starting with remote contact leading to direct. This was an agreed schedule of contact made at court. When the LA then moved away from that schedule as T was very distressed at even remote contact with her mother, the LA issued an application for leave to refuse contact under s34(4) as they wanted to retain just the remote contact for the time being.

When this came in front of the court again the judge treated the agreed schedule as if it was an order made under s34 Children Act 1989 and he criticised the LA for diverting from the terms of the schedule. The judge made an order for twice weekly direct contact. This order was appealed by the LA and the Guardian.

The Court of Appeal's main criticism of the family court judge was his lack of reference to T's welfare in making the decision to order direct contact. He failed to address the s1 CA welfare checklist in terms of the risk of emotional harm (s1(3)(e)), the capability of the mother (her engagement in the remote contact had raised questions) (s1(3)(f)) and failed to give sufficient weight to her background in terms of the alleged abuse and the admitted abuse by the mother's partner (s1(3)(d)).

Cobb LJ reiterated the phrase of Butler Sloss LJ which 'retains its unimpeachable authority':

contact – 'must not be allowed to destabilise or endanger the arrangements for the child'. The judgment demonstrates how essential it is for both parties and the court to go back to the s1 principles when making recommendations and decisions on contact, even at this interim stage.

The CA also discussed the 'disproportionate number of highly discursive recitals' which make orders 'unwieldy and difficult to navigate'. This is what led to the family court judge believing that the schedule of agreed contact was an order under s 34. The CA referred to the President's Memorandum on Drafting Orders (2021) and the 'House Rules', reissued in 2023.

Lastly the CA held that the judge was not wrong to adjourn the LA's application under s34(4) for leave to refuse contact as the LA wished to restrict contact, not cease it altogether. S34(4) is one of those misunderstood provisions – it gives the LA the authority to refuse contact, but that is not the same as an order for 'no contact'. The LA can re-establish contact if it believes that to be in the child's best interests.

If a LA wishes to divert from the terms of an order made under s34(2) or s34(3) as a matter of urgency, in order to safeguard or promote the child's welfare, then it must follow the provisions of s34(6) and make an application under s34(4) in order to be in court within seven days. The LA must also follow the provisions of regulation 9 Care Planning, Placement and Case Review (Wales) Regulations 2015, giving notice and reasons for ceasing the contact.

Placement Orders and Time Limits

H&J (Placement Orders) [2024] EWCA Civ 429

This is a welcome case on two counts but also frustrating in so far as the discussion on post adoption contact for sisters and brothers is concerned.

The case involved 5 and 4 year old brothers who had older siblings, with whom they had close relationships – in particular an older sister who had cared for them whilst they were all still at home.

The mother appealed the making of placement orders on the basis that there was insufficient recent evidence on the nature of the sibling relationships and so the judge

could not carry out her welfare evaluation under s1(4)(f) ACA 2002 (relationship with relatives and the likelihood of those relationships continuing and value) and, secondly, that the relationship between the boys and their siblings was of such importance that it outweighed all other factors and consequently the boys should be placed in a long term foster placement in order to facilitate direct contact.

The CA approved of the judge's conclusion that adoption was the right care plan for the boys, even though it would curtail the sibling contact, which:

'was outweighed by other factors, in particular the boys' need for stability which adoption could best provide. She (the judge) recognised that long term fostering provided a degree of stability but ultimately not on the scale provided by adoption.'

Although this is a welcome confirmation of the court's continued acknowledgment of the permanent nature of adoption, the case demonstrates that we still have a long way to go to ensure that permanence through adoption and keeping in touch with birth family, particularly with sisters and brothers, are not mutually exclusive of each other. Children have need and the right to both if in their best interests and we need to continue to develop our support to prospective adopters and adoptive parents in being able to commit to providing both. The work NAS, the adoption regions, VAAs and children's services continue to do should ensure that these stark choices will not need to be made in the future.

The other area that the CA looked at was whether the judge was seeking to impose a condition on the placement order by 'inviting' the LA to seek to discharge the placement order in six months if an adoptive placement had not been found.

The CA confirmed that the court does not have jurisdiction to attach conditions to a placement order (here in the form of a time restriction), but there is nothing to stop the court from voicing an expectation. In this particular case, the LA's care plan had been amended to reflect the timetable and so that became part of the LA's care plan rather than being required by the court.

There is a considerable amount of case law on this area and perhaps a thin line between a court 'expectation' and the LA interpretation of an expectation as a 'requirement'. The CA has approved time limited searches, particularly where there is a parallel search for a long term foster placement and this does not undermine the 'nothing else but adoption will do' test. However, this really must be led by the LA and be part of its care plan. Having proved the need for a placement order, the LA has the authority to place with prospective adopters chosen by them and they have the duty to apply for revocation of the placement order should the plan for adoption change.

Adoption

Re T (Adoption Hearing): Involvement of Applicants) [2024] EWCA Civ 189

This was a fairly straight forward case in terms of principles.

Agency prospective adopters made their application for an adoption order. Even though it was their application, the order setting down the hearing was not sent to them. They were told by the court office that 'we never serve adoption applicants' when they eventually knew about the hearing from the social worker and contacted the court. When the prospective adopters asked if they could attend the hearing (for the purposes of being able to tell the child that they had been there when the order was made), the judge (a designated family judge) told the adopters that 'prospective adopters are not permitted to attend adoption hearings. This is usual practice' and that the reason why they wanted to attend court was not a 'valid' one.

At the first hearing the judge adjourned the application in order to allow parents to file statements, but the adopters were not provided with any detail of the hearing. No proper note was made of the hearing. The adopters requested a transcript of the hearing which was refused and this was then the adopters appealed.

The CA, with the President giving the lead judgment, held:

- 1) Neither the ACA 2005 nor the Family Procedure Rules 2010 give the court the power to prohibit an applicant in adoption proceedings from attending. If they do decide to attend, then it is the court's responsibility to make the appropriate arrangements to preserve anonymity.
- 2) When a party has been prevented from attending a hearing and that party requests a transcript, the request should be granted unless there are clear and specific reasons for refusal.

The President stated that it was a matter of concern that prospective adoptive parents were being discouraged from attending their own hearings and the local authority / adoption agency being treated as the applicant instead. Of course, in many cases prospective adopters are relieved and happy to let the LA /AA take the lead, but that must be a matter for discussion and agreement.

He also stated:

'Given the life-changing nature of the proceedings for all involved, one might ask, rhetorically, why any adopter would not want to attend the hearings of their own application, provided suitable and safe arrangements are made to protect anonymity. I would urge each local adoption centre to review its current practice.'

As we have become more and more used to 'celebration hearings' following the making of the adoption order where the child/ren meets the judge, we have removed adoptive parents from the hearing where the adoption order is made and the President's words

will be welcome for those adopters who want to be in attendance when the order is made.

AFKA Cymru Updates

Kinship in Wales

AFKA Cymru's Kinship Conference, held on 25 April in Wrexham was well attended and well received. The day focused on what we are doing well and where we want to go with kinship in Wales. The day varied from hearing the voice of the kinship carer and the care experienced young person to looking at how we can include children's views in research and shaping policy and practice and we heard from practitioners and project workers in kinship in Wales.

Learning from the conference will be shared by Amy Shepherd in due course. Briefly, feedback called for a different system for kinship foster care, easier access to support when things get difficult especially in terms of the child's behaviour, life story and therapeutic support, equality for children irrespective of legal status, a clear and fair system for payments/allowances with consistency across Wales, the importance of kinship care in terms of belonging, acceptance, remaining part of the family, feeling loved and cared for - these should drive policy rather than seeking to reduce the numbers of children who are looked after.

Foster Wales

AFKA Cymru has supported Foster Wales with their transfer guidance to support foster carers with a smoother transition when transferring fostering services. The guidance ensures that regulations are adhered to as well as suggestions for good practice to ensure children are at the heart of the planning.

The guidance sits alongside The Fostering Network Transfer Protocol but provides Wales specific advice on the transfer of foster carers arising from Welsh Government's 'eliminate profit' agenda. It discusses the possible, and cautious, use of regulation 26 Care Planning, Placement and Case Review (Wales) Regulations 2015 (temporary placement with a connected person) in particular circumstances where a FSP ceases to operate before a LA FSP has been able to approve the foster carers.

The guidance can be accessed here - [Foster-Wales-Transfer-Guidance.pdf \(afkacymru.org.uk\)](https://afkacymru.org.uk/Foster-Wales-Transfer-Guidance.pdf)

Special Guardianship in Wales

As mentioned in the last newsletter, the completed special guardian cards have now been sent out to every LA to distribute to all SGs in Wales. These cards have been created and designed by AFKA Cymru and generously funded by the Welsh Government.

They enable special guardians to present them to any service, person or worker (for example a GP surgery, hospital, nursery or school), who needs to better understand what it means to be a special guardian to a child. Each card features a QR code that links to a comprehensive leaflet providing further information about the role and responsibilities of a special guardian.

Compact and convenient, these cards are designed for easy storage in purses or wallets, ensuring they are readily accessible whenever clarification is needed. They aren't identification cards but should be able to provide a short cut for people needing to know the relationship between special guardian and child, especially when it's not appropriate to have that conversation in front of the child.

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