Consultation on Children Cases in the Family Court – Interim Proposals for Reform

Response from **- The Legal Group Advisory Committee of CoramBAAF**

Public LawWorking Group - Interim Report of June 2019, Recommendations to achieve best practice in the child protection and family justice systems

We are a group of local authority, private and voluntary sector lawyers, academics and social workers based across England and Wales who meet 3 times annually to advise CoramBAAF in relation to its research activities and projects and to share best practice. We also share and consider any current legal and governmental developments to assist each of our organisations to deliver excellent services for children. There follows our response to the above report by The Honourable Mr Justice Keehan's working group. For ease of reference we have adopted the main chapter headings of the report. We focus on those aspects of the report which appear to us of particular significance now and not the longer term changes. Our response below is designed to assist the working group in its stated objectives.

Introduction

We welcomed the content of the address by The President of The Family Division to the Association of Lawyers for Children in October 2018. It described the system as we recognise it to be. It is noteworthy that the steep rise of public law proceedings has not been accompanied by any significant documented change in the rate of threshold being met in issued proceedings.

Also noteworthy though are the LA areas of North Yorkshire, Leeds, Essex and Hertfordshire for a reduction in their care numbers and applications to Court. There has been a more recent trend of a number of London Boroughs showing dramatic reductions in applications to court: https://www.cafcass.gov.uk/about-cafcass/research-and-data/public-law-data/?highlight=statistics

LOCAL AUTHORITY DECISION-MAKING

RECOMMENDATIONS

1. *Sharing good practice*; there exists DFE guidance namely Court Orders and Pre Proceedings For Local Authorities, April 2014 which is used in social work training but is rarely referred to in the court arena and has not been updated since then or since the Revised PLO. The status of any new guidance would need to be clear and adopted by the DFE/ statutory with active steps to own and embrace it across all stakeholders. As a preliminary to the preparation of such final guidance agreed principles should be articulated.

2. *A shift in culture to one of co-operation and respect that values and equally questions the contribution of all parties;*

3. *A renewed focus on pre-proceedings work and managing risk;*

4. *Develop consideration factors to support decision-making prior to legal gateway meetings*; we agree with this recommendation and the emphasis on the voice of the child. The DFE guidance Preparing for Care and Supervision Proceedings (August 2009, page 13) includes advice to invite children to PLO meetings (subject to the parents' wishes, welfare considerations and age and understanding) and any new guidance should include this again.

5. *Re-focussing the role of local authority legal advisers and the use of the legal gateway meeting*;

There is a danger that defining the role of legal advisers with an emphasis on the need to work towards staying out of court conflicts with the overriding consideration of the welfare of the child (see page 62 of the report). The report's identification of a need for a shift in the role of the legal adviser is not one which we recognise, legal advisers already operate in the manner recommended and direct the social work analysis to the key questions identified. Further, legal advisers are not social work managers and it is for the legal adviser to advise and the social work mangers to decide. The emphasis on the role of the legal adviser risks losing sight of the vital need for social work analysis and supervision.

In our experience local authority legal advisers have a brief to explore alternatives to escalation ranging from creative social work interventions to private law alternatives. The barrier identified at paras 37 and 50 is not one which we recognise.

There does need to be a clear dividing line between lawyers, whose advice is legally privileged, and social work management whose decision making needs to be transparent.

6. *Develop and share good practice in driving positive challenge with the IRO / conference chair*.

<u>Pre-proceedings and the PLO</u>

<u>Recommendations;</u>

7. *A renewed focus on the central principles in the pre-proceedings phase of the PLO*

8. *Drafting of local authority pledges or charters to families*

In our experience children often feel lost in such pledges. At j7 not much is set out as expected of the parents whilst much is expected of the local authority and this imbalance is not desirable where parental change needs to be effected to avoid the case escalating. The focus of a written agreement needs to be to foster a good working relationship with the parents and to simply set out the need for parents and professionals to work together and respect each other.

9. *Working with children, including using the FJYPB's Top Tips.*

10. *Simplifying letters to parents*

11. *Using the pre-proceedings phase of the PLO early (where required) and effectively*

12. *A standard agenda for meetings before action.*

13. *Re-focussing the role of local authority legal advisers.* Please see comments above regarding Recommendation v.

14. *Better use of assessments, services and support and fuller record keeping*

The importance of assessing sibling relationships should be highlighted here.

15. *Tracking progress of cases pre-proceedings*

We highlight here the judicial practice in a number of court centres of micro managing the LA in the management of S20 cases - an area which is outside the remit of the judiciary. Such practice undermines trust in and partnership working between the judiciary and the LA.

16. *Working with family and friends and the use of the FRG's Initial Family and Friends Care Assessment: A good practice guide (2017).*

Clarity is urgently sought in your forthcoming guidance as to the lawfulness of a local authority approaching wider family members prior to acquiring parental responsibility for the child and without any direction or declaration by a court. This is a barrier in many cases where parents decline Family Group Conferences or other approaches to their wider families. It delays contingency planning and clogs later proceedings with kinship assessments which might otherwise have been obtained earlier. If legislative change is required to allow the above we would welcome it.

We are not clear from the proposals what will be done to advise LAs as to;

1. In what circumstances they can lawfully seek out other family members and

2. What information they can then share with them.

Central to this is GDPR and social workers being anxious about any breach.

17. *Greater pre-birth preparation for new born babies*.

18. *Effecting a change in culture, with training in support.*

The proposed best practice guidance at D1 omits wider family being brought in at the pre proceedings stage. This would allow them to be part of devising the pre proceedings plan rather

than having it presented to them. In most cases this is desirable. In many cases this is part of the solution to avoid proceedings.

Further, the best practice guidance at D1 is vague. We would encourage the undertaking of a bigger piece of work to create a tool for front line use.

The longer term change at Recommendation 2 would require a statutory basis and risks placing the Cafcass officer in a position of conflict once proceedings start if s/he has supported the PLO plan. The Cafcass officer will want to be independent in any pre proceedings stage and to carry that independence through to any subsequent proceedings. Maintaining this may be difficult.

THE APPLICATION

RECOMMENDATIONS;

19. *Revision of the Form C110*

This is desirable as it is repetitious and voluminous. A form which builds on information rather than replicating it would be welcome.

20. *Greater emphasis on pleading "the grounds for the application" in the Form C110*

This is welcome. Also, we would welcome guidance that a separate schedule of threshold findings will in most cases not be required so long as the grounds for the application are set out in the C110A.

21: *Revision of the Form C110A for urgent cases/ use of an "information form" for urgent cases pending roll out of the online form.* West Yorkshire uses such a form to good effect now including focusing on whether S.20 has been explored to prevent the need for an urgent hearing.

22: *Early notification of Cafcass*

23: *Good practice guidance for courts listing urgent applications and CMHs*.

24. W*orking with health services in relation to new born babies.*

25: Including the child's birth certificate in the bundle.

26: Focussed social work evidence / the SWET for urgent applications

A separate additional short SWET is not desirable as it increases the volume of paperwork required at a highly pressurised moment in the case management by the local authority. The new style C110A should incorporate the reasons for the urgency and the legal test for removal. A short form template interim care plan is also not desirable for the same reasons. The new style C110A should incorporate a basic interim care plan unless a full interim care plan is filed on issue too.

27: Revision of the SWET generally

We are mindful that it will not be appropriate at this stage in most cases to provide the view of the IRO as the IRO may not be appointed until after the child becomes looked after in or as a result of the proceedings. The SWET is already more cumbersome than the document it replaced and needs to be more focused and to allow reference to other evidence filed to avoid repetition. Its current

structure allows rambling when what is required are; a concise focus on key alleged facts pertaining to and identifying the harm and social work analysis.

28: *A revised template for standard directions on issue*.

29: *Introduction of checklists for advocates' meetings and CMHs for practitioners and the court*

This is particularly welcome for advocates' meetings and is already in use in some areas where it is an aid to the advocates' preparation for the meeting too and the identification of issues.

30: *Circulation of case summary templates*

31: *Early and active case management*

32: *DFJ focus on wellbeing*

Whilst this is welcome it must incorporate a focus on the tone adopted by the judiciary towards professionals in the court room. Where this is humiliating, impatient and unduly critical, it has a direct impact not just on wellbeing but also upon the parents' perceptions of professionals and thus their willingness to work together outside the court room. These aspects merit more attention in the drive to focus on wellbeing. There is immense scope for wellbeing to continue to be sacrificed to achieve a conclusion within 26 weeks.

CASE MANAGEMENT

RECOMMENDATIONS

33: *Use of short-form order*

Any annexe or schedule to the order should be incorporated within it by pagination to avoid their loss or misidentification. Currently there is a repetition of information in Orders and recitals are bloated. Concision is welcome.

The appendix should be updated, where possible, by parties prior to the court hearing, and the preferred mechanism for this is by the local authority legal adviser after the advocates' meeting when filing the draft order pre hearing. This is preferred to a mechanism of each party sending in a short note of their client's position for inclusion on the appendix after the hearing and before leaving court. This only seems to be a repetition of work that the local authority legal adviser will already have undertaken by way of necessary preparation for the hearing to assist the court.

The need for the new style of orders to be understood by parents and litigants in person is essential.

34: *Advocates' meetings: using an agenda and providing a summary*

Advocates should agree at advocates' meetings the core reading list, the schedule of issues and list of agreed matters. These should be set out in the revised case summary by 11am/4pm the working day before the hearing. The proposed sheet of A4 is a time consuming duplication and complication when a concise case summary can address this.

35: *Use of new template position statements and case summaries*

Please see 43 below.

36: *Renewed emphasis on judicial continuity*

37: *Renewed emphasis on effective IRHs*

38: *The misuse of care orders*

There is evidence in Wales of care orders being granted rather than special guardianship orders because the children's guardian and judge do not trust the local authority to sustain the provision of special guardianship support services over the lifetime of the order. Also in Wales, significant numbers of children are made the subject of care orders and placed under the placement with parents provisions of the Care Planning, Placement and Case Review (Wales) Regulations 2015 although the local authority does not seek parental responsibility.

There are three references in the interim report to a 'Code' in Wales but not which one. This needs specifying as the Code to Part 6 Social Services and Well-being (Wales) Act 2014 (see pp 81; 99 and 111).

39: *Case management of cases in relation to new born babies and infants.*

40: *Experts: a reduction in their use and a renewed emphasis on "necessity".*

41: *Experts: a shift in culture and a renewed focus on social workers and CGs.*

Our perception is that Children's Guardians are often vocally appreciated by the court but social workers are not. To achieve the desired shift in culture proposed in the interim report, judicial reflection and expression are encouraged upon all the professional evidence which has assisted the court. This includes in respect of the pre proceedings work undertaken not at the direction of the court. Often this work appears 'lost' in the proceedings themselves and in any subsequent judgment. Alongside valuing the expertise of social workers, there is room for a re-evaluation of the need for directions to repeat or continue assessments in any case where there exists good social work analysis already. Often assessments are replicated or updated at the direction of the court without good cause. It is implicit in this practice that the expertise of the social worker is undervalued.

Judicial training in respect of the regulatory sphere within which social workers operate (eg. Care Planning and Case Review (England) Regulations 2010 and 2015 and the Special Guardianship and Adoption Regulations 2017 would be welcome and inform the judicial understanding of the social worker's expertise and constraints.

A further issue is the extent to which Children's Guardians can be regarded as experts when they have much reduced opportunity now to view social work files and to involve themselves directly in the work with the family whether by assessment or otherwise. They see children much less frequently than in previous decades. A renewed focus on their work is desirable but must take account of this reality.

42: *Judicial extensions of the 26-week limit.*

43: *A shift in focus on bundles: identifying what is necessary*

The proposal to add new document types to the bundle eg Case Summaries by Respondents and an A4 sheet following an advocates' meeting is at odds with the drive which we support to reduce the size of bundles and unnecessary or duplicated paperwork/information. There is a risk that focus shifts to the documentation (and its presence or absence) rather than on the issues. Further, it is not apparent that there is any issue with entrusting to the local authority the writing of an updated case summary in the new format and encompassing the positions of all parties.

44: Fact-finding hearings: only focus on what is necessary to be determined.

45: Additional hearings: only where necessary

46: The promotion nationally of consistency of outcomes.

SPECIAL GUARDIANSHIP ORDERS

RECOMMENDATIONS

47: SGO assessments and SGSPs.

We endorse the recommendations to support robust and comprehensive assessments, including the expectation that there should be adequate opportunity to develop and observe the relationship between the child and the proposed special guardians.

Where there is a need for a period of time during which the child is cared for by the proposed special guardian before a final decision is made, we would prefer a recommendation that this be done under an extension of the 26 week time limit within care proceedings. The making of a final care order in the expectation that the LA will support the carers in making an application for an SGO at a later date has the potential side-effect of depriving the child's parents of legal representation at the hearing which makes final permanence decisions about their child, including their contact. The public funding which is provided as of right in the care proceedings may not be available in the later SGO application.

It may be worth considering that where a S.31 application could result in a SGO, this is 'flagged up' at the outset so that the Court can automatically extend the Court timeframe.

It would helpful for guidance to set a minimum of 12 weeks and not more than 12 weeks for the undertaking of an SGO report.

There needs to be clarification from LAs on whether they are taking all potential Special Guardians to Foster Panel - because appeals to the Panel /ADM and reassessments - all take time.

Realistic timetabling for the provision of SGO assessments should take into account the requirement in Chapter 3 of the Special Guardianship Regulations 2005 for a draft support plan to be provided and for time to be included for representations about the support plan to be made and considered. That support plan will not be sufficiently robust unless there has been time for a full assessment upon which it can be based.

In addressing the issues arising from re P-S (Children) [2018] EWCA Civ 1407, where a special guardianship assessment is taking place at a late stage of the care proceedings and where there is no pre-existing relationship between proposed special guardian and the child, some of us believe that an order analogous with a placement order, made under s21 ACA 2005, would be the answer to the problem of over extending care proceedings. In these cases, often a period of months may be necessary to effect introductions, placement and a settling in period, before it would be safe and in the child's interests for the SGO to be made. A placement order type of order has the advantage of:

- Bringing the care proceedings to a conclusion

- Providing the local authority with overriding parental responsibility but awarding the prospective SG with limited PR from the date of placement

- The child retaining the security of being looked after for the lifetime of the order, with statutory visits and reviews ensuring a safe framework for the transition to the SGO placement

The major disadvantage of this option is, as highlighted above, the child's parents will be deprived of publicly funded legal representation and this would need to be addressed. The alternative preferred by some of us is the continuation of the ICO for the SGO report to be undertaken.

48: *Better training for SGs*

We support the recommendation for training for prospective special guardians, and suggest that engagement in training and preparation should be part of the assessment. Current timescales do not allow training to take place.

49: *A reduction in supervision orders with SGOs*

Our members report frequent use of supervision orders either because the court have some outstanding concerns about the special guardians' capacity to care for the child or because they lack confidence in the LA's support in the absence of an order. We support the proposed 'culture shift'.

50: *Renewed emphasis on parental contact*

We support the proposed emphasis on contact and suggest that this should be combined with the revision of the form of orders so that the contact plan is clearly set out in one place and in plain language. Parents' expectations of the level of contact that they might have under SGOs can often be at odds with the concept of an SGO as a permanence order, and contact plans need to accessible and comprehensible to parents and to SGOs.

Best Practice Guidance

We support the issue of the Best Practice Guidance as attached, but would suggest the addition of a reminder that the court should not routinely make SGOs of their own motion.

Longer Term Changes

Recommendation 11 On-going review & Recommendation 12 Further analysis and enquiry

The statutory framework for SGOs was set up on the assumption that SGOs were providing a legal framework for an established relationship between child and carer. The aim was to take the child out of the care system without the total severance of birth family relationships that adoption would provide and the expectation was that the carer would make an application for an SGO. The current use of SGOs rarely meets these expectations and it appears that the majority of SGOs are made of the court's own motion within care proceedings alongside the decision that the child must be removed from his/her parents. This is despite clear case law (reiterated in Re P-S) that SGOs should not routinely be made of the court's own motion.

We support the further analysis and enquiry and would welcome the opportunity to contribute to further discussions about potential legal frameworks for placement of children pending the completion of full SGO assessments.

The SGO Court Judgements research is almost complete. We understand that some of the outcomes are:

- The SGO's in the Study share an identical demographic as Placement Orders ages 2 -8.

- Where a child is aged 8+ the courts were far more likely to make a Care Order (Long Term Fostering)

- Consider the introduction of a 'floor' to the minimum age for the making of a SGO.

- SGO's were not a guarantee of keeping a sibling group together.

- There was a conversion rate from Placement Order to the making of a SGO at the Final Hearing - invariably at very short notice to all Parties

- DBS checks for everyone aged 16+ in a potential SG's household needs to be confirmed as a statutory requirement.

- For the law to be framed as to prevent side stepping the DBS issue by using S8 orders - where the proportionate order is a SGO.

- For further training at the Judicial College about the role of the ADM and the limits of judicial scope to try and change the outcome of the LA.

S 20/ S 76 ACCOMMODATION

RECOMMENDATIONS

51: *Appended guides*

At paragraph 20 of the proposed guide to good practice (page 233) it is stated that, "Separation of a new born or a young baby from her parents is scarcely appropriate under the provisions of s 20. The circumstances in which this is appropriate are very rare." The examples given of such use should also include these circumstances which are consistent with the 'no order' principle and appropriate uses of s.20;

i. Where a local authority has worked with the parent pre proceedings to assess the child's likely future care and has explained S.20 and where, upon birth, the parent on legal advice consents to the child being accommodated for a short period whilst a court hearing is arranged in a non-urgent manner. This is a common and short term usage of S.20 and important to the court for planned case management. Were this not to be acknowledged as an appropriate use of S.20, the alternative is to put parents and the local authority unnecessarily at odds in the court arena.

ii. Where a child is placed in a parent-child assessment foster care placement for around 12 weeks for the purpose of such an assessment and where the LA does not need to acquire parental responsibility. The flow chart acknowledges this but the guidance does not.

Also, regarding the use of S.20 for older children eg aged 15/16 years old, there is some guidance from the case of Re J 2017 where Peter Jackson LJ talks about whether or not a LA needs to issue care proceedings for older children with no recourse to public funds. However, there is little guidance in relation to older children presented to Legal planning meetings where they have been involved in gang activity and reprisals. Such young people are often very vocal about what they want to do and where they want to live. Sometimes they are placed under s 20 in a foster placement if that is agreed and is suitable (mainly outside the child's borough where the risks from other gang members are not present). Other times the entire family can be supported to move outside the borough and be rehoused - alongside other support and intervention from the LA. In cases, where the entire family is not willing to move, the LA sometimes places the child with a family member who can accommodate (s20) or in a foster placement or residential placement outside the borough for a short while or for a time period which is needed for any risks to alleviate. This is under s 20. Social workers are not always of the view that going into care proceedings and obtaining a Care Order always helps especially where there is no need to share parental responsibility and the child accrues leaving care rights in any event. Therefore specific S.20 guidance about its use for such young people would be welcome.

52: No time limits on s 20 / s 76 – but agreement at the start.

We offer this example - Birmingham reached a local agreement about their S20 population based on age and need. They would nonetheless go into proceedings if the situation required it.

53: Focus on independent legal advice

We support the recommendation and consider that a factor here can be the limited public funding available to parents pre – proceedings which often results in more junior members of staff attending PLO meetings to represent them legally. Also, there is an inherent tension between the advice parents seek in relation to S.20 and their lawyer's incentive to hold a public funding certificate which would be available were the parent to object to S.20 and were proceedings to be issued as a result. We believe this is a factor in the number of proceedings issued for want of an alternative solution achieved through working together with the parent.

54: *Local authority implementation of the good practice guide and a review of their functioning*

Many local authorities have template s 20 documents which they discuss with and give to parents to sign (with legal advice but sometimes without if there is no lawyer acting for the parents at the time). It is a useful exercise to produce a jointly agreed template document between Local Authorities, and lawyers acting for the parents and perhaps with input from children's solicitors and the court too.

55: On-going training / education on the proper use of s 20 / s 76

The recommendation that training and the material for training should have a national oversight and coordination to ensure consistency does not sit easily with the autonomy of local authorities. It is not clearly made out why such centralised oversight is justified and why the proposed guidance and best practice cannot achieve the required objectives alongside a local authority's internal training.

This is part of the ongoing issue of a loss of trust by the judiciary in the work of the LA. Where there is a positive working relationship between the judiciary and the LA (Relationship based practice) there is much to be gained. 1st line team managers need to be skilled in understanding and applying S.20 so that they can make accurate and confident decisions without delay.

56: *A process of feedback and review on the proper use of s 20 / s 76*

This recommendation and the appended draft guidance are not a substitute for updated statutory guidance which is advisable and which would be informed by evidence. Without that there remains the risk of inviting more applications to court when local authorities do not feel that the use of S.20 is permitted or when they are placed under pressure by local Family Court judges who have imposed 'local' Key Performance Indicators to provide reasons why a LA should / should not be making an application to court.

57: *Further consideration of and guidance on s 20 / s 76 and significant restrictions on a child's liberty*

CONCLUSION

By way of closing observations, we consider that there is very little focus in the Interim Report on the factors leading to the rise of children in care/number of proceedings being issued. Making specific recommendations without looking more carefully at that context is not evidence based. This was examined as part of the Care Crisis Review – report here: https://www.frg.org.uk/images/Care_Crisis/Care-Crisis-Review-Factors-report-FINAL.pdf

Further, the evidence base for advancing certain matters (eg. the practice at Brighton and Hove) is not made out and yet is indispensable for developing and disseminating best practice.

The thrust of the Interim Report very much finds favour with us and this is apparent from those recommendations listed above on which we do not feel we need to comment.

Finally, we note and approve the blog of Yvette Stanley (OFSTED) of 5 August 2019 as follows;

Why is good pre-proceedings work important?

The family justice system has been under phenomenal pressure over the past few years.

Since the death of Baby Peter Connelly, we've seen a rise in applications for care orders. At the same time, the time frame that cases should be completed within has been reduced. In short, there's more work in the system, with less time to do it. And, as ever, there is the need to do it carefully and well.

Good pre-proceedings work helps to ease this pressure. It helps some families turn their lives around and keep their child safely at home, diverting cases away from court entirely. Or when court is the only option, it makes sure that cases are well supported and properly evidenced so that they can conclude quickly, with as little disruption for children as possible.