

**Chapter 10:** The Law Relating to Children – Public Law and Adoption

**Question One**

Discuss the extent to which the wishes and feelings of the child are taken into account during care proceedings.

**Answer Guidance**

This essay question focuses on the wishes and feelings of the child in the context of care proceedings. A brief account of care proceedings can be included, but a detailed explanation is not required. First, it is important to mention *Gillick v West Norfolk and Wisbech AHA* [1986] 1 FLR 224, which recognises the rights of mature children to make certain decisions, but it should be noted that the decision of the court is based on the welfare principle (s.1(1) Children Act 1989) rather than the child's wishes. This does not mean that the child's wishes are not relevant as s.1(3)(a) requires the court to consider the ascertainable wishes and feelings of the child considered in the light of his age and understanding, but this factor does not have priority over other factors. The answer should explore how the child's wishes are communicated to the court i.e. via the children's guardian, who is appointed under s.41 of the Children Act 1989 and via the child's solicitor. Students should point out that the children's guardian may recommend a course of action that it is contrary to the child's wishes. The fact that there is no requirement for the child to give evidence in court, but no presumption against it (*Re W (Children)* [2010] UKSC 12) should also be discussed. The conclusion should assess whether the child's views are sufficiently considered during care proceedings.

## Question Two

Toby is three years old. He lives with his parents, Usman and Valerie in a rented flat. Toby attends a local nursery when his parents are at work. Six months ago Winona, one of the nursery workers, noticed that Toby had several bruises on his arms and legs. She asked Valerie about it and was told that Toby is a clumsy child, who is often falling over and bumping into things. Toby is withdrawn at nursery and does not interact well with the other children. Winona does not think that Toby is clumsy. He still arrives at the nursery with bruises on his arms and legs. Last week Winona telephoned the local authority to report her concerns. Yesterday Toby was taken to hospital and diagnosed with a broken arm and leg. The doctor informed the local authority as he did not believe that Toby's injuries were accidental. Usman and Valerie have been interviewed by the police and a social worker: both claim that they did not injure Toby.

Discuss the legal position in this case.

## Answer Guidance

This question requires students to apply the public law provisions of the Children Act 1989 to a factual scenario. As Toby has been admitted to hospital suffering from non-accidental injuries, emergency protection should be considered. The answer should explain that the local authority will apply for an emergency protection order (s.44 Children Act 1989) and should discuss the criteria for making such an order and the consequences of it (*X Council v B (Emergency Protection Order)* [2005] 1 FLR 341). Interim care orders can be discussed (s.38) but to secure long term protection, the local authority will apply for a full care order (s.31). Much of the discussion will centre on the threshold criteria contained in s.31(2) of the Act. Students should be aware that difficulties arise if a child suffers non-accidental injuries and it is not clear who caused them: cases such as *Re S-B (Children)(Care Proceedings: Standard of Proof)* [2009] UKSC 178 and *Re J (Care Proceedings: Possible Perpetrators)* [2013] UKSC 9 should be included in the answer. Students should explain that if the threshold criteria is met, the court will decide whether to make a care order based on the welfare principle (s.1(1)), no order principle (s.1(5)) and the welfare checklist (s.1(3)). It should be noted that the court may make an alternative order. The consequences of obtaining a care order should be explained and the possibility of adoption should be discussed.

### Question Three

Discuss the circumstances in which a child can be adopted without a parent's consent. Do you approve of the approach taken ?

### Answer Guidance

An adoption order transfers legal parenthood and parental responsibility from the birth parents to the adopter(s) and it is extremely rare for an order to be set aside. Making an adoption order without a parent's consent is an extreme step (See *Re B-S (Children)* [2013] EWCA 963), which must be evaluated in the answer to this essay. Students should begin by explaining that adoption is regulated by the Adoption and Children Act 2002 and that the welfare principle applies to adoption proceedings (s.1(2)). A brief account of the adoption process can be included, but a detailed explanation is not required. In addition to satisfying eligibility requirements, an order will be made if the parent or guardian consents or the parent or guardian's consent should be dispensed with (s.47(2) Adoption and Children Act 2002). Students should explain that 'parent' means a parent with parental responsibility (s.52(6)) and the implications of this for fathers should be discussed. Candidates should also point out that consent can be dispensed with if the parent or guardian cannot be found or lacks capacity (s.52(1)(a)): reference can be made to *KK v FY* [2014] EWHC 3111 (Fam). Consent can also be dispensed with if the welfare of the child requires consent to be dispensed with (s.52(1)(b)), which should be explored in depth with reference to case law such as *Re P (Placement Orders: Parental Consent)* [2008] EWCA Civ 535. The making of adoption orders during care proceedings should also be discussed, with reference to cases such as *Re B (A Child)* [2013] UKSC 33 and *Re R (Adoption)* [2014] EWCA Civ 1625.

#### **Question Four**

Explain the purpose and consequences of adoption and consider whether the legal concept of adoption is still required.

#### **Answer Guidance**

This essay question invites students to discuss the purpose and consequences of adoption, which has a long history, but only became regulated when the Adoption of Children Act 1926 was passed. Students should note that the model adopted in England and Wales was that of total legal transplant of the child from the birth family to that of the adopters and was based on an unmarried mother giving up her baby to a married couple who could not have children. Current legislation (The Adoption and Children Act 2002) retains this model: s.67 provides that an adopted person is treated in law as if born as the child of the adopter or adopters, whilst s.46 extinguishes the parental responsibility of the birth parents and transfers it to the adopters. The implications of these provisions should be discussed e.g. students should consider nationality, inheritance, child support and prohibited degrees of relationship for the purpose of marriage. The purpose of adoption was and remains, to provide a secure and stable home for the child, but the circumstances in which children are adopted have changed e.g. step parent adoptions and adoption from care. Students should also discuss the move towards open adoptions and the introduction of post-adoption contact with the birth family, but should note that the latter is unlikely to be imposed on the adopters against their will (*Re T (Adoption: Contact)* [2010] EWCA Civ 1527). Alternatives to adoption should be considered e.g. granting a step parent parental responsibility under s.4A of the Children Act 1989 and Special Guardianship Orders under s.14A-F of the Children Act 1989. The advantages and disadvantages of these alternatives, compared with adoption, should be assessed, ending with a conclusion as to whether the concept of adoption is still required.