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Anaum Riaz discusses: Family Justice Council Interim Guidance on Special Guardianship

The Family Justice Council last week released its Interim Guidance on Special Guardianship, with the approval of Sir Andrew McFarlane, President of the Family Division, in response to recurring problem in the Family Court as to how to deal with Special Guardianship in light of the 26 week time limit, most recently identified in the case of Re P-S (Children) [2018] EWCA Civ 1407. The Interim Guidance addresses the question of what to do when an extension to the statutory 26-week time limit is sought in order to assess potential Special Guardians in public law proceedings.

Re P-S (Children) [2018] EWCA Civ 1407

Re P-S involved a first instance decision to grant final Care Orders, contrary to agreement of all parties that Special Guardianship Orders should be made in favour of the two children's respective paternal grandparents. The Judge at first instance took issue with the fact that the children were not living with the proposed Special Guardians, due to them having been identified late in the proceedings. There was effectively no assessment of the proposed Special Guardians with the children in their care. The Special Guardians were not represented and were not parties to the proceedings. The Local Authority had invited the Court to make SGOs of its own motion, under section 14A(6)(b). The Judge made final Care Orders, intending them to be of short duration to test the placement, envisaging that SGO applications could be made later down the line.

The decision was appealed by the Association of Lawyers for Children. The appeal was successful and the Court of Appeal set aside Care Orders and substituted SGOS in favour of the paternal grandparents.

The judgement on appeal was given by Sir Ernest Ryder, although a short concurring judgement was given by Sir James Munby, the then President of

the Family Division. The principles arising from the judgement can be summarised as follows:

- 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 avoid 'firefighting'.

- There were three options available to the Judge at first instance: (1) make SGOs, (2) make final Care Orders and (3) adjourn for further evidence/consideration and make ICOs. After considering the authorities in relation to delay ([23] – [27]), the Court of Appeal concluded (3) was likely to have been appropriate in this case.

- "The concept of short term order is flawed" ([33]). The Court of Appeal criticised the concept of short term Care Orders and warned that 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.

- In relation to the Court making SGOs of its own motion, the Court of Appeal noted, "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" [54]. Such residual power should only be used where it is in the interests of the child and the Court is able to have regard to the protections in sections 14 and 10 of the Children Act.

- The Court concluded that it was wrong not to have made appropriate provision for the potential Special Guardians to obtain effective access to justice. They had no party status, no documents and no legal advice. The Court identified this amounted to procedural unfairness and could have been avoided by appropriate directions at previous hearings.

Sir James Munby, in his judgement, considered the question: What is the Court to do when the prospective Special Guardian is identified late in the

day? He went on to confirm the principles in Re S (Parenting Assessment) [2014] 2 FLR 575:

- The First question is whether the proposed Special Guardian is a 'runner'. This must be evidence-based, with a solid foundation, not driven by sentiment or hope. However, it need not necessarily be too lengthy or searching at this stage;

- 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? If the child has never lived with, or has a tenuous relationship with, the Special Guardian proposed, what steps need to be taken and over what period to test the proposed placement?

- 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. "In relation to SGOs, as elsewhere, justice must never be sacrificed upon the altar of speed" [69].

Sir James Munby then invited investigation of the question by the Family Justice Council.

Family Justice Council Interim Guidance

The interim guidance sets out guidelines for the best approach to managing such cases within the Family Court. It is short guidance at this stage, and can be summarised as follows:

- Alternative carers should be identified at an early stage and, where possible, pre-proceedings, by adherence to good practice including convening a Family Group Conference, at an early stage. Assessments should commence promptly and be evidence-based, balanced and child-centred;

- Full assessment will usually require a 3-mont timescale;

- Where proceedings have commenced, all parties should file and serve position statements in advance of the first CMH to include details of proposed carers for assessment. The local authority and the Guardian should explicitly address the identification of carers. These SHOULD NOT be governed by the parents' approval/disapproval but must be focused on the child's interests.

- If the whereabouts of prospective carers is unknown, the family or, if appropriate, other agencies should be invited to assist in locating them.

- If the viability assessment is negative, the local authority must notify the subject of the procedure to challenge the assessment. Any challenge must be pursued promptly.

The interim guidance goes on to give consideration to those cases in which possible carers are identified late. The approach advocated by Sir James Munby in Re S (A Child) is confirmed such that where the application has a sound basis, an extension beyond 26 weeks should be permitted if it is "necessary to enable to Court to resolve the proceedings justly". The extension period will depend on the individual features of the case and delay should be proportionate to the welfare criteria set out in sections 1(3) and 1(4) of the Act.

The guidance goes on to set out that where a viability assessment is positive, the parties and the Court should, when making directions for a full SGO assessment, consider and, if necessary, make orders relating to the time the child will spend with the proposed carer. This will ensure that the evidence-based assessment includes assessment of the proposed carers' relationship with the child.

Further consideration is also given to the legal framework for placement during assessment. It may not be possible to place pursuant to an ICO under

the current regime proposed by Regulation 24 of The Care Planning, Placement and Case Review (England) Regulations 2010. In such circumstances, placement pursuant to section 8 Children Act, such as a Child Arrangements Order with an Interim Supervision Order, may be an appropriate alterative.

Conclusions

More comprehensive guidance on public law is expected later in the year but the Interim Guidance, albeit brief, is welcome in confirming a common-sense approach to the extension of the 26-week time limit where assessment of a potential carer is required to meet the interests of the child.

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