

SPECIAL GUARDIANSHIP

- Michael Harrison Q.C.

Background

1.1 *Special Guardianship* is the brainchild of a review of long-term provision for child care carried out by the government in 2000, called: "The Prime Minister's Review of Adoption" (July 2000). It was followed by a White Paper (December 2000): *Adoption: a new approach*, and then by the Adoption and Children Act 2002.

1.2 The policy objectives are these.

- Some children do not want the complete break with their birth family that adoption involves.
- On the other hand, planned long-term fostering is suitable for some children, but for others lacks sufficient family security and permanence.
- Therefore, there is a need for a form of intermediate legal status between adoption and a residence order to give greater legal security without severing the child from the birth family.
- *Special Guardianship* would:
 - give the carer clear responsibility for all aspects of care and decisions about upbringing,
 - provide a firm foundation for a lifelong, permanent relationship between child and carer,
 - be legally secure,
 - preserve the basic link between child and birth family, and
 - have access to a full range of support services, including financial support where appropriate.

- In summary, SGOs are an option for children who would benefit from a permanent, legally secure, relationship with their carer but where it is desirable to keep the legal link with the birth family.

Special guardianship obviously pre-supposes that parental care is long-term inadequate. It appears to be accepted that an SGO will not be suited to all such cases. But there does not seem to have been any calculation of what proportion of children would actually benefit from this new provision.

- 1.3 The provisions have been brought into play together with a raft of SGO “support services” – details are set out in the Special Guardianship Regulations 2005 – which are intended to play a central role in making SGOs workable, by supporting and encouraging the use and continuation of SGOs. The government recognised that the SGO Regulations placed important new duties on local authorities, but gave reassurance that these would not represent a significant new burden: financial costs would be met from ‘ring-fenced funding’ of £32 millions for adoption and special guardianship support in 2005-2206.

The Legislation

- 1.4 Although *Special Guardianship* was introduced by the Adoption & Children Act 2002 (s.115(1)), the provisions were added as six new sections in the Children Act 1989: ss.14A – 14F¹. Together with the *Special Guardianship Regulations 2005*, the new sections came into force on 30 December 2005. It is important to read the new sections and the Regulations together to see just what the new type of order involves.

¹ Originally there was a seventh, s.14G, but that was repealed before the provisions came into force.

- 1.5 The effect of introducing these sections in this way is that *special guardianship* has become one of the orders available in all family proceedings, private law as well as public law. Importantly, the involvement of a local authority is necessary in every case before a SGO can be made. And as the Regulations provide, in cases where continuing support services are necessary to sustain the special guardianship placement, the local authority will be involved after the making of a SGO. But the policy objectives of *special guardianship* do not square with the local authority having a significant role in the care of the child at the same time as a SGO is in force.
- 1.6 On the scale of available options for looking after children, the SGO comes somewhere between long term residential fostering and adoption. However, the Act and Regulations have been drawn up in such a way as to require a local authority to conduct an investigation and make a report for the court, and to provide support services, as demanding in their scope as any pre-adoption inquiry. It remains to be seen how in practice this new provision will meet real needs in a way that could not have been met before. It seems to me to be an order whose closest neighbour is adoption rather than residential placement.
- 1.7 An important consequence will be the extent to which there is a tendency in practice to couple special guardianship to applications for a residence order. Especially as the special guardianship support provisions are seen as a way into local authority financial support on a scale that would not be available under a family and friends fostering arrangement.

*Effect of a SGO – section 14C(1)*²

2.1 While a SGO is in force, (s.14C(1)):

- (a) a special guardian has parental responsibility for the child, and
- (b) is entitled to exercise parental responsibility to the exclusion of any other person with parental responsibility,
 - apart from another special guardian, and
 - “subject to any other order in force with respect to the child under the 1989 Act”.

2.2 This gives a special guardian exclusive parental responsibility. But *subject to any other order in force*. What other orders in force does this mean?

- Residence order? S12(2) – a person with a residence order (s.8) who is not a parent or guardian has parental responsibility while the residence order is in force: but s.14B(1)(b) requires the court before making a SGO to consider whether any section 8 order in force should be varied or discharged.
- Parental responsibility orders under s.4 and 4A CA 1989: (fathers and step-parents) and s.5 (guardians)?
- Care order? Section 91(5A) CA 1989 – the making of a SGO discharges a care order. But, the making of a care order does not discharge a SGO: s.33(3) CA 1989: while a care order is in force, the local authority shall (a) have parental responsibility, and (b) shall (where necessary to safeguard or promote the child’s welfare) have power to determine the extent to which a parent, guardian, or special guardian may meet his parental responsibility. So, a care order can co-exist with a SGO

² Subsections (2) to (6) deal with special guardianship in relation to parental consents, adoption and placement for adoption, change of surname and removal from the UK, and notifications to parents and other guardians where the child dies. By subsection (6), where an adoption placement order is in force, additional restrictions apply: see s.29(7) A&CA 2002.

providing the SGO is in place before the care order. When it is, the special guardian's authority is subject to the power of the local authority under the care order.

Clearly, a SGO is subject to the express provisions of s.33(3) where a care order is in force. So this is an example of *subject to any other order in force*. But it cannot be a sensible interpretation that the special guardian's exclusive authority is to be qualified where a person has parental responsibility by an order under sections 4, 4A or 5, (but not where parental authority arises naturally from parentage under s.2). Therefore, the better view is that *other order in force* in s.14C(1)(b) means an order which expressly has the effect of curtailing the parental responsibility of the special guardian.

The routes to special guardianship

- 3.1 As with other orders available in children cases, a special guardianship order may be made *either* upon the application of a party to proceedings, *or* by the Court even though no application has been made. Section 14A sets up some potential complications as to the interplay between the two routes.
- 3.2 S.14A(2). A special guardian must be 18 or over and must not be a parent of the child.
- 3.3 S.14A makes an important distinction between persons (referred to as "individuals") who are entitled to apply for a SGO, and those who are not entitled. S.14A(3): the Court may make a SGO on the application of an individual:
 - (a) who is entitled to apply, or
 - (b) who has obtained the leave of the court to apply.

Joint applications may be made.

3.4 S.14A(5) sets out the list of those entitled to apply. See Appendix - a table setting them out. Those *not entitled* to apply must first obtain the leave of the court: a two-stage process.

3.5 It seems that the structure of ss.14A(3) and (5) is intended to refer to originating applications, because s.14A(6) says:

“(6) The court may **also** make a special guardianship order with respect to a child in any family proceedings in which a question arises with respect to the welfare of the child if –

(a) an application for the order has been made by an individual who falls within subsection (3)(a) or (b) (or more than one such individual jointly); or

(b) the court considers that a special guardianship order should be made even though no such application has been made.”

3.6 An important issue to be worked out in practice is which route should be used to bring special guardianship into play once family proceedings are under way.

Obtaining leave

4.1 S.14A(12):

“(12) Subsections (8) and (9) of section 10 apply in relation to special guardianship orders as they apply in relation to section 8 orders.”

This unhelpfully worded subsection involves adapting subsections (8) and (9) of section 10 to special guardianship to find the principles for whether or not to grant leave to make an application. Section 10 must be construed as if it read (words added in italics):

“(8) Where the person applying for leave to make an application for a section 8 order *or a special guardianship order* is the child concerned, the court may only grant leave if it is satisfied that he has sufficient understanding to make the proposed application for the section 8 order.³

(9) Where the person applying for leave to make an application for a section 8 order

³ Subsection 8 as applied to special guardianship is curious. It works well enough with the range of s.8 orders, but does not transpose comfortably into the wording of s.14A, particularly s.14(A)(3),(8)(a) and the Regulations. Presumably, the intention is that a child may be given leave to apply to the court for another to be appointed his special guardian.

or a special guardianship order is not the child concerned, the court shall, in deciding whether or not to grant leave, have particular regard to—

- (a) the nature of the proposed application for the section 8 order or special guardianship order;
- (b) the applicant's connection with the child;
- (c) any risk there might be of that proposed application disrupting the child's life to such an extent that he would be harmed by it; and
- (d) where the child is being looked after by a local authority—
 - (i) the authority's plans for the child's future; and
 - (ii) the wishes and feelings of the child's parents.”

4.2 It is not easy to see what subsection (8) envisages as applied to SGO. (See further f.n. 3 above.)

4.3 As for subsection (9)(a) – (d), these involve that in deciding whether or not to grant leave the court should have regard to the context of other applications and proceedings in progress relating to the child. (If not, the same considerations remain material to the grant or refusal of leave because the factors identified in (9)(a)-(d) are not exclusive but merely those to which the court “shall ... have particular regard”.)

4.4 Surely, an overriding consideration is that leave to apply should only be given where it appears to the court, at the time the application for leave is made, that making a SGO to the applicant will become a real issue in determining the future of the child. In *RE J (LEAVE TO ISSUE APPLICATION FOR RESIDENCE ORDER)*, [2003] 1 FLR 114 Thorpe LJ and Ferris J, the Court of Appeal gave guidance on the approach to exercising a discretion to give leave, applying s.10(8) and (9). A grandmother applied for leave to apply for a residence order. The Court said:

- (1) When considering a grandparent's application for leave to make an application for a residence order, the statutory checklist needed to be given its proper recognition and weight. It was not appropriate to substitute the test 'has the applicant satisfied the

court that he or she has a good arguable case' for the test that Parliament set out in s 10(9) of the Children Act 1989.

- (2) Applicants for leave now enjoyed rights to a fair trial and, usually, rights to a family life under Art 8. The minimum essential protection of a grandparent's rights was that judges were careful not to dismiss their applications without full inquiry.

In fact what Thorpe LJ said [judgment para.19] was:

“... it is important that trial judges should recognise the greater appreciation that has developed of the value of what grandparents have to offer, particularly to children of disabled parents. Judges should be careful not to dismiss such opportunities without full inquiry. That seems to me to be the minimum essential protection of Arts 6 and 8 rights that Mrs J enjoys, given the very sad circumstances of the family.”

It is important not to give this greater significance than was intended. The *fair trial* and *family life* aspects of a decision to give leave to apply for a SGO must be assessed against the reality that a person who is refused leave to apply for a SGO may nevertheless be given leave to apply for a residence order, in which case those rights are for the time being appropriately protected.

- 4.5 As for subsection (9)(c), (disruption of the child's life by the application), see further the implications of the statutory investigation required as a pre-condition to making a SGO.

Notice to the local authority: investigation and report; availability of support services

- 5.1 There is a very important requirement that before any application may be made for a SGO, written notice must be given to the relevant local authority at least three months before. S.14A(7):

“No individual may make an application under subsection (3) or (6)(a) unless, before the beginning of the period of three months ending with

the date of the application, he has given written notice of his intention to make the application –

- (a) if the child in question is being looked after by a local authority, to that local authority, or
- (b) otherwise, to the local authority in whose area the individual is ordinarily resident.”

5.2 The giving of notice has two significant consequences.

- First, under s.14A(8): on receipt of such a notice the local authority “must investigate the matter and prepare a report for the court” dealing with: the applicant’s suitability, matters prescribed by the Secretary of State, and any other matter the local authority considers relevant.
- Second, a person who has given notice becomes a “prospective special guardian” and the child becomes a “relevant child” for the purposes of the special guardianship support services, (SG Regulations 2005).

5.3 The investigation and report is an essential pre-condition to the making of every SGO. S.14A(11):

“(11) The court may not make a special guardianship order unless it has received a report dealing with the matters referred to in subsection (8).”

The three months minimum period between notice and application for SGO is clearly intended to give the local authority adequate time to carry out the investigations and report required by s.14A(8).

5.4 Notice before leave? Can an individual who requires the leave of the court to apply for a SGO give notice of his intention to apply before obtaining leave? This is one of a number of issues on special guardianship currently before the Court of Appeal. (Reserved judgments pending.) It is submitted the answer is plainly ‘No’. But that was not the view of a circuit judge in Birmingham who read the statute as giving *carte blanche* to anyone who wanted to apply for a SGO to give notice without first obtaining leave. Two obvious objections to that

view. First, the absurdity that a local authority would by s.14A(8) be obliged to undertake the duties of investigating and reporting regardless of the fact that the intending applicant's prospects were hopeless. Second, it is not a proper use of language to say that a person who needs leave but has not yet got it at that stage *intends* to apply for a SGO. He *intends* to apply for leave; but his 'intention' to apply for the order itself is conditional upon getting leave.

The local authority's investigation and report

6.1 S.14A(8) is very specific about what the investigation and report should cover. The Special Guardianship Regulations 2005 are even more precise, and demanding. The Schedule to the Regulations sets out in detail the 'prescribed matters' referred to in s.14A(8) under the headings:

1. the child
2. the child's family
3. wishes and feelings of the child and others
4. the prospective special guardian(s), and
5. the local authority.

Broadly, those aspects of the case will be mostly factual, although some subjective assessments will arise. However, the regulations also require that there should be:

6. a summary by a medical professional who has provided information relating to the health history of the child and the prospective special guardians,
7. an assessment of the implications of making a SGO for the child, the parent, the prospective special guardian and his family, and any other relevant person,
8. an assessment of the relative merits of SGO and other orders available under the CA 1989 or the Adoption and Children Act 2002, with an assessment

of whether the child's long term interests would be met by a SGO,

9. A recommendation whether the SGO should be made, and if not any alternative proposal,

10. A recommendation as to contact between the child, his relatives and any other relevant person.

6.2 What this calls for is a professional judgment on the merits of the SGO in the particular case. In some cases, the local authority will be able to deploy its own resources to complete the investigation and report. But in others, it will be necessary to out-source the work. Section 14A(10) expressly allows for this. It is likely to arise in cases where the local authority has already come to an adverse view of the applicant as a future carer before the need for a s.14A(8) investigation and report has arisen. Paragraphs 7 to 10 of the Schedule involve that someone should be able to give evidence in support of their conclusions, and not be open to challenge on the grounds of pre-judgment or bias against the applicant.

6.3 There may also be dangers in the author of a special guardianship report simply adopting the facts and findings of earlier assessments of the proposed special guardian, especially where those assessments were adverse. Where the circumstances are such that the issue of special guardianship is not controversial, no doubt in practice a short report can be compiled which, although complying with the statutory need for provision of information and opinion to the court, can draw upon earlier assessments without any prejudice to the child, the local authority or the prospective special guardian.

Support services: s.14F and the SG Regulations 2005

7.1 The Act requires each local authority to provide special guardianship support services, which means *counselling, advice and information*, and other services set out in the Regulations, viz,

financial support;

services to enable children, parents and special guardians (including prospective SGs) to discuss matters relating to special guardianship;

assistance (including mediation services) relating to contact;

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

assistance to ensure the continuance of relationship between the child and a special guardian or prospective special guardian, (including training for meeting any special needs of the child), respite care and mediation).

Such services may include giving cash assistance.

7.2 Financial support is payable to a special guardian or prospective special guardian (Reg 6(1)):

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

(b) to support arrangements after a SGO is made.

But Reg. 6(2) in effect restricts such support to circumstances where, in the local authority's judgment, it is necessary to ensure that the special guardian can look after the child, or to meet special needs care, or to meet legal costs of a special guardian or prospective special guardian, or to contribute to accommodating or maintaining the child.

7.3 S.14F(3) and Regulations 11-17 provides for the local authority upon request to carry out an assessment of a person's needs for special guardianship support services, and requires (reg 15) that an opportunity to make representations must be afforded before the local

authority makes any decision about needs for support services following the assessment. By s.14F(3) and reg. 11(1), the local authority must carry out such assessment where the request is from:

- (a) a 'relevant child' who is looked after by the authority, or was so looked after before a SGO was made;
- (b) a special guardian or prospective special guardian of such child;
- (c) the parent of such child.

Where any other person requests an assessment, the local authority has a discretion whether to carry one out.

Special Guardianship – on the Court's own motion

8.1 To repeat s.14A(6)(b):

“(6) The court may **also** make a special guardianship order with respect to a child in any family proceedings in which a question arises with respect to the welfare of the child if –

...

(b) the court considers that a special guardianship order should be made even though no such application has been made.”

8.2 This is to be read with s.14A(9):

“(9) The court may itself ask a local authority to conduct such an investigation and prepare such a report, and the local authority must do so.”

“Ask” really means “Order”: the local authority must comply. Once the court has ‘asked’, the position is exactly the same as regards the need for investigation and report, the status of the child and prospective special guardian, and the provision of support services, as if an applicant had given a notice of intention to apply for special guardianship: except there is no minimum time requirement relating to the period in which the local authority must investigate and report.

8.3 In any proceedings where the question of making, varying, discharging or otherwise relating to a SGO arises, the court is required by s.14E(1)

and (2) to draw up a timetable with a view to determining the question without delay, and to give directions to ensure the timetable is adhered to. Obviously, it is under these provisions that the court will determine the time within which an investigation and report must be concluded, (remembering s.14A(11) that the court may not make a SGO unless it has received a local authority report dealing with the s.14A(8) matters).

8.4 In what circumstances should the court initiate the special guardianship investigation and report? (Again – a matter currently under appeal on which the judgments are awaited.) It would be going too far to say that the court should already have concluded that “a special guardianship order *should be made*” (see s.14A(6)(b)): all this subsection means is that it is open to the court to make an order where one should be made even though no application for it has been made. The purpose of investigation and report is to furnish the court with an opinion about whether or not a SGO should be made: pointless to require the court and local authority to go through all that exercise if the outcome is a foregone conclusion.

8.5 Equally, it cannot be that there is no threshold test for the exercise of the court's discretion. It has been submitted to the Court of Appeal that the judge should not exercise the court's own powers to initiate consideration of special guardianship unless, at the time the matter has arisen, there is a *real possibility* that making such an order will be required in the interests of the welfare of the child.

8.6 There is a point in many cases at which it is impossible to rule out certain parties as possible long-term carers for a child, yet equally impossible to see (at that point) that the status of special guardian should be conferred upon them, with all that that implies for the permanence of a placement and the long-term relationship between

child and carer. In such situations, it is submitted that the point has not (yet) been reached at which special guardianship has become a real possibility as an outcome of the hearing: it should not simply be tagged onto the proceedings as an incidental consideration that might or might not ever come into play⁴.

What about the notice provision where a person wishes to apply for special guardianship during proceedings?

9.1 Example: care proceedings in which it is accepted that the mother cannot provide long-term care; father is out of the picture. The care plan is for a placement for adoption and eventual adoption. At a late stage, maternal grandparents intervene to seek a residence order and a SGO.

9.2 On a strict reading of s.14A(7), an application may not be made within three months of giving written notice of intention to apply. So long as there is sufficient time before the final hearing for that to be complied with, no problem arises. Where that would not be possible without causing unacceptable delay in the proceedings, the question arises whether it is possible for the court or the parties to abridge the time requirement. It is not possible to do that under the rules of court: (the FPR, RSC and CCR only allow the parties restricted rights to extend or abridge a time requirement in the rules or an order of the court; this is a time-notice requirement in a primary statute). It is submitted that the local authority is able to *waive* strict compliance with the requirement where it is appropriate to do so without prejudice to the local

⁴ In the Birmingham case before the Court of Appeal, the circuit judge 'asked' for a report under s.14A(9) accepting that he did not know whether there was any prospect of special guardianship being consistent with the child's welfare: he did it because he took the wrong view that since the applicants were proposing to give notice of their intention to apply, the local authority would be bound to carry out the investigation and report in any event: wrong because the proposed applicants had not yet obtained leave to apply.

authority's interests, even though the time provision is in mandatory terms in primary legislation.

9.3 But, surely in such circumstances, where it appears necessary for the court to be in a position to consider making a SGO, the sensible course is for the court to consider acting of its own motion by 'asking' under s.14A(9). Once the court has done that everything falls into place to enable the issue to be fully considered. The person interested in obtaining special guardianship status can be made a party in the proceedings to such extent as is necessary to enable the point to be considered properly. Nothing is gained by going through the motions of becoming an applicant covered by s.14A(6)(a).

10.1 It is impossible to anticipate all the practical problems that will arise in the working out the role of special guardianship in child care. There has not been time in this seminar contribution to attend to every aspect of the statute and regulations. Hopefully, what has been said will help to clarify some of the confusions that are already appearing as practitioners and the courts try to apply legislation that is not the easiest to interpret.

APPENDIX

Individuals entitled to apply for Special Guardianship: (involves reading together s.14A(5) and s.10(5)(b)(c) and s.10(10))

| | |
|---------------------------------|--|
| 14A(2)(a) (b) | A special guardian – must be aged 18 or over; and - must not be a parent of the child |
| 14A(5)(a) (b) | Any guardian of the child Any individual in whose favour a residence order is in force with respect to the child |
| 14A(5)(c) 10(5)(b) 10(10) | - any individual listed in s.10(5)(b), read with s.10(10): i.e. - any person with whom the child has lived for a period of at least three years; - which need not be continuous but must have begun not more than five years before, or ended more than three months before, the making of the application. |
| 14A(5)(c) 10(5)(c) | - any individual listed in s.10(5)(c): i.e any person who - - (i) has the consent of each person in whose favour a residence order is in force; (ii) has the consent of the local authority where the child is in care; or (iii) has the consent of those who have parental responsibility for the child. |
| 14A(5)(d) | a local authority foster parent with whom the child has lived for at least one year immediately preceding the application. |
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S.14A(4) brings in s.9(3) as it applies to s.8 orders: local authority foster parents “within the last six months” may not apply for leave to apply unless: (a) has the consent of the authority; (b) is a relative of the child; or (c) the child has lived with him for at least one year preceding the application.

S.14A(13) has the effect of making s.14A subject to the particular restrictions as to the making of a special guardianship order when an adoption placement order is in force.

Persons entitled to apply for Section 8 Orders:

| | Any s.8 Order | Residence or Contact only | Residence Only |
|--------------------|--|--|--|
| 10(4)(a) | any parent, guardian or special guardian | | |
| 10(4)(aa) | any person with parental responsibility | | |
| 10(4)(b) | any person with a residence order in force | | |
| 10(5)(a) | | Any party to a marriage where the child is a child of the family | |
| 10(5)(aa) | | Any civil partner where the child is a child of the family | |
| 10(5)(b) 10(10) | | Any person with whom child has lived for at least 3 years - which need not be continuous but must have begun not more than five years before, or ended more than three months before, the making of the application | |
| 10(5)(c) | | Any person who – (i) has the consent of each person with a residence order in force; (ii) has the consent of the local authority where the child is in care; or (iii) has the consent of those with parental responsibility | |
| 10(5A) | | | a local authority foster parent with whom the child has lived for at least one year immediately preceding the application. |