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Prioritising Sibling Relationships for Looked After Children

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SIBLING RELATIONSHIPS FOR LOOKED AFTER CHILDREN: POTENTIAL CHANGES TO THE LAW

This is a complex area, involving several different legal processes, with associated legislation and guidance. Overall, looked after children have few enforceable rights at present in law in relation to placement and contact with siblings. It is clear that legislative change is needed to enable them to have rights they can vindicate, in order to maintain sibling relationships. We propose the following changes. The current situation and justification for proposed changes are set out in the accompanying paper.

1. Define “Sibling” in law, compatible with Article 8 ECHR:
“Sibling” includes full sibling, half sibling, step sibling by virtue of marriage or civil partnership, sibling by virtue of adoption, and any other person the child regards as their sibling and with whom they have an established family life.
2. Sibling Placements in Alternative Care: **Introduce requirement to place siblings together in care** unless there are compelling reasons for separating them, based on best interests of one sibling or another. (See UN Guidelines for Alternative Care of Children, and Moving Forward Guidance)
3. Where siblings are placed separately, introduce **duty on local authorities to consider reunification** at the first and all subsequent reviews of placements. (See Guidance on 2009 Regulations)
4. **Contact for Separated Siblings: Amend Children (Scotland) Act 1995, Section 17** to place **duty on local authorities to promote and facilitate contact between looked after children and their separated siblings**, where it is practicable and appropriate in the circumstances of the case. (i.e. extend duty beyond parental contact)
5. **Amend Children’s Hearings (Scotland) Act 2011** to:
 - place a specific duty on the hearing to consider sibling contact at each hearing whether representations are made on behalf of the sibling or not; and
 - give siblings right to be notified of hearings; to make representations as to sibling contact; to seek measures of sibling contact; and to have right of appeal against decision of hearing or court in respect of sibling contact.
6. Introduce an explicit duty on **local authorities to take into account views of siblings** when making an **assessment** in relation to a looked after child. (See Regulation 4(2) 2009 Regulations)
7. **Permanence Proceedings: Amend Adoption and Children (Scotland) Act 2007** to introduce explicit right for siblings to be notified of permanence proceedings; to make application for contact with sibling; and to place a duty on the court to consider sibling contact.
8. **Family Actions: Amend Children (Scotland) Act 1995, Section 11** to introduce explicit right for siblings to make application for contact.

IMPORTANCE AND BENEFITS OF SIBLING RELATIONSHIPS

Sibling relationships are amongst our longest lasting relationships and contribute greatly to our sense of identity. Research has demonstrated that positive sibling relationships can provide a source of resilience for children facing adversity and provide continuity at a time of change and uncertainty¹. They can also be a source of support into adulthood². Placing siblings together has been associated with increased wellbeing and stable, enduring placements³.

Despite these benefits, sibling separation and estrangement are common outcomes when children become looked after and accommodated⁴. Research has estimated that around 70% of children in care experience separation from siblings^{4,5}. Where this occurs children typically express a strong desire to stay in contact with brothers and sisters⁶ yet contact varies in quality and tends to become less frequent over time. This is a source of distress for children and a concern of professionals working on their behalf.

Research has recommended that children should not be separated from their siblings on admission into care and if this occurs children should be reunited speedily in order to avoid brothers and sisters losing a shared sense of their development and identity^{2, 7}. Interventions designed to promote positive sibling relationships and reduce sibling conflict have also been shown to be effective⁸.

INTERNATIONAL CONTEXT

Human Rights: Family Life

In terms of the Human Rights Act of 1998, public authorities (including local authorities, courts and children’s hearings) have a duty to act compatibly with certain rights set out in the European Convention for the Protection of Human Rights and Fundamental Freedoms (“ECHR”).

¹ Wojciak, A.S., McWey, L.M. & Waid, J. 2018. Sibling relationships of youth in foster care: A predictor of resilience. *Children and Youth Services Review*, 84, pp.247-254.

² Kosonen, M. 1996. Maintaining Sibling Relationships – Neglected Dimension in Child Care Practice. *British Journal of Social Work*, 26, pp.809-22.

³ Jones, C. 2016. “Sibling relationships of children in foster care and adoption: A review of international research”, *Children & Society*, 30(4), pp. 324-334

⁴ Jones, C. & Henderson, G. 2017. *Supporting Sibling Relationships of Children in Permanent Fostering and Adoptive Families: Research Briefing*. Glasgow: University of Strathclyde.

⁵ Ofsted. 2012. *Children’s care monitor 2011: children on the state of social care in England*. Manchester: Ofsted.

⁶ Sinclair, I., Baker, C., Wilson, K., & Gibbs, I. 2005. *Foster Children. Where They Go and How They Get On*. London: Jessica Kingsley.

⁷ Albert, V. & King, W. 2008. Survival analyses of the dynamics of sibling experiences in foster care. *Families in Society: The Journal of Contemporary Social Services*, 89(4), pp.533-541.

⁸ Kothari, B., McBeath, B., Sorenson, P., Bank, L., Waid, J., Webb, S. J., & Steele, J. 2017. An intervention to improve sibling relationship quality among youth in foster care: Results of a randomized clinical trial. *Child Abuse & Neglect*, 63, pp.19–29.

Those rights include the right to respect for “**family life**” specified in Article 8 of ECHR. The existence of “family life” depends on “the real existence in practice of **close personal ties**”⁹. It has been observed that there are four key relationships which amount to family life:

*“First there is the relationship between husband and wife. Secondly, there is the relationship between parent and child. Thirdly, there is the **relationship between siblings**. And, fourthly, there are relationships within the wider family: for example, the relationships between grandparent and grandchild, between nephew and uncle and between cousins. Each of these relationships can in principle give rise to family life within the meaning of Article 8.”¹⁰*

Any interference by a public authority in family life must be lawful and “a proportionate response to a legitimate aim.”¹¹

It follows that local authorities need to consider whether there are close personal ties between siblings in care, or whom they are considering taking into care. If those ties are present, then “family life” between those siblings, in terms of Article 8, exists and any interference by a local authority must be lawful and proportionate. To be lawful, the interference must be conforming to or permitted by law (which could be a statute, a regulation or common law). To be proportionate: (1) the objective of the interference must be sufficiently important to justify limiting the fundamental right; (2) the interference must be rational, fair and not arbitrary; (3) the interference must be kept to a minimum, so far as is reasonably possible; and (4) the interference must involve the striking of a fair balance between the rights of the individual and the interests of society. If the interference is unlawful or disproportionate, the Article 8 rights of each sibling will be violated.

It is important to be aware also of the terms of the United Nations Convention on the Rights of the Child (UNCRC). Although the UNCRC is not incorporated directly into UK or Scots Law, it is relevant in interpreting domestic legislation and ECHR. Article 16 of the UNCRC is in the following terms:

- “1. No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, or correspondence, nor to unlawful attacks on his or her honour and reputation.*
- 2. The child has the right to the protection of the law against such interference or attacks.”*

All of the duties imposed on local authorities, courts and children’s hearings and referred to below, must be read in the context of the obligation on public authorities to act compatibly with the rights under ECHR, including the Article 8 right to respect for family life.

United Nations Guidelines for the Alternative Care of Children¹²

The United Nations Guidelines for the Alternative Care of Children were issued to enhance the implementation of the UNCRC regarding the protection and well-being of children who are deprived of parental care or who are at risk of being so. One of the fundamental policy orientations of the Guidelines is set out in Guideline 17:

⁹ European Court of Human Rights in *Lebbink v Netherlands* (2005) 40 E.H.R.R. 18

¹⁰ English Court of Appeal in *Singh v Entry Clearance Officer* [2005] Q.B. 608, per Munby J, at para 58

¹¹ Supreme Court in *Principal Reporter v K* [2010] UKSC 56

¹² https://www.unicef.org/protection/alternative_care_Guidelines-English.pdf

“Siblings with existing bonds should in principle not be separated by placements in alternative care unless there is a clear risk of abuse or other justification in the best interests of the child. In any case, every effort should be made to enable siblings to maintain contact with each other, unless this is against their wishes or interests.”

Guidance has been developed to assist with implementation of the Guidelines.

“As a general rule, siblings should not be separated from each other in care placements unless there are compelling reasons for doing so. These reasons must always be in the best interests of any of the children concerned. While this may seem an obvious policy directive, the number of documented cases where siblings are separated without regard to their best interests made it necessary to stipulate it as a general principle of the Guidelines.

“Where siblings are separated, [national policy should] facilitate contact so that meaningful links can be maintained.”¹³

The United Nations Committee on the Rights of the Child in its 2016 Concluding Observations on the UK expressed the following concern on this matter¹⁴:

“Children deprived of a family environment

51. The Committee is concerned about: ... Children placed at a distance from their biological families which prevents them from keeping in contact, and siblings being separated from each other without proper reason; ...

52. ... The Committee recommends that the State party: ... (c) Wherever possible find a placement for the child which will facilitate contact with his or her biological parents and siblings;”

DOMESTIC LEGISLATION

The Children (Scotland) Act 1995 (“the 1995 Act”)

By virtue of section 17(1) of the 1995 Act, a local authority has a duty to safeguard and promote the welfare of a child looked after by them. In terms of the Children and Young People (Scotland) Act 2014, sections 95 and 96, the local authority must exercise that duty in a way which is designed to safeguard, support and promote their wellbeing, under reference to the SHANARRI indicators: Safe, Healthy, Achieving, Nurtured, Active, Respected, Responsible, and Included.

Section 17(1)(c) directs the local authority to *“take such steps to promote ... personal relations and direct contact between the child and any person with parental responsibilities ...”*. There is no equivalent duty in relation to sibling contact. The issue of sibling contact, whether direct or indirect, can be overlooked in assessment, care planning and preparation of reports.

When making decisions about a looked after child, the local authority has a duty to ascertain the views of the child, his parents (or anyone else with parental rights) and any other person whose views

¹³ Moving Forward: Implementing the ‘Guidelines for the Alternative Care of Children’, CELCIS 2012, pages 38 & 95

¹⁴ http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC/C/GBR/CO/5&Lang=En

the local authority consider to be relevant to the matter to be decided. (Section 17(3)) For sibling contact, “any other person” should generally include the sibling, although siblings are not expressly mentioned. The local authority must have regard to those views, so far as practicable. (Section 17(4))

In family actions, such as those in which contact and residence are in dispute, the court may make a contact order, which regulates “relations and direct contact between a child under [sixteen] and a person with whom the child is not, or will not be, living.”¹⁵ The courts can be reluctant to allow children to become parties to such actions, in order for them to pursue the issue of sibling contact.¹⁶

The Adoption and Children (Scotland) Act 2007 (“the 2007 Act”)

When a court is making a permanence order under section 80 of the 2007 Act, it may make an ancillary order “specifying such arrangements for contact between the child and any other person as the court considers appropriate and to be in the best interests of the child.” (Section 82(1)(e)) In permanence order applications, the court must allow the local authority, the child, or a person with parental responsibilities or rights, or “any other person who claims an interest” who wishes to make representations to the court to do so. (Section 86) A sibling of the child could claim an interest. However, there is no requirement that the sibling be notified of the proceedings, nor is there any duty on the court to consider sibling contact when making a permanence order.

The Looked After Children (Scotland) Regulations 2009 (“the 2009 Regulations”)

Regulation 4(5) of the 2009 Regulations is in the following terms:

“(5) Where [the local authority are considering placing a child with a kinship carer, or a foster carer, or in a residential establishment]; and ... any other child in the same family is looked after or about to be looked after,

the local authority must, in making their assessment take into account the need to ensure, where practical and appropriate, that those children are placed with the same carer or in the same residential establishment or in homes as near together as is appropriate or practicable.”

There is no actual duty to place siblings together in care unless there are compelling reasons otherwise, such as is set out in the UN Guidelines (see above).

The Guidance on the 2009 Regulations states as follows: “...[L]ocal authorities should try to ensure that siblings (children in the same family) are placed together, except where this would not be in one or more of the children’s best interests. Where this proves impossible, they should, wherever possible, be placed near each other. ... Where it is not in the children’s best interests for them to be placed together, or this has proved unachievable, then it may be appropriate for frequent contact to be maintained. This should be recognised in its own right and not purely as part of contact with parents. Where siblings are placed separately, reunification should be considered at the first and all

¹⁵ Section 11(2) Children (Scotland) Act 1995

¹⁶ D v H 2004 SLT (Sh Ct) 73 The court in E v E 2004 Fam L.R. 115, however, allowed a child to pursue sibling contact. That approach was endorsed by Prof K McK Norrie, “Why title to seek orders such as contact orders is not confined to those entitled to apply for an order conferring parental rights” Journal of the Law Society of Scotland, October 2004 <http://www.journalonline.co.uk/Magazine/49-10/1001018.aspx#.UKZNImcRIwQ>

*subsequent reviews, particularly where separation was dictated by a shortfall of placements.*¹⁷ The Guidance does not, however, impose enforceable duties, for example to consider reunification, on local authorities. Such duties, to be enforceable, require to be contained in legislation.

By virtue of Regulation 4(2) of the 2009 Regulations, the local authority making an assessment in relation to a looked after child “*must, where appropriate, seek and take into account the views of ... any other person as the authority considers appropriate.*” Although not explicit, such a person might be thought to include siblings when separation from siblings might be an issue. To ensure that the views of siblings are sought and taken into account, however, an explicit duty is needed.

Children’s Hearings (Scotland) Act 2011 (“the 2011 Act”)

When a looked after child is the subject of a compulsory supervision order (CSO) or an interim compulsory supervision order (ICSO), a children’s hearing or court, when making, varying or continuing a CSO or ICSO, must consider whether to include in the order a direction regulating contact between the child and a specified person or class of person.¹⁸ There is, however, no specific duty on a hearing or court to consider sibling contact, regardless of whether representations are made.

DIFFICULTIES FACED BY LOOKED AFTER CHILDREN SEEKING SIBLING CONTACT

As noted above, section 17(1)(c) of the 1995 Act directs the **local authority** to “take such steps to promote ... personal relations and direct contact between the [**looked after**] child and any person with parental responsibilities ...”. As a result, social workers often prioritise contact with those with parental responsibilities over sibling contact. Notwithstanding the terms of the 2009 Regulations and Guidance, the issue of sibling contact can be overlooked in assessment, care planning and preparation of reports.

Looked after children may find themselves at the centre of a **family action** in court, to which section 11 of the 1995 Act applies, relating to parental responsibilities or parental rights. Difficulties can be experienced by children in seeking court orders for sibling contact (see above), and in obtaining **legal aid** to seek a court order for sibling contact.¹⁹

In **children’s hearings** proceedings under the 2011 Act, if the issue of sibling contact has been overlooked in the preparation of social background reports, then the hearing or court is less likely to consider including a direction in relation to sibling contact. In addition, one sibling is not automatically notified of hearings for another sibling, so is often unaware of the date of the other sibling’s hearing. It can then be difficult to raise the issue of sibling contact with the hearing.

In certain circumstances, it may be possible to have one sibling **deemed a relevant person** in respect of another sibling. However, the test for deeming is a high one, requiring significant involvement in

¹⁷ Guidance on Looked After Children (Scotland) Regulations 2009 and the Adoption and Children (Scotland) Act 2007, page 43

¹⁸ Section 29A Children’s Hearings (Scotland) Act 2011

¹⁹ <https://www.clanchildlaw.org/Handlers/Download.ashx?IDMF=cb3fd83f-eaf3-48a1-bfb7-eae731c3b0b8>;
<https://www.clanchildlaw.org/Handlers/Download.ashx?IDMF=a92c7e42-8552-4521-87b9-22fabcc07119>

the other sibling's upbringing, and it may well be that, in some circumstances, it would be undesirable, in any event, for a sibling to have all the rights of a relevant person which would include receiving all of the papers in relation to the other sibling.

In **permanence proceedings** under the 2007 Act, as there is no duty to notify siblings of the proceedings, siblings rarely have the opportunity to make representations on the matter of sibling contact.

Who are Siblings?

"Sibling" is not defined in the relevant legislation. "**Any other child in the same family**" is as close as the legislation comes to defining "sibling".²⁰ According to the relevant Guidance:

*"This highlights the need for awareness of the child's view of "siblings". Many families have complex structures with full, half and step siblings and research has shown that children's perception of brothers and sisters and who is in their family is rooted as much in their living experience as biological connectedness. In initial planning for children, especially when they face a separation from their parents, the emphasis should be on maintaining as much as possible of familiar and comforting relationships. Longer term planning needs to be based on a fuller assessment of the nature and quality of different sibling relationships."*²¹

One example from research shows the following:

*"While laws and policies may have restrictive definitions of siblings that typically require a biological parent in common, child- and family-centred practice recognises close, non-biological relationships as a source of support to the child. In these cases, the child may be one of the best sources of information regarding who is considered a sibling."*²²

The following may be a useful working definition: "**Sibling**" includes full sibling, half sibling, step sibling by virtue of marriage or civil partnership, sibling by virtue of adoption, and any other person the child regards as their sibling and with whom they have an established family life. For example, a sibling might include a foster child, living in the same family.

²⁰ Regulation 4(5) Looked After Children (Scotland) Regulations 2009

²¹ Guidance on Looked After Children (Scotland) Regulations 2009 and the Adoption and Children (Scotland) Act 2007, page 43

²² Children's Bureau 2013 "Sibling Issues in Foster Care and Adoption", Child Welfare Information Gateway <https://www.childwelfare.gov/pubs/siblingissues/index.cfm>