

# 1KBW

## ***PUBLIC LAW MONTH***

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Session Two

Speakers: Andrea Watts and Lucinda Ferguson

**THURSDAY 9 MAY 2024**

***Leading in family law***

## FDAC: Suitability, scope and success



### Andrea Watts

Call: 2006

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Andrea has a broad children practice covering care proceedings, adoption, private children proceedings and international cases including abduction and wardship. She is an experienced mediator in private children issues. Andrea also deals with cases involving applications for protective orders such as forced marriage protection orders and FGM protection orders as well as non-molestation and occupation orders.

[Click here to view Andrea's full profile](#)

*"Andrea is very much one of those people who astutely keeps abreast of the changing landscape of case law."... "A lawyer with superior advocacy and client management skills."* - CHAMBERS AND PARTNERS, 2024

## Older children and applications for public law orders



### Lucinda Ferguson

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Lucinda qualified in 2020 and is an associate member of chambers alongside her roles as Associate Professor of Family Law at the University of Oxford and Tutorial Fellow in Law at Oriel College, Oxford.

Lucinda is a specialist in family law and education law and has advised and acted at all levels up to and including the High Court. Her thriving family law practice includes all areas of family finance, private law children matters, a wide range of public law matters, child abduction, and emergency injunctions. Lucinda's academic background makes her a particularly useful junior in cases that involve significant research or novel issues.

[Click here to view Lucinda's full profile](#)

*"Lucinda is a true professional, personable, unbelievably well prepared, fantastic knowledge and she led the way from the start... Thank you so much for recommending her"* - Lay Client

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## FDAC: Suitability, scope and success

**Andrea Watts**

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## Outline

### Part 1

- Overview of FDAC

### Part 2

- Recent cases

### Part 3

- FDAC approach in standard care proceedings

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## Part 1 – Overview



### What is FDAC?

- Problem solving
- Drug & alcohol misuse, mental health, domestic abuse etc
- Referral by LA
- Judicial continuity and non-lawyer reviews
- Specialist multidisciplinary team

### What are the outcomes?

- 2022/2023 – 191 families
- 58% reduced or ceased drug use
- 45% of children returned to live with their families
- 10% contested hearings
- Average case 43 weeks (compared to 46 weeks in standard track)

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## Part 1

### FDAC in England

- April 2019 – 8 teams, 20 LAs, 13 family courts
- April 2021 – 14 teams, 35 LAs, 20 family courts
- Currently 13 teams, 37 LAs, 21 family courts

### FDAC in Wales

- FDAC pilot November 2021 to November 2023 - £450,000
- HHJ Adem Muzzafer in Vale of Glamorgan Council v M and Others [2024] EWFC 84 (B) (29 February 2024)

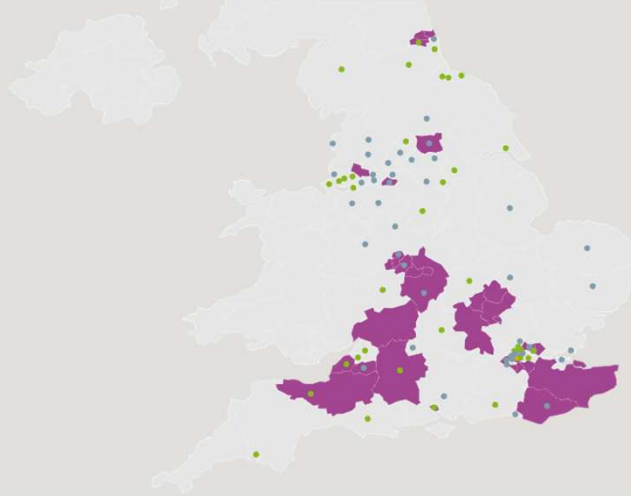
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# Part 1

From the Research in Practice website – part of the National Children's Bureau (as of 2022)



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## Part 2 – Recent Cases

Swindon Borough Council v B, C and Child A [2024] EWFC 8 (B) Outcome:

- Both parents long term Class A drug users
- Pre-birth CP plan and parenting assessment
- The level of addiction was likely to require professional intervention and possible inpatient treatment
- Mother achieved 3m abstinence then relapsed
- Adjournment refused
- Care and Placement orders
- Postscript – serious concerns about the lack of support services offered to parents
- Breach of Article 3?
- Different outcome in FDAC?

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## Part 2

### Gloucestershire CC v A, B and C [2024] EWFC 18 (B)

- FDAC case
- Baby removed shortly after birth
- Parents history of substance misuse
- 3 older children removed
- Parents fully engaged
- Achieved abstinence
- Proceedings extended

#### Outcome:

- Child transitioned into parents' care
- 12m SO ('soft landing')
- An example of why FDAC is so vital
- People can break harmful patterns of behaviour

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## Part 2

### London Borough "A" v A and others [2024] EWFC 46

- Children 8 and 5 years
- FDAC
- Primary issues – domestic abuse and neglect
- Proceedings extended
- Children transitioned back to mother's care

#### Outcome:

- CAO to live with mother
- 12m SO
- Postscript to judgment
- Doubtful this would have been achieved in standard care proceedings
- The LA could not replicate keywork sessions
- LA do not have access to the multidisciplinary expertise

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## Part 3 – (2) Judicial Continuity

- Judge's relationship with parents is really important
- Continuity – best practice guidance
- Non-lawyer reviews?
- Progress
- Achievements
- Can LA / CG identify strengths or constructive areas of development
- Regular professional meetings

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## Part 3 – (3) FDAC screening

- FDAC recommendations
- Work to be done / how / where
- Advice about assessments
- Bespoke support package / involvement / signposting / frequency / peer support / timetable of activities / managing commitments
- A note of caution about rejection if not accepted into FDAC



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## Part 3 – (4) Experienced professionals



- Social worker
- Guardian
- Independent SW
- Expert Psychologist / Psychiatrist

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## Part 3 – (5) Timescales



- Snapshot vs dynamic assessment
- Short timescale does not enable assessment of progress or change
- Assessment plan?
- Re S (A Child) [2014] FLR 575 when arguing for an extension of proceedings in 'FDAC type cases'
- Re P (A Child) [2018] EWCA Civ 1483

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## Part 3 – (6) Support / Services



- What can be provided by the LA, community, charities, wider support services
- Key worker / advocate / family member to support with commitments – FGC?
- Diary keeping / schedule management
- Meetings / email chain / methods of communication

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## Thank you for listening!

**Andrea Watts – [awatts@1kbw.co.uk](mailto:awatts@1kbw.co.uk)**

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## Older children and applications for public law orders

- Lucinda Ferguson

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### Overview

We will focus on dilemmas faced at each stage of public law proceedings when the child / young person concerned is older\* :

- What are the key age-based and capacity/competence-based rules to bear in mind?
- When can and should s20 agreements be used and when should a local authority apply for a public law order?
- How do DOLS restrictions apply if the YP may have capacity?
- When should a LA apply for public law orders despite it not being likely / no longer being possible the LA can secure final orders before the YP's 17<sup>th</sup> birthday?

*\* Generally talking about young people ("YP") of 16 years old and above, but we will also have a view to younger "children" who may have competence.*

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## 1 Key ages and (Interim) Care Orders

### Final orders?

- **Making the order: Section 31(3) of the Children Act 1989** - no care / supervision order may be made with respect to a child who has turned the age of 17 years (or 16 if the child is married).
- **Duration of the order: Section 91(12) CA 1989** – until the child's 18<sup>th</sup> birthday (unless brought to an end earlier)

### But what about interim orders?

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## 1 Key Ages and ICOs cont'd

### Interim orders:

- **Making the order:** Nothing in **section 38 CA 1989** (the main ICO provision) about any age after which the order cannot be made. So we need to work this out from the duration.
- **Duration of the order: Sections 38(4) and 91(12) CA 1989**
- **S38(4)** – Until conclusion of proceedings / as specified in order / 8 weeks (for any ICO made at conclusion of a s37 investigation).  
**Does this mean theoretically it can last till the child turns 18 yo if proceedings are still ongoing?**

s91(12) Any care order, other than an interim care order, shall continue in force until the child reaches the age of eighteen, unless it is brought to an end earlier.

Answer: **no** because of *other than an interim care order*” wording. **So what is the answer?**

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## 1 Key Ages and ICOs cont'd

### Interim orders:

- **Duration – case law answer: *Re Q (Child: Interim Care Order: Jurisdiction)* [2019] EWHC 512 (Fam), Knowles J**

16 yo Q, who was soon to turn 17 yo, was subject to an ICO.

**Question for the court was whether an ICO could subsist after Q turned 17 yo.**

**Knowles J: No.**

**Take away: The court cannot make an ICO after child turns 17 yo, and any ICO previously made will automatically terminate when the child turns 17 yo.** Knowles J at para 28:

*“To be clear, interim care and supervision orders made for a period during which the child turns either seventeen or gets married (if aged sixteen) are impermissible.”*

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## 1 Key Ages and ICOs cont'd

### Interim orders:

[Court cannot make an ICO after child turns 17 yo; any ICO previously made will automatically terminate when the child turns 17 yo.]

**Reasoning?** An **ICO is not a freestanding remedy**. The purpose of an ICO is to enable the court to safeguard the child's welfare **until such time as** the court is in a position to decide whether/not it is in the child's best interests to make a (final) care order [-the s37 direction is an exception to this]. I.e. the **jurisdiction arises on adjournment only** (especially para 30, 31).

If the court can't make a (final) care order after the child turns 17 yo, the same logic dictates that the court can't make an ICO after the child turns 17 yo (because there's nothing to adjourn). This is also why ICOs automatically terminate when the child turns 17 yo.

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## 2 The value of public law proceedings

**If the LA can't get an ICO after the child turns 17 yo or any ICO made automatically expires upon the child's 17<sup>th</sup> birthday, is it worth applying for public law orders?**

- Potentially yes. Cf **Knowles J** in **Re Q (2019)**:

*"Whilst no interim or final public law order would, on my analysis of section 38(4), be available in respect of a seventeen year old child (or sixteen if married), I am not persuaded that these welfare-driven proceedings themselves would necessarily lack purpose and must fall away once the jurisdiction to make either interim or final public law orders is lost. In some cases, it may be crucial to establish whether the threshold criteria have been met because this might determine the basis for future decision making by a local authority, for example, as to the type of support available to the child or family concerned. **Whether that exercise is necessary and proportionate will be a matter for the good sense of the judge managing/determining the proceedings.....**" (para 31)*

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## 2 The value of public law proceedings cont'd

- **Knowles J** in **Re Q (2019)** cont'd:

*"... For example, it might not be where a child of seventeen wishes to be accommodated against the wishes of those with parental responsibility. Additionally, although final public law orders would not be available to the court, the court might conclude the proceedings before the child is eighteen by making other orders available to it such as a section 8 order (assuming exceptional circumstances applied) or by making orders under the inherent jurisdiction. Whilst the latter could not operate to require a child to be placed in either the care or supervision of a local authority or to require a child to be accommodated by a local authority, other orders under the inherent jurisdiction may be entirely suitable in the circumstances of the individual case. I conclude that, **when the jurisdiction to make interim and final public law orders is no longer available, careful scrutiny of the circumstances of each case is required by the court in order to discern whether the proceedings themselves lack merit and whether it is proportionate and in the child's welfare interests for them to continue. Discontinuance of the proceedings is likely to be the proportionate, welfare-driven outcome in many such cases and, if that is so, the local authority should be permitted to withdraw its application. There will, however, be some cases where a useful forensic and welfare-driven purpose might be served by the continuation of public law proceedings albeit without the structure provided by interim public law orders.**" (para 31)*

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## 2 The value of public law proceedings cont'd

- What does this mean? **Need to prepare for each hearing within the care proceedings considering if it's still necessary and proportionate to continue beyond that hearing** (and marshalling your arguments for the court) or whether the LA should withdraw its application for public law orders.
  - One common reason to continue: are expert assessments needed and best obtained via public law proceedings?
  - Can't always rely on need for accommodation since that could be achieved via s20 agreement (with either a parent or the child if the child has capacity) – we will discuss this.

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## 3 What if DOLS restrictions are needed?

### Art 5(1)(d) ECHR

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

(d) the detention of a minor by lawful order **for the purpose of educational supervision** or his lawful detention for the purpose of bringing him before the competent legal authority;”

Interpreted broadly: *Re T (A Child) (Appellant)* [2021] UKSC 35 per Lady Black (“broad meaning”) citing Judge LJ in *Re K (A Child) (Secure Accommodation Order: Right to Liberty)* [2001] Fam 377 (CA) (see next)

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### 3 What if DOLS restrictions are needed?

**Judge LJ:**

*“107. This goes far beyond school. It is not just about the restriction on liberty involved in requiring a reluctant child to remain at school for the school day. It arises in the context of the responsibilities of parents which extend well beyond ensuring the child’s attendance at school. So it involves education in the broad sense, similar, I would respectfully suggest, to the general development of the child’s physical, intellectual, emotional, social and behavioural abilities, all of which have to be encouraged by responsible parents, as part of his upbringing and education, and for this purpose, an appropriate level of supervision of the child to enhance his development, where necessary, by restricting his liberty is permitted.”*  
(emphasis added)

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### 3 What if DOLS restrictions are needed? cont’d

**Question:** given the YP’s age, should the placement be organised under s20 (with parental or the child’s consent) or within public law proceedings?

**Answer:** it depends.

- **If LA opts for public law proceedings**, needs to bear in mind that, as soon as the YP turns 17 yo, a s20 agreement will be immediately required in order for there to be a basis for DOLS restrictions;
- **If the LA opts for a s20 agreement**, need to decide (1) whose agreement is required – a parent or the YP, depending on capacity; (2) need to be ready to justify the position to the court if the placement is at all long-term, especially if it’s unregulated.

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### 3 What if DOLS restrictions are needed? cont'd

- Long term use of s20 agreements:

***Re S (A Child), Re W (A Child)* [2023] EWCA Civ 1 per King LJ:**

*"I can see no inhibition on a section 20 order being made in appropriate circumstances for a longer period of accommodation provided that proper consideration is given to the purpose of the accommodation and that the regular mandatory reviews are carried out."*  
(para 62)

- **Why be particularly ready to justify this if the placement is unregulated?** Due to risks of criticism if anything goes wrong in the placement and current pressure on the judiciary to be seen to scrutinise such placements. LA needs to be particularly confident in the quality of any unregulated placement.

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### 4 What if the YP might have capacity?

**Let's assume either:**

- the LA has opted for s20 **because the child is about to turn 17 yo and the LA can't see any particular benefit to public law proceedings on the facts;** or
  - the YP has **turned 17 yo during proceedings hence any ICO has automatically expired** and the court can't make any (final) care order
- Can the court (and LA, etc) rely on parental authorisation under s20 if the YP may have capacity? Answer:** Only for any period that it is not known that the child has capacity. But this cannot be assumed; capacity must be assessed. This is because **s1 of the Mental Capacity Act 2005** provides that individuals aged 16 and over are assumed to have capacity unless evidence shows otherwise.

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## 4 What if the YP might have capacity?

### **s1 of the Mental Capacity Act 2005:**

(2) A person must be assumed to have capacity unless it is established that he lacks capacity.

This **applies to any YP who has turned 16 yo.**

Any parental authorisation via s20 must be understood as vulnerable to challenge on the basis of the YP having capacity. The LA (and the court) needs to proceed with caution given that the assumption is in favour of the YP having, not lacking, capacity. Capacity here is specific to decision-making about the DOLS restrictions, rather than more generally.

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## 4 What if the YP might have capacity?

### **What is required for a YP to be able to give valid consent to DOLS restrictions?**

1. The YP has **sufficient information** to make the decision;
2. The YP has the **capacity** to be able to make the decision;
3. The YP has made the decision **without any undue pressure** being placed on them.

[NB. This also applies to a child under 16 yo, who is held to have the competence (*Gillick*, etc.) to make such decisions.]

**How should capacity be assessed?** Often the children's solicitor, but may be advised to get an expert report given the importance for the child and their safeguarding.

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## 4 What if the YP might have capacity?

### **If a YP has capacity (or child has competence) to consent to DOLS restrictions, what does this mean for their placement?**

- It is the YP (17 yo) who must sign any s20 agreement.
- If the YP is 17 yo hence no ICO / care order is available, and they have capacity to consent to s20 and DOLS restrictions, they can withdraw that consent. This is a significant risk in terms of keeping the YP safe (and one reason why expert capacity assessment may be sensible).
- If the YP is 16 yo hence an ICO / care order is available, and the YP has capacity, it is still their consent that is key for any DOLS restrictions.
- If the child is under 16 yo, and the child is assessed as having competence, their consent is key for any DOLS restrictions..

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## Summary of key points

- There are particular difficulties that arise when a child / young person is nearing adulthood;
- There is a complex interplay between s20 agreements and care proceedings, which is especially important where DOLS restrictions may also be required;
- s20 can be an important tool to support a placement in children's / the young person's 'best interests' but the LA (and other parties) must check this against any benefits of public law proceedings even where no ICO / (final) care order would be available;
- It is important to bear in mind the assumption of capacity for any YP aged 16 or above. This makes assessing capacity a matter of urgency.

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