Court of Appeal sets out approach when considering SGOs in care proceedings (P-S (Children) (care orders))

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Family analysis: What factors should parties take into consideration in identifying realistic placement options for a child at the start of care proceedings? Sam Momtaz QC and Sharon Segal, of 1GC|Family Law, examine a Court of Appeal decision that a Family Court judge had been wrong to make full care orders rather than special guardianship orders (SGOs) in respect of two children.

P-S (Children) (care orders) [2018] EWCA Civ 1407, [2018] All ER (D) 118 (Jun)

What was the background?

The case concerned two children who had the same mother but different fathers.

During the proceedings the children were being cared for by family members who were, at time of the final hearing, not in a position to care for them. Both sets of paternal grandparents were assessed by the local authority positively as special guardians. The local authority filed care plans based upon the recommendations supported by the children's guardian, but opposed by the children's mother and the father of one child. Neither the local authority nor the paternal grandparents made an application for SGOs, with the consequence that the court was invited to make SGOs of its own motion. The paternal grandparents were not represented before the court at first instance and had not been joined. They had no opportunity to have any legal advice.

The court declined to make SGOs at the final hearing, and instead made final care orders in respect of both children, who were placed with the paternal grandparents. The judge was concerned about the viability of the placements as they were 'untested' and suggested a 'short-term care order' was appropriate.

The judge was influenced by informal guidance given by a High Court judge in his role as a leadership judge. The advice given was that an SGO should not be made unless 'absent cogent reasons to the contrary, the child has been placed with the proposed SGO applicants/parties for a considerable period'.

The issue in the Court of Appeal was whether the judge below had been wrong in the circumstances to decline to make SGOs to the paternal grandparents.

The Court of Appeal considered the status and relevance of guidance issued by designated family judges and Family Division liaison judges, the circumstances in which the court should make care orders when the special guardianship assessment process is either incomplete or delayed, and procedural unfairness to prospective special guardians.

The Association of Lawyers for Children was granted leave to intervene to assist the court in relation to the issues of law and principle.

What did the Court of Appeal decide?

The Court of Appeal concluded that the judge had been wrong to make final care orders, that his rationale for the same was insufficiently reasoned and his lack of scrutiny of the plans that were required was contrary to section 31(3A)(a) of the Children Act 1989 (ChA 1989).

In his leading judgment, Ryder LJ confirmed that the concept of a 'short-term care order' was flawed, and that the judge should have reflected on the fact that 'if the local authority did not in due course apply to discharge the care orders [itself] it would have been incumbent on the proposed special guardians to do so and to satisfy the test for leave to make that application without the benefit of legal aid, given that in the circumstance of a disagreement with the local authority it would be highly unlikely that the special guardians would be in receipt of funding from them' (para [33]).

The Court of Appeal confirmed that there were no residence requirements prior to the making of an SGO, and it had been inappropriate for the judge to have relied on the guidance. Munby P in his supporting judgment, and as President of the Family Division, confirmed that he would invite the Family Justice Council to consider the issue of the necessity of guidance in SGO cases (para [71]).

In broader terms, the court acknowledged the inevitable tension between the adverse effects of delay and the time needed for more complex welfare determinations, and in particular those cases where the realistic options for the care of a child changed during the proceedings which would lengthen proceedings, but Munby P confirmed the general principle that 'if the court does not have the kind of evidence it needs for it to be properly equipped to decide the issues before it, then an adjournment must be directed, even if this takes the case over 26 weeks' and that the outcome is not to be determined by 'rigorous adherence to an inflexible timetable if justice is thereby potentially denied' (para [63]).

What are the practical implications of the judgment?

This decision highlights the importance of all parties identifying the realistic placement options for a child at the beginning of the proceedings. In particular, it confirms the importance of the local authority undertaking thorough planning before proceedings, which is likely to involve detailed discussions with the extended family or others, leading to the assessment of potential carers as early as possible. The Court of Appeal confirmed that 'the best planning for a child includes contingency planning and care plans should always identify the realistic options for the care of a child as the contingencies to a local authority's preferred option'.

The parties must identify whether the proposed special guardian is a realistic option, and the judge will need to consider carefully what further steps then need to be taken, in all the circumstances of the particular case, before the court can be satisfied that the proposed SGO should indeed be made.

Importantly, and in considering whether any SGO applications should be made, the Court of Appeal disapproved of the practice whereby the residual power in the court to consider making a SGO of its own motion under ChA 1989, s 14A(6)(b), is normal or the default process because it avoids the protections that the statutory scheme provides. The importance of early consideration of when to direct an application for an SGO to be made was highlighted by the court so as to ensure that case management directions on that application relating to party status, disclosure and time for advice could be made.

In the event that the process cannot be completed justly, fairly and in a manner compatible with the child's welfare within 26 weeks, then time must be extended. Munby P, as one of the three Court of Appeal judges in this case, was clear that:

'There can be—there must be—no question of abbreviating what is necessary in terms of fair process, and necessary to achieve the proper evaluation and furthering of the child's welfare, by concern about the possible impact of such necessary delay upon the court's performance statistics. In relation to SGOs, as elsewhere, justice must never be sacrificed upon the altar of speed.' (para [69])

Advocates should be aware of the need to advance a case for interim care orders if assessments are not complete or if the placement needs a degree of 'testing'.

The Court of Appeal confirmed the methods by which guidance can be given, which should be read alongside the President's judgment in *Re B (A Child*) [2017] EWCA Civ 1579, [2017] All ER (D) 100 (Oct). If guidance is to be brought before the court, the importance of it having gone through a 'transparent process of inter-disciplinary working supported by evidence-based research, a report of a working party or council that is scrutinised by the body concerned and then the adoption of recommendations by the judiciary, professional bodies and practitioners and/or government' was emphasised (para [47]).

The Court of Appeal did not discourage the use of research and references to research by witnesses or judges, but 'the key to its use is the identification of the materials upon which the guidance is based so that the court can decide whether there is an issue that arises and, if so, whether expert evidence is necessary' (para [51]).

Sam Momtaz QC and Sharon Segal acted for the intervener in this case.

Interviewed by Robert Matthews.

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