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The lure of the s38(6) placement over the Regulation 24 'risk'

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The lure of the s38(6) placement over the Regulation 24 'risk'

There is an increased tendency in public law cases for local authorities (LA's) to propose the placement of children with family members under s38(6) placements rather than as them as temporary foster carers. The law with respect of this area is rather complex and as the outcome is realistically the same (child with a family member under an interim care order) many lawyers tend to not argue against such a placement.

However, this article aims to consider the rules behind temporary foster carer approval and why the overuse of s38(6) assessments is often the result of a misunderstanding or misapplication of the relevant regulations.

Legal position on placements

When a child is placed into the care of a LA, they have a duty to accommodate them. The LA first has to give preference to placing with a parent, a holder of PR or someone who had a child arrangement order made prior to any ICO.[1] Inevitably this does not apply if the LA determines this is not consistent with their welfare.[2] If such a placement is not possible then they are required to *'place C in the placement which is in their opinion the most appropriate placement available'.*[3] The list of appropriate placements specifically includes relatives and friends, in addition to placement with a LA foster parent. The LA is obliged to *'give preference to a placement'*[4] with family members save in very unusual circumstances.

Local authorities specifically have duties for the placement to comply with the following so far as it is reasonably practicable:[5]

- Ascertain and give due weight to the wishes and feelings of child and those holding PR;
- Provide accommodation near to the child's home (so far as reasonably practicable)
- Provide accommodation that does not disrupt C's education or training;
- If they are also accommodating a sibling to enable C to live with that sibling;
- If the child is disabled that the accommodation is suitable for C's particular needs.

There is thus a requirement (as would be expected) for connected persons to be considered as a first option prior to placing a child with non-familiar foster carers.

At any time a child is placed with an extended family member (or indeed a friend of the family) they are considered to be a 'local authority foster-parent'. A local authority cannot place them under a CO or an ICO without them being defined as such or indeed being approved as a foster carer.

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[1] S22C(3) CA 1989
[2] S22C(4) CA 1989
[3] S22C(5) CA 1989
[4] S22C(7) CA 1989
[5] S22C(8) CA 1989

A family member already having full approval as a 'foster carer' within the court sphere is unusual, and thus the LA has the ability to give temporary approval to a connected person, however that temporary period cannot exceed 16 weeks.[6] This power is regularly referred to as 'a regulation 24 placement' or even more trendily as a 'placement under reg 24'. In a strictly legal concept, the power for temporary approval of family members comes from Regulation 24 of the 'Care Planning, Placement and Case Review Regulations 2010'. This provides:

1. Where the responsible authority is satisfied that—

a. the most appropriate placement for C is with a connected person, notwithstanding that the connected person is not approved as a local authority foster parent, and

b. it is necessary for C to be placed with the connected person before the connected person's suitability to be a local authority foster parent has been assessed in accordance with the 2002 Regulations.

they may approve that person as a local authority foster parent for a temporary period not exceeding 16 weeks ("temporary approval") provided that they first comply with the requirements of paragraph (2).

The requirements under paragraph 2 are that the local authority must prior to making such a placement:

a. assess the suitability of the connected person to care for C, including the suitability of—

i. the proposed accommodation, and

ii. all other persons aged 18 and over who are members of the household in which it is proposed that C will live,

taking into account all the matters set out in Schedule 4,

b. consider whether, in all the circumstances and taking into account the services to be provided by the responsible authority, the proposed arrangements will safeguard and promote C's welfare and meet C's needs set out in the care plan, and

c. make immediate arrangements for the suitability of the connected person to be a local authority foster parent to be assessed in accordance with the 2002 Regulations ("the full assessment process") before the temporary approval expires.

So, in summary it has to undertake a viability assessment (initial assessment) that covers where they will be living, who they will be living with and what services that the LA needs to provide, together with arranging a full assessment to be completed within those 16 weeks. The matters to be considered as part of the viability assessment are listed in schedule 4 of the regulations and include matters which practitioners would expect but are always useful to have available to reference.[7] **However, for the purposes of this article there is no requirement for it to appear likely for them to be able to pass the fuller assessment to be an approved foster carer.**

The LA has the ability to extend the temporary approval for a further 8 weeks if the temporary approval *'is likely to expire before the full assessment process is completed'.* The LA can extend the approval for longer if the connected person when faced with a negative assessment wishes to review the decision.[8]

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[6]The Care Planning, Placement & Case Review Regulations 2010 reg24(1)

[7]https://www.legislation.gov.uk/uksi/2010/959/schedule/4/made

[8]The Care Planning, Placement & Case Review Regulations 2010 reg25(1)-(3)

Legal position on s38(6)

S38(6) as practitioners will know is the mechanism typically through which the court can order an assessment of the child. It specifically can only be made when there is an interim care order or an interim supervision order and is theoretically limited to a *'medical or psychiatric examination or other assessment of the child'.*

It is settled law that the judge has the power to use s38(6) to insist that a LA places a child in a specific placement. Indeed, Munby LJ considers in Re A [2009] EWHC 865 this specific power and specifically agrees that the court can use this mechanism to overrule the local authority and effectively insist upon an interim placement, provided that it can show that the *'primary purpose'* of the placement is an assessment. The caselaw from available contested appeals all relate to LA's opposing such orders to dictate a placement upon them, rather than them having used this as a mechanism to avoid a placement under regulation 24.

There can be little argument that a court imposing a s38(6) assessment avoids the LA having to abide by the temporary approval mechanisms described above. Essentially the court is taking the 'risk' of the placement, dictating this to the LA, rather than the LA approving it as a placement and taking any risk itself.

The issue

The increasing trend however is for LA's to propose that a child be placed under s38(6) rather than under the standard temporary approval mechanism under regulation 24. This appears logically perverse, essentially for the LA to propose that the court impose something upon them, that they want to do themselves.

The rationale regularly for this is that such a carer 'will not pass regulation 24' or the placement won't be approved, so the only options are for there to be a s38(6) or for there to just be a Child Arrangement Order in favour of the connected person. Private law orders are often not thought appropriate, partly because an ICO is preferred, but also invariably the connected person is not at court and has not been given any legal advice. Thus, the LA insist that for there to be a placement with the family member (that generally all parties want so as to avoid foster care) there should be a s38(6) assessment.

The purpose of this article is to ask why this is seen as the appropriate mechanism.

The considerable downside to this methodology (often missed by LA's) is that as the court has dictated the assessment, it removes a discretion from the LA to manage its own care plan. Any planned removal from that carer, even in emergency situations, would necessitate a return to court for the court to remove the s38(6), whereas were they just approved foster carers then in critical situations the LA would retain this power without court involvement.

As above, there is often very limited challenge to a LA in this approach. We as practitioners too readily accept that the LA cannot place and thus this is the only option to avoid non-family foster carers. However, the regulations provide an obligation on the LA to place a child with connected persons if at all possible and there is a mechanism for them to be approved in short order. The requirements for the assessments prior to that placement are relatively standard but crucially do not require them to be able to pass any fuller fostering assessment in the future. Too regularly LA's use this as the explanation, the suggestion that the bedrooms are too small or that the carers smoke, are heard regularly within pre-hearing discussions as justification for the LA avoiding them being temporarily approved.

It is often said that 'they will not pass regulation 24.' As is set out above the terms for passing regulation 24 are relatively limited and realistically are listed in Schedule 4. There is no requirement anywhere within Regulation 24(2) nor even Schedule 4 for there to be any compliance with the fuller assessment process, indeed the limit of the reference to the fuller assessment is that the LA must 'make immediate arrangements' to begin that assessment.

The likelihood or otherwise for passing a fuller assessment is not an issue for at least 16 weeks, or 24 weeks with an extension being given, or far longer if the carers appeal the negative fostering assessment. It cannot feasibly be used as a reason not to give regulation 24 approval.

The other position that is regularly put forward is that they need to be placed with that carer for the purposes of assessment. This should usually be a non-starter, given that they will be assessed under either placement. Very often this can be undermined by asking the LA for an assessment plan for the carers under s38(6), and there is rarely such a plan in place or has even been considered.

This article is not intended to seek to encourage conflict or to cause militant arguments against LA counsel/solicitors. However, it is to suggest that not always the correct mechanisms and regulations are utilised. There will invariably be cases where a LA does not want to take a risk on a connected person and has objectively a good reason to. In such cases welfare may dictate that this has to be forced upon them by the court. However, the s38(6) mechanism is not designed for a LA worried about smoking or bedroom sizes to shift the decision making onto the court, whilst actually encouraging that decision itself. To do so ironically ties their own hands whilst demonstrating a misunderstanding of the regulations that govern such placements.

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