

SPECIAL GUARDIANSHIP

Where have we got to?

Where are we going?

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1. On a dull Saturday afternoon in December I found myself driving up the M5 motorway. Traffic was light and to add a bit of interest to the situation I turned on the car radio. So, by chance, I stumbled across an MP exercising a hobby-horse. According to him, social workers snatch babies from their mothers at birth in order to attain government targets for children placed for adoption. The spokesman for children's services thought that he had the answer to that for, as many here will know, the targets no longer exist. Quick as a flash the MP came back saying "Ah, but look at the enormous increase in the number of children placed for special guardianship."
2. It reminded me that it was time to start putting together my disparate thoughts for the purposes of this paper.
3. First a word of caution: they are only the thoughts of a single judge, sitting in a single care centre, albeit a busy one. A job like mine does not leave much time for high thinking or for original research but it does afford a sense of what is going on at the coal face. Even that, however, is limited by geography: my experience is inevitably confined to cases which involve a small number of Midland local authorities, not just Birmingham and Solihull (though heaven knows, they keep me busy enough) but predominantly those two. In an unscientific way I have asked some colleagues from elsewhere what they are experiencing and, to my comfort, their experiences reflect my own but that is almost the limit of my authority to speak to you about special guardianship orders.
4. Everyone here will be aware that special guardianship became available from 30 December 2005 and the recently published judicial statistics for England

and Wales for the year 2006 provide some information about what is going on even if they are less helpful than they might have been.

5. In the first place, the statistics come with a health warning in the commentary. We are told *“There are known data quality issues with figures provided by the Family Proceedings Courts. The figures presented...are likely to be an undercount and should be treated with caution.”* For the county court and the high court the Ministry of Justice puts great faith in the computer programme on which court records are stored but having encountered that programme (called Familyman) in its daily operation, I am aware that court records are fallible. I am also aware that Familyman does not extend to adoption work.
6. Subject to those warnings, Table 5.3 of the published statistics shows that 474 applications for special guardianship orders were made in the year. This figure includes an estimate (of 75) for applications made in the Family Proceedings Courts. 394 applications were made in the county courts and only 5 in the High Court. The number of orders made on such applications was inevitably much smaller at 176: 3 applications were withdrawn: none were dismissed.
7. Table 5.4 of the statistics, however, shows that 726 Special Guardianship Orders were made as the outcome of public law proceedings. No breakdown is provided for the number of orders made at each level of court.
8. While the legislation allows the court to make a Special Guardianship Order without a specific application, I have some misgivings about the capacity of HMCS or the Ministry of Justice generally (not just in the FPCs) to draw accurately the distinction between a free-standing application and an application made in the course of care proceedings. To me it seems likely that the vast majority of the 474 apparently free-standing applications concerned children who were subject to care proceedings (with, perhaps a few children who would have been subject to such proceedings if the option of special guardianship had not been available).

9. For comparison, 4764 children were entered on the adopted children register in 2006, a reduction of 10% on the figure for 2005: this is not reported from court records but from the Office of National Statistics without the breakdown between adoptions from care, step-parent and other intra-familial adoptions and inter-country adoptions which has been provided in past years.
10. Certainly experience shows that special guardianship is being used largely, if not exclusively, for children coming out of care proceedings and that sometimes there is a specific application and sometimes the order is made without such an application.
11. That experience is confirmed by statistics published late last year by the Department for Children, Schools and Families. These apply only to England and are for the year to 31 March 2007. They record a total of 740 looked after children made subject to special guardianship orders and also show that, for 490 of these children, the special guardians appointed were their former foster-carers.
12. The size of that group of 490 children (all but two thirds of the total) would appear to contradict the expectation in the White Paper "Adoption: A New Approach" Cm.5017 that special guardianship would be used to provide long-term familial placements which would, or might, otherwise have been effected by adoption orders.
13. That is certainly one situation in which special guardianship may sometimes (but not always) provide a better framework for the child but in my experience, in this situation, intra-familial adoption had fallen out of favour because of its effect in distorting family relationships.
14. Cases reported since special guardianship became available have shown that there can be no general rule that special guardianship is preferable to intra-familial adoption: it all depends on the circumstances of the case and the needs of the child. Conversely I have encountered foster-cares who have become special guardians and that possibility is also recognized in the reported cases.

Meanwhile, to return to the statistics, I cannot help wondering whether some family carers have been counted as foster-carers in that figure of 490.

15. Why should special guardianship be reserved for children the subject of care proceedings (or almost reserved for such children since in family law, it is always possible to find an exception to any general statement)?
16. The answer to that question lies in the place of special guardianship in the range of orders available to the court. They constitute a hierarchy. At the foot of this, the least intrusive order is the order that there be no order. At the top the most intrusive order is the adoption order. This removes a child from his/her birth family entirely: alone of all orders about children, it is not subject to any ordinary procedure for variation or discharge while the child remains a minor and it retains its effect throughout the lifetime of the child. Between these extremes, in ascending order of intrusion, are the residence order, the special guardianship order and the care order.
17. I have drawn attention to an ascending scale of intrusion because that is important for justification of the court's order under Article 8 of the European Convention for the Protection of Human Rights. The court's intervention should be no more than is required for the protection of the child from harm.
18. Underlying this ascending scale, however, is the concept of parental responsibility. Parental responsibility is the building block of our law of children and the orders which courts make about children are concerned with one or both of two fundamental questions:
 - (1) Who has parental responsibility?
 - (2) How is that parental responsibility to be exercised?
19. Under the law as it was until 30 December 2005:

- (1) If the court made no order, those who already had parental responsibility would retain it: no-one would gain parental responsibility and those who had it were left to agree upon the exercise of it
- (2) A residence order would confer parental responsibility on a child's carer if he/she did not already hold it but, on its own, a residence order would leave the holders of parental responsibility to agree on the exercise of it. If that did not appear to be conducive to the welfare of the child, the court could make prohibited steps and specific issue orders to regulate the exercise of parental responsibility between them: in an extreme case these orders might go so far as to give the residence order a quality approaching that of an adoption order.
- (3) A care order would not extinguish the parental responsibility of anyone else but it would allow the local authority to determine how and to what extent others should exercise their parental responsibility.
- (4) At the top end of the scale an adoption order would extinguish the parental responsibility of all who held it, whether human beings or a local authority under a care order: indeed an adoption order would substitute new family relationships for all the child's relationships not only with his/her parents but also with all other members of his birth family.

20. Since 30 December 2005 all of those orders remain available with the effects which I have ascribed to them. Into the range of orders, however, has been inserted the special guardianship order. Like the residence order, this confers parental responsibility upon the special guardian(s) but, with a very few exceptions, a special guardian is entitled to exercise this to the exclusion of anyone else who holds parental responsibility other than another special guardian. This gives the parental responsibility held by a special guardian a controlling quality analogous to (but not the same as) the parental responsibility exercised by the designated local authority under a care order.

21. The special guardianship order was brought into being by the Adoption and Children Act 2002 most of which is concerned with the reform of the law of adoption. Perhaps that encouraged my MP on the radio to think that special guardianship is an alternative to adoption. He is not alone, however, in making that connection: when the DCSF published its statistics last autumn, a commentator in Community Care associated special guardianship with a reduction of 300 (11%) in the number of looked after children adopted during the year.
22. It is significant, however, that the special guardianship order is not an order under the Adoption and Children Act 2002: even if it is an order made under provisions inserted by the Adoption and Children Act 2002, it is clearly and firmly placed as an order under Part II of the Children Act 1989 (that is the part which begins with section 8 and deals with the issues which we commonly subsume under the title of private law).
23. Apart from the symbolic significance which this gives, it means that when the court considers whether to make a special guardianship order, it applies the same checklist under section 1(3) as it applies when considering any of the other orders under the Children Act: it does not apply the check-list under section 1(4) of the Adoption and Children Act 2002.
24. The difference between the check-lists illustrates the differences between special guardianship and adoption. The adoption checklist repeats much that is in the Children Act check-list but it also addresses the fact that an adopted child ceases to be a member of his/her original family.
25. Before special guardianship became available, the statutory guidance advanced it as a substitute for long-term-foster-care and suggested that the candidates for it would be *“a significant group of children, mainly older, who do not wish to make the absolute legal break with their birth family that is associated with adoption”*.

26. In practice, my experience is that special guardianship orders are by no means restricted to children who could be called ‘*older children*’. This is because less weight is being attached to the age of the child than to the advantages of a special guardianship order.
27. For the child these advantages are not only the advantages of being able to retain links with birth family but also the advantages of not being subject to a care order. These are familiar: the child is subject to the intrusion of twice-yearly statutory reviews: he/she may feel stigmatised at school and socially and such innocent incidents of childhood as a sleep-over are subject to CRB checks.
28. It seems to me, however, that there is another party interested in advantage here and that is the local authority. As the appeal in *Birmingham City Council v R* [2007] 1 FLR 564 showed, some local authorities may be apprehensive in the early stages about the resource implications of being required to provide special guardianship reports (remember that without such a report the court cannot make a special guardianship order). At a later stage, however, the local authority may see real advantage to itself in a special guardianship order.
29. Many here will remember the debate that used to take place at the end of some care proceedings. Everyone agreed that the child should stay with his/her current carers (whether foster-carers or members of the extended family) or go to live with members of his/her family. Anxious to have the child off its list of looked after children, the local authority would propose a residence order as the appropriate vehicle for this with, at most, a supervision order for a period of 12 months: the proposed carers might feel apprehensive about the prospects of managing contact with the child’s parents and, perhaps with other members of the family (especially in the early years, while feelings may still be raw and emotions may still be running high): the guardian might then propose that there should be a care order to make the local authority responsible for the management of contact.

30. In this situation, the special guardianship order is easily seen to give everyone the best of all possible worlds. The enhanced parental responsibility of special guardianship is seen to be sufficient to enable the carers to manage contact: the child does not have to suffer the consequences of a care order: the local authority is relieved of a looked after child.
31. This approach has its peril. On its own, the enhanced parental responsibility of special guardianship may not be sufficient to protect the child from arguments about contact.
32. This peril need not be an objection to the use of special guardianship but the solution requires the continuing involvement of the local authority in the management of contact under a special guardianship support plan.
33. I shall be interested to hear the experience of people present here tonight but mine is that some local authorities have been less enthusiastic about special guardianship support plans than they have been about special guardianship orders.
34. The law does not limit the forms of support which may be provided under a support plan. Express provision is made, however, for the inclusion of financial support in a support plan.
35. Typically a support plan may include social work support (such as in the management of contact) and financial support. A support plan may therefore have substantial resource implications for the local authority and, sadly, in some cases, I have encountered real reluctance to accept these implications.
36. In the early days of special guardianship, one local authority was telling me that it would not carry out an assessment of special guardianship support needs until the order had been made. That was a managers' policy decision, no doubt designed to ration the resources required to carry out these assessments. The court, however, is not bound by such a policy decision. Indeed the policy can be seen to be unlawful because:

- (a) in certain circumstances the legislation (especially the Special Guardianship Regulations 2005) requires the local authority to carry out an assessment of support needs before an order is made, and
- (b) in its special guardianship report the local authority is required by the Regulations to include a summary of any special guardianship support services provided and the period for which those services are to be provided OR the reasons for its decision not to provide special guardianship support services.

37. The court is entitled to require a report which covers the matters specified in the regulations: in consequence, the local authority which cited its own decision to defer all assessments of support needs as a reason for not providing support plans was firmly told that the court would not be bound by that decision. That was not the limit, however, of its resistance to special guardianship support.

38. Within the last three months, nearly two years after special guardianship became available, that local authority has tried to persuade the court that it cannot include financial provision in a support plan because it has not yet established a policy for the determination of the amount of the financial support. This was said to be a requirement of its auditors. Suffice it say that, in the case in question, the special guardianship order was not made until the court had been given a support plan which included financial support. The fact that, because of the needs of the child, the financial support includes a weekly allowance in excess of £220 encourages me to think that the court was right to take the line it took.

39. The lesson to be learned is that the court must be prepared to take a firm line on this: it must not accept a report which fails to cover the matters concerning

support which are specified in the Regulations and it must, if necessary, require the local authority to file a support plan.

40. There is a trap here, however. In my view the assessment of support needs should rarely be filed because it may contain sensitive financial and other information about the prospective special guardian(s) which would be better not disclosed generally in the proceedings. Indeed, in some situations, it may be necessary (in the interests of the welfare of the child) to withhold some details of a support plan from other parties to the proceedings.
41. All this has implications for the children's guardian in care proceedings. If there is a role for the court in scrutinising the local authority's support plan (or the lack of it), it follows that there is also a role for the guardian in his/her examination of the local authority's proposals for the future upbringing of the child. Guardians must not accept local authority excuses at face value.
42. Special guardianship orders have further resource implications for local authorities as children grow up. The legislation imposes duties to give such children advice and assistance equivalent to the duties to provide advice and assistance to children who have grown up in care. It remains to be seen whether local authorities are more enthusiastic about these duties than some of them have been about their duties, or potential duties, to provide special guardianship support.
43. When I was asked for a title for this seminar, I posed two questions: where have we got to? where are we going? The answer to each, I think, is that the picture is still evolving but it is clear that in some quarters at least the special guardianship order has been welcomed and is being quite widely used. The Family Rights Group which played a significant part in developing the concept is entitled to take some satisfaction in that. But this is a seminar, not a lecture, and that allows me now to sign off and ask others to tell me about their experiences of the use (and, if they think fit, the misuse) of special guardianship and the problems that are being encountered with it.