UKIP PARLIAMENTARY RESOURCE UNIT

Opening Up the Family Courts

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This is the first of a series of Occasional Papers to be published by the UKIP Parliamentary Resource Unit (UKIP PRU). It is written to support the work of the UKIP Parliamentary party and to contribute to policy debate and development. Views expressed are those of the author(s) and do not necessarily reflect those of Douglas Carswell MP or the policy of UKIP.

I. Summary

The power of the British state to remove a child from the custody of its birth parents, which can culminate in a full adoption by others, is one of the most severe of any country in the world. More often than not, local authorities' social services departments and family courts of this country act in the best interests of the children in question. However, in some cases, children are removed from their birth parents unnecessarily, resulting in emotional distress for both children and families, and on occasion instances of abuse in foster care.

These failures in the care and adoption system are made possible, in part, by a lack of transparency in family courts, which protects the testimony of professional (local authority) witnesses from public scrutiny, and denies families full knowledge of the evidence used against them. This paper will assess the severity of the problem arising from the lack of transparency, previous attempts to tackle it and our proposals for reform.

There is also a danger that government pressure to increase adoption numbers causes local authority social workers to prioritise adoption rather than the best interests of the child.

II. The Current Process

There are several legal avenues by which the state can remove a child from the custody of its birth parents. All of these require the approval of the Family Court, created in 2014 from the merging some functions of County Courts and Magistrates' Courts.[1] Such orders rely on evidence from local authorities and others in their support, notably medical professionals and psychologists.

The most common route entails the issue of a care order by a family court on the request of a local authority. The basis for the issue of a care order is that the child is suffering, or is very likely to suffer, significant harm. When a care order is granted by the Family Court, the requesting local authority assumes parental responsibility over the child or children involved. A care order can then last up to the age of 18.[2]

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1 "Confidentiality and openness in the family courts: current rules and history of their reform", House of Commons Library, 18/9/15

2 https://www.citizensadvice.org.uk/relationships/children-and-young-people/child-abuse/court-orders-to-protect-children/care-orders-in-child-abuse-cases/

In tandem with a care order, the Family Court may also issue an emergency protection order if a child is considered to be in imminent danger. Such an order entails the immediate removal of a child from the family home for a maximum of 15 days.[3]

A further route is the issue of a supervision order, which allows a local authority's social services department to monitor a child if the local authority is concerned that the child is at risk of significant harm in the home[4]. Breaches of terms by parents can cause this to convert to a care order, thus removing the child from the parents' custody in many cases.

Ultimately, a court may issue an adoption order, in most cases depriving birth parents, and potentially grandparents, of further contact with a child in favour of its now adoptive parents.

The overarching data shows that just under 70,000 children were looked after by local authorities in England, of whom 75% are in foster care placements in 2015.[5] 3,320 were placed for adoption, representing 4.8%[6]. Governments past and present have remained committed to the notion that adoption is the best option for children in care, with then education secretary Michael Gove introducing guidelines for completing an adoption within six months.[7] Yet the focus on targets and raw numbers ignores the differing needs of the child and their stage in life, potentially influencing local authorities and the family court system into doing what may be the wrong thing for the child to help meet adoption order targets. It is important to understand that infants, where adoption may be more likely, represent only a small proportion of children in care.

To better understand the scale of forced adoptions, we sent freedom of information requests to every local authority in England and Wales responsible for children's social care. The FOIs asked about the number of care orders, emergency protection orders and supervision orders asked for in each local authority, how many of these subsequently became adoption orders,

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3 https://www.citizensadvice.org.uk/relationships/children-and-young-people/child-abuse/court-orders-to-protect-children/child-abuse-emergency-protection-orders/

4 https://www.citizensadvice.org.uk/relationships/children-and-young-people/child-abuse/court-orders-to-protect-children/child-abuse-supervision-orders/

5 Page 5, "Children in care in England: Statistics," House of Commons Library Briefing Note

6 Page 9, Ibid.

7 http://www.telegraph.co.uk/women/mother-tongue/familyadvice/11223566/The-adoption-crisis-is-a-legacy-of-target-culture.html

the criteria used, and the processes in place for families affected by them. So far, a response has been received from 22 councils. Very few councils gave figures specifying when requests for these order had been successful and unsuccessful. East Riding of Yorkshire Council, however, had 82% of their care order requests approved between 2011 and March 2015.

Information was not forthcoming on how many occasions professional witnesses had been used in family court cases, with reasons ranging from the data not being centrally held or that it breached the 18 hour limit for answering FOI questions. The exception so far was Halton Borough Council, which showed 390 occasions where expert witnesses had been called, between 2011 and March 2015. Equally, asking about the processes the council uses when an order is unsuccessful prompted answers which were vague and often referred to legislation, or only stated that it depended on the circumstances of each child.

An annual study has been produced as to the numbers of children going into care aged under 5 and those leaving care under 5, looking at their destinations. These figures are available from 1995 to March 2014. In the most recent year that is available, of the 8,200 children under 5 that left care, 3,700 were adopted. This means that 45% of under 5s that leave care are adopted, making it the most common outcome for children leaving care in infancy.

III. Flaws in the Current Process

The issue of an adoption order should require the highest level of evidence. However, the precise nature of the evidence on which such orders can be made is often unclear. A Court of Appeal judgment from 2013 expressed "real concerns…about the recurrent inadequacy of the analysis and reasoning put forward in support of the case for adoption, both in the materials put before the court by local authorities and guardians and also in too many judgments. This is nothing new. But it is time to call a halt."[8]

Family Court proceedings lack transparency. While media access was relaxed under the Family Procedure Rules of 2010, it remains severely restricted.[9] Anyone entitled to be at a hearing (namely, the family and children involved) can ask for the media to be excluded, and

8 Re B-S (Children) [2013] EWCA Civ 1146 (http://www.familylawweek.co.uk/site.aspx?i=ed117048)

9 The Family Procedure Rules 2010 are wide-ranging and focus in part on media attendance. These built on the Family Proceedings Courts statutory instruments which were introduced by Jack Straw in 2009. In part, they were a response to Camilla Cavendish July 2008 'Family justice' in The Times, which criticised the family court system for relying too readily on experts' potentially 'fatal lack of objectivity'.

the court retains the power to exclude the media. We are particularly concerned that there is a blanket prohibition on the media attending placement or adoption order proceedings.[10]

Those who testify on behalf of local authorities, particularly social workers and medical professionals, can also generally expect to retain anonymity through the court process. This can hinder their being held to account. Even where identification is allowed in the limited number of judgments published, the generality of professional and expert evidence, as well as the written reports they cite, will remain hidden from public view.

One particular concern is that medical professionals testifying on behalf of the local authority do not always operate with full knowledge of the child's situation. The case of Fran Lyon highlighted that it is possible for an adoption order to be granted without the testifying medical professionals having met the family and child concerned.[11]

Large annual fluctuations in the number of adoption orders requested and granted also raise the question as to whether local authorities and courts are acting on the basis of consistent standards. In the year ending 31st March 2014, 5,050 children, ie. under 18, were adopted from public care, representing an increase of 58% from 2010. Of these, 96% were completed without parental consent, an 11% increase since 2010. [12]

Such changes in the prevalence of adoption may indicate that decisions have not been made consistently. In any event, the sharply rising incidence of so-called "forced adoptions", i.e. without the consent of birth parents needs to be closely and publicly scrutinised. That requires much greater public openness from the family courts.

A further problem in the system relates to solicitors' potential conflicts of interest in the family court system. Solicitors may represent a family contesting a care order, as well as in other cases previously or subsequently representing the local authority opposing them in another case. The Law Society says that this is a permissible practice.[13] However, the economic imperative for solicitors' firms is likely to be maintaining good relations with councils, which may instruct them again and again, rather than families passing through the system. At a

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10 "Confidentiality and openness in the family courts: current rules and history of their reform", House of Commons Library, 18/9/15

11 "Family Justice: your word against theirs", The Times, 9/7/08. Ms. Lyon left the UK and is now living with her daughter in Sweden.

12 Page 20-21, http://www.europarl.europa.eu/RegData/etudes/STUD/2015/519236/IPOL_STU(2015)519236_EN.pdf

13 https://punishmentwithoutcrime.wordpress.com/about/our-mps/john-hemming-mp/

minimum, this points to the need for transparency at all stages of the process which lead to an adoption order.

A need for finality in the interests of the child is understandable. However, the restrictions on appealing adoption orders make it difficult to correct instances of injustice. This was exemplified in the case of Webster v Norfolk, in which, three years after the adoption, experts argued that the children's injuries were the result of nutritional difficulties, rather than abuse. The courts found that even if a serious injustice had occurred, public policy considerations prevented overturning adoption orders.[14] In a separate case, Norfolk County Council was criticised for wrongly placing a child on the child protection register, on the basis of treating rumours about the mother's mental health as fact. Then in October 2015, a couple who had their child taken into care and subsequently adopted were found not guilty of causing injuries to their child. This situation would not have arisen if the family courts had permitted evidence that would have cleared them, their barristers insisted.[15] This helps to illustrate that the quality of evidence must always be as sound as possible, when a local authority is purportedly tending to the best interests of the child.[16]

The family court system also makes relatively little use of Special Guardianship Orders (SGOs). These are less final than an adoption order, since they do not sever the legal relationship between the birth parents and a child.[17] The links with a birth family may be maintained, and a child can often by placed with an extended family member. If the local authority was responsible for the child, through a care order, prior to an SGO being made, that care order ends, although the local authority may monitor the SGO arrangement.[18] The SGO will generally conclude when the child turns 18 and parents retain the right to consent (or not) to a child's placement for adoption.[19] SGOs may offer a better alternative for some children (for example, those in adolescence) than full adoption, while maintaining some birth family link.

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Page 19, http://www.europarl.europa.eu/RegData/etudes/STUD/2015/519236/IPOL_STU(2015)519236_EN.pdf

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http://www.thetimes.co.uk/tto/news/uk/article4581926.ece

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http://news.bbc.co.uk/1/hi/england/norfolk/6243155.stm

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http://www.familylives.org.uk/advice/your-family/fostering-adoption-kinshipcare/special-guardianship-orders/

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Page 7,
"http://webarchive.nationalarchives.gov.uk/20130401151715/http://www.education.gov.uk/publications/eOrderingDownload/2030-2005PDF.pdf"

19
Ibid.

IV. Previous attempts to reform the system

The recognition that professional witnesses' anonymity and the restrictions on publication around family court proceedings may undermine justice in the family courts is not new. The Rt. Hon. Jack Straw, as Secretary of State for Justice, sought to make the family courts more transparent and to relax reporting restrictions on their proceedings. Unfortunately, his civil servants frustrated his intentions, with the Newspaper Society later observing that "the intention of increased transparency has been lost in the Act's drafting".[20] The relevant part 2 of the 2010 Children, Schools and Families Act was then never commenced, and was eventually repealed by the Crime and Courts Act 2013.

There have also been calls for greater transparency from within the judiciary. In January 2014 Sir James Munby, President of the Family Division of the High Court, published new guidance on the publication of Family Court judgments,[21] although it does not apply to the large number of district judges who hear family cases. One authoritative analysis of this guidance concluded "for those judgments to which it does apply there will now be mandatory publication of anonymised judgments where, in the view of the judge, there is a public interest in doing so".[22]

However, this is not wholly reassuring, since publication will not be "mandatory" but at the discretion of individual judges, and other voices within the judiciary have been less sympathetic to greater transparency. Sir Mark Potter, predecessor to Sir James Munby, has stated that the notion that highly contentious cases "would have been avoided by the presence of the press when the evidence was given is highly questionable."[23] Moreover, in a survey of judges the Ministry of Justice previously found that 73% of judicial responses opposed greater media access to family courts.[24]

Sir James Munby's guidance also states that "public authorities and expert witnesses should be named in the judgment approved for publication, unless there are compelling reasons why

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20 Evidence to the Justice Select Committee "Operation of the Family Courts" 2011

21 Practice Guidance: Transparency in the Family Courts – Publication of Judgments [2014] 1 FLR 733

22 Halsbury's Law Exchange "Pulling back the curtain of privacy in family and Court of Protection proceedings" 23/012014

23 [15] "Family justice is private – not secretive", The Times, 11/9/08

24 Page 29, "Family Justice in View" Cm 7502 12/08

they should not be named" but, again, this remains at the discretion of the individual judge. The conclusion that 'this is intended to include social workers because "anonymity in the judgment as published should not normally extend beyond the privacy of protecting the privacy of the children and adults who are the subject of the proceedings and other members of their families" may also not be widely followed by other judges.[25]

The issue of anonymity for professional and medical witnesses was also considered, both during the passage of the 2010 Children, Schools and Families Act and later by the House of Commons Justice Select Committee. The last Government accepted the 2011 recommendation of the House of Commons Justice Committee to retain professional anonymity, on the basis that doing otherwise might jeopardise children's ability "to give vital information to family justice service professionals"[26]. The Justice Committee in turn cited evidence given by the Royal College of Paediatrics and Child Health stating "our paramount principle is that a child's welfare must be maintained ... openness and transparency is a secondary priority"[27]. Our concern is that a lack of openness and transparency can allow decisions to be made contrary to children's welfare, without those involved being held publicly accountable.

The only study of which we are aware into the quality of expert evidence in the family division was performed by Professor Jane Ireland in 2012. It found that two thirds of expert psychologists' reports were rated poor or very poor.[28] It is clear that greater scrutiny of expert evidence is needed.

We welcome the President of the Family Division's latest consultation paper on transparency in the family courts.[29] However, we believe that in some areas we should go further still, and we are concerned that it is over a year since it has been published with no follow-up to date.

25 Halsbury's Law Exchange "Pulling back the curtain of privacy in family and Court of Protection proceedings" 23/012014

26 "Confidentiality and openness in family court", House of Commons Library, 7/1/13

27 Operation of the Family Courts, House of Commons Justice Select Committee 2011

28 Page 3, http://www.ccats.org.uk/images/Expert%20Witness.pdf

29 "Transparency - the next steps: A Consultation Paper issued by the President of the ~Family Division" 15/08/14

Therefore, we propose:

1. Promote more extensive use of Special Guardianship Orders, particularly where a child is made a ward of an extended family member, such as a grandparent.

2. Open placement and adoption order proceedings to the media on the same basis as other family law proceedings.

3. Introduce a presumption to allow reporting of Family Court proceedings on an anonymised basis (e.g. Child A, the mother of Child A).

4. Mandate publication of all judgments (those from district judges on application and subject to a fee), except where the presiding judge seeks and obtains a contrary order from the President of the Family Division.

5. Mandate that all local authority witnesses, including social workers as well as expert witnesses, be identified by name and position(s) held.

6. Require expert witnesses to list previous court cases in which they have given evidence, on application and subject to administrative costs.

7. Publish, on an anonymised basis, all statements of case, skeleton arguments, case summaries and other documents prepared and exchanged by the advocates in a case.

8. Allow media access to expert reports on an anonymised basis, with reporting restrictions imposed only in exceptional circumstances.

9. Allow unrestricted access to expert reports to academics for peer review on the condition that any research papers written as to the quality of reports are anonymised.