

Local authority input into private law proceedings

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many public law cases. At the interim stage of public law care proceedings, it may be necessary for the relevant child to be placed with a family member whilst the parents undertake assessments and in such circumstances, an order regulating with whom the child is to live¹ may be regarded as sufficient to regulate the living arrangements of the relevant child. Further, at the conclusion of proceedings it may be that the court does not find that the final threshold criteria are met to warrant a public law order or perhaps, the local authority is not advancing a case that a public law order is necessary or proportionate and as such, a parent may seek a private law order to regulate the final child arrangements.

Broadly speaking, within the private law areas there are many different ways in which a local authority may become involved in the proceedings. For example, they could be made a party to the private law proceedings, they may themselves issue public law proceedings whilst the private law proceedings are extant, or be required to formulate a welfare report or s 37 report (more of which will be considered in this article).

Private and public law proceedings are two different areas of the law relating to children, both of which are governed by the Children Act 1989. The areas can overlap with one another for a variety of reasons. This article will touch upon some of the circumstances in which local authority involvement (public law) becomes relevant within private law children proceedings.

From the outset, it must be appreciated that private law considerations are relevant in

A welfare report

A welfare report under s 7 of the Children Act 1989 is a common direction which can cause a local authority to become involved in a private law case. Before a s 7 report is contemplated by the court, the way in which private law proceedings are initiated is an important consideration. In practice, private law proceedings are initiated by a person with parental responsibility applying to the court for a Child Arrangements Order using

¹ Section 8 (1) (a) Children Act 1989

In Practice

a C100 application form.² Within the C100 application form there is a box which can be ticked in order to alert the court that there has been previous local authority involvement.³ In practice, typically 17 days before the first hearing termed a First Hearing and Dispute Resolution Appointment ['FHDRA'], Cafcass will complete their safeguarding checks. Cafcass may also be in attendance at the FHDRA to speak to the parties and will provide confirmation of their safeguarding checks and be available to the court during the course of the hearing. An important feature of the safeguarding letter is to outline what recommendations Cafcass make to the court but also the outcome of the safeguarding letter will briefly outline whether and to what extent there has been local authority involvement with the family and how recent this involvement is.

In terms of s 7 welfare reports, the statute specifies the following:

'Welfare reports.

- (1) A court considering any question with respect to a child under this Act may—
- (a) ask [F1an officer of the Service][F2or a Welsh family proceedings officer] ; or
 - (b) ask a local authority to arrange for—
 - (i) an officer of the authority; or
 - (ii) such other person (other than [F1an officer of the Service][F2or a Welsh family proceedings officer]) as the authority considers appropriate,

to report to the court on such matters relating to the welfare of that child as are required to be dealt with in the report.

...

- (3) The report may be made in writing, or orally, as the court requires.'

In private law proceedings a s 7 report can be undertaken by Cafcass but can also be undertaken by an independent social worker in particular cases (where a Part 25 FPR application is made and granted) or by a local authority. The report will contain information and analysis flowing from all the information the author of the report will have received as well as what they have gathered themselves in the course of discussions with the parties. The author will consider a number of factors, such as ascertaining the child's wishes and feelings, considering the concerns of the parents and will ultimately use the information to formulate a recommendation as to what they consider to be in the best interests of the child/children. In terms of the stage of proceedings at which a s 7 report is directed, it is typically at the FHDRA or after a fact-finding hearing. Within the order, the court will often specify the precise areas which the author of the s 7 report should analyse and consider.

To provide further context to the importance of s 7 reports, it is to be noted that less than a decade after the enactment of the Children Act 1989, Waite LJ stated in *Re W (Welfare Reports)* [1995] 2 FLR 142 in respect of s 7 reports (at paras [145] and [146]):

'That is a power which clearly provides the court with at least two sources of reporting expertise. One is the court welfare service. The reporting officers of that service are social workers for the purposes of s 7. The other is more widely cast. It is a category that may include local authority social workers or other persons or officers selected by local authorities. In the nature of things, the degree of expertise as between those two different categories of social worker is bound to vary a good deal. Welfare officers, in the nature of their duty, are accustomed to the court process, to interviewing

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2 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/874364/C100_eng_0818.pdf

3 Section 1a of the application form asks if any of the children are known to the local authority and section 1b asks whether the children are subject to a child protection plan.

the child and the adults concerned in the child's life, to attending court, to making recommendations orally or in writing and to submitting to be questioned by the parties. Social workers, on the other hand, are familiar with the reporting routine in the much wider context of preparing reports for use at case conferences and for placing on file for the assistance of other social workers, and so on. Their knowledge of the court process may be much more limited, and frequently their role will be confined to fact-finding reports, and will not involve the making of any recommendations at all'

Further observations were made by Wall J (as he then was) in *W v Wakefield City Council* [1995] 1 FLR 170 (at para [175]) :

'This section goes a long way to bridge the gulf between private and public law proceedings. In a private law case where a local authority has been involved, and evidence from the local authority is relevant, the proper course is for an application to be made to the court hearing the private law proceedings for a report under s 7, which the local authority is duty-bound to provide.

Whilst it may not thereafter follow that the local authority will wish to intervene in the private law proceedings or become a party to them, it is inconceivable that once the report is available the local authority will not itself make the author of the report available for cross-examination and/or will refuse discovery of relevant documentation underlying the report itself. I have never found when I have made orders under s 37 that a local authority which is required to assist the court under that section has in any way sought to refuse co-operation by way of evidence or documentation and although I have myself never made an order under s 7, I would be very surprised if any local authority declined, as I say, to

produce the author of the report to give evidence or to give underlying discovery.'

Expanding upon the above, the author of a s 7 report could be subject to scrutiny and cross examination at the final hearing if one party does not agree with the analysis / recommendations. However, as Waite LJ stated in 1995, the question of whom should undertake a s 7 report is very much dependent upon the degree of expertise required (or perhaps, previous knowledge of the family). A s 7 report is vitally important in private law proceedings as they will contain important recommendations for the welfare of the child, although a court is not bound by the recommendations they are an important piece of the evidential jigsaw before the court when it comes to make a final order. Therefore, in deciding who should write the report, i.e. Cafcass or a local authority, the court may be asked to consider the options and the benefits which one or the other could bring to the particular case.

A local authority is often directed to carry out the s 7 report where a family is known to them. A local authority who has previously dealt with a family may be better placed to undertake a report in a speedy manner where they hold information on the family, which would perhaps prevent any delay which is likely to prejudice the welfare of the child⁴, albeit this is not necessarily always the case. If there has been local authority involvement with the family, compelling arguments can be made as to why they should undertake the s 7 report. A family may be known to the local authority for a number of reasons, for example there may have been previous public law proceedings: the child may have been or is currently subject to assessments; or the child may be a 'child in need' or subject to child protection plans.⁵ Where there has been local authority involvement with the family previously, there will likely have been an

⁴ Section 1 (1) (2) Children Act 1989 states in any proceedings in which any question with respect of the upbringing of a child arises, the court shall have regard to the general principle that any delay in determining the question is likely to prejudice the welfare of the child.

⁵ Section 17 Children Act 1989

allocated social worker on the case. The local authority will also have easy access to their records and have worked with the family before in the form of assessments and will be more familiar and able to deal with the relevant issues which caused the proceedings to reach the doors of the court in the private law context.

Where PD 12J is in play

A local authority may also be directed to undertake a s 7 report further down the line of proceedings where PD 12J is in play. For example, Cafcass may recommend a fact-finding hearing be undertaken at the FHDRA in light of allegations raised by either or both parents. The court will be guided by the extensive provisions within PD 12J before deeming a fact-finding hearing necessary. The following provisions within PD 12J are relevant when considering a s 7 report:

PD 12J:

‘21 In any case where a risk of harm to a child resulting from domestic abuse is raised as an issue, the court should consider directing that a report on the question of contact, or any other matters relating to the welfare of the child, be prepared under s 7 of the Children Act 1989 by an Officer of Cafcass or a Welsh family proceedings officer (or local authority officer if appropriate), unless the court is satisfied that it is not necessary to do so in order to safeguard the child’s interests.

22 If the court directs that there shall be a fact-finding hearing on the issue of domestic abuse, the court will not usually request a s 7 report until after that hearing. In that event, the court should direct that any judgment is provided to Cafcass/CAFCASS Cymru; if there is no transcribed judgment, an agreed list of findings should be provided, as set out at paragraph 29.

23 Any request for a s 7 report should set out clearly the matters the court considers need to be addressed.’

Either after a FHDRA stage or after a fact-finding hearing, the court may be sufficiently concerned with the information reported or findings made to direct a local authority to undertake a section 37 report. This will be directed by the court where it feels that it may be appropriate for a care or supervision order to be made. The court may direct the local authority to undertake an investigation of the child’s circumstances,⁶ for example, if the allegations or findings made are concerning. The local authority will then have to consider whether to (a) apply for a care order or for a supervision order with respect to the child; (b) provide services or assistance for the child or his family; or (c) take any other action with respect to the child. This shall be given to the court before the end of an 8-week period from the direction being made unless the court directs otherwise⁷ and if the local authority decides not to apply for such an order, they must provide reasons to the court.⁸ It may be that upon being made aware of the concerns from the court that a local authority may feel that threshold is crossed for it to apply to the court for a public law order.

Family Assistance Orders

Within the private law arena, there can also be Family Assistance Orders (‘FAO’) pursuant to s 16 Children Act 1989⁹ which can be a recommendation that the local authority make within the s 7 report in conjunction with a private law order. A direction for a FAO can be made requiring a Cafcass officer or a social worker within a local authority to be made available to advise, assist, befriend any person named in the order. That person could be a person with whom the child lives such as a parent, a guardian or the child themselves and the order can be made to last for up to 12 months. Before a FAO can be made, every

6 Section 37 (1) Children Act 1989

7 Section 37 (2) & Section 37 (4) Children Act 1989

8 Section 37 (3) (a)

9 Section 16(4A) Children Act 1989 sets out the provisions relating to contact under a FAO

person named in the order (apart from the child) must consent and a FAO therefore cannot be made against a local authority unless they agree and the child concerned lives or will live within their area¹⁰ (s 16(7)). The assistance contained within a FAO is similar to that of a supervision order, however there is no need for any threshold to be established as there would be within the context of a public law order.

Turning to some analysis of recent cases in which public and private law considerations have arisen in tandem:

Case 1: *A Children's Trust v K* [2020] EWHC 861 (Fam)

Issue: wasted costs and s 7 reports

Facts:

- Each parent sought an order that the child lived with them, with the mother also applying to relocate to Canada.
- The local authority was directed to complete a s 7 report addressing the seven issues which remained between the parties.
- The social worker who completed the s 7 report fell ill prior to the final hearing and thus the hearing was adjourned and the team manager was directed to complete an addendum s 7 report on issues which had arisen during contact.
- During the course of the team manager's evidence at the adjourned final hearing, it became clear that she had not prepared for the hearing by reading the statements or giving consideration to the issues that were identified in the original order for a s 7 report. The s 7 report addressed the question of relocation in the briefest of terms and did not deal with critical aspects of welfare related to relocation. Nor did it deal with critical issues relating to the competing 'live with' applications. The team manager was clearly not prepared so as to be able to fill those gaps. The original social worker had been given a more

discrete s 7 function and so her inability to answer questions relating to the relocation or the live with order was not surprising.

- At the conclusion of the hearing, the judge at first instance directed Cafcass to complete a s 7 report, due to the fact (recited in the order) that "the quality of the social work evidence is so poor that the court is unlikely to be able to place any weight on those reports or Ms Y's and Ms Z's [the team manager and social worker respectively] oral evidence. As a result the court considers that it requires a further s 7 report prepared afresh and independently of the local authority in order to assist the court to determine the parents respective applications."

Analysis

1. It is worth noting as a starting point his lordship's explicit call for this case not to be cited as authority for the proposition that s 7 reporters are by reason of that status alone, within the reach of a non-party costs order.
2. Usefully, the case highlights the care and attention to detail that should be paid by local authorities when they are directed to complete s 7 reports in private law proceedings. Of particular importance is the need for team managers, if called to speak to the report of a social worker, to have considered themselves the issues raised as well as all of the written evidence before the court prior to giving their oral evidence.
3. As to the making of a costs order against a local authority, this case must be read on its specific facts. Of particular note on appeal was the concession in the local authority's own skeleton argument that its conduct had fallen short of what was to be expected and that the quality of the written and oral evidence also fell short of what was reasonably to be expected.
4. The standard for an order for costs

¹⁰ Section 16 (7) Children Act 1989

against a non-party remains high. In *Re OB (Private Law Proceedings: Costs)* [2013] EWHC 1956 (Fam), [2016] 1 FLR 92, Cobb J characterised the failings as ‘not minor, they are extensive, and have had a profound effect on the conduct of the proceedings . . . they have failed fundamentally to investigate, address or analyse the serious issues in the case’. This is necessarily a high bar to hurdle. In this context, Williams J (as did Cobb J in *Re OB*) felt that the failings did fall within the scope of reprehensible or unreasonable conduct, such as to justify an order for costs.

Case 2: *Re C (a child)* [2016] EWFC 3

Issue: quality of s 7 reports written by local authority social workers

Facts:

- The child ‘C’ had been living with a maternal aunt for three years when the father applied for C to live with him (the mother lived in Mozambique and supported C staying with his aunt).
- The aunt cross-applied for a Special Guardianship Order.
- In 2014, the local authority had completed a s 47 investigation following a referral from C’s school that C had been hit with a slipper by his aunt. At this point, C was assessed for ADHD and the aunt attended various courses to support those caring for a child with ADHD.
- C had complex needs, including moderate to severe ADHD, global developmental delay and dyslexia. He needed stable and consistent routines and had one-to-one educational intervention 4 times each week.
- A social worker completed a s 7 report and two addendums.

MacDonald J made the following observations about the methodology adopted by the social worker and the resulting complications in producing the report:

1. In February 2015, the initial s 7 report was directed to be completed. In July 2015, an addendum was ordered when it became clear that the author of the report ‘had not spoken to the partners of each of the parties seeking care of C, to C’s teacher nor to the SENCO worker allocated to C nor secured Police checks in respect of the adults involved’. (at para [34])
2. In September 2015 a further addendum report was ordered when the social worker had failed to include the information identified to be covered in the second addendum report and it further emerged that she had not yet spoken to C alone. (at para [34])
3. The social worker was newly qualified, this was her first s 7 report. The social worker confirmed in her oral evidence that ‘her academic studies (a BSc in social work) did not cover the preparation of s 7 reports. She further made clear that the training afforded to her by Newham in preparation for completing what was to be her first s 7 report, comprised a ninety-minute discussion with her supervisor’. (at para [35])
4. The social worker appeared to lack ‘even a basic understanding of the nature of the proceedings in which she was being asked to provide a report’. (at para [35])
5. There was a substantial delay in the local authority’s legal department even communicating the need for a s 7 report to the social worker, thereby giving someone ‘who was already prejudiced by her lack of experience’ even less time to complete a complex piece of work. (at para [37])
6. AND – ‘Finally, it is important, and indeed concerning, to note that each of the social worker’s reports were signed off by her supervising Practice Manager as meeting the standards required by the court following a discussion between them. In the circumstances, the mistaken view of the social worker that she was doing that which was required of her was further amplified and reinforced by

her supervising Practice Manager. This, perhaps and in part, explains the social worker's repeated failures to comply with the express directions of the court'. (at para [38])

On the content of the report itself, MacDonald J remarked:

1. That the report contained "a significant number of factual errors, contradictions and omissions. These include the periods of time that C has been in the care of the aunt. Of even greater concern, and quite inexplicably, the social worker did not speak to the mother of C, or make any attempt to speak to her, before reaching her conclusions and filing her substantive report."
2. Further, "the account of the family set out at the beginning of the report simply makes no mention of the mother at all. In addition to being extremely poor practice this had significant forensic consequences. In particular, it meant that the report did not consider the significance of the mother's allegations of domestic violence and relied solely on the father's account of the history of the parents' relationship. Further, when pressed in cross examination by Mr Woolley, the social worker had to concede that even now that she is aware of the issue of domestic violence she has not sought to investigate that issue further with the parties. She likewise conceded that she had not discussed with the father his motivation for making his application nor had she discussed with him his removal of C from the aunt's care in February 2015." (at para [40])
3. AND, "The social worker's substantive report contains only the most cursory examination of the factors set out in the welfare checklist. Whilst C's wishes and feelings as expressed to the social worker are set out (about which I will say more below) they are not analysed in anyway by reference to

C's age and understanding or in the context of his ADHD or family situation. C's health needs are summarised as being "ADHD" with "no other concerns". There is no mention of C's global developmental delay, the consequences of his medical conditions or the nature and level of support in place in respect of the same. In relation to the effect of a change of circumstances on C the social worker simply concludes that "if given time to prepare for a change in circumstances C will be able to prepare and adapt" but offers no explanation of why she reaches such conclusion. In respect of the capability of those seeking to care for C in respect of the father the social worker's conclusions are limited to noting that the father and his partner are "aware" of C's health and education needs, have identified a school for C and "report that they have routines and boundaries in place when C visits and these would be in place if he lived with them permanently". (at para [41])

4. FINALLY, the social worker's report contained no parallel welfare analysis of the competing options for C's care. (at para [42])

Analysis:

1. In relation to the welfare checklist:
 - a. With respect to the specific factors set out in the statutory 'welfare checklist' in the Children Act 1989, s 1(3), the wishes and feelings of a mature child do not carry any presumption of precedence over any of other the other factors in the welfare checklist (*Re P-S* [2013] EWCA Civ 223, [2014] 2 FLR 27). The weight to be attached to the child's wishes and feelings will depend on the particular circumstances of each case. In particular, having regard to the words of s 1(3)(a), it is important in every case that the question of the

- weight to be given to the child's wishes and feelings is evaluated by reference to the child's 'age and understanding'.
- b. The court is required to consider the effect of any change in the child's circumstances. In the same way that the fact that a person is a natural parent does not in itself create a presumption in favour of that person, the fact that a child has been living with a person for a significant period of time does not create a presumption in favour of that person. However, when considering the outcome that best meets the child's welfare needs the court should also consider, as an element of its analysis of best interests, the extent to which it is desirable to maintain C's current status quo (see *Re E-R (Child Arrangements Order)* [2015] EWCA Civ 405, [2016] 1 FLR 521 at [35]).
 - c. The court (and therefore the author of the s 7 report also) must consider the range of orders available to the court under the Children Act 1989 in these proceedings.
2. The Supreme Court has made clear on a number of occasions that all consideration of the importance of parenthood in private law disputes must be firmly rooted in an examination of what is in the child's best interests. Pursuant to s 1(1) of the Children Act 1989, that is the court's paramount consideration (see *Re B (A Child)* [2009] UKSC 5, [2010] 1 FLR 551 at [37]).