

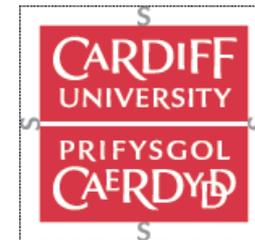
# CHILD PROTECTION – AVOIDING LITIGATION

---

Julie Doughty

Law School

Cardiff University



# Litigation



# The court's functions in care cases:

1. Proving the child is at risk of harm
  - Burden of proof is on the local authority to prove abuse or neglect
  - Court makes a finding on civil standard of proof
  
2. Making an order based on the child's welfare
  - examined by the *Family Justice Review*
  - courts not well equipped to scrutinise care plan
  - scrutiny no guarantee of success
  - need to balance the benefit against the cost and time involved

# The *Family Justice Review*

- Four headlines to its recommendations:
  - Children's wishes should be taken into account; they should know what is happening and why
  - It is better for parents to mediate than litigate (private law)
  - Presumptions about 'shared parenting' should not be introduced
  - 'Care cases take far too long'
- Since:
  - Legal aid removed in private law; mediation information meeting compulsory for court applicant
  - Presumption of parental involvement
  - Care cases to be time limited to 26 weeks

# *Family Justice Review – care cases*

- ‘Approaches that avoid or reduce the need for distressing and costly court cases’ should be encouraged:
  - Family group conferences
  - Child protection mediation
  - Family Drug and Alcohol Court
  - Support for parents post proceedings
- FJR recommended: research; pilots; roll-out
  - awaited

# In practice:

- An alternative to care proceedings:
  - FGCs and use of private law orders for kinship care
  - Pre-Proceedings Process
  - Voluntary agreements for local authority to maintain the child in out-of-home care
- An alternative that may reduce time in court:
  - Support for parents (Drug & Alcohol Courts; post-court support)
  - Is there a place for mediation?
    - Court directed in USA and Australia
    - 'no more than an expedited adjunct to formal litigation'?

# Two 'alternatives'

1. Agreements avoiding court – use of voluntary accommodation
2. Potential for mediation

# 'Informal' agreements avoiding court – voluntary care

- 'voluntary' accommodation is part of the family support part of the Children Act 1989
- Not in the care proceedings or protection parts of the Act
- Intended to help keep children out of care and out of criminal activity
- Provides services and support for homeless young people, unaccompanied minors, children whose parents have intermittent or short term problems
- Not intended as an alternative to a care order being made
- Nationally, 2/3 voluntary: 1/3 under care orders, but wide variations between local authorities
- No court oversight
- Heavily bureaucratic planning and review system – but criticised as ineffective
- Examples of coercive use of 'agreements'

# 'Informal' agreements within/alongside court - mediation

- What does mediation offer apart from reducing expenditure on judges?
- Which cases are suitable?
- What can be mediated in cases of harm?
  - Multiple problems of ill-health; disability; poverty; substance abuse; domestic violence
- How can parents be open?
- How is the balance struck between stronger and weaker parties?
- How are marginalised individuals and minority groups represented?
- Is the child present?
- Who are mediators?
  - Independent, court officers, lawyers, social workers
- How are they regulated?

# Conclusions

- Policy to reduce expenditure on the justice system
- High numbers of children referred because of child protection concerns
- Reduction in spending on local support services
- Pressure on courts – but no indication cases are brought wrongly
- ‘Cheaper’ options are (1) keeping children in care without orders or (2) finding an alternative dispute resolution process
- Dangers of wholly administrative processes in ‘austerity’
- ADR with legal representation has potential to protect rights and welfare