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Public Law Month

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WEEK TWO

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Andrea has a broad children practice covering care proceedings, adoption, private children proceedings and international cases including abduction. She is an experienced mediator in private children issues.

Andrea also deals with cases involving applications for protective orders such as forced marriage protection orders and FGM protection orders as well as non-molestation and occupation orders.

Special Guardianship Orders

Introduction

1. The ***Prime Minister's Review of Adoption*** report dated 7 July 2000 identified the need for an alternative legal status for children that offered greater security than long term foster care but did not go as far as severing legal ties with the child's birth family through an adoption order. The report recommended further consultation on a new legislative option for permanence for children.

2. The White Paper ***Adoption: a new approach*** dated 29 December 2000 set out several routes to permanence and recommended a new legal status to be known as special guardianship. This new status would:

    a. give the carer clear responsibility for all aspects of caring for the child and for taking the decisions to do with their upbringing. The child will no longer be looked after by a local authority;
    b. provide a firm foundation on which to build a lifelong permanent relationship between the child and their carer;
    c. be legally secure;
    d. preserve the basic link between the child and their birth family; and
    e. be accompanied by access to a full range of support services, including where appropriate, financial support.

3. The special guardianship provisions were introduced by the Adoption and Children Act 2002 and are to be found in the Children Act 1989 in Section 14A to 14F. Those provisions are supported by the Special Guardianship Regulations 2005 (as amended by the Special Guardianship (Amendment) Regulations 2016) and the Special Guardianship Guidance published by the Department for Education (January 2017). In Wales the Code of Practice on the Exercise of Social Services Functions in relation to SGOs are also applicable, imposing requirements and setting out guidelines for social services.

The Special Guardianship Order

4. The special guardianship order provides permanence and security for children who cannot live with their parents and for whom adoption would not be appropriate. The order enables the holder to exercise parental responsibility to the exclusion of others with parental responsibility but without discharging that parental responsibility or severing legal ties with birth family. The special guardian will have clear responsibility for the day to day decision making for the child or young person and his upbringing. The order allows the special guardian to remove the child from the jurisdiction for up to 3 months without the consent of others with parental responsibility (although the consent of another special guardian would be required).

5. The child's parents remain the legal parents and retain parental responsibility however their ability to exercise that responsibility is limited. They retain the right to consent or not to the child's adoption or placement for adoption and their consent is required in order to cause the child to be known by a different surname, or if the special guardian wishes to remove the child from the UK for longer than 3 months.

6. Unlike an adoption order the special guardianship order can be varied or discharged.

Application Process

7. Applications can be made by an individual or jointly by two or more people and joint applicants do not need to be married, although they must be over 18 years old and cannot be one of the child's parents.

8. The court may make a special guardianship order on the application of:
    a. any guardian of the child
    b. any individual who is named in a child arrangements order as a person with whom the child is to live
    c. a local authority foster parent with whom the child has lived for a period of at least one year immediately preceding the application
    d. a relative with whom the child has lived for a period of at least one year immediately preceding the application
    e. any person with whom the child has lived for three out of the last five years

f. where the child is in the care of a local authority, any person who has the consent of the local authority
g. anyone who has the consent of all those with parental responsibility for the child
h. in any case where a child arrangements order in force with respect to the child regulates arrangements relating to with whom the child is to live or when the child is to live with any person, any person who has the consent of each of the persons named in the order as a person with whom the child is to live
i. any person, including the child, who has the leave of the court to apply

9. The court may also make an order of its own motion in any family proceedings concerning the welfare of a child if they consider such an order should be made.

10. When considering whether to make a special guardianship order the child's welfare is the court's paramount consideration and the court will have regard to the matters set out in the 'welfare checklist' (S1(3) CA 1989).

11. Any person who wishes to apply for a special guardianship order must give three months' written notice to the local authority of their intention to apply. There is only one exception to this; where a person has the leave of the court to make a competing application for a special guardianship order where an application for an adoption order has already been made. This is to prevent the competing application delaying the adoption order hearing.

12. Once notice has been given the local authority must investigate and prepare a report for the court. A special guardianship order cannot be made unless the court has received a report from the local authority dealing with the suitability of the applicant to be a special guardian and any other relevant matters (S14A(8) CA 1989) or has received the required information in some other form. The Regulations set out the matters which the report must deal with (see below).

13. Before making a special guardianship order the court must consider whether to vary or discharge any s8 CA 1989 order and should also consider whether to make an order for contact at the same time as the special guardianship order.

14. Where a special guardianship order has been made the local authority is under a duty to make arrangements for the provision of a package of special guardianship support services, which may include counselling, advice, information and financial support (S14F CA 1989; SGR 2005). This is addressed further below.

The Report

15. The matters that the local authority must address in the report are set out in the Special Guardianship Regulations, reg 21. The Schedule to the 2005 Regulations (as amended by the 2016 Regulation) sets out the prescribed matters for the report in respect of both the child and the child's family. In summary these matters are:
    a. information about the child who is the subject of the application including their current and likely future needs, and any harm they have previously suffered;
    b. information about the child's family including any likely risk of future harm posed by the child's parent or other relevant person;
    c. the wishes and feelings of the child and others;
    d. information about the prospective special guardian including the nature of their current and previous relationship with the child and, their ability and suitability to bring up the child until the child reaches the age of 18;
    e. information about the local authority which compiled the report
    f. a summary prepared by a medical professional;
    g. implications of the making of a special guardianship order for those involved;
    h. relative merits of special guardianship and other orders;
    i. a recommendation regarding special guardianship; and
    j. a recommendation regarding contact.

16. The local authority may arrange for someone else to carry out the investigation or prepare the report on their behalf (s14A(10) CA 1989) and local authorities should consider how best to exercise this power to facilitate the investigation and timely preparation of the report to the court.

17. The statutory guidance for local authorities on the special guardianship regulation by the Department for Education (January 2017) says the following in respect of the way in which the report should be prepared:

> *"Local authorities are expected to ensure that the social worker who conducts the investigation and prepares the report to the court is suitably qualified and experienced. In conducting the investigation, the person preparing the report should analyse and consider the information they ascertain from and about the prospective special guardian. The approach should be objective and inquiring. Information should be evaluated, and its accuracy and consistency checked. The safety of the child is of paramount concern and it is vital that the background of the prospective special guardian is checked rigorously. The special guardian (with an appropriate support package) should be considered able to meet the child's needs at the time of the making of the order and in the future."*

Support Services

18. Section 14F deals with special guardianship support services, which may be vital to many kinship carers seeking a special guardianship order. Under the Special Guardianship Regulations 2005 the local authority is under a duty to provide services such as counseling, information and advice, but this also includes financial support in appropriate circumstances. The Regulations set out what financial support is available, the assessment process and the way in which local authorities must plan and review the provision of services.

19. Regulation 3 sets out the services available as follows:

> (1) For the purposes of section 14F(1)(b) of the Act the following services are prescribed as special guardianship support services (in addition to counselling, advice and information)—
>
> (a)financial support payable under Chapter 2;
>
> (b)services to enable groups of—
>
> (i)relevant children;
>
> (ii)special guardians;

(iii)prospective special guardians; and

(iv)parents of relevant children,

to discuss matters relating to special guardianship;

(c)assistance, including mediation services, in relation to arrangements for contact between a relevant child and—

(i)his parent or a relative of his; or

(ii)any other person with whom such a child has a relationship which appears to the local authority to be beneficial to the welfare of the child having regard to the factors specified in section 1(3) of the Act;

(d)services in relation to the therapeutic needs of a relevant child;

(e)assistance for the purpose of ensuring the continuance of the relationship between a relevant child and a special guardian or prospective special guardian, including—

(i)training for that person to meet any special needs of that child;

(ii)subject to paragraph (3), respite care;

(iii)mediation in relation to matters relating to special guardianship orders.

(2) The services prescribed in paragraph (1)(b) to (e) may include giving assistance in cash.

(3) For the purposes of paragraph (1)(e)(ii) respite care that consists of the provision of accommodation must be accommodation provided by or on behalf of a local authority under section 23 of the Act (accommodation of looked after children) or by a voluntary organisation under section 59 of the Act.

20. Regulation 6 deals with financial provision;

(1) Financial support is payable under this Chapter to a special guardian or prospective special guardian—

(a)to facilitate arrangements for a person to become the special guardian of a child where the local authority consider such arrangements to be beneficial to the child's welfare; or

(b)to support the continuation of such arrangements after a special guardianship order is made.

(2) Such support is payable only in the following circumstances—

(a)where the local authority consider that it is necessary to ensure that the special guardian or prospective special guardian can look after the child;

(b)where the local authority consider that the child needs special care which requires a greater expenditure of resources than would otherwise be the case because of his illness, disability, emotional or behavioural difficulties or the consequences of his past abuse or neglect;

(c)where the local authority consider that it is appropriate to contribute to any legal costs, including court fees, of a special guardian or prospective special guardian, as the case may be, associated with—

(i)the making of a special guardianship order or any application to vary or discharge such an order;

(ii)an application for an order under section 8 of the Act;

(iii)an order for financial provision to be made to or for the benefit of the child; or

(d)where the local authority consider that it is appropriate to contribute to the expenditure necessary for the purposes of accommodating and maintaining the child, including the provision of furniture and domestic equipment, alterations to and adaptations of the home, provision of means of transport and provision of clothing, toys and other items necessary for the purpose of looking after the child.

21. Regulation 8 sets out that payments can be made periodically, by a single payment, or by instalments. Regulation 9 stipulates that payments come to an end when the child reaches the age of 18 or ceases full time education or training, or becomes eligible for income support or jobseeker's allowance. The payments also come to an end if the child ceases to have a home with the Special Guardian. Regulation 10

sets out the conditions on which payments are made such that if there are changes in circumstances, either personal or financial, which are not communicated to the local authority then payments may come to an end. Further, the local authority may seek to recoup some or all of the payments so special guardians must be very clear about what information they are expected to provide to the local authority on an ongoing basis to avoid getting into financial difficulties.

22. Regulations 11, 12 and 13 deal with the assessment process. A request must be made for this to be triggered. The assessment will take into account the financial needs and resources of the proposed special guardian and the child. In addition to regular payments by way of an allowance there can be provision for legal costs, initial costs of accommodating a child, recurring costs in respect of travel to visit relatives, or other persons with whom they have a beneficial relationship, any special care, or any remuneration for those who were formerly foster carers for the child.

23. The support plan must set out all the support and services which are to be provided including the amount of financial support and how it is to be paid. The plan will be reviewed at least annually and at any time when the special guardian's circumstances change.

Case Law

24. There has been significant judicial guidance in respect of the statutory framework, the making of special guardianship orders, their relationship with s8 orders and the balancing of competing options such as placement with a parent or adoption. For example:

    a. ***Re S (Adoption Order or Special Guardianship Order) [2007] 1 FLR 819*** (appeal considering whether an adoption order or SGO should be made to secure the child's placement with his foster carer and the differences between those two orders. Adoption was sought by the foster carer but SGO was the right order).

    b. ***Re M-J (Adoption Order or Special Guardianship Order) [2007] 1 FLR 691*** (appeal considering whether placement of a young child with maternal aunt

should be by SGO or adoption. Adoption was the correct outcome in this case and SGO would be insufficient to ensure the long-term stability of placement).

c. ***Re J (Adoption Order or Special Guardianship Order) [2007] 1 FLR 507*** (appeal considering whether a 6 month old baby should be placed with paternal aunt and uncle under SGO or adoption. The adoption order was the most appropriate and would not unduly distort the family dynamics).

d. ***A Local Authority v Y, Z and Others [2006] 2 FLR 41*** (placements with relatives was agreed and although no order was an option it would leave the children vulnerable to the parents changing their minds. The relationship between special guardianship and contact orders was considered and it was determined that it was for the special guardians to decide what kind of contact, if any, the children should have with extended family, whilst orders were made for contact with the parents).

e. ***Re L (Special Guardianship: Surname) [2007] 2 FLR 50*** (appeal by grandparents against orders made which were ancillary to the SGO (i) refusing a change of surname (ii) ordering contact 6 times per year away from the home supervised by the local authority (iii) further or other contact as agreed between mother and grandparents if approved in advance in writing by the social worker, and (iv) letterbox contact with the father. The grandparents argued the orders placed restrictions on their ability to exercise overriding parental responsibility conferred on them by the SGO. The court considered that special guardianship was not free of judicial oversight and the court was required to consider making a contact order and had the power to make (or refuse) an order changing a child's surname. The provision for further/other contact to be approved by the social worker in advance in writing was discharged).

f. **Re S (A Child) [2014] EWCC B44 (Fam)** (consideration of the statutory time limit and that the 26 week rule "is not, and must never be allowed to become, a straightjacket, least of all if rigorous adherence to an inflexible timetable risks putting justice in jeopardy")

g. **Re M-F (Children) [2014] EWCA Civ 991** (the court of appeal considered the trial judge's decision at the end of a final hearing to adjourn for a further report in respect of the mother's progress. The Judge set out her reasoning and was entirely justified to take the approach she did. The Court of appeal endorsed what Pauffley J said in *In re NL (A Child) (Family Proceedings: Practice and Procedure)* [2014] 1 FLR 1384 "*Justice must never be sacrificed on the altar of speed*.")

h. ***Surrey County Council v Al-Hilli and Others [2014] 2 FLR 217*** (special guardianship orders made in respect of two sisters in favour of an aunt and uncle. The parents had been killed in a shooting in the French Alps and the children had been placed in foster care. All parties, including the police, supported that outcome).

i. **In *Re H (A Child) (Analysis of Realistic Options and SGOs) [2016] 1 FLR 286*** (an appeal considering the trial judge's decision to place a child with a member of the family support network under a SGO. There had been no application and no SGO report had been directed. The role of the SG had been as part of the father's support network to support his case that he care for the child, which he had been doing for six months. There was no cross examination on the SG's ability to care for the child and no evidence from the assessor of the SG for the connected persons report. The court had not carried out a comparative welfare analysis. The SGO was set aside and a new IRH directed).

j. ***Re F (Special Guardianship Order: Contact with Birth Family) [2016] 1 FLR 593*** (the court considered competing options for a child (who was of black African Congolese heritage) of ongoing placement with a foster carer under a SGO or adoption, or placement with a paternal great aunt under a SGO. The court made a SGO to the foster carer and made orders for direct contact with the paternal great aunt and indirect contact for the parents).

k. ***Re A (A Child) [2019] 1 FLR 687*** (the court had two competing options for special guardianship placements for a child of dual British and Ghanaian heritage; the maternal grandmother's first cousin and her husband who lived in

Ghana, and the child's foster carer who was of Afro-Caribbean origin. Both placements were capable of meeting the child's needs. The court made an SGO to the foster carer with ongoing contact to family members. This was set aside on appeal. The Judge's reasoning was not of sufficient depth and detail to underpin a decision of such importance. The arguments in favour of placement with the foster carer had not been properly balanced with the powerful arguments in favour of placement in Ghana. The Judgment did not sufficiently explain why it was necessary for the child to grow up in foster care when there was a placement available in his natural family which offered the prospect of significant time spent with close family members, nor did it explore the consequences for him of being the only member of his family to grow up outside it).

Re P-S

25. In *Re P-S (Children) (Care Proceedings: Special Guardianship Orders) [2019] 1 FLR 251*, *CA*, the Court of Appeal reviewed a decision made by HHJ Tolson at the conclusion of care proceedings concerning two young boys who were half siblings to place them with their respective paternal grandparents under care orders, rather than SGOs.

26. Both sets of paternal grandparents had been assessed and the local authority's care plan was for placements with them under SGOs, which was supported by the Children's Guardian and the father of one of the boys. The mother and the other father opposed but did not challenge the special guardianship assessments.

27. The judge at first instance queried whether making SGOs was premature and considered the various options; care order, special guardianship, and child arrangements order. He expressed concern that neither child was living with the proposed special guardians and those placements were therefore untested. He referred to a letter written by Keehan J in his role as the Family Division Liaison Judge to the Midlands Circuit prepared as a result of a meeting between the chairs of the Circuits Local Family Justice Boards which said:

"a special guardianship order should not be made, absent compelling and cogent reasons, until the child has lived for an appreciable period with the prospective special guardians."

The Judge noted that was not binding he but considered it to be sound common sense.

28. The Judge ultimately made a "*short term*" care order and said:

"Whilst I do not suggest that these children should be the 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 orders would be that if all goes well, then applications for special guardianship orders should follow in due course. By the expression 'in due course' I mean 'when the new placements are regarded as settled and working well for the children'. In this case that might perhaps be in about a year from now……"

29. The two sets of grandparents had not made applications for a special guardianship order, had not been joined as parties, were not represented, and had no opportunity to take legal advice. They were not intended to be witnesses at the final hearing. They attended the court building but had only been invited into the hearing for part of one of the days.

30. The appeal was allowed and the care orders set aside. SGOs were made in favour of the paternal grandparents for each child.

31. The judge failed to analyse the benefits and detriments of the two options of a care order or a SGO. In the absence of any evidential basis, none of the propositions that the judge appeared to rely upon to justify making the orders was sufficient. Therefore, the imposition of care orders was not adequately reasoned (para [32]).

32. The concept of a short-term care order within which the placements could be tested was flawed. There was no mechanism for a care order to be discharged on the happening of a fixed event or otherwise to be limited in time. Furthermore, the judge did not follow the guidance given in *Re W (A Child) (Care Proceedings: Court's Functions)* [2013]

EWCA Civ 1227, [2014] 2 FLR 431 and obtain from the local authority s 31A care plans for each of the children setting out the plan that he wanted them to pursue, namely a trial of the proposed placements by the local authority. The lack of scrutiny by the court of the plans that were required was contrary to s 31(3A)(a) of the 1989 Act (paras [33], [34]).

33. If the judge intended to suggest that there was any equivalence between the way in which a court should consider the permanence of a SGO and the permanence of an adoption order then that was inappropriate. There was no direct equivalence with an adoption order and the protections around it were, accordingly, different (paras [32], [35]).

34. The informal guidance apparently relied upon by the judge in this case fell into none of the recognised categories for which guidance could be given. It did not identify the research or basis upon which the guidance was given, it had not been the object of scrutiny or consultation in any environment where those responsible were accountable for that process, it was not transparently issued with an acknowledgement of responsibility, that was with the intention that its contents should be relied upon and it did not have a status that permitted a party to challenge its contents if a court or party in a particular case sought to rely on it. The opinion it expressed might be right, but it was not an appropriate vehicle for an opinion of the kind expressed to be relied upon in court in an individual case. It was understandable but inappropriate for the judge to have relied on the letters identified (paras [48], [51]).

35. It was wrong not to have made appropriate provision for the grandparents to obtain effective access to justice at the final hearing. To leave them on the sidelines without party status, without documents and without advice and without any mechanism being identified for the parents of the younger child to cross-examine them on their proposals 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 (para [55]).

36. Sir Ernest Ryder gave the leading judgment and noted that the Judge might have reached the conclusion he did as a result of time constraints imposed by the 26 week statutory time limit in s32(1)(a) CA 1989. That time limit had already been exceeded

in this case as a result of the realistic options for the children changing twice during the course of the proceedings, first when the FDAC process for the parents broke down, and then when the children's interim carers (a paternal aunt and the maternal grandmother) indicated they were not in a position to care for the children. The court of appeal was not able to say there was inadequate planning which led to the delay and noted that *"Sequential planning may be necessary when unforeseen events occur and it achieves nothing in this case to spend any more time speculating whether the paternal grandparents could have been assessed earlier"*.

37. The President supplemented the judgment of Sir Ernest Ryder raising two important issues:

    i. There are 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; and
    ii. There are concerns that the assessments relied on by the court in deciding whether to make a SGO are not always as rigorous as might be thought appropriate.

    Both issues raise serious questions as to how they are best addressed having regard to the 26 week statutory timetable.

38. The President noted there was a real need for authoritative guidance as to the way SGOs were applied for and used to sit alongside the statutory materials which would address what was evidence based, peer-reviewed research, what was the reliable data about the outcomes that different practices achieved and the good practice that an analysis of those outcomes suggested. Such guidance would have been invaluable in this case and in other cases where similar decisions needed to be made. The President invited the Family Justice Council to undertake an investigation of what form any necessary guidance should take (paras [40], [70], [71]).

Interim Guidance

39. Interim Guidance was issued by the FJC President's approval on 24 May 2019 (https://www.judiciary.uk/wp-content/uploads/2019/05/fjc-sg-interim-guidance-pfd-approved-draft-21-may-2019-1.pdf). The primary purpose of the interim guidance was to address cases where an extension to the statutory 26-week time limit is sought to assess potential special guardians, more fully, within public law proceedings.

40. The principles of the Interim Guidance are:

    a. As a general proposition, alternative potential carers should be identified at an early stage and where possible, pre-proceedings.
    b. Assessments should be commenced promptly, and in the event that a full assessment is undertaken it will usually require a three-month timescale.
    c. In most cases, compliance with good practice will ensure that any prospective special guardian has been identified at an early stage and the assessment completed within the statutory timescale. However, it is recognised that there are cases where possible carers are identified late in proceedings or for other reasons. In those cases, further time will be required to assess the relationship between the child(ren) and the carer(s) fully.
    d. Where a viability assessment is positive, the parties and the court should consider, and if necessary order, the time the child will spend with the proposed carers. An evidence-based assessment which does not include any assessment of the proposed carers' relationship with the child is likely to be regarded as incomplete.
    e. If the court approves an extension, consideration will need to be given to the legal framework. It may not be possible for the child to be placed pursuant to an interim care order under the current regime imposed by reg 24 of the Care Planning, Placement and Case Review (England) Regulations 2010, SI 2010/959. In those circumstances, an alternative approach would be placement pursuant to a Child Arrangements Order under s 8 and an interim supervision order to provide support for the placement, particularly during any transition period.

41. In light of the decision in *Re P-S*, the Nuffield Family Justice Observatory (NFJO) commissioned a rapid evidence review to establish the most up-to-date evidence relating to special guardianship.

42. The increased use of SGOs, particularly at the conclusion of care proceedings and with pressure to meet the 26-week statutory timeframe, prompted questions about whether this placement option is always in the best interests of children and their guardians.

43. The rapid evidence review suggests that special guardianship continues to be an important permanence option 'for the right child and the right family'. However, it suggests improvements are needed in the identification, assessment, preparation and support for Special Guardians. A robust protocol is also needed to ensure that any prospective Special Guardian has, or develops, a significant relationship with the child (including day-to-day care of the child), and that this forms the evidence base for the making an SGO.

Matters to consider in a SG case

44. A number of lessons can be learned from Re P-S and the following issues may be relevant or necessary in cases involving proposed special guardianship:
    a. Joinder;
    b. Disclosure of papers;
    c. Formal application for a SGO;
    d. Witness statements from proposed SGs;
    e. Including proposed SGs on the witness template;
    f. Invitation to the attend the IRH/Final Hearing even if not parties/witnesses; and
    g. Legal advice.

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Cherry Harding is a specialist in all aspects of the law relating to children and children's rights. She has long experience in all aspects of the field; adoption, including inter-country adoption, care proceedings, where she acts for parents, local authorities and the children, child abduction, removal from jurisdiction and private law applications.

Her cases frequently include issues of the most serious issues of significant harm to children, where the family history includes addiction, mental ill-health personality disorders.

She often appears in the High Court and the range of hearings she has been instructed in include, judicial reviews, inquests and in the Court of Protection. She has appeared in many very serious and high profile matters relating to children.

Reform of the Law in respect of Special Guardianship orders

Public Law Working Group

Research by the Coram Group shows that the number of children leaving care through adoption equates with the number of children leaving care through being made the subject of Special Guardianship order. https://coram-i.org.uk/asglb/data/

There is speculation that SGOs are made more frequently as they can be made of the court's own motion in care proceedings without an application and notice to the local authority as would be required for adoption. Further, after a court has made an SGO those carers do not have funding or support to go on to make an adoption application.

This talk follows on from Andrea's resume of the law as it stood, and case law decided up to the President's approval of Interim Guidance on Special Guardians in May 2019.

Andrea set out the Interim Guidance and the call for improvements in the identification, assessment, preparation and support for Special Guardians.

I will address the report of the Public Law Working Group dealing with the overhaul of the use of SGOs published in June 2020 and move on to the new Guidance that followed, approved by the President in 2020 and set out at Appendix E to the PLWG report.

The key themes of the Public Law Working Group's SGO recommendations are:

i. to ensure full and comprehensive assessments are undertaken of prospective SGs and that sufficient time is afforded to local authorities to undertake these assessments;

ii. 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 that the child is cared for on an interim basis by the prospective SG before any final consideration is given to the making of an SGO;

iii. the SGSP should be based on the lived experience of the child and of the proposed SG and must be a comprehensive plan based on the assessed needs of the individual child and of the proposed SG; and

iv. the plan should include clear provisions for the time the child will spend with his parent(s) or former carers and the planning of and support for the contact arrangements.

The Judicial Implementation Group met with the Family Justice Council's working group on Special Guardianship orders supported by the Nuffield Family Justice Observatory and the Public Law Working Group delivered its report to the President in February 2020.

Much of the best practice that was advised and intended to be put into practice has had to be postponed and the main Final Report will not be issued until the end of the year.

In May 2020 the JIG decided that such was the need for guidance on special guardianship orders that the part of the report relating to that area and its associated guidance would be published in June 2020.

A Family Justice Reform Implementation Group has been set up to promote the reforms. The FJBs will have a crucial role in bringing about change.

The report made four recommendations for immediate change and four for longer-term change.

The four recommendations for **immediate change** are:

1. more robust and more comprehensive special guardianship assessments and special guardianship support plans, including a renewed emphasis on (1) the child-special guardian relationship, (2) special guardians caring for children on an interim basis pre-final decision and (3) the provision of support services;
2. better preparation and training for special guardians;
3. reduction in the use of supervision orders with special guardianship orders;
4. renewed emphasis on parental contact;

The four recommendations for **longer-term change** are:

1. on-going review of the statutory framework;
2. 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;
3. a review of public funding for proposed special guardians;
4. effective pre-proceedings work and the use of the FRG's *Initial Family and Friends Care Assessment: A good practice guide* (2017); *see below*

I consider how practitioners may use the guidance

Use of the Guidance

In Pre-proceedings

> More weight to be attached to the need for identification of potential carers at an early stage.
>
> Parents need to be prepared in pre-proceedings for the fact that their family and support group will be scrutinised and mined for those who might want/need to be assessed. The parents will have to be given robust advice (as they are, but this needs to happen in every case) that this exercise does not mean that the child is not going home.

Viability Assessments

I set out the publisher's extract to the Family Rights Group Good Practice Guide in relation to initial family and friends care assessments, commonly known as viability assessments since potential special guardians may be lost to the children through a poor assessment at this stage.

A good practice developed for social workers conducting Viability assessments are increasingly being used by local authorities to decide whether a family member or friend

might be a potentially realistic option to raise a child who cannot live safely with their parents. The guide, developed in partnership with an expert working group, is a response to the lack of any minimum standards as to how such assessments are conducted. It lists what factors social workers conducting the assessment need to consider, including when undertaking assessments with family members overseas. It includes research evidence, examples from practice, a schedule and an example template. It also contains resources for family members to help them understand the purpose of an initial assessment, what it will entail, what they need to consider and how to get independent advice. Although primarily developed for social workers, it is also be relevant for other professionals who make decisions about, work with or represent family and friends carers and the children who may be unable to live safely with their parents.

Case management

It is vitally important that recruitment of potential SGs and others to be assessed is dealt with by order at the *start of the proceedings*. This is of course easier if the parents have been represented in pre-proceedings.

The parents, supported or led by children's guardians will need to ensure that assessments are commissioned and directed at the first opportunity

Children's Guardians' role

Seeking out the SGs and Court's needs at the earliest stage

Enquiry into **relationship** between prospective Special Guardians and the child

A true account of any relationship between a potential Special Guardian must be discovered so that it may be addressed as soon as possible. By this means, as much time as may be available for this purpose in the 26-week period can be utilised.

Where little or no relationship between the prospective Special Guardian(s), the option of the child living with the prospective SG(s) on an interim basis, under ICO, is to be considered

Advice to prospective SGs

The SGs will need

Legal advice about the *form of order(s)* they may want/need

And information about

why the proceedings have been commenced

what the parents'/family's problems are and how to confront a situation where the parents may end up on the other side of proceedings

Consider joining the SGs to the proceedings at an early stage- brings with it access to paperwork and the potential for advice/representation

Planning

The chance of an application by Special Guardians could be lost if it is not planned as early as possible

(i) There may be a need to plan for a move abroad

See the case **of Re A (A Child) [2019] 1 FLR 687** in Andrea's talk.

Consider liaison with the courts of the other jurisdiction, Special Guardianship may not be recognised or understood

Look carefully at what support may be needed in that jurisdiction

(ii) Consider looking at the help prospective adopters get, both before they are matched and after placement. What may be sought/argued for

(iii) The prospective Special Guardians may be unaware of

a) the child's contact needs
b) a child's predisposition to physical or mental problems

c) SGs may be unaware of the effect on child of the significant harm they have suffered and possible future effects of harm

These matters are difficult if the harm is not yet proved, but ion many cases the effect of harm on child may be fairly clear

Quality assessment of potential Special Guardians

In order to ensure the assessments and support plans are of a sufficiently high quality and to ensure the court is able to make a fully informed welfare decision, the following will need to be addressed:

i. whether there has been adequate attention paid to/time taken to build relationships and develop (and observe) contact between the child and the proposed SG. This may well be a vital component of a rigorous special guardianship assessment if the initial phases of the assessment are sufficiently positive to indicate such contact is in the welfare interests of the child and where the court is satisfied that such a step is not prejudicial to the fairness of proceedings;

ii. where such relationship-building work has not (for whatever reason) formed part of the assessment process itself, it is likely that further time will be needed to allow this work to be carried out before proceedings are concluded (e.g. through an extension of the 26-week time limit). This may particularly arise as necessary where early work to identify prospective carers and begin assessment prior to proceedings was not carried out;

iii. where there is little, or no, prior connection/relationship between the child and

the prospective SG and after an analysis of all the available evidence and of child's best interests, it is very likely to be in the child's best interests that the child is cared for on an interim basis by the prospective SG (e.g. under an

ICO) before any final consideration is given to the making of an SGO. There is a debate amongst professionals and the judiciary about whether (1) care proceedings should be extended beyond the 26-week timetable to enable the court to allow further time and assessments before deciding to make an SGO or (2) where a lengthy period of time is likely to be required before the court could consider making an SGO, the proceedings are concluded with the making of a care order on the basis that the local authority will assist the proposed SG in making a future application for an SGO. One important benefit of this approach is that the provisions of the SGSP will be informed by the needs on the ground of the child and of the proposed SG rather than on assumptions and expectations of what will be required to achieve a successful long-term placement;

iv. where a party proposes the court should make an SGO, consideration should be given at an early stage to the issue of joining the proposed SG as a party to the proceedings and if joined consideration should be given to the funding of legal representation for the proposed SG.

SG Support plan to be scrutinised by the court

Assessment of the specialist support that a placement is likely to need and that support must appear in a support plan.

Supervision Orders must not to be used as a means of *delivering* the support. To use one in that way shows lack of confidence in the placement and has been described as being a "red flag" to the court.

Robust clarity in respect of the provisions is needed not vague promise of help.

The Court needs to know the placement is going to work, without the need for an SO, i.e. a public law order.

When arguing these matters consider disclosure of the CPR file and ADM decision

But If child young and no clarity re interplay between congenital problems and the effects of significant harm, be it neglect or abuse, there may be no clarity as to the extent that early problems might be overcome, and progress made.

Parental Contact

The emphasis on the need for proper consideration of this matter before making SGOs has been welcomed by SG carers. At present SGs are told they are in charge of making arrangements with parents/LAs and it is a private law matter if orders are needed.

Recent Case Law

Re C (A Child) (Special Guardianship Order) 2019 EWCA Civ 2281

Both parents had mental health difficulties and at the time of the final hearing the mother had been in therapy. She had made progress and applied for an adjournment and rehabilitation. The judge made a SGO to the grandparents and the mother appealed.

Appeal refused. The SGO was appropriate. Mother might continue to make progress, but the court could not be sure.

Re CO (A Child) 2020 EWCA Civ 501

The court made a final care order with a plan for long term foster care and a section 91(14) order.

The mother argued for placement with a maternal aunt who had had a positive assessment. However, her final report had not been received.

The judge did not make the aunt a party.

Appeal dismissed. The judge had sufficient evidence to make the orders and had considered the relevant information. He did not need to make the aunt a party.

Re T (A Child: Refusal of Adoption Order) [2020] EWCA Civ 797

Grandparents appealed against the refusal of an adoption order for a child they had cared for all of its life. The judge had concluded that private law orders including a s91(14) order would afford the security needs and did not give enough weight to the protection that adoption provides. He cited the need to avoid skewing family relationships.

Leonie James

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Leonie specialises in all areas of family law. She joined chambers as a tenant in October 2020 following completion of her pupillage.

Prior to starting pupillage, Leonie was a Research Assistant at the Law Commission, working on the 'Building Families Through Surrogacy' and 'Making a Will' projects.

Leonie is a qualified solicitor, having completed her training contract at a leading family law firm where she gained experience in high net worth matrimonial finance and private law children.

She volunteered on a regular basis in a legal advice centre, advising on all areas of law and managing her own cases.

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