

Special Guardianship Orders Clarified: 10 Points to Note

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Introduction

1. On 18th June 2018, the Court of Appeal comprising the Senior President Sir Ernest Ryder, Sales LJ and Sir James Munby PFD handed down judgment in the case of ***In the matter of P-S (Children) [2018] EWCA Civ 1407*** unanimously allowing an appeal by the children's guardian.
2. The issue in the appeal was whether the judge at first instance was wrong in the circumstances that occurred to decline to make special guardianship orders ('SGOs') to the paternal grandparents. The judgment, running to 71 paragraphs, concludes with a note that further research will be provided on SGOs. Watch this space.

Brief Facts

3. The court was concerned with two children, S and P, in the Family Drug and Alcohol Court ('FDAC') in London. S's mother and father unfortunately relapsed and had withdrawn from proceedings. During the currency of proceedings, P was living with the maternal grandmother and S with a paternal aunt and her partner under interim care orders. By the time of the final hearing, S's carer could not continue to care for him and the maternal grandmother withdrew her application to care for P on day one of the final hearing.
4. S's aunt and her partner had initially been assessed and approved to care for S, long-term, but changed their mind as a consequence of the alleged conduct of S's parents. As a result, the local authority needed to consider a new care plan meaning the final hearing did not proceed.
5. In the event, both sets of paternal grandparents were assessed as potential special guardians. Both reports recommended that the children be made the subject of SGOs to their respective paternal grandparents. However, neither the local authority nor either set of grandparents applied for a SGO with the consequence that the court was invited to make of its own motion. None of the grandparents were joined as parties to proceedings. They had no opportunity for legal advice. The extent of their involvement appears to have been that they were called into court by the judge for part of one of the days of the final hearing.
6. The local authority and the guardian's positions are recorded as having supported the making of SGOs. At the conclusion of the hearing, the judge made full care orders.

7. The points for appeal were, broadly:
 - a. The judge was wrong to make care orders as no party supported the making of the same and to do so in light of uncontradicted SGP assessments, the care orders were disproportionate;
 - b. The judge was wrong to make a 'short term care order' absent any statutory mechanism for the making of time-limited care orders;
 - c. The judge was wrong to rely upon the extra-judicial guidance of Keehan J to the effect that children should live with proposed special guardians for a period of time before a court entertains an application for an SGO; and
 - d. The judge was wrong not to make provision to join the grandparents, for documents to be disclosed for them and for them to take legal advice.

10 Points to Note

8. Whilst, of course, there is no substitute for reading the judgment in full, practitioners may wish to note the following:
 - a. This case is another reminder as to the importance of identifying proposed placements at the start of proceedings. Given the time constraints in assessing long-term placements, the statutory timetable can only be met if such placements are identified at the very outset of the case (para. 19);
 - b. There is no such thing as a short-term care order which is discharged on the happening of a fixed event. The exercise of parental responsibility by a local authority cannot be constrained once a full care order is made other than on public law principles of unlawfulness, unreasonableness and irrationality (para. 33);
 - c. A SGO does not have the same characteristics of an adoption order. It is not intended to. Special guardianship was introduced to provide permanence in the care of children who cannot return to their birth families, but where adoption is not appropriate. The legislative framework is different. It does not extinguish the parental responsibility of a child's parents or terminate their legal relationship with the child, it can be varied or discharged (but not by a parent without the court's leave) and it comes to an end when the child reaches the age of 18. There is no direct equivalence with an adoption order and the protections around it are accordingly different (para. 35);
 - d. Unlike adoption orders which—by operation of section 42 of the Adoption and Children Act 2002—are subject to a residence requirement, SGOs are not. The two statutory schemes are completely different (para. 36);

- e. As to which, the regulatory scheme, that is regulation 21 and the Schedule to the Special Guardianship Regulations 2005, (as amended) prescribes the elements that are to be assessed which include an applicant's 'current and past relationship' with the child. The regulations were amended by the Government in 2016 to include the need for assessments to be more robust in assessing whether a person is capable of caring for a child into adulthood: Special Guardianship review: report on findings, Government consultation response, December 2015. The opportunity to include provision for a period of assessment of a child living with a proposed special guardian was not taken by the Government. It is neither a statutory nor a regulatory requirement (para. 37);
- f. There remains a real need for authoritative guidance to sit alongside the statutory materials which would address what is evidence based, peer reviewed research, what is the reliable data about the outcomes that different practices achieve and the good practice that an analysis of those outcomes suggests (paras. 38 and 40). In future, expert evidence may be required on the point (para. 50);
- g. Keehan J's guidance was not authoritative guidance or a practice direction. Despite its commendable origins, it does not identify the research or basis upon which it was given—nor had it been the object of scrutiny or consultation in any environment where those responsible were accountable for that process (para. 48);
- h. The President of the Family Division was urged to consider (para. 49):
- i. whether further steps need to be taken to bring together existing research and guidance about special guardianship into a framework or to encourage agencies and practitioners within the family justice system to work together to promote good practice in a more coherent way; and
 - ii. recommend to leadership judges who have good practice initiatives that they liaise with him before publication to ensure that the problem that has arisen in this case is avoided in future.
- i. In response, Sir James Munby PFD agreed that there is a real need for authoritative guidance. Accordingly, Sir James considered that the appropriate body to prepare such guidance is the multi-disciplinary Family Justice Council who in due course are asked to make available to all its research and other relevant materials (paras. 70 and 71); and
- j. The time has arrived to follow the Court of Appeal's guidance in ***Re H (A Child) (Analysis of realistic options and SGOs) [2015] EWCA Civ 406, [2016] 1 FLR 286 CA*** and the courts should not be invited to consider making an SGO of its own motion (para. 54).

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