Late Spring 2018 Edition of the AFA Cymru Legal Bulletin

Welcome to the late spring edition of the newsletter, which aims to provide updates on all legal matters relating to permanency planning for children in Wales.

RECENT CASE LAW

Re T (A Child) [2018] EWCA Civ 650

This very recent Court of Appeal case has implications for the assessment of kinship carers as local authority foster carers.

The case involved an eighteen-month-old boy. The judge in the care proceedings made care and placement orders. The birth parents acknowledged that they could not care for the child but supported the paternal grandmother's appeal (she had been a party to the proceedings).

The grounds for appeal concerned the way in which the judge had looked at the 'nothing else will do' test in relation to whether to grant a placement order. She had found, on a narrow balance, that the best outcome for the child would be to be placed with his grandmother, under the terms of a care order, but with a higher than usual number of statutory visits to 'keep her on her toes'.

During the proceedings the local authority's fostering panel and Decision Maker did not recommend approval or approve the grandmother. They were required by the judge to take a second look, taking into account her favourable risk assessment and refused again. On that basis the judge said that she had no alternative to make a placement order; if the child could not be placed with the grandmother under the terms of a care order, with 'increased local authority vigilance' there were too many risks, and so 'nothing else would do' but an adoption order.

The Court of Appeal held that 'the court's assessment of risk is sovereign within proceedings'. In accepting the local authority's assessment and subsequent refusal to approve rather than asserting her own, the judge was allowing the child to be

‘sent for adoption as a direct result of a non-court body, an outcome unprecedented in modern times…’

So where does the administrative decision-making process end and the judicial decision-making process begin following this case?

The LA still has the decision-making power, under the fostering regulations, to approve and decide on the terms of approval, in relation to a kinship carer applicant. However, that LA decision MUST take account of the court welfare evaluation of that potential carer in coming to that decision. If a local authority disagrees with a judge’s evaluation their course of action should be an appeal against the making of the order, where the appellate court may decide.

The CA reiterated the primacy of the court’s risk and welfare evaluation over any other assessment, including a connected person’s assessment, a panel recommendation and DM decision. The roles of panel and DM are now, therefore, circumscribed by the court’s assessment of the proposed carer.

If the LA (panel /DM) refuses to accede to the court’s evaluation, then they run the risk of challenge by way of judicial review.

Following from this, the LA must supply services to prevent a disproportionate intervention of an Art 8 right (that is provide sufficient services to ensure that the child is safe in the kinship foster placement under a care order). A LA’s failure to provide those ‘lawful and reasonable’ services would lead to the disproportionate plan of adoption where it cannot be argued that ‘nothing else will do’ because a care order with a great deal of support and monitoring will do. It is for the court to decide on proportionality in terms of the order and the LA to decide on what services are necessary in order to meet that proportionality decision. Again, if the LA refuses to provide lawful and reasonable services to support proportionality, because it disagrees with the care plan, then it may be subject to challenge by judicial review.

In this case the judge ‘boxed herself in’ by saying that the only two options were adoption or placement with PGM under the terms of a care order with more than the statutory regime of visits / supervision. As the LA refused to approve the PGM the judge felt she had no option but to make a placement order. The Court of Appeal held that here she was wrong in, at that stage, she should have revisited the ways in which other orders could have been used (SGO / supervision order / injunctions and possibly wardship), to bring about a safe placement.

So the judge was wrong in a) not asserting the primacy of her evaluation of risk and b) in not considering the private law options.

Can local authorities now avoid a child becoming subject to care orders under these circumstances? Do children such as the one in this case need the local authority to have parental responsibility or is it the safeguards that go with a care order that make this an attractive proposition to the courts? Could a special guardianship order with a robust support plan (allied with a Part 4 care and support plan), supervision order and even (if needed) a non-molestation order, granted under the Family Law Act 1996, provide the support to keep this grandmother 'on her toes', and the child safe, just as well as a care order? That is now the challenge; to use these private law options in a creative way to avoid children becoming subject to care orders when it is not necessarily in their interests to be looked after.

The other area the Court of Appeal scrutinised was the way in which the foster panel and decision maker dealt with the second panel meeting and decision, with the benefit of the first judgment, including the court risk evaluation. The Court referred back to the old Hofstetter case (Hofstetter v LB Barnet and IRM (2009) EWHC 328 (Admin)). The Court of Appeal was critical of the panel and ADM for not abiding by the guidance given in the Hofstetter case (which has also been endorsed in English statutory guidance). In this case the decision maker had merely put a signature to panel's recommendations, which was inadequate.

It is worth while looking at this guidance again and ensuring that both fostering and adoption agencies use the following checklist. Following this case it is likely that the family court will be scrutinising decision makers' processes. It is good discipline for decision makers to:

- List the material taken into account in reaching the decision;
- Identify the key arguments;
- Consider whether they agree with the process and approach of the relevant panel and are satisfied as to its fairness and that the panel has properly addressed the arguments;
- Consider whether any additional information now available to them that was not before the panel has an impact on its reasons or recommendation;
- Identify the reasons given for the relevant recommendation that they do or do not wish to adopt;
- State (a) the adopted reasons by cross reference or otherwise and (b) any reasons for their decision.

Herefordshire Council v AB [2018] EWFC 10

This case concerned two children who were accommodated under s20 Children Act 1989 (the English equivalent of our s76 SSWB(W)A 2014, on a voluntary basis, one from birth until he was nine years old and the other from the age of eight to 16.

The children's histories, although salutary, do not provide any new guidance, but they do highlight two areas:

1) The position of very young parents and their capacity to consent

In the case of the baby accommodated from birth, his mother was only 14 when he was born and the local authority was severely criticised for not even considering whether she had the capacity to consent to voluntary accommodation. The fact that later she withdrew her consent and the local authority did not return the child but advised her to seek legal advice compounded the problem and it was reiterated by the court (and we should be clear on this by now), s76 is a voluntary arrangement - keeping a child looked after when parents do not consent is unlawful.

The issue of capacity consent is the one to note here and practitioners need to be satisfied, if they are dealing with any use of s76 with young parents, that those parents have the capacity to properly consent to that accommodation (no matter how short a period of time). If there is no capacity to consent and the provisions of s76(1)(c) are not met (ie the parents are not 'prevented' from caring for the child), then accommodation under s76 will be unlawful.

2) The role of the IRO in s20 /s76

The case reiterates the importance of the IRO in challenging delay, for children accommodated on a voluntary basis, in commencing care proceedings, not just at LA reviews but in the monitoring role between reviews, and, if there is delay, using a robust approach to the use of the dispute resolution process.

It is hoped that the new practice standards and good practice guide for the reviewing and monitoring of a child or young person's Part 6 care and support plan will help local authorities and IRO's to ensure that s76 is used lawfully and properly, with no element of delay or avoidance of the scrutiny of the court.

UPDATES

ADOPTION

There is new updated guidance from the President (Munby LJ) on listing final hearings in adoption cases. It can be accessed through our website or through the Family Law Week website. It provides some clarity for adoption agencies and prospective parents on the way in which adoption applications are to be conducted, from application through to celebration hearing (or 'adoption visit' as it is termed in the guidance).

PART 6 CODE OF PRACTICE

There is a new version of the Part 6 SSWB(W)A Code of Practice (dated April 2018). The amendments to the original are as follows:

- Minor changes
    - Paragraphs 24, 26
- Emergency placements out of area
    - Paragraphs 202-207 – replacement with new text
- Placements outside England and Wales
    - Paragraph 216 – removal of final sentence: 'A placement should only be agreed where the stay overseas is for a definite and limited period.'
- Visits to children in detention
    - Paragraphs 360 & 361 – replacement with new text
- Unaccompanied asylum seeking children
    - Paragraph 509 – replacement with new text
- Financial assistance for care leavers qualifying for information, advice and assistance
    - Paragraph 640 – replacement with new text
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The new version can be accessed on the Welsh Government website:
http.//gov.wales/docs/dhss/publications/180328pt6en.pdf

Sarah Coldrick
AFA Cymru Legal Advisor
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AFA Cymru contact details:

Website www.afacymru.org.uk
Email: cardiff-afacymru@stdavidscs.org
rhyl-afacymru@stdavidscs.org
Telephone: Cardiff – 02920 761155
Rhyl – 01745 336336

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