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In the matter of P-S (Children)

[2018] EWCA Civ 1407

18/06/2018

Barristers
David Bedingfield

Court
Court of Appeal

Practice Areas
Public Children Law
Successful appeal against final care orders made. 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.

At first instance, all parties had been in agreement that Special Guardianship Orders should be made in favour of the two children's respective paternal grandparents. The Judge himself had taken issue with the fact that the children were not, and had not been, living with the proposed Special Guardians. The Special Guardians were not party to these proceedings and were not represented – the Local Authority invited the Judge to make SGOs of his own motion.

The Judge proceeded to make final care orders, intending them to be of short duration to test the placements before applications were later made for SGOs (assuming the placements went well).

The Association of Lawyers for Children intervened. The appeal was successful. 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.

Delay
This was a case whereby, at the time of the first instance decision, the 26-week time-limit had already been exceeded. Whilst not criticising the Local Authority in this case, the Court of Appeal emphasised the need to ensure that realistic placement options are identified at the start of proceedings to minimise any delay and to avoid 'firefighting'.

The Court of Appeal also emphasised that the Judge had had three options available to him at the hearing. He could have (i) made SGOs, (ii) made final care orders and (iii) adjourned for further evidence/consideration and made ICOs. The Court of Appeal considered the authorities in respect of delay (paragraphs 23 to 27 and 31), noting that option (iii) was likely to have been appropriate in this case.

The flawed concept of ‘short term care orders’
The Court of Appeal noted unequivocally that, in respect of final care orders “the concept of a short term order is flawed” (paragraph 33). The following will be essential for practitioners to keep in mind:

“There is no mechanism for a care order to be discharged on the happening of a fixed event or otherwise to be limited in time. 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. 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 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.”

The status of guidance
In coming to the decision he did, the Judge at first instance appeared to have been somewhat influenced by “informal guidance” given by a High Court Judge “in his role as a leadership judge” whereby that Judge had recommended in a letter intended for family judges of a particular circuit that “absent cogent reasons to the contrary, the child has been placed with the proposed SGO applicants/parties for a considerable period”, which was caveated in a later letter “it all depends on the particular circumstances of each case”.

The ALC “alerted the court to a practice which is developing of reliance being placed on the letter to influence courts to take a particular course, for example, to encourage a court to make a full care order rather than to seek outstanding evidence about the merits in particular where a child has not lived with a prospective special guardian for any or any appreciable period of time.”

The Court of Appeal was clear that such guidance “is not the same as authoritative guidance or a practice direction”. Paragraphs 45 to 51 deal in detail with the status of different forms of guidance. Particular criticism was made of the “informal guidance” in issue in this case as it did not carry with it the same protections that, say, a Practice Direction caries nor did it “identify the evidence based research upon which it relied nor was it scrutinized”. As such “The opinion it expresses might be right but it is not an appropriate vehicle for an opinion of the kind expressed to be relied upon in court in an individual case”. Therefore, whilst understandable, it was inappropriate for the Judge to have relied on the letters identified.

Special Guardianship Orders
The Court of Appeal considered some interesting research presented by the ALC (paragraphs 38 and 39). From paragraph 52, the Court of Appeal addresses applications for Special Guardianship orders in the context of procedural fairness.

The Court of Appeal was clear (paragraph 54): “The residual power in the court to consider making a special guardianship order of its own motion in section 14A(6)(b) of the Act should not be the normal or default process because it avoids the protections that I have just referred to”. The ‘protections’ referred to are discussed at paragraphs 52 and 53.

The Court of Appeal went on to note:

“That is not to say that circumstances will not arise where that residual process is in the interests of the child and the court is able to have regard to the protections in sections 14 and 10 in its decision making, but it should not be the normal process. Not only does it tend to avoid the protections in the statutory

scheme but it tends to avoid good planning by the local authority and the court which will include identifying the status of the prospective special guardians, how they will achieve effective access to justice and such case management directions as will provide fairness to all parties by notice of the proceedings, the disclosure of evidence and the ability to take advice."

The Court of Appeal had no hesitation in coming to the conclusion that it was wrong not to have made appropriate provision for the grandparents to obtain effective access to justice at the final hearing. Not doing so left them on the sidelines at the final hearing, without party status, without documents, without advice and was unfair in more than one respect. "From the children's perspective, it meant that part of their case was assumed to be incomplete when it could have been tested."

The Court of Appeal identified that the solution would have been "either to direct that an application for an SGO be made so that case management directions on that application relating to party status, disclosure and time for advice could be made or for case management directions to be made that otherwise secured the same procedural protections."

As this was not done in this case, at the final hearing "the grandparents did not know what was happening, did not have the evidence upon which the court was making a decision, were unable to take advice and in the event, in my judgment, did not have effective access to justice. That was not in the interests of the children. The procedure was accordingly unfair."

In his separate judgment, the President of the Family Division considered cases where the prospective special guardian is identified late in the day. What then is the court to do? The President's answer is to apply the principles in Re S.

First "the first question is whether the proposed special guardian is a 'runner'". This appraisal must be "evidence based, with a solid foundation, not driven by sentiment or … hope." However, "it need not necessarily be too lengthy or too searching at this stage; what is sometimes referred to as a viability assessment or something similar may well suffice. If the proposed special guardian is ruled out at this stage, then so be it. If not, the judge will need to consider carefully what further steps 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."

Then the Court must turn its mind to "what further assessment, addressing which issues, is necessary to enable the judge to come to a properly informed conclusion? How long will the necessary assessment take – something on which the professional opinion of the proposed assessor is likely to be of crucial importance? If the child has never lived with, or has only a tenuous relationship with, the proposed special guardian, what steps need to be taken and over what period to test the proposed placement? These are some of the questions the judge may need to have answered; no doubt there will be others."

"If the answer to these questions demonstrates 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. 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".

Future guidance

The President argued that there is a real need for authoritative guidance to sit alongside the statutory materials. Given the nature of the relevant kinds of questions, the appropriate body to undertake the investigation of what form any guidance should take is the multi-disciplinary Family Justice Council. The President therefore invited the Family Justice Council to undertake this task.

To read the judgment, please click here.

Permission

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