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Albion Chambers CHILD LAW NEWSLETTER

Local Authority v G (Parent with Learning Disability) [2017] EWFC B94

Guidance in care proceedings involving parents with a learning disability

This case concerned three children, A, K and T. K and T were the children of the mother and father, A was the mother's oldest child and her father had passed away. The Local Authority's case was that the parents were unable to meet the needs of the children. The mother had a mild learning disability and was partly deaf in both ears. The father had been her registered carer since their marriage and they both suffered from depression. The Local Authority sought care and placement orders for K and T. A had already been placed with carers under a special guardianship order and the Local Authority sought a supervision order to support this arrangement. The Guardian supported the making of a supervision order in respect of A and care and placement orders in respect of K and T. The parents accepted some of the Local Authority's concerns but did not accept that the threshold criteria under section 31 had been made out. The parents argued that, with appropriate support, they were able to care for K and T.

During the hearing, the mother had an intermediary, a support advocate and a team of two lip-speakers translated for her. FPR 3A and PD3AA dealing with Vulnerable Parties and Witnesses were taken into account to ensure the mother's full participation. The advocates also bore in mind the provisions of the Advocate's Gateway Toolkits.

HHJ Dancey took into account *Re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] UKSC 33, *Re B-S* [2013] EWCA Civ 1146 and *Re R (A Child)* [2014] EWCA Civ 1625 and observed that the Local Authority was required to demonstrate that 'nothing else will do' before the court could make a placement order. He also had regard to the fact that there is no legal presumption or right in favour of a child being brought up by their natural family and referred to *Re W (A Child)* [2016] EWCA Civ 793.

HHJ Dancey emphasised that where a parent has a learning disability, the court must make sure that a parent is not being disadvantaged simply because of their disability. The essential question is whether the parenting that can be offered is good enough, if support is provided. The decisions in *Re D (A Child) (No 3)* [2016] EWFC 1 and *Re Guardian and A (Care Order: Freeing Order: Parents with a Learning Disability)* [2016] NIFam 8 were considered, which establish a number of important points:

I. Parents with learning difficulties can often be 'good enough' parents when provided with the ongoing emotional and practical support they need.

II. The concept of 'parenting with support' must underpin the way in which courts and professionals approach parents with learning difficulties.

III. Courts must make sure that parents with learning difficulties are not at risk of having their parental responsibilities terminated on the basis of evidence that would not hold up against parents without such difficulties. To that end, parents with a learning disability should not be measured against parents without disability, and the court should be alive to the risk of direct and indirect discrimination.

IV. Multi-agency working is critical if parents are to be supported effectively and the court has a duty to make sure that has been done effectively.

V. The court should not focus so narrowly on the child's welfare that the needs of the parent arising from their disability, and impacting on their parenting capacity, are ignored.

VI. Courts should be careful to ensure that the supposed inability of the parents to change is not itself an artefact of professionals' ineffectiveness in engaging with the parents in an appropriate way.

The Good Practice Guidance on working with parents with a learning disability was also summarised, which underlines the importance of support services working in unison to help enable children to live with their parents.

HHJ Dancey found that there was considerable force in the criticisms made by the parents of their assessments, and the support given to them. In particular, the Local Authority did not have a protocol for dealing with parents with a learning disability, the Good Practice Guidance had not always been followed, and those working with the mother were not trained in dealing with parents with a learning disability; which would have given them a better understanding during the assessment and taught them how best to work with the mother and how to deliver the right support. Nevertheless, the court also acknowledged that the professionals involved did their best, the Good Practice Guidance was followed to the extent that Children's Services took the

lead and consulted with a specialist service, and a lot of support had been given to the family. HHJ Dancey considered that the assessments of the parents could have been better but were not entirely undermined by their shortcomings. It was unlikely that the outcome would have been different had different support been given, because of the fundamental nature of the mother's limitations, the father's lack of understanding of the concerns and the need for change.

The court found that threshold had been met, that K and T were children who needed attuned parenting to repair the harm caused to them by neglect in their parents' care and that the parents were unable to parent at that level. HHJ Dancey considered that the package of support proposed by the parents would not in itself be enough to protect the children, and that the family would need support throughout the children's waking hours, which would amount to substituted parenting, not support. *Re D (A Child) (No 3)* [2016] EWFC 1 and the Good Practice Guidance does not require Local Authorities to provide support to the extent that it amounts to substituted parenting.

Care and placement orders were made in respect of K and T, and a supervision order was made in respect of A.

Monisha Khandker

Long-term foster care as a plan for permanence

The balance sheet

In public law cases it is not uncommon for there to be a debate about the viability of long-term foster care as a permanency option, especially when the only realistic alternative is adoption. Parents will often favour long-term fostering over adoption (for obvious reasons), and we are often tasked with mounting arguments in support of long-term foster care even for very young children. It can often feel as though the local authority's default option for children under the ages of five or six is adoption and the same arguments appear on the social worker's balance sheets time and time again. One 'con' of long-term fostering is almost inevitably going to be that long-term fostering does not provide permanence; that a child does not have a 'forever family' that will claim him or her as their own and will commit to him or her to adulthood and beyond. In circumstances where the child had not been matched with their long-term carer that may well be a sound argument, but to accept that as a principle, that applies across the board in the case of long-term fostering, must be avoided.

What is permanence?

The Care Inquiry 2013 found that 'permanence' for children means:

'security, stability, love and a strong sense of identity and belonging. This is not connected to legal status, and one route to permanence is not necessarily better than any other'.

The inquiry called for greater recognition of the possibility of permanence through long-term fostering and identified that improving the support available to adults with a special guardianship order would be a helpful way of encouraging more foster carers to apply to become Special Guardians.

The statutory guidance that accompanies the CA 1989 defines permanence as providing children with *'a sense of security, continuity, commitment and identity ….. a secure, stable and loving family to support them through childhood and beyond'.*

When considering the strengths, and indeed weaknesses, of long-term foster care for younger children it is helpful to remind oneself of the words of Sir Ernest Ryder in *S-F (A Child)* [2017] EWCA Civ 964 at [8]:

The proportionality of interference in family life that an adoption represents must be justified by evidence not assumptions that read as stereotypical slogans. A conclusion that adoption is better for a child than long-term fostering may well be correct but an assumption as to that conclusion is not evidence even if described by the legend as something that concerns identity, permanence, security and stability.

Sir Ernest Ryder stressed the importance of the permanency report and the ADM's record of decision making containing the required analysis and reasoning which is necessary to support an application for a placement order [11].

It is not, therefore, sufficient to simply list the oft-quoted arguments in favour of adoption and against long-term foster care. Analysis of the circumstances of each particular child must be provided by the social worker. That analysis may well lead to the conclusion that adoption is the right care plan for that child, but an assumption due to the age of the child, for example, is not sufficient. The research of Ben Grey published in Seen and Heard in 2006 also warns against plans for children becoming policy-driven rather than determined by the best interests of the individual child concerned.

One issue that sometimes arises is that a foster carer (ordinarily one that has been caring for the child in the interim) expresses a commitment to care for that child long-term. The usual approach by the local authority is to ask the foster carers if they would like to be SGO assessed and will offer to fund legal advice. What if the foster carers don't want to care for the child under an SGO? Is long-term fostering in that scenario too risky? It is unsurprising that many foster carers shy away from accepting an SGO and prefer to care for children on a long-term basis under a Care Order, given the level of support that they are accustomed to receiving under fostering arrangements. What is frequently said in response to this, is that this provides no guarantees to a child that this will be his or her forever family. In response it is helpful to consider:

a) An SGO will last until a child is 18 years old and not beyond. An SGO therefore does not compel any life long investment in to a child.

b) Neither order will safeguard against placement breakdown. In fact the additional support will assist to safeguard against placement breakdown.

c) In light of a and b above what should surely be brought in to sharp focus is not the type of order that the foster carer favours but rather the degree of commitment that that carer has to the child now and throughout his or her childhood and hopefully his or life.

The child's ability to maintain direct family relationships in long-term foster care (as opposed to adoption) is often considered a benefit of long-term fostering arrangements. The importance of those family relationships and the impact upon the child of losing those relationships requires careful analysis. The impact on one child may not be the same for another. In order

to appropriately analyse the significance or otherwise of such loss, the social worker and the children's guardian should provide analysis of that impact. Similarly, if a deep bond and attachment has been formed with a foster carer, the impact of breaking that tie must be properly considered.

There is plenty of available research, on the experiences of children in long-term foster care. Recent research carried out by the charity Coram Voice and the University of Bristol, asked 2,263 children and young people aged between four and 18 about their experiences of being in care. 83% of children asked said that their life had improved whilst in care. Only 6% said they felt life had got worse. The survey, named Our Lives Our Care also revealed that half of four-to-seven-year olds felt that they had not been given proper full explanations about why they were in care. Interestingly 16% of the children asked felt that they had too much sibling contact. The lessons to be taken from the research are that more must be done to remedy apparently avoidable problems that children in care experience in particular ensuring that children are given clear explanations about why they are in care and involve them in decisions about their lives.

To conclude, whilst adoption will be better for some children if they are unable to be cared for in the family the possibility of long-term foster care should not be discounted simply on the basis of a child's age.

Alice Darian

Same goal, new rules

The impact of the Children and Social Work Act 2017 and secure accommodation in Scotland

The court system is inundated with applications by Local Authorities across England and Wales to place children in secure accommodation. Applications arise where children are considered to be beyond parental control and are placing themselves at risk of significant harm. Carolyne Willow, the Director of children's charity Article 9, highlighted that over the past six years there has been a 21% reduction in secure accommodation places in England alone. This has placed a substantial amount of pressure on Local Authorities across England and Wales, as they continue to struggle to find suitable accommodation for children in desperate need of accommodation that caters to their specific health and behavioural needs.

In looking for suitable alternatives, English and Welsh Local Authorities have considered residential units in Scotland to be an adequate solution, and began placing children there when no places were available in this jurisdiction. This practice continued until X *(a child) and Y (a child)* [2016] EWHC 2271, in which Sir James Munby pointed out that there was a complete lack of statutory mechanism to register and enforce English orders placing children in secure accommodations in Scotland. In that same authority, Sir James Munby, highlighted that in moving children's placements from England to Scotland, there was a "serious lacunae in the law which, it might be thought, needs urgent attention".

The effect of that decision was that any young person from England being detained in secure accommodation in Scotland was being detained unlawfully. That unlawful detention was potentially a contravention of Article 5 of the European Convention on Human Rights, under which any deprivation of liberty had to be held by the court in that jurisdiction to be lawful and proper. Staff in Scottish units were therefore placed in a difficult position, as they had to consider whether or not to detain children in light of the legal uncertainties.

The legislation changed on 27 April 2017, when Parliament passed the Children and Social Work Act 2017. This Act came into force on 28 April 2017. Schedule 1 of the Act amended s.25 Children Act 1989. This reflected that the use of accommodation in England for restricting the liberty of children looked after under English and Welsh local authorities was now extended to Scotland. As such, courts in England and Wales can now grant secure accommodation orders that apply the same legal principles to residential units in Scotland.

So, moving forward, what does this mean for Local Authorities in practice? Due to the very limited numbers of residential units in England and Wales, it would seem likely that applications to place children in Scotland will increase. What then are the implications on Scottish Local Authorities who require those places for children in their locality? Which children do Scottish secure accommodations then prioritise? Likewise, with BREXIT swiftly looming and talks of Scotland hoping for a second referendum to leave the UK, what issues would English and Welsh Local Authorities face with the children who are already placed in Scotland? Is this amendment to the Act really a solution or deflecting the actual problem that central government has yet to fix? What is not clear, is why more secure units are not being built in England and Wales to cater for a larger number of applications for secure accommodation.

At the same time, how is the impact on the child's welfare being considered in light of these changes to the legislation? It is well known that the courts consider secure accommodation orders to be a draconian step and a measure of last resort. On a more practical level, placing children potentially hundreds of miles away from their own family and support system merely adds to the already draconian nature of placing these children in secure accommodation.

Research for the Department for Education published in December 2016, noted that, *"Sending children [long distances] away meant disrupting their (often fragile) connections with family and other support networks, and with local services. This could add to the stress of what was already an extremely stressful experience for a child, and could make transition back into the community more difficult."*

On 30 January 2018, journalist Louise Tickle for the Guardian highlighted another case that was referred to the Education Secretary Damian Hinds. This regarded a boy who was suffering "appalling racial abuse" in a Scottish residential unit. The unit was 300 miles away from his home and family in Kent. In his judgment, District Judge Scarrett said: *"I have asked the supervisor of the secure accommodation in Scotland to ensure absolutely that such racial abuse is stopped immediately but the fact remains that there is a very serious gap in the system created by a very serious shortage of secure accommodation."*

As it stands, unless more pressure is put on central government by the Judiciary and Local Authorities, who experience cases like this on a regular basis, we will be no closer to making the necessary changes required to ensure that vulnerable children are safe.

In his judgment last year, Sir James Munby warned that there would be "blood on our hands" if the shortage of accommodation available to those children didn't change. Accordingly, the goal is set…

Yasmine El Nazer

Alcohol testing

One too many?

I recently represented a mother within care proceedings whose case was that she had not consumed alcohol or drugs for some considerable period of time. Hair strand and blood tests were undertaken for alcohol use, in addition to Transdermal Alcohol Continuous Testing. The tests unanimously appeared to demonstrate significant and sustained alcohol use. Having cross-examined a number of the expert witnesses, what follows is a brief summary of the tests and a few thoughts.

Transdermal Alcohol Continuous Testing ("TACT")

TACT testing for alcohol via a bracelet is a relative newcomer to the Family Court. When alcohol is consumed it is broken down by the liver and a small amount, about 1%, avoids metabolism and is excreted through the skin. The system works by a tag attached to the subject's leg which, at set intervals, uses a pump to pull a controlled sample of perspiration from the skin to the alcohol sensor for analysis. The amount of the reaction to the fuel cell in the tag is interpreted remotely to provide a calculation of the Trans-dermal Alcohol Concentration ("TAC"). TAC is an estimation of the blood alcohol concentration.

To determine whether TAC readings represent alcohol use, a set of criteria is applied by the testing company. In my case, the criteria applied to provide a confirmed alcohol reading was whether: (1) there was a zero TAC reading before the 'event'; (2) a peak reading was reached; (3) the rate alcohol was absorbed and then eliminated from the TAC readings occurred at certain rates; and (4) there was an eventual return to a zero TAC reading. If the criteria were not met, alcohol use would not be confirmed and could be explained by other factors.

The tag contains a number of mechanisms to determine whether the device has been tampered with. The first mechanism is a temperature gauge. Whilst modest shifts in temperature may be expected, for example if the subject moves to a warmer room or uses a blanket, the analysist looks for significant temperature shifts. The second mechanism is infra-red ("IR") which is sent between the tag and the skin. The sensor receives a voltage proportional to amount of light reflected from skin. The expectation is that if the tag is not tampered with, this IR reading remains relatively static (allowing for natural movement of the tag on the leg). However, if an obstruction such as foil or tissue paper is placed between the tag and the skin, the IR reading changes. The testing company have their own obstruction confirmation criteria which they apply, based upon the length of time that an IR reading departs from a previously measured baseline and whether any TAC is detected at the same time.

In respect of TAC readings, it appears there is no industry wide standard to generate a confirmed positive alcohol result. Similarly, when determining whether there has been a tamper event, the extent of any change in the IR reading required and its duration also appears to be based on the testing company's own criteria. The basis for a company's own criteria may, therefore, warrant exploration.

Another issue to explore may be the impact, if any, of a tag being fitted loosely, or becoming loose. It seems that a loose tag increases the potential for the tag to react to alcohol contaminants within the surrounding environment. In my case an issue arose about the impact, if any, of using a vaping device upon the readings. Such devices can contain alcohol and whether this could affect readings might require consideration in an individual case.

Blood tests for alcohol

In my case a Carbohydrate Deficient Transferrin ("CDT") test was undertaken, which tests for excessive alcohol consumption in the period of 2 – 4 weeks prior to sampling. Transferrin is a protein in the blood which transports iron. It has carbohydrate sidechains attached and when there is excessive alcohol use, the number of sidechains reduces. The test establishes the percentage of transferrin that is carbohydrate deficient. This type of testing is an indirect alcohol abuse test; it looks at how the body and/or organs are functioning. The indirect biomarkers considered are often highly influenced by someone who has consumed alcohol, however, they may be outside normal ranges due to other factors such as consumption of some medications and as a result of some medical conditions.

Direct biomarkers are only produced when someone has consumed alcohol or increased their blood alcohol levels. Tests which consider these markers have a much higher sensitivity rate. An example is Phosphatidylethanol testing which covers a 3 – 4 week period before testing and is said to have a sensitivity rate of over 99%. Not all companies offer this type of testing. Careful consideration of the type of test to be undertaken is clearly warranted to reduce any doubt when the results are received.

Philip Baggley

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