

## **CHILDREN AND YOUNG PEOPLE WHO ARE LOOKED AFTER / IN CARE.**

**THIS SECTION WAS LAST UPDATED ON 31<sup>ST</sup> JANUARY 2008**

### **INTRODUCTION**

1. There are usually approximately 2,500 looked after children in Northern Ireland.<sup>1</sup> The term 'looked after' encompasses all children who are being looked after by a Trust whether on a voluntary basis or under a care order. The term 'in care' implies that a formal care order has been made by the court.

### **THE LAW**

#### **International provisions**

##### **The United Nations Convention on the Rights of the Child**

2. There are several provisions of the United Nations Convention on the Rights of the Child, which are relevant to the rights of children in the care system:

##### **Article 2**

State parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parents or legal guardians race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

State parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians or family members.

##### **Article 3**

In all actions concerning children whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

##### **Article 12**

State Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

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<sup>1</sup> Children Matter, A Review of Childcare Services DHSS /SSI 1998. Key Indicators of personal Social Services for NI, 2006.

## **Article 14**

State Parties shall respect the right of the child to freedom of thought, conscience and religion.

## **Article 20**

A child temporarily or permanently deprived of his or her family environment or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.

## **Article 27**

State Parties recognise the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.

## **THE CHILDREN (NI) ORDER 1995**

3. The main legislation which deals with the rights of children in care and leaving care is the Children (NI) Order 1995 and the Children Leaving Care Act (NI) 2002, which should be read in conjunction with the seven volumes of guidance issued by the DHSS PS.

- 1) Volume 1 Court Orders
- 2) Volume 2 Family Support, Childminding and Day-care
- 3) Volume 3 Family Placements and Private Fostering
- 4) Volume 4 Residential Care
- 5) Volume 5 Children with a Disability
- 6) Volume 6 Co - operating to Safeguard Children ( together with the ACPC Regional Child Protection Policy and Procedures)
- 7) Volume 7 Schools Accommodating Children

The most relevant volumes in respect of children in care and leaving care are Volumes Three and Four.

In addition the Human Rights Act 1998 came into force in October 2000, which incorporated rights under the European Convention on Human Rights into our domestic law. There has been considerable case law in the area of child protection and care proceedings and this is dealt with in detail in the human rights section of our information pack.

## **THE COURT PROCESS**

4. Being looked after means that the Trust is legally looking after a child. This can mean that there is either a care order in place or the child is being accommodated by a Trust. The rights relating to representation in court by a guardian ad litem and solicitor referred to below apply only to children involved in specified proceedings in court. Most other rights apply to all looked after children.

## 5. The allocation of proceedings

The allocation of proceedings to appropriate courts is governed by the Children (Allocation of Proceedings) Order (NI) 1996. The majority of public law proceedings are commenced in the family proceedings courts in Northern Ireland. A case can be transferred to a family care centre upon application by a party or by the court's own motion where the court considers that the proceedings are exceptionally grave, important or complex. In particular the case may fall into these categories because of complicated or conflicting evidence, the number of parties, a conflict of law with another jurisdiction, a novel or difficult point of law or because of some general point of public interest.<sup>2</sup> The family proceedings courts can only transfer proceedings where it is considered that such action would be in the best interests of the child. A case can be transferred to the High Court by a family care centre if it is considered that the proceedings are appropriate for determination in the High Court and that such determination would be in the best interests of the child concerned.<sup>3</sup>

### The appointment of a guardian ad litem and solicitor for the Child

6. The Children (NI) Order 1995 (art 60) provides for the appointment of a guardian ad litem for a child concerned in specified proceedings.

#### *Specified proceedings*

Specified proceedings are defined and listed in article 60 (6) of the Children (NI) Order 1995 as follows:

- on an application for a care or supervision order
- where the court is considering whether to make an interim care order and an Article 56 direction has been given
- discharge of a care order or variation or discharge of a supervision order
- application under article 58(4)
- proceedings where the court is considering making a residence order where the child is the subject of a care order
- proceedings about contact between a child in care and any other person
- proceedings under part VI Children (NI) Order
- on an appeal against the making or refusal to make a residence order in respect of a child in care or the variation, discharge or refusal of an application to vary or discharge an order of a kind mentioned in paras a) or b)
- the refusal of an application under 58(4)
- the making or refusal of an application under Part VI.

If a child is the subject of any of the above proceedings the court has the power to appoint a guardian ad litem who will also appoint a solicitor to represent the child in court.<sup>4</sup>

#### *Role of the guardian ad litem*

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<sup>2</sup> Art 5 (1) of the Children (Allocation of Proceedings) Order (NI) 1996.

<sup>3</sup> *Ibid* art 10. In relation to rights of appeal against transfer decisions see *B and N*, Unreported, Fam Div, NI, (13 March 2002) ( GILF 3617).

<sup>4</sup> Magistrates Courts (Children (NI) Order 1995) Rules (NI) 1996, rule 11(1) provides that the court must appoint a guardian ad litem as soon as practicable after the commencement of proceedings unless the court thinks that it is not necessary to safeguard the interests of the child. Under rule 12 (2) the guardian ad litem must appoint a solicitor for the child unless one has already been appointed.

7. The role of the guardian ad litem is to safeguard the best interests of the child<sup>5</sup> and to report to the court on what he/she considers to be in the child's best interests. As part of this procedure the guardian ad litem must ensure that the child's views and opinions are made known to the court.

### ***Conflict between instructions of competent child and best interests of child***

**10** If there is a conflict between the instructions of a competent child and the views of the guardian ad litem the solicitor is obliged to continue to act for the child and not the guardian ad litem. In these circumstances, the solicitor will continue to act on the child's instructions and the solicitor's role is to ensure that the child's views and opinions are made known to the court. The guardian ad litem submits the report to the court indicating the course of action, which is in the child's best interests and the solicitor represents the child's instructions.<sup>6</sup>

### ***Competency/sufficient understanding***

**11** King and Young in *The Child as Client*<sup>7</sup> provide a useful framework for assessing whether a child has 'sufficient understanding'. The child should understand (and it is the duty of the solicitor to explain) the following:

- i) the solicitor's role;
- ii) the nature of the proceedings in respect of which the child is subject;
- iii) the reasons for the proceedings;
- iv) what takes place in court;
- v) what other professionals think is best for the child;
- vi) what the child's parents and other parties to the proceedings think is best for the child;
- vii) the views of the guardian ad litem;
- viii) the law which affects the proceedings;
- ix) the threshold criteria.

The competent child should be able to outline their wishes and feelings regarding the past and future, have some perception of events leading up to the proceedings and of his/her stay to date in care and be able to give an indication of what type of arrangements/court order they think would be most suitable.

### ***Discharge of solicitor and guardian ad litem from case***

**13** The guardian ad litem and solicitor are discharged from the case as soon as a final care order is made by the court. No monitoring role remains for the guardian ad litem.<sup>8</sup> The child can however contact their solicitor if further matters arise in future, but this will of course depend on their age and competency to do so.

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<sup>5</sup> Art 60(2) b) of the Children (NI) Order 1995.

<sup>6</sup> See *Oxfordshire County Council v P* [1995] 1FLR.

<sup>7</sup> King and Young, *"The Child as Client"* Family Law, (1992). See also, in the context of medical consent, *"Consent, Rights and Choices in Healthcare for Children and Young People"*, Chapter 5, (2001), BMA, BMJ Books.

<sup>8</sup> See *Re T (a child) and R (a child) (Discharge of Care Order)*, Unreported, Fam Div (NI) (9 March 2001) and the House of Lords decision in *Re S (Minors) Re W (Minors)* [2002] UKHL 10.

## THE COURT ORDERS (PUBLIC LAW ORDERS)

### The concept of significant harm

**14** A court can only make a care or a supervision order if it is satisfied that: (a) the child concerned is suffering or likely to suffer significant harm; and (b) that the harm or likelihood of harm is attributable to: i) the care given to the child or likely to be given to him if the order were not made, not being what it would be reasonable to expect a parent to give to him, or ii) the child's being beyond parental control.<sup>9</sup> These criteria are often referred to as the 'threshold criteria'.

Where the question of whether harm suffered by a child is significant turns on the child's health or development, his health or development has to be compared with that which could be reasonably expected of a similar child.<sup>10</sup>

Under article 2 (2) of the Children (NI) Order 1995, harm is defined as "ill treatment" or the "impairment of health and development".<sup>11</sup> Ill-treatment is drafted in wide terms and includes sexual abuse and forms of ill treatment, which are not physical. "Health" means physical and mental health and development means physical, intellectual, emotional, social or behavioural development.

It is the role of the court to assess firstly whether the child is suffering or likely to suffer significant harm. The Court of Appeal has approved the dictionary meaning of significant being "considerable, noteworthy or important."<sup>12</sup> The court must assess whether at the time the Trust initiated procedures for protection under the Children (NI) Order 1995 the threshold criteria were satisfied.<sup>13</sup>

In relation to the term 'likely' the House of Lords have indicated that in this context 'likely' is being used in the sense of a "real possibility, a possibility that cannot sensibly be ignored having regard to the nature and gravity of the feared harm in a particular case."<sup>14</sup>

In cases where parents concede that the threshold criteria are wholly or partially met, the court must consider the individual facts of each case and the decision taken to ascertain whether the concessions made by the parents are sufficient to meet the justice of the case and the best interests of the children.<sup>15</sup> In the case of *Re M* in 1999 the parents conceded the threshold criteria on

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<sup>9</sup> Art 50 (2) of the Children (NI) Order 1995.

<sup>10</sup> Art 50 (3) of the Children (NI) Order 1995.

<sup>11</sup> For a discussion in relation to the effects of domestic violence on children and the risk of significant harm see *Re DJ and D (Freeing Order)*, Fam Div, NI, (25 Sept 2001) (GILF3493). For a discussion of significant harm in the context of neglect, failure to thrive and emotional abuse see *Re E (Care Proceedings; Social Work Practice)* [2000] 2 FLR 254.

<sup>12</sup> *Humberside v B* [1993] 1FLR 257.

<sup>13</sup> *Re M (A Minor) (Care Order)* [1994] 2 FLR.

<sup>14</sup> *Re H and R (Child Sexual Abuse; Standard of Proof)* [1996] 1 FLR 80.

<sup>15</sup> See *In the Matter of J (Threshold Criteria); Parental Concessions*, Unreported, Fam Div (NI) (28 June 2002) (GILC 3733), where Mr Justice Gillen found that despite partial concessions by the parents in the case that the best interests of the child required a further determination.

grounds of neglect and modest physical abuse but denied serious allegations of sexual abuse. The Court of Appeal was of the opinion that the concessions offered were insufficient because of: (i) the potential for future contact; (ii) the enormous discrepancy between the harm alleged and the harm admitted; and (iii) the children had had their credibility impugned and fairness demanded that a judge should make findings.<sup>16</sup>

Secondly, if the court finds that a child is suffering or likely to suffer significant harm, it must also be satisfied that the harm is attributable to the care given to the child or likely to be given to him, if the order were not made, not being what it would be reasonable to expect a parent to give to him or the child's being beyond parental control.

Finally, the court must decide whether to make a care order, a supervision order, no order or an article 8 order, for example a residence order.<sup>17</sup> The court must consider whether a care order would interfere with the family and private life of the parents and children concerned under Article 8 of the European Convention on Human Rights (the ECHR) as incorporated by the Human Rights Act 1998. A care order requires justification and must be proportionate.<sup>18</sup>

### **The child assessment order<sup>19</sup>**

#### ***Description***

**15** This is an order for an assessment of a child's health or development or of the way he/she has been treated. The purpose of the order is stated in guidance as "to allow the local authority or authorised person to ascertain enough information about the child's health or development or the way in which he/she has been treated to decide what further action if any is required".

#### ***Who can apply?***

**16** The Trust or an authorised person as defined by article 49(2) of the Children (NI) Order 1995 can apply for a child assessment order. Parental responsibility is not given to the Trust when a child assessment order is made.

#### ***Grounds***

**17** The grounds for making an order are that the applicant has reasonable cause to suspect that the child is suffering or is likely to suffer significant harm, an assessment of the child's health or development or of the way he/she has been treated is required to enable the applicant to determine whether or not the child is suffering or likely to suffer significant harm and it is unlikely that such an assessment would be made in the absence of an order.

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<sup>16</sup> *Re M (Threshold Criteria; Parental Concessions)* [1999] 2 FLR 728. See also *Re W (Threshold Criteria; Parental Concessions)* [2001] 1 FCR 139; concessions must be considered to see whether they meet the reasonable requirements of the local authority and the guardian ad litem seen in the light of judicial decision.

<sup>17</sup> See eg. *MW v KS*, Unreported, Fam Div, NI, (2001) (GILE 2884) where on an application for a care order in a case where a child had been in 11 placements, a residence order was granted to the child's father and a Family Assistance Order was made to monitor the placement.

<sup>18</sup> See *In Re A (Care Order Freeing Without Consent)*, Unreported, Fam Div, NI (24 Oct 2001). See also; *Re C & B (Care Order) Future harm* [2001] 1FLR. For a full discussion of the implications of the ECHR as incorporated by the Human Rights Act 1998 on public law see the human rights and children section.

<sup>19</sup> Art 62 of the Children (NI) Order 1995.

### *Child of sufficient understanding*

**18** It is of note that if a child is of sufficient understanding he/she may refuse to submit to a medical or psychiatric assessment.

### *Duration*

**19** A child assessment order lasts for seven days from the date specified in the order.

### **Emergency protection order<sup>20</sup>**

#### *Description*

**20** An emergency protection order is an order, which gives parental responsibility to the applicant in addition to the child's parents or any other person who had parental responsibility prior to the making of the order.<sup>21</sup>

The Order authorises the applicant to remove the child to any accommodation provided by or on behalf of the applicant and being kept there or authorises the prevention of the removal of a child from hospital or other place where he/she was accommodated prior to the order being made.<sup>22</sup>

#### *Who can apply?*

**21** Any person, Trust or authorised person can apply for an Order.

#### *Grounds<sup>23</sup>*

**22** Where "any person" is the applicant, the court may only make an emergency protection order where there is reasonable cause to believe that the child is likely to suffer significant harm if he/she is not removed to accommodation provided by or on behalf of the applicant or he/she does not remain in the place in which he/she is then being accommodated.

Where the applicant is an authority, where inquiries are being made with respect to the child and those enquiries are being frustrated by access to the child being unreasonable refused.

Where the applicant is an authorised person, the applicant has reasonable cause to suspect that a child is suffering or is likely to suffer, significant harm, the applicant is making inquiries about the child's welfare and those enquiries are being frustrated by access to the child being unreasonably refused.

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<sup>20</sup> Art 63 of the Children (NI) Order 1995.

<sup>21</sup> Art 63(4) c) of the Children (NI) Order 1995. The vesting of parental responsibility in the applicant is subject to the requirements of art 63 (5).

<sup>22</sup> See *Re C and B (Care Order) Future harm* [2001] 1 FLR 611 per Hale LJ; "Such orders are intended to be made when there is an emergency and it can be shown that unless emergency action is taken, that child will be at risk of significant harm during the period of the order".

<sup>23</sup> Art 63 (1) of the Children (NI) Order 1995.

### ***Duration***

**23** An emergency protection order lasts for a period not exceeding eight days. The order can be extended by seven days but can only be extended once.<sup>24</sup> As a result of the judgment of Mr Justice Gillen in the case of *ES* [2007] NIQB 58 which found that Article 64(8) of the Children (NI) Order 1995 was incompatible with Articles 6 and 8 of the ECHR as incorporated by the Human Rights Act 1998, Article 64(8) which prevented an application for the discharge of an emergency protection order being heard by a court within 72 hours of the making of the order, has been repealed.<sup>25</sup>

### ***Exclusion requirement***

**24** Article 29 of the Family Homes and Domestic Violence (NI) Order 1998 inserted a new article 63A into the Children (NI) Order 1995 which allows the court to attach an exclusion requirement to an emergency protection order, an interim care or supervision order or a full care or supervision order, which would exclude a suspected abuser from the child's home

### ***Interim care or supervision order***<sup>26</sup>

#### ***Grounds***

**25** The court can only make an interim care order if it is satisfied that the statutory threshold criteria are met that is: (a) the child concerned is suffering or likely to suffer from significant harm; and (b) that the harm or likelihood of harm is attributable to: (i) the care given to the child if the order were not made, not being what it would be reasonable to expect a parent to give him/her; or (ii) the child is beyond parental control.

#### ***Who can apply?***

**26** The Trust or authorised person can apply for an interim order.<sup>27</sup> Parental responsibility vests in the applicant when an interim care order is made, but not when an interim supervision order is made.

### ***Duration***

**27** The first interim order can be made for up to eight weeks<sup>28</sup> the court can then make further interim orders each for a maximum period of four weeks.<sup>29</sup>

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<sup>24</sup> *Ibid* art 64 (5).

<sup>25</sup> Children (Emergency Protection Orders) Act (NI) 2007

<sup>26</sup> *Ibid* art 57

<sup>27</sup> *Ibid* art 50 (9).

<sup>28</sup> *Ibid* art 57 (4).

<sup>29</sup> See *In the Matter of SM (Interim Care Orders; Exercise of Judge's Discretion)*, Unreported., Fam Div, NI (2 May 2002) (GILC3695), for guidance on procedure for renewing interim care orders.

### *Court directions*

**28** The court can give directions as to the medical, psychiatric or any other assessments in respect of the child, but if the child is of sufficient understanding he/she may refuse to consent to assessments.<sup>30</sup>

### **Supervision Order**<sup>31</sup>

#### *Who can apply?*

**29** The Trust or an authorised person can apply for a supervision order<sup>32</sup>

#### *Description*

**30** A supervision order places a child under the supervision of the Trust and requires a supervisor to be appointed. Parental responsibility remains with the parents. The role of the supervisor is to advise, assist and befriend the child, take all necessary steps to comply with the order and where the order is not being fully complied with to consider referring the case back to court for variation or discharge.<sup>33</sup> The court can give directions to a supervised child to comply with directions of the supervisor, for example to reside at a specific place or to participate in a certain activity.<sup>34</sup> In certain circumstances the supervision order can require the supervised child to attend medical or psychiatric examinations.<sup>35</sup> In the case of a child of sufficient understanding such examinations can only be carried out with the child's consent.

#### *Grounds*

**31** The court may only make a supervision order if satisfied that: (a) the child concerned is suffering or likely to suffer significant harm; (b) that the harm, or likelihood of harm, is attributable to: (i) the care given to the child, or likely to be given to him if the order were not made, not being what it would be reasonable to expect a parent to give him; or (ii) the child's being beyond parental control.<sup>36</sup>

#### *Duration*

**32** A supervision order lasts for one year from the date of the order but cannot continue beyond a child's eighteenth birthday. The supervisor can apply to court to extend the order, but its maximum duration cannot be for a period of more than three years from the making of the initial order.<sup>37</sup>

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<sup>30</sup> Article 57 (6) of the Children (NI) Order 1995.

<sup>31</sup> *Ibid* art 54.

<sup>32</sup> *Ibid* art 50 (1).

<sup>33</sup> *Ibid* art 54 (1) c).

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<sup>35</sup> Sch 3, para 4 to the Children (NI) Order 1995.

<sup>36</sup> *Ibid* art 50 (2).

<sup>37</sup> *Ibid* Sch 3, para 6.

## Care order <sup>38</sup>

### *Who can apply?*

**33** A Trust or an authorised person as defined by article 49(2) of the Children (NI) Order 1995 can apply for a care order.

### *Description*

**34** A care order is an order placing a child in the care of a Trust. Parental responsibility is vested in the Trust. This is shared with parents or carers who had parental responsibility prior to making of the care order. The Trust can determine the extent to which a parent or guardian may meet his parental responsibility for the child.<sup>39</sup> A care order cannot be made in respect of a young person after they have reached the age of 17.

### *Grounds*

**35** The court may only make a care order if satisfied that: (a) the child concerned is suffering or likely to suffer significant harm; (b) that the harm, or likelihood of harm, is attributable to :(i) the care given to the child, or likely to be given to him if the order were not made, not being what it would be reasonable to expect a parent to give him; or (ii) the child's being beyond parental control.

### *Duration*

**36** A care order lasts until a young person becomes 18 years of age when it automatically ceases, but an application to the court for discharge can be made before this.

When a care order is in force the Trust is not allowed to bring a child up in any religious persuasion other than that in which he/she would have been brought up if the order had not been made. Neither can the Trust agree to an adoption order or appoint a guardian for the child.<sup>40</sup>

While a care order is in force no one can change the child's surname or remove him or her from the United Kingdom without either the written consent of everyone who has parental responsibility for the child or the leave of the court.<sup>41</sup>

### **The right to be heard**

**37** The child has a right to be heard throughout all administrative and court proceedings including case conferences and 'Looked After Children Reviews' (LAC Reviews) as well as formal court proceedings. The right to be heard is not a right to self-determination, but rather the facilitation of children and young people to participate in decisions which affect their lives. This has been affirmed by the High Court in Northern Ireland in cases such as E (Voice of the Child) [2005]NIFAM12

### **The best interests principle**

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<sup>38</sup> *Ibid* art 52.

<sup>39</sup> *Ibid* art 52 (3) (b) which is subject to art 52 (4) – (9) .

<sup>40</sup> *Ibid* art 52 (6).

<sup>41</sup> *Ibid* art 52 (7) which is subject to art 52 (8).

**38** In respect of court proceedings the welfare checklist at article 3 of the Children (NI) Order 1995 states that the child's welfare shall be the court's paramount consideration and that the court should have regard in particular to the ascertainable wishes and feelings of the child concerned (considered in the light of age and understanding). This is commonly known as the 'best interests principle'.

### THE CARE PLAN

**39** The Arrangements for Placement of Children (General) Regulations 1996<sup>42</sup> place a statutory duty on Trusts to draw up a care plan in writing for every child whom they are preparing to look after or accommodate. Volume 4 of the guidance accompanying the Children (NI) Order 1995 provides further detail about the content of the care plan. The care plan in each case should be "rigorously scrutinised" by the court.<sup>43</sup> In England, detailed guidance is provided under Local Authority Circular LAC 99(29) about the appropriate content of a care plan.<sup>44</sup> The Circular indicates that the care plan should set out the following: (i) Section One of the plan should set out the overall aims of the plan and a timetable; (ii) Section Two should clearly identify the child's needs (including those arising from race, culture, religion or language, special educational, health or disability needs). It should also set out clearly the extent to which the wishes and feelings of the child have been obtained and acted upon and the reasons supporting this, or explanations why these wishes have not been given absolute precedence. The arrangements for, and the purpose of contact and proposals to restrict or terminate contact should be set out together with a plan as to how all the child's needs can be met; (iii) Section Three should set out the extent to which the wishes and feelings of the child's parents and anyone else with a sufficient interest in the child have been obtained and acted upon and the reasons supporting this or explanations of why these wishes and views have been discounted; (iv) Section Four should set out the proposed placement, the time that is likely to elapse before the placement is made, the likely duration of placement in the accommodation, the arrangements for healthcare, the arrangements for education, the arrangements for reunification, other services to be provided to the child and/or the family, support in the placement and the specific roles to be played by the child's parents; (v) Section Five should state who is responsible for the implementation of the plan, the dates for reviews, a contingency plan, arrangements for an input by the child, parents and others into the ongoing decision making process and arrangements for notifying the responsible authority of disagreements or making representations.

It has been indicated in a recent report by the Social Services Inspectorate that the fact that social workers may be duplicating effort by servicing two care planning processes to meet the requirements of the court and the Trust is a matter which requires some attention.<sup>45</sup>

The care plan is produced to all parties in the case and the role of the court is to scrutinise the care plan and to satisfy itself that the care plan is in the child's best interests, prior to making a final care order<sup>46</sup>

### Review of care plans by the courts

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<sup>42</sup> 1996 SR No 453.

<sup>43</sup> See *Re J (Minors) Care: Care Plan* [1994] 1 FLR.

<sup>44</sup> See Hershmann and Mc Farland, *Children Law and Practice*, D1140-1143.

<sup>45</sup> 'Planning To Care'; Social Services Inspectorate, (November 1999), page 13.

<sup>46</sup> See *Manchester Council v F* [1993], 1FLR 419 per Eastham J. Also *Re J* [1994] 1FLR, 253 per Wall J, Nourse LJ in the Court of Appeal decision of *Re T* [1994] 2 FLR 423 and Butler Sloss LJ in *Re L* [1996] 1FLR.

**40** When a final care order is made a child's guardian ad litem and solicitor are discharged from the case. There is no specific application which a child can make under the Children (NI) Order 1995 to return a case to court if the care plan breaks down, for example, where a particular service is sought for a child under the care plan presented to the court at the final hearing which then does not materialise or where significant changes are made in relation to the child's place of residence. There were important decisions made recently by the Court of Appeal and the House of Lords in relation to care plans.<sup>47</sup> Although the Court of Appeal's decision was later overturned by the House of Lords, it is worth looking in detail at the issues discussed in both courts.

### ***The Court of Appeal***

**41** It was held initially by the Court of Appeal that, in light of the incorporation of Articles 6 and 8 of the ECHR by the Human Rights Act 1998, the Court should have a wider discretion to make an interim care order where the care plan seems "inchoate" or where the passage of a relatively brief period seems bound to see the fulfilment of some event or process which is vital to planning and deciding the future. In appropriate cases a judge must be free to defer making a care order until he is satisfied that the way ahead is no longer obscured by uncertainty that is neither inevitable nor chronic.

It was also stated as follows per Lord Justice Thorpe:

"The children who are most vulnerable to breakdown and delay are the very young whose healthy future development may depend upon forming a sound psychological attachment in time. Although the good faith, commitment and expertise of social services departments is not in question, I am in no doubt that cases do arise where the welfare of a vulnerable child would be protected or advanced had the responsibilities of the Guardian Ad Litem continued and in some instances had the guardian's options included a return to court."  
Thorpe LJ went on to state:

"The greater concentration on the quality of the care plan should extend to a collaborative assessment of its essential milestones which must then be elevated to 'starred status'. If the parties cannot agree this detail the judge can decide. Thereafter a failure to achieve a starred milestone within a reasonable time of the date set at trial must reactivate the interdisciplinary process that contributed to the creation of the care plan. At a minimum the local authority must inform the guardian ad litem of the failure. Either the guardian ad litem or the local authority should then have the right to apply to the trial court for directions. If for any reason the original guardian is not available then the local authority must apply to the court for directions"

The judgments of the Court of Appeal represented a radical rethink of the role of the courts in ensuring that care plans are implemented appropriately. There were major implications for guardians ad litem, solicitors and social services and it is unsurprising that the cases were appealed to the House of Lords.

### ***The House of Lords***

**42** The House of Lords overturned the concept of starred care plans stating that such a scheme would exceed the bounds of its judicial jurisdiction. It was felt that the intention of Parliament in drafting the Children Act 1989 was that when a final care order was made, the court should no

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<sup>47</sup> *Re W and B; Re W* [2001] EWCA Civ 757, *Re S and Re W* [2002] UKHL 10.

longer have any control over decisions made under the care plan and that the introduction of starred care plans would mean that the court did retain control. The House of Lords also gave guidance in this case on the use of interim care orders.

Although the House of Lords did not endorse the use of starred care plans, important statements were made about the problem of implementing care plans and ensuring that resources are made available to do this. Lord Mackay of Clashfern stated:

“ In agreeing that the appeal should succeed against the starring, I would strongly urge that the Government and Parliament give urgent attention to the problems clearly described by the Court of Appeal and by my noble and learned friend so that we do not continue failing some of our most vulnerable children. As a practical matter, I do not see how a child who has no person to raise the matter on his behalf can be protected from violation of his or her human rights or the rights conferred by our domestic law, other than by reliance on an effective means by which others can bring the violation to notice”.

**43** It remains to be seen whether The Children (NI) Order 1995 will be amended to incorporate a review mechanism for cases where care plans have ‘fallen apart’ or have not been properly implemented post the final hearing for a care order. In the meantime the only remedy, which remains available, is judicial review on grounds of human rights violations.<sup>48</sup> This is not a very satisfactory mechanism, particularly for younger children who are unlikely to be able to voice their concerns effectively.<sup>49</sup>

#### **The review of care plans by social services**

**44** Reviews of care plans are carried out by social services and are governed strictly by the Review of Children’s Cases Regulations (NI) 1996.<sup>50</sup> Regulation Two places a statutory responsibility on the responsible authority to review the case of a child who is looked after or accommodated. Regulation Three states that the first review should take place within two weeks after the date on which the child begins to be looked after or is provided with accommodation. The second review should take place not more than three months after the first review. After this the reviews should take place not more than six months apart. Regulation 4 requires that arrangements in writing are made known to children, parents and others with parental responsibility and those, whose views the authority considers relevant to the child’s case.

**45** The DHSS PS Guidance, Volume 4 (Residential Care) indicates that the standards set by the Regulations are minimum standards. It states that it is only in exceptional circumstances that a child or parent should not be invited to attend a review. Before any decision is made about a looked after or accommodated child the authority should obtain and take account of the wishes and feelings of the child (subject to his age and understanding and so far as it is in the child’s best interests), together with the wishes of the parents, those with parental responsibility and any other person whose views are considered relevant (e.g. carer, independent visitor, GP, ELB, teacher)<sup>51</sup>

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<sup>48</sup> See Robin Tolson QC, “*Care Plans and The Human Rights Act*”, Fam Law [2002]. It is suggested in this text book that applications under section 7 of the Human Rights Act 1998 in relation to breaches of Articles 6 and 8 ECHR should be made in conjunction with an application for contact or discharge of the care order under the Children Act to ensure the appointment of a guardian ad litem.

<sup>49</sup> See Khan and Peddie, “Care Orders, Local Authorities and the Courts”, (2002), New Law Journal. See also Charles Geekie, “Protecting Children’s Rights After Re S- The Pressing Need For Reform”, (July [2002] Fam Law, 534 and Association of Lawyers for Children, “The Division of Powers between Local Authority and Court”, Issue 25, (June 2002).

<sup>50</sup> SR 1996 No 461.

<sup>51</sup> Arts 26 (2), 76 (2) and 92 (2) of the Children (NI) Order 1995.

The Guidance states that children subject to their age and understanding should attend the review and be given an outline of what is going to be talked about before the review and particular regard should be had to the wishes of the child in choosing a venue for the review and the child should always be asked about this.

**46** The main matter for consideration at the review is the care plan. Schedule 2 to the Regulations sets out the statutory minimum requirements for matters to be considered at a review:

- i) Examination of care plan in relation to the wishes and feelings of the child.
- ii) Wishes and feelings of parents.
- iii) Whether child's welfare safeguarded and promoted.
- iv) Where the child is in the care of a Trust whether or not the order could be discharged or a lesser order made.
- v) Whether the placement continues to be appropriate.
- vi) Views of the carer.
- vii) Whether the plan makes appropriate provision for the child's religious persuasion, racial origin and cultural and linguistic background.
- viii) Whether the plan takes account of the duty under article 27(7) of the Children (NI) Order 1995 to see whether the child could live with parent/ family member/friend.
- ix) The arrangements for contact.
- x) Views of independent visitors.
  - xi) Whether plan considers special needs of child e.g. disability.
  - xii) Child's health needs.
  - xiii) Child's education.
  - xiv) Financial support of the placement.
  - xv) Reunification.
  - xvi) Stability.
  - xvii) Where appropriate, aftercare.

### **After the review**

**47** A written record of each review must be kept and put on the child's records. The child must be notified in writing of the main points of the written report. If the child disagrees with decisions which have been made it is possible to invoke the Children Order complaints procedure.

### **Placement/contact with siblings**

**48** Where a child is being looked after by a Trust, the Trust is required to make arrangements for that child to live with a member of his/her family unless to do so would be impractical or would be inconsistent with the child's welfare.<sup>52</sup>

In so far as is reasonable practicable and consistent with the welfare of the child, the child has to be accommodated near his home and siblings should be accommodated together.<sup>53</sup>

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<sup>52</sup> Art 27(7) Children (NI) Order 1995.

## CONTACT ARRANGEMENTS FOR CHILDREN IN CARE

**49** Contact arrangements are governed by article 53 of the Children (NI) Order 1995 and the Contact with Children Regulations (NI) 1996.<sup>54</sup>

Article 53(1) provides that the authority shall allow the child reasonable contact with:

- i) his/her parents;
- ii) where a residence order was in force immediately prior to making the care order with the person in whose favour the residence order was made.
- iii) Where a person had care of the child immediately before the making of the care order under an order made by the High Court exercising inherent jurisdiction, that person;
- iv) On an application for contact by any of the above or by any person with leave, the court can make such order, as it deems appropriate.

### Application by the child concerned

**50** Article 53(2) of The Children (NI) Order 1995 provides that the court can make such order as it deems appropriate with respect to contact on an application made by the child or the authority for an order.

The child in care, if of sufficient understanding/competence could make an application under article 53 for contact.<sup>55</sup>

### Refusal of Contact

**51** Article 53(6) of the Children (NI) Order 1995 allows a Trust to refuse contact if it is satisfied that this is necessary to promote or safeguard the child's welfare and the refusal is decided upon as a matter of urgency and does not last for more than seven days. Such a decision has to be notified in writing to the child (if of sufficient understanding) and to other parties under regulation two.<sup>56</sup>

In the case of *Re D*, an application was made by a Trust for an order prohibiting contact between a minor who was in the care of the Trust and a female third party under article 53(2) of the Children (NI) Order 1995. The order was refused on the grounds that article 53(2) was not supposed to be used in a 'prohibitory fashion'.<sup>57</sup> An application for an injunction under the inherent jurisdiction of the High Court was later successful on the grounds that there was reasonable cause to believe that without an injunction the child would suffer significant harm.<sup>58</sup>

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<sup>53</sup> *Ibid* art 27 (8) a) and b). See Wendy Cousins, "The Lives and Care Careers of Younger Looked After Children," Centre for Childcare Research, (2001) preliminary findings. The majority of looked after children in NI are not living with siblings or parents.

<sup>54</sup> SR 1996 No 443.

<sup>55</sup> See *Re F (Contact: Child In Care)* [1995] 1FLR 510.

<sup>56</sup> Contact with Children Regulations (NI) 1996, (SR 1996, No443).

<sup>57</sup> *Re D (Article 53 (2) Order)* Unreported, Fam Div, NI (GILE 3345), (2001).

<sup>58</sup> *Re D* [2001] NIJB 163.

## **Notification**

**52** The Contact with Children Regulations (NI) 1996 require a Trust to notify all those affected if they intend to make changes to contact arrangements.

## **Contact and the care plan**

**53** Contact arrangements should always form part of the care plan and the Trust is obliged to carefully consider the wishes and feelings of the child when making arrangements for contact.

## **Variation of Contact**

**54** Where an order under article 53 of the Children (NI) Order 1995 about contact has been made by the court and the Trust wants to vary this order this can be done if the Trust and the person in relation to whom the order is made agree, the child agrees and written notification is sent out within seven days to all persons listed in Schedule 2. If agreement cannot be reached the matter would have to be referred back to court. In a case where no order has been made, but a contact arrangement has been entered into, the contact can be changed as long as all parties have been notified in regulation two. A contact order made under article 53 can be varied or discharged on an application by the child, authority or the person named in the order.

## **Independent Visitors**

**55** Article 31 of the Children (NI) Order 1995 places a duty on Trusts to appoint an independent visitor in respect of any child it is looking after if it believes this to be in the child's best interests. Regulation 5 of the Review of Children's Cases Regulations (NI) 1996 places a duty on the Trust to consider at reviews whether an independent visitor should be appointed.

### ***Grounds for Appointment;***

**56** An independent visitor will be appointed where:

- a) communication between the child and his/her parent or any person with parental responsibility has been infrequent; or
- b) he/she has not visited or been visited by or lived with any such person within the last 12 months.

The duty on the independent visitor is to visit, advise and befriend the child. It is important that this right is investigated as such a service can be invaluable to children and young people in the care system.

## **RECORDS**

**57** The keeping of records is regulated by the Arrangements for Placement of Children (General) Regulations (NI) 1996.<sup>59</sup> The Trust is obliged to keep a written case record in respect of each child and the record must include:

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<sup>59</sup> SR 1996, No 453

- i) A copy of the immediate and long - term placement arrangements;
- ii) A copy of any written report in its possession concerning the welfare of the child;
- iii) A copy of any document considered or record established in the course of or as a result of a review of the child's case;
- iv) Details of contact arrangements;
- v) Details of court orders.

### **Maintenance of records**

**58** These records should be maintained for at least 75 years from the birth of the child or for 15 years after child's death.

### **Access by child to records**

**59** A child with sufficient understanding should be allowed access to his/her file unless access to the file would cause the child harm or cause a third party harm.

## **SECURE ACCOMMODATION**

**60** There are presently fifteen secure accommodation places in Northern Ireland, eight at Shamrock House and seven at Linden House, which are both located at the Lakewood Centre in Rathgael, Bangor. The Social Services Inspectorate published a report in June 2002<sup>60</sup> in relation to secure accommodation facilities at Shamrock House and Linden House and made 53 wide ranging recommendations, including a recommendation that the ministerial task force should consider as a matter of urgency the entire replacement of the secure units because of the accommodation deficits within the existing facilities.

### **The Children (NI) Order 1995**

**61** The grounds for using secure accommodation are set out under article 44 of the Children (NI) Order 1995:

- 1) "Secure accommodation means accommodation provided for the purposes of restricting liberty
- 2) Subject to paragraphs (3) to (10), a child who is being looked after by an authority may not be placed, and if placed, may not be kept in secure accommodation unless it appears -
  - a) that -
    - i) he has a history of absconding and is likely to abscond from any other description of accommodation; and
    - ii) if he absconds, he is likely to suffer significant harm; or
  - b) that if he is kept in any other description of accommodation he is likely to injure himself or other persons."

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<sup>60</sup> "Secure Care; An Inspection of Secure Accommodation at Shamrock House and Linden House", Social Services Inspectorate, Education and Training Inspectorate,( June 2002), Ref 47/02

## **The Children (Secure Accommodation) Regulations (NI) 1996<sup>61</sup>**

### ***Restrictions on Use***

**61** Children under 13 years of age cannot be placed in secure accommodation without the approval of the Secretary of State<sup>62</sup> and the use of secure accommodation provisions for a child who is detained under any provision of the Mental Health (NI) Order 1986 is prohibited.<sup>63</sup>

Secure accommodation cannot be used in relation to a child/young person to whom article 21(5) of the Children (NI) Order 1995 applies. This article applies to the exercise by Trusts of their discretionary duties to young people who are over 16, but under 21 years of age, who are provided with accommodation by them, or in relation to children who are subject to a child assessment order under article 62 of the Children (NI) Order.

Regulation 13 prohibits the use of accommodation for restricting liberty in voluntary homes and private children's homes

### ***Maximum length of stay***

**62** The maximum period of time that a child/young person can be kept in secure accommodation without the authority of the court is 72 hours (whether or not consecutive) in any period of 28 days<sup>64</sup>.

**63** The maximum period for which a court may authorise secure accommodation is three months.<sup>65</sup>

**64** A court may authorise an extension of the period a child/young person can be held in secure accommodation by up to six months.<sup>66</sup>

### ***Review***

**65** The Trust is required to appoint three persons to review the keeping of the child in secure accommodation and one of these persons must be independent of the Trust. The first review must take place within one month of the inception of the placement and then at intervals of not more than three months<sup>67</sup>. The persons appointed to carry out the review must seek inter alia the views of the child before the review.<sup>68</sup>

### ***Records***

**66** Regulation 12 stipulates the records, which must be kept for each child in secure accommodation.

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<sup>61</sup> SR 1996 No 487.

<sup>62</sup> Reg 2.

<sup>63</sup> Reg 3.

<sup>64</sup> Reg 6.

<sup>65</sup> Reg 7.

<sup>66</sup> Reg 8.

<sup>67</sup> Reg 10.

<sup>68</sup> Regulation 11.

### ***The Human Rights Act 1998 and secure accommodation***

**67** The Human Rights Act 1998 commenced in October 2000. It established in domestic law most of the rights enshrined in the European Convention on Human Rights (ECHR).

The Human Rights Act 1998 requires all public authorities to act in a way which is compatible with the rights enshrined in the ECHR and the courts must consider the case law of the European Court of Human Rights when determining cases.

The main debate about secure accommodation provisions, centred around their apparent incompatibility with Article 5 of the ECHR. Article 5 enshrines the right to liberty and security of the person, which as with all ECHR rights applies to children as well as to adults. Article 5 of the ECHR is set out in its entirety for ease of reference below:

#### ***Right to liberty and security***

“ 5(1) Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following circumstances and in accordance with a procedure prescribed by law:

- a) the lawful detention of a person after conviction by a competent court
- b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
- c) the lawful arrest or detention of a person for the purposes of bringing him before the competent legal authority.....;
- d) the detention of a minor by lawful order for the purposes of educational supervision;
- e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics, drug addicts or vagrants;
- f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country.....”

**68** The potential difficulty lay in the fact that Article 5 (1) (d) clearly states that the deprivation of liberty from a child/young person will only be justified in circumstances where the detention is for the purposes of ‘educational supervision’. The Secure Accommodation Regulations state, however, that the purpose of secure accommodation is for the restriction of liberty. The Regulations do not use the term ‘educational supervision’.

The Court of Appeal has indicated that the use of secure accommodation is a deprivation of liberty under Article 5 and that to be justified it must fall within one of the categories (a) – (f). The only categories, which will be relevant, are (d) and (e), as it would not be possible to use the other categories. The focus has been on category 5 (1) (d).

#### ***The cases***

**69** The case of *Bouamar v Belgium*<sup>69</sup> concerned a young boy aged 16 who was remanded on nine successive occasions to a remand prison, due to the lack of another suitable alternative placement. The European Court of Human Rights stated that “the detention of a young man in a remand prison in conditions of virtual isolation and without the assistance of staff with educational training cannot be regarded as furthering the educational aim”. The Court found that the nine placement orders were incompatible with Article 5 (1) (d) as the placements did not provide ‘educational supervision’

The case of *Koniarska v UK*<sup>70</sup> was a decision by the European Court of Human Rights as to the admissibility of a complaint by the applicant in relation to the use of secure accommodation. The applicant was convicted of common assault, criminal damage and affray in March 1995 and in May 1995 she was detained under the Mental Health Act for assessment. One consultant psychiatrist took the view that the applicant suffered from a psychopathic disorder, which was not treatable, but an assessment by a psychiatrist appointed by the applicant’s solicitor did not reveal criteria for psychopathic disorder. The applicant was discharged from hospital to Glenthorne Centre in August 1995.

On 23 November 1995 an application was made by the local authority for the applicant to be kept in secure accommodation until her eighteenth birthday. (July 1996) At the same time the applicant applied to revoke her care order. The application for secure accommodation was ultimately successful although on appeal the length of detention was decreased.

On expiry of the secure accommodation order the applicant returned to live with her parents.

### ***The applicant’s complaints in Koniarska v UK***

**70** The applicant argued that her rights had been breached under Article 5 (right to liberty and security of the person), Article 3 (freedom from inhuman and degrading treatment) and Article 8 (right to family life) of the ECHR. She complained that she was beyond school leaving age and that she received no education while detained and therefore her detention was not compatible with Article 5 (1) (d). She complained that her detention amounted to intense mental suffering which constituted inhuman and degrading treatment. She complained that the further detention period was in breach of her right to family life, in that her ability to make home visits was limited.

### ***The findings of the European Court of Human Rights in Koniarska v UK***

**71** The Court was of the opinion that the applicant was deprived of her liberty within the meaning of Article 5 (1). Therefore her detention had to fall within one of the exceptions under Article 5(1) (a)-(f). The Court considered (although this was not argued by the Government) the relevance of the exception under Article 5 (1) (e) and stated:

“ The applicant has been diagnosed as suffering from a psychopathic disorder and there is no suggestion that at the time of the making of the secure accommodation orders that this condition did not exist any more. Further her detention was found to be needed, as there was a danger that she would injure herself or others. There could thus be said to be medical and social reasons for her detention”

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<sup>69</sup> *Bouamar v Belgium*, Judgment of EurCtHR, App. No 9106/80 ( 29 Feb 1988)

<sup>70</sup> Admissibility Decision of the EurCtHR, Application No 33670/96, (12 October 2000)

Unfortunately the Court did not give a formal ruling under Article 5 (1) (e), but considered the Article 5 (1) d) exception.

In considering the point raised that the applicant was over school leaving age, the Court stated that Article 5 (1) (d) applied to ‘minors’ and not just those of official school age. They were of the view that detention could still be for the purposes of educational supervision.

The applicant argued that her detention was not for the purposes of educational supervision and that any education she received was incidental. The Court stated as follows:

“The Court considers that, in the context of the detention of minors, the words ‘educational supervision’ must not be equated rigidly with notions of classroom teaching. In particular, in the present context of a young person in local authority care, educational supervision must embrace many aspects of the exercise, by the local authority, of parental rights for the benefit and protection of the person concerned”.

The Court was of the view that the secure accommodation orders made were capable of constituting part of educational supervision.

The Court, however, then looked in detail about the reality of the educational supervision provided at Glenthorne which is a specialist residential facility for disturbed young people. As part of its multi - disciplinary approach Glenthorne provided an educational programme in which young people were taught in groups of three or four and sometimes on a one- to -one basis. Until January 1996, the applicant had attended a full range of classes until an incident occurred, which meant she could not attend all classes. The applicant continued to take part in some classes and in life skills and social skills programmes. The Court was of the view that extensive educational provision was made and that the fact that the applicant chose not to go to some of the classes did not alter this fact.

The Court distinguished the case of *Bouamar v Belgium* and found that the applicant’s detention was justified under Article 5 (1) (d) on the grounds of educational supervision. It found that although the applicant was very unhappy, there was nothing to indicate that her treatment had amounted to the threshold required for inhuman and degrading treatment. It also found that the interference with the applicant’s family life was justified.

**72** The case of *Re K*<sup>71</sup> involved an appeal on behalf of a 15-year-old boy against the making of a secure accommodation order on 30 June 2000. The issue under determination was whether a secure accommodation order was a deprivation of liberty and, if so, whether such deprivation fell within the exceptions set out in Art 5 (1)(a) –(f) of the European Convention. The case of *Koniarska v UK* was decided prior to the judgment of the Court of Appeal in this case and was referred to.

The facts of this individual case were that the young person had displayed serious destructive, aggressive and sexualised behaviour from a young age. He was placed in secure accommodation at the age of 11, with the consent of the Secretary of State in 1997 on grounds that he presented a serious risk to himself and others.

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<sup>71</sup> *Re K (Secure Accommodation Order; Right to Liberty)* [2001] Fam 377

Between October and December 1998 there was a marked deterioration in his behaviour. He was charged with two offences of indecent assault and was involved in two incidents of fire setting. He assaulted members of staff.

He was placed in secure accommodation again and the principal of the Unit expressed concern in a letter about his sexualised and aggressive behaviour, stating that he was a very dangerous young man.

During the period August 1996 –April 1999 the applicant was convicted of indecent assault, criminal damage, burglary, common assault, arson and criminal damage caused by arson.

### ***Findings of the Court of Appeal in W Borough Council v DK***

**73** Secure accommodation was a deprivation of liberty under Article 5 of the ECHR. Therefore, it had to fall within one of the exceptions under Article 5 (1) (a) – (f) to be justified. On the facts of the appeal the young person was receiving education, which was carefully supervised, although there was criticism about the lack of provision of appropriate therapy. The duty of the English Court under the Human Rights Act is to try and find a compatible interpretation.

In each case where a secure accommodation order is applied for, the English Court, at any level, must have the requirements of Article 5 (1)(d) in mind when it is considering the relevant criteria, and thereby ensure the compatibility of the Article with the Convention right.

The case of Koniarska was followed. In the context of minors, the words educational supervision must not be equated rigidly with notions of classroom teaching...educational provision embraced many aspects of the exercise of parental authority of parental rights.

### ***Conclusions from case law***

**74** Both Koniarska and Re K were extreme cases. K was described by a professional as being the most dangerous young person he had come across in 23 years of experience. In both cases a range of other specialised provision and professional help had been implemented for the young people concerned and the use of secure accommodation was as a last resort.

The care plan needs to be very specific in relation to the purpose of the use of secure accommodation and also in relation to exit strategies.

The Children (NI) Order 1995 and associated Regulations and Guidance make it quite clear that secure accommodation is a measure of last resort. It is an extremely serious step to take and can be draconian if used inappropriately. Secure accommodation should not be used due to lack of or failure to access other appropriate services or facilities for the child.

From a children's rights perspective, the child's right to liberty and security of the person (Article 5, ECHR), the child's right to family life /contact with family (Article 8, ECHR) and the child's right to freedom from inhuman and degrading treatment (Article 3, ECHR) must all be considered. The child also has a right to a fair hearing before an independent and impartial tribunal under Article 6 of the ECHR.

As Lady Butler Sloss indicated in her judgment the use of secure accommodation *per se* amounts to a breach of a child's liberty unless it falls within one of the exceptions and, therefore, the requirements of Article 5 should be firmly in mind when a decision is made to place any child in secure accommodation.

## **DISCHARGE OF CARE ORDERS**

### **Application to discharge care order**

**75** An application to discharge care proceedings can be made under article 58 of the Children (NI) Order 1995. A child or young person can make an application to discharge a care order if they have "sufficient understanding".<sup>72</sup>

## **RIGHTS OF YOUNG PEOPLE LEAVING CARE**

### **PLEASE REFER TO THE SECTION OF THE INFORMATION PACK ENTITLED NEW ARRANGEMENTS FOR CHILDREN LEAVING CARE FOR FURTHER INFORMATION ON THE RIGHTS OF CHILDREN AND YOUNG PEOPLE LEAVING CARE**

**89** Research has shown that care leavers are one of the most vulnerable groups of young people and are heavily represented in homelessness figures. It is suggested that the housing needs of care leavers should be dealt with before they leave care in association, if appropriate, with other agencies and in a way which integrates the young person's need for support, education, employment and health. The leaving and after care teams in Trusts play an essential role in the co-ordination of young people's needs on leaving care.

### **Children (Leaving Care) Act 2000**

**90** In England a consultation paper entitled "Me, Survive, Out There?" was published by the Department of Health in June 1999.<sup>73</sup> The consultation paper recognised that young people leaving care had not had a "fair deal"<sup>74</sup> and drew on extensive research carried out in England which showed *inter alia* that as many as 75% of young people leaving care had no educational qualifications<sup>75</sup>, up to 50 %<sup>76</sup> were unemployed and up to 20 %<sup>77</sup> had experienced some form of homelessness within two years of leaving care.

The Children (Leaving Care) Act 2000 came into force in England on 1 October 2001 and significantly extended the duties of local authorities towards looked after children in England<sup>78</sup>

### **Children (Leaving Care) Act (NI) 2002**

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<sup>72</sup> Art 58 (1) (b) of the Children (NI) Order 1995 and *Re A (Care Discharge Application by a Child)* [1995] 1 FLR 599. A child can also initiate proceedings to discharge a supervision order under article 59(2) (b) of the Children (NI) Order 1995.

<sup>73</sup> "Me, Survive, Out There?" Department of Health, ( June 1999); [www://doh.gov.uk/scg/leavers.htm](http://www://doh.gov.uk/scg/leavers.htm)

<sup>74</sup> See the Foreword to *Me Survive Out There?* Frank Dobson, Secretary of State for Health

<sup>75</sup> Garrett L, "Leaving Care and After", NCB 1992

<sup>76</sup> Broad B "Young People Leaving Care", Jessica Kingsley 1998

<sup>77</sup> Biehal et al, "Moving On", HMSO 1995

<sup>78</sup> See Tregenna - Piggott and Christine Daly *The Children (Leaving Care) Act 2000*, Children's Legal Centre, Childright, (2001)

**91** In Northern Ireland, research carried out by Pinkerton and Mc Crea and published in 1996<sup>79</sup> had indicated that young people leaving care were seriously disadvantaged in terms of educational achievement and employment opportunities and that a significant percentage of these young people had experienced periods of homelessness and teenage pregnancy.

In October 2000, the Social Services Inspectorate of the Department of Health, Social Services and Public Safety published a report called 'Promoting Independence; A Review of Leaving and Aftercare Services' which confirmed that many young people leaving care in Northern Ireland were experiencing a range of disadvantages in terms of education, employment, housing and family support.

A consultation document entitled 'Proposals for a Children Leaving Care Bill' was circulated by the DHSS PS in March 2001 and contained proposals to strengthen the rights of young people leaving care in Northern Ireland.

**92** The Leaving Care Bill was introduced in the Northern Ireland Assembly on 4 March 2002. It's stated aim was to improve the life chances of young people who are looked after by Trusts as they make the transition to independent living. The Children (Leaving Care) Act (NI) 2002 was introduced in Northern Ireland in 2002 and contains amendments to article 35 and article 36 of the Children (NI) Order 1995 to strengthen the rights of young people leaving care by placing new and enhanced duties on Trusts to support care leavers. The Act is complex in terms of the definitions of "eligible" and "relevant" young people, but in summary the key proposals are as follows<sup>80</sup>;

- The Act places a new duty on Trusts to assess and meet the needs of eligible 16 and 17 year olds who remain in care, or those who have left care.
- The Act places a new duty on Trusts to keep in touch with young people who have left care up until they are 21 years old or later if they are receiving help with education and training.
- The Act places a duty on Trusts to provide a personal adviser and a pathway plan for all eligible young people.
- Somewhat controversially, the Act excludes 16 and 17 year olds in the care system from applying for state benefits and instead places a duty on the Trusts to maintain the young people.<sup>81</sup>
- The Act enables young people who have reached the age of 18 (and who previously qualified for the new arrangements) to continue to have a personal adviser and a pathway plan. Once the young person has reached the age of 18, he/she will no longer be excluded from state benefits.
- The Act requires Trusts to provide assistance for these young people in kind or exceptionally in cash until they are 21 years old and to assist them with the expenses associated with employment, education and training.

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<sup>79</sup> John Pinkerton and Ross Mc Crea, "Meeting the Challenge? Young People Leaving The Care of Social Services and Training Schools in Northern Ireland" (1996), Centre for Childcare Research, QUB. See also Horgan & Sinclair, "Planning for Children In care in Northern Ireland", national Children's Bureau, (1997)

<sup>80</sup> See the Explanatory and Financial Memorandum to The Children (Leaving Care) Bill HMSO, 2002 which is helpful in clarifying the complex legislation.

<sup>81</sup> See Report on the Children (Leaving Care) Bill (N/A Bill 5/01), Committee for Health and Social Services and Public Safety, HMSO, 26 June 2002

- The Act also requires Trusts to provide vacation accommodation (or funds to secure it) to care leavers who are being assisted in relation to full time higher education or further education.

## **COMPLAINTS PROCEDURES FOR CHILDREN IN CARE AND SERVICES FOR CHILDREN IN NEED**

**93** Section 5 of the Children Leaving Care Act NI 2002 (inserting new Article 35D in the Children (NI) Order 1995) places a duty on Trusts to establish procedures for representations and complaints about leaving and aftercare and pursuant to article 45 of the Children (NI) Order 1995 Trusts are required to establish procedures for complaints for children and young people who are looked after or in need.

**94** The Children Order Representations and Complaints Procedure<sup>82</sup> may be invoked by the following:

- any child looked after by the Trust;
- any child not looked after by a Trust but in need;
- a parent of his/hers;
- any person with parental responsibility;
- any Trust foster parent;
- any other person whom the Trust considers has sufficient interest in the child's welfare.

**95** The procedure includes provision for complaint in the following areas:

- day care;
- services to support children within the family home;
- accommodation of a child;
- after care;
- placement decisions;
- the process of decision-making;
- the denial of a service;
- a decision in relation to usual fostering limit;
- matters, which affect a group of children;
- dissatisfaction about the Trust's management of a case.

### **Making a complaint**

#### *Problem Solving Phase*

A request should be made for the appropriate complaints form and the form should be completed and forwarded to the Designated Complaints Officer in the Trust. The complaint should be checked with the child, subject to age and understanding, to ensure his/her views are reflected. The complaint should be acknowledged within two days. A review meeting should be arranged to consider the issue in the context of the child's case/care plan, the aim being to complete this phase within 28 days.

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<sup>82</sup> Representations Procedure (Children) Regulations (NI) 1996, (SR 1996, No 451)

### *Formal Investigation*

If the complainant remains dissatisfied following the problem solving phase of the complaints procedure, the Designated Officer should arrange for the appointment of an independent person. These two individuals will then arrange to jointly conduct an inquiry and provide written comments within a 28 day timescale.

### *Review Panel*

If the complainant informs the Trust that he or she remains dissatisfied with the outcome of the formal investigation and wishes the matter to be referred to a panel for consideration, a panel should be appointed for these purposes. An independent person will be appointed by the Trust to sit on the panel.

### *Ombudsman*

Complainants who are dissatisfied with the outcome of the complaints procedure may take this case to the NI Commissioner for Complaints (the Ombudsman).<sup>83</sup>

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<sup>83</sup> Excerpted from Chapter 5 of Complaints in Health and Social Services, Nov 2006, DHSS PS.