Special guardianship orders: where are we now?

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1. The Courts have had the ability to make Special Guardianship Orders (SGOs) since December 2005. Section 14A (3)(a) CA 1989 sets out the power of the Court to make an SGO when an application is made by a person eligible to do so. Section 14A (3)(b) contains the power where that individual has obtained the leave of the Court to apply.

   Those eligible to apply for an SGO are:-

   i) Any Guardian of the child
   ii) Any individual who is named in a child arrangements order as a person with whom the child is to live
   iii) Any individual listed in subsection 5(b) or (c) of Section 10
   iv) Any Local Authority foster carer with whom the child has lived for a period of at least a year preceding the application
   v) A relative with whom the child has lived for a period of at least 1 year immediately preceding the application.

   The Court may also make a SGO with respect to a child in any family proceedings in which a question arises with respect to the welfare of the child.

2. My first involvement in researching SGOs was shortly before they came into force when I was involved in a care case in Bournemouth. The parents were genuine but had very low IQs. They loved their young son but were unable to keep him safe. I acted for the mother. Her adopted brother who was a lovely young man who was a teacher in Essex was approved to adopt the child and this was the care plan which the Court approved.

   Father appealed and on behalf of mother we supported the appeal. With the imminent introduction of SGOs it was argued the Court's decision to approve a care plan for adoption was a step too far. Despite being led by the now Lord Justice Baker the parents appeal

failed. The Court of Appeal were clear orders were made as per the law at the date they were made!

3. A review of SGOs was undertaken in 2015. The review focused on concerns re:-
    - Rushed or poor quality assessments
    - Potentially risky placements being made (for example, where the SGO is made in conjunction with a supervision order because of some doubt about the SG's ability to care for the child in the long term)
    - Inadequate support for SGs

    The review caused amendments to be made to the Special Guardianship Regulations 2005, through the Special Guardianship (Amendment) Regulations 2016. The amendments were aimed at strengthening the SGO assessment process and in particular to ensure that any harm the child had experienced was identified and that the capacity of the prospective SGs to address consequences arising from those issues in the parenting of the child were considered.

4. The case of P-S (Children) [2018] EWCA Civ 1407 perhaps highlights the ongoing need for further clarification as SGOs have evolved.

    In this case all parties had been in agreement that SGOs should be made in favour of the two children's respective paternal grandparents.

    This was a case whereby at the time of the first instance decision the 26-week time limit had already been exceeded.

    The Court of Appeal emphasised that the first instance Judge had 3 options available to him. He could have made (i) SGOs, (ii) final care orders, (iii) adjourned for further evidence/consideration and made ICOs.

    The care proceedings began in January 2016. Unfortunately, at the time of the final hearing the mother and father had relapsed into drug/alcohol abuse and had withdrawn from the FDAC process.

    There were two children, P aged 5 and S aged 2 years – 2 different fathers.

    During the proceedings P was living with the maternal grandmother and S with a paternal aunt and her partner, but neither were able to care for the children in the longer term.

Both sets of paternal grandparents were positively assessed by the Local Authority as potential SGs and the Local Authority filed care plans based upon the recommendations that the children be made subject of SGOs to their respective paternal grandparents.

Neither the Local Authority nor grandparents made an application for a SGO with the consequence that the Court was invited to make SGOs of its own motion. The grandparents were not represented before the Court and had not been joined, although they were physically present and called into Court by the Judge for a part of one of the days of the hearing.

HHJ Tolson QC at first instance stated,

> "*Whilst I do not suggest that these children should be subject of care orders for their minority, the real balance in the case is in my judgment between Special Guardianship Orders now and Care Orders (although not interim orders). The care plan under such care order would be that if all goes well, then applications for SGOs should follow in due course. By the expression 'in due course', I mean 'when the placements are regarded as settled and working well for the children'. In this case that might be in about a year from now …*" The Judge made the final orders.

The Court of Appeal criticised the Judge's approach and allowed the appeal. They stated,

> "*It is evident that the Judge recognised that the only realistic placement options that he had were with the paternal grandparents. His concern was the viability of those placements, not because they were unassessed but they were untested in the specific context of the possible interference with them by the children's mother and the father of S…"*
>
> "*The solution to the problem was the choice of Order, SGO, care order or interim care order and an adjournment. The route to the solution lay in an evaluation of the evidence including oral evidence from professional witnesses, the parents and the proposed carers i.e. the paternal grandparents. It is clear from the judgment and from a transcript of the Judge's discussions with the advocates … that the Judge had the problem and the solutions in mind. What was missing was a route to the preferred solution. Having identified the problem and the range of solutions, the Judge did not go on to evaluate the evidence.*"

The Court of Appeal criticised the first instance Judge:-

> *"The concept of a short term care order within which the placements could be tested was raised by the Judge as a justification for making full care orders.*"

The Court of Appeal made it clear that the concept of a short term care order was flawed. The Court stated that there is no mechanism for a care order to be discharged on the happening of a fixed event or to be otherwise limited in time,

> "*The Judge should have reflected on the fact that if the Local Authority did not in due course apply to discharge the care orders themselves, it would have been incumbent on the proposed SGs to do so and to satisfy the test for leave to make that application without the benefit of legal aid…*"

The Court of Appeal allowed the Appeal.

The Court of Appeal also gave general guidance on the approach to be taken to consideration of Special Guardians and the making of SGOs within care proceedings.

The president of the Family Division who gave a separate judgment argued that there was a real need for alternative guidance to sit alongside the statutory materials and invited the Family Judge Council to undertake such a test.

5. In June 2020 the Public Law Working Group made recommendations to achieve best practice in relation to SGOs.

   The report highlighted that a number of controversies had emerged in recent years about the use of SGOs,

   > "*These are mainly whether the Courts are giving Local Authorities and potential SGs, sufficient time for full assessments to be undertaken and for everyone to fully understand the implications and effects if the order is to be made, which will last until the child turns 18. Associated with the above issues the guidance highlighted that Special Guardians receive minimal advice and support from Local Authorities compared with foster carers, although there is little to distinguish between the extent of children's welfare needs."*

Four recommendations were made that were to come into effect immediately

a) More robust (i.e. stronger) and more comprehensive SG assessments and support plans with renewed emphasis on the child – special guardianship relationship, whether special guardians are caring for children on an interim basis before an SGO is made and the provision of support services.
b) Better preparation and training for SGs.
c) A reduction in the use of Supervision Orders with SGOs.
d) Renewed emphasis on parental contact.

6. In addition the working group made 4 aspirational recommendations being:-
   - Ongoing review of the statutory framework
   - Further analysis and enquiry into
     i) Review of the fostering regs
     ii) The possibility of interim SGOs
     iii) Further duties on Local Authorities to identify potential carers
     iv) The need for greater support for SGs.
   - A review of public funding for proposed SGs
   - Family Group conferences and other ways to engage the wider family before proceeding.

7. The report highlights the concerns over rushed assessments since the introduction of the 26-week time limit to complete care cases in 2014.

   The report highlights the options of testing out a potential SGO in situations where the child is not in a settled living arrangement with the potential Special Guardian.

8. Following the June 2020 best practice guidance, I have been involved in a number of cases where the existence of the guidance has at times been disregarded mainly by Local Authorities, but on other occasions taken fully on board:

Case A

I acted for mother. There were 3 children (different fathers). The Local Authority care plan was for child 2 and 3 to be subject to SGOs to the paternal grandparents of child 2. Child 1 was older and was in foster care. Child 2 spent many extended weekends with her paternal grandparents and wanted to live with them. Child 3 was a baby who had barely even met the paternal grandparents of child 2. The care plan was for a care order for child 1 and for her to remain in foster care. SGO orders were proposed re child 2 and 3 to the paternal grandparents

of child 2. The paternal grandparents had not been offered any legal advice. During the hearing legal advice was organised for the paternal grandparents, thanks to the children's guardian. It became apparent that they were only realistically able to care for child 2 and would have had to move house to accommodate child 3 too!

SGO made re child 2.

Child 3 remains with the mother under a supervision order and tight contract of expectations.

Case B

I acted for the child through his Guardian. He was living in foster care in the UK subject to an ICO.

The potential SGs lived in Southern Ireland and had barely met the child and given COVID restrictions travel to England was limited. The Local Authority were intent on asking the Court to make a Special Guardianship Order until they were given a very clear steer at the IRH! Recorder Christopher Adams, sitting as a Deputy H/C Judge, heard the case in a copybook way in February this year.

The Local Authority made the necessary formal application to the Irish Central Authority for their consent to a placement of a child in their jurisdiction under a care order. The child was to move to Ireland in accordance with a detailed transition plan.

The contact arrangements not only between the child and his parents, but also between the child and siblings/half siblings in the UK were set out in detail in an amended care plan. For the duration of the care order, the Local Authority agreed to provide to the relatives in Ireland

- Weekly payments
- Cost of 2 trips each year to the UK to facilitate contact etc.

A final care order was made. Pursuant to Section 22C (6)(d) of the Children Act 1989, the Court authorised the placement of the child outside the jurisdiction and granted the relatives in Ireland permission to remove the child from this jurisdiction and relocate him to the Republic of Ireland.

The Local Authority had permission to disclose to the Irish relatives

i) A copy of the Court's judgment,

ii) The final order

iii) The Section in the final care plan setting out contact arrangements. Permission was also given for the Local Authority to disclose these documents to the link worker in Ireland.

9. The March 2021 best practice guidance sets out some key themes which to a large degree reinforce what had been set out in the June 2020 BPG. https://www.judiciary.uk/wp-content/uploads/2021/03/Special-guardianship-BPG-report_Clickable.pdf

   i) The assessment of a proposed SG should be thorough and comprehensive and evidence and experience informed.

   ii) The support plan should be comprehensive and set out the support and services to be provided to the child and the prospective SG.

   iii) Where there is little or no prior connection/relationship between the child and the prospective SG, it is very likely to be in the child's best interests to be cared for on an interim basis by the prospective SG in order to establish a meaningful relationship with the child.

   iv) The SGSP should be based upon the lived experience of the child and the lived experience of the prospective SG.

   v) The SGSP should set out the contact arrangements between the child and parent(s) and should include:

      - The type of contact which is to take place
      - The frequency and duration of contact
      - Who is to be responsible for making the arrangements of contact
      - What practical arrangements need to be provided to facilitate contact
      - What professional support and assistance if any will be provided to the prospective SG

   vi) Save for cogent reasons, a supervision order should not be made alongside an SGO.

10. The BPG is well worth studying closely but it sets out how best to work towards a SGO without delay.

    The BPG also includes Appendix A and B which are useful. Appendix B lists the options for the various ways a child can be placed with family and friends, eg if they are approved as foster carers, using Section 38(6) CA 1989 etc. The Appendix does not give all the answers, but it highlights the options.

11. Recent case – March 2021 - How to discharge an SGO - **Re M [2021] EWCA Civ 442**

The appeal was about the test for granting leave to apply to discharge an SGO. The proceedings concerned a boy aged 9 years. The mother's parents divorced during her teenage years. In 2016, following a breakdown in his mother's health, C then 4½ years, moved to live with his maternal grandmother and her partner, who lived a very short walk from the mother's home, which she shared with Mr D, her cohabitee.

The Local Authority took care proceedings. The parenting assessment concluded that the mother could meet most of C's needs when well, but that her recurrent ill health meant that she was unable to care for him adequately overall. The mother's relationship with Mr D was fairly new and the Local Authority highlighted significant deficiencies in his parenting. The mother was assessed by a consultant psychiatrist, Dr Ratnam, who concluded that she had an emotionally unstable personality disorder and needed long term therapy.

Care proceedings concluded in 2017 and the outcome was that an SGO was made in the grandparents' favour without opposition. The written agreement that accompanied it provided for the child and mother to have contact for up to 3 hours twice per week. In. February 2020 the mother applied for leave to discharge the SGO and with a view to C returning to her care. The grandparents acknowledged the improvements in the mother's mental health but believed they were insufficient to enable her to care for C.

The mother's application came before HHJ Vincent on 24th August 2020. She refused leave to the mother to apply to discharge the SGO and she dismissed the mother's additional application for contact.

Section 14D of the 1989 Act concerns the manner in which SGOs, unlike adoption orders, can be varied or discharged.

i) The Court may vary or discharge an SGO on the application of:-
   a) The SG
   b) Any parent of Guardian of the child concerned
   c) Any individual who is named in a child arrangements order as a person with whom the child is to live
   d) Any individual not falling within paras a) to c) above, who has, or immediately before the making of the SGO had, PR for the child
   e) The child him/herself
   f) A Local Authority designated in a care order with respect to a child

In any family proceedings in which a question arises with respect to the welfare of a child subject to an SGO, the Court may also vary or discharge the SGO if it considers it necessary, even though no application has been made.

12. Who needs leave to apply to discharge/Vary?

    a) The child
    b) Any parent or guardian
    c) Any step parent who has PR
    d) Any individual falling within i) d) who immediately before the making of the SGO had, but no longer has PR for the child

- The Court may not grant leave to a person falling within b), c) or d) above unless it is satisfied that there has been a significant change in circumstances since the SGO was ordered
- 'Significant' means considerable, noteworthy, important
- If a significant change has occurred, the Court will turn to a second stage, namely what has to be shown is broadly a real prospect of success. The child's welfare is an important factor but it is not the paramount consideration at this stage.

Where an SGO is in effect, an application for an order regulating with whom a child is to live can only be made with leave of the Court (Section 10 (7A) and (7B) of the 1989 Act. However, a parent does not require leave to apply for other forms of CAO, including an order that the child should spend time with them.

The Court of Appeal noted that "in a statutory structure designed to achieve permanence and security for children and their carers outside adoption, it may seem an anomaly that the natural parent who PR is effectively and largely neutered should have an automatic right to apply for a Section 8 order (other than a change of residence) (Section 91 (14) could always be used if the parent was abusing the right)".

The Court allowed the mother's appeal in this case. The Court found the Judge had set the bar too high to for the test of 'significant change'. The Court said that the Judge failed to make any real assessment of the mother's prospects of success beyond saying without elaboration that it would be difficult for her to succeed. The Court found the Judge was wrong to treat the child's welfare as the paramount consideration when determining the leave application.

The Court stated that fundamentally the Judge did not look at welfare in the round, and commented that the SGO was not currently bringing the child the sense of security, stability and belonging he needed. The Court allowed the appeal and stated that if leave to apply to discharge the SGO was refused, the issue of contact remained, and the Judge should have ensured that it was fairly decided.

28 April 2021

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