Local authority input into private law proceedings, part II

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In this second instalment of our look at the intersection of private and public children law (the first article 'Local authority input into private law proceedings' was published in the November 2020 issue at [2020] Fam Law 1517), we are going to focus on the law relating to special guardianship orders ('SGOs')[1].

An SGO is a private law order which is most often made at the conclusion of public children law proceedings. It has the benefit of creating a legally secure placement for children where perhaps adoption and other public law orders are not a viable or suitable option. It is an order appointing one or more persons as a child's special guardian, thereby granting them parental responsibility for that child to the exclusion of any other person with parental responsibility (unless they are another special guardian)[2]. A benefit of SGOs therefore is that the link between the children and their parents remains intact. In practice, within public law proceedings, at the earliest opportunity the courts wish for the respondent parents to put forward any person whom they wish to be assessed as a viable carer for the children, usually to be considered as a long-term option and if the initial viability assessments are positive then the assessment can progress to a full SGO assessment.

The rise in the use of SGOs has been noted by many, including the recently published Family Justice Council ['FJC'] report[3] which highlights that SGOs are now more commonly made than placement orders. Prior to the FJC report, Sir James Munby in *Re P-S (Children) (Special Guardianship)* [2018] EWCA Civ 1407, [2019] 1 FLR 251 at [60] commented:

> 'Published research and practical experience demonstrate the increasing use in recent years of SGOs in the context of care proceedings, sometimes alone, sometimes in conjunction with a supervision order. Practical experience

1 See Lord Justice Wall at paras [5]–[13] in *Re S (Adoption Order or Special Guardianship Order)* [2007] EWCA Civ 54, [2007] 1 FLR 819 for the background and origins of SGOs.
2 Section 14C (1) (b) Children Act 1989
3 www.judiciary.uk/wp-content/uploads/2020/06/PLWG-SGO-Final-Report-1.pdf

> and much anecdotal material have identified two important issues giving rise to much concern: first, the not infrequent examples of cases in which a SGO is proposed for the placement of a child with a relative with whom the child has never previously lived and whose relationship with the child may be tenuous or non-existent; secondly, worries that the assessments relied on by the court in deciding whether or not to make a SGO are not always as rigorous as might be thought appropriate.'

Despite the increasing prevalence of SGOs, the Court of Appeal in *Birmingham City Council v R* [2006] EWCA Civ 1748, [2007] 1 FLR 564 at [78] emphasised that SGOs are not:

> '. . . to be embarked upon lightly or capriciously, not least because the status it gives the special guardian effectively prevents the exercise of parental responsibility on the part of the child's natural parents, and terminates the parental authority given to a local authority under a care order (whether interim or final). In this respect, it is substantially different from a residence order which, whilst it also brings a previously subsisting care order in relation to the same child to an end, does not confer on any person who holds the order the exclusivity in the exercise of parental responsibility which accompanies a special guardianship order.'

An SGO is usually made within existing public law proceedings on the application of one of the parties to those proceedings (often the local authority) although it can also be made on a free-standing application of any party or of the courts own motion. The special guardians must be aged 18 or over and must not be a parent of the child in question.[4]

SGO reports

If a court is considering making an SGO, it must direct a report be completed. Without this report, the court has no power to make an SGO. Upon receipt of an application, the local authority is required to produce the report within 3 months. The report should be an evidence-based assessment and should comply with the schedule set out in reg 21 of the Special Guardianship Regulations 2005, as amended by the Special Guardianship (Amendment) Regulations 2016.

Problems arise in relation to the timeline for the assessment of a possible special guardian. Reconciling the 26-week timetable for care proceedings with a proper, full and evidence-based assessment of a special guardian may not always be possible.

In a large number of cases, the SGO application will often come after care proceedings have been issued (when the 26-week clock will already be running). The FJC best practice guidance identified two primary issues with what courts should do in the interim when care proceedings have started which need to be concluded:

1. The 'need for the child to be placed with the carers' although 'the challenge comes where there are issues with individual compliance with the fostering regulations.' (para 29(i), p.23); and
2. 'the legal order that would enable the placement of the child to be made on conclusion of care proceedings. Currently this could be through a care order, although as *Re P-S (Children) (Special Guardianship)* [2018] EWCA Civ 1407, [2019] 1 FLR 251 identified, care orders are not short-term orders. This then suggests that an ICO could be a solution, but that would not conclude care proceedings. The issue that must be addressed in this route is the provision of support to the SG and the child when the order is made as they are excluded

4 Section 14A (2) (a) and (b) Children Act 1989. It is possible for children themselves to apply for permission, but the court will only grant it if the court is satisfied the child has sufficient understanding [s 14A (10) and s 10 (8)]. Also, anyone applying for a SGO must give the local authority 3 month's notice: S14A(7), (8) and (11). When an individual seeks to apply for an SGO within private law proceedings, the local authority will produce a report.

from a mandatory assessment of need if the child was not in care immediately before an SGO is made.'

The first issue is not 'insurmountable' because if there are significant compliance issues with the regulations, that potential special guardian would likely not be considered suitable to apply for the SGO in the first place.

The second issue is thornier. The FJC concludes that the current system 'seems to be insufficiently tailored to respond to these very different scenarios.' (para 31, p.24) The issue seems to be that there is no ability within the current system to construct a legal halfway house between the inability to make an SGO without a full evidence-based and schedule-compliant report on the one hand and the need to conclude the care proceedings on the other. What this has led to in many cases is courts making SGOs (private law orders) alongside supervision orders (public law orders) at the conclusion of proceedings. The FJC report however concludes that this approach is not appropriate in the majority of cases. Where a court is making a supervision order and an SGO, it is 'likely to signify a lack of confidence in the making of an SGO at that time and/or results from the inadequacy of the support and services provided'. This reflects the observation of Sir James Munby P in *P-S (Children) (care orders)* [2018] EWCA Civ 1407that justice must not 'be sacrificed upon the altar of speed'; there must be no question of abbreviating what is necessary in terms of fair process and proper evaluation. In practice, courts are having regard to the FJC recommendations and anecdotally, it has been noted that a pattern of supervision orders being granted in isolation is becoming more frequent.

No matter the different factors at play, ultimately the order to be made is that which in all the circumstances of the case best meets the welfare needs of the child or children concerned. In considering the child's welfare needs and weighing up each of the options available, the court must apply the s 1(3) of the Children Act 1989 welfare checklist. The well-established principle of preference remains for 'the least intrusive effective option' (per Peter Jackson LJ).[5] The FJC report has highlighted that the SGO cannot be used as a panacea. The guidance is clear that without a comprehensive assessment, a clear prior connection/relationship between the potential special guardian and the child and a proper support plan, an SGO should likely not be made.

Recommendations for the way ahead

What remains clear is that there is still much fertile ground for development in this area. The FJC makes recommendations for longer-term change in this area as follows:

i. on-going review of the statutory framework;

ii. further analysis and enquiry into (1) review of the fostering regulations, (2) the possibility of interim special guardianship orders, (3) further duties on local authorities to identify potential carers, (4) the need for greater support for special guardians;

iii. a review of public funding for proposed special guardians;

iv. effective pre-proceedings work and the use of the FRGs *Initial Family and Friends Care Assessment: A good practice guide* (2017).

Of particular interest is the notion of an interim special guardianship order. An interim SGO does not currently exist in law but those in favour of its creation tend to highlight its practicality where the only current option is to place the child with a potential special guardian under an interim care order subject to the fostering regulations. It remains to be seen what, if any, changes are forthcoming in this area from a statutory perspective.

5 *Re W-P (children)* [2019] EWCA Civ 1120 at [37]