

Special Guardianship

Interim Briefing Paper

By:



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Section 115 Adoption and Children Act 2002 inserts a new s.14A-G into the Children Act (CA) which empowers the court to make a special guardianship order (SGO) in cases where a child is living with someone other than his/her parent on a long term basis. The order is intended to be more robust than a residence order (RO) in that it not only secures the placement, but also confers parental responsibility (PR) on the special guardian and authorises him/her to exercise this PR to the exclusion of anyone else with PR. However, it is less draconian than an adoption order in that it does not sever the legal link between the child and his/her birth family. It is something of a "hybrid" order because it is expected to be made in both private and public law proceedings.

The broad framework for special guardianship is outlined below. However, Guidance and Regulations on the detail of how the order will work in practice have yet to be issued, and these will be subject to consultation before being finalised. The provisions for special guardianship are therefore unlikely to be implemented until late 2004.

The framework for special guardianship is set out below. All legal references refer to the Children Act unless otherwise specified:

1. When can the court make an SGO?

- 1.1 s.14A (3)(5)&(6) provides that the court can make an SGO in the following circumstances:
 - a) on the application of anyone who is entitled to apply, including
 - guardians,
 - anyone who has a RO for the child,
 - a Local Authority (LA) foster carer who has had the child living with him/her for at least one year preceding the application,
 - anyone with whom the child has lived for at least 3 yrs preceding the application,
 - anyone listed in s.10 (5)(b)&(c) CA which includes: where a residence order is already in force anyone who has the consent of the person with the RO, or in the case of a child in care anyone who has the consent of the LA, or in any other case anyone who has the consent of everyone with PR s.14A (5);
 - b) on the application of anyone who has been granted leave to apply by the court. Applications for leave will be subject to the same restrictions and criteria as any other section 8 order, i.e. the criteria in section 10(9) will apply (s.14A (4&12); and/or
 - c) of the court's own motion s.14A (6)
- 1.2 More than one individual may apply jointly with another person for a SGO.
- 1.3 A special guardian must be 18 and over and must not be a parent of the child.

2. What is the local authority's involvement?

- 2.1 No application can be made unless the applicant has given notice of his intention to apply for a SGO to the local authority 3 months before the date of the application. In the case of a looked after child who is the subject of the application, this notice should be given to the LA which is looking after the child, and in any other case to the LA in which the applicant resides s.14A (7).
- 2.2 On receipt of this notice, the LA must investigate the matter and prepare a report to the court on the suitability of the applicant to be a special guardian and other matters to be prescribed in Regulations s.14A (8).
- 2.3 Where the court wishes to make a SGO of its own motion it can ask the LA to investigate the matter and prepare such a report s.14A (9).
- 2.4 The court cannot make the SGO unless it has received this report (s.14A (11)).

3. Will a CAFCASS officer be appointed in SG cases?

When the Bill was before Parliament a number of agencies involved in the Adoption Law Reform Lobby Group pressed for an amendment that a CAFCASS officer be appointed in SG cases in order to ensure that there was an independent assessment of the child's best interests before the court. This amendment did not succeed, but Lord Hunt stated in the House of Lords Committee debate that the government intends to provide in court rules that a CAFCASS officer will be appointed in *most but not all cases* when the court is considering making a SGO¹. These rules have not yet been issued.

4. What are the criteria for making an SGO?

The criteria for making a SGO will be the same as for any other private law CA order i.e. the welfare principle and checklist in s.1 CA [s.115 (3) ACA].

- 4.1 Before making a SGO the court must consider whether:
- a contact order should be made with respect to the child and
 - any section 8 order already in force should be varied or discharged (s.14B (1)).
- 4.2 On making a SGO the court may also give leave for the child to be:
- known by a new surname, and/or
 - removed from the jurisdiction without the written consent of everyone with PR, either generally or for a specific trip s.14B (1)(b).
- 4.3 A SGO (or the varying of one) may contain provisions which are to have effect for a specified period.
- 4.4 A SGO lasts until the child reaches 18 unless it is revoked.

¹ Hansard 18/7/023, Vol 637, no 173, CWH 348

5. What is the effect of a SGO?

Whilst the order remains in force, the effect of a SGO is as follows:

5.1 The SG has PR for the child and s/he can exercise it to the exclusion of anyone else with PR but:

- the SG cannot change the child's surname nor take him/her outside the UK for a period of more than 3 months without the consent of everyone with PR or the leave of the court s.14C (3) & (4);
- the SG cannot override the parent's rights in relation to the child's adoption or placement for adoption s.14C (2)
- the SG's "exclusive" PR does not obviate the need for the consent of each person with PR where this is required by law;
- parents also retain PR, and their legal relationship with the child (including the right to give or withhold consent to [a placement for] adoption). However, the SG can override their wishes as above;
- parents remain liable for financial support for the child under s.1 CSA 1991, and correspondingly the SG does not acquire financial liability in legal terms although they may do so in practice; and
- the SG must notify each parent or guardian if the child dies s.14C (5).

5.2 Where there is a dispute as to the exercise of PR, the court has the power to make a prohibited steps or specific issue order under s.8 alongside a SGO.

5.3 The SG may appoint a guardian for the child (s.5 CA as amended by s.115 (4) ACA)

6. What about contact with family members?

It is envisaged that there will be contact between the child and his/her family in the vast majority of SG cases – see duty on the court to consider, before making an order, whether a contact order should be made or whether any existing s.8 order should be varied or discharged s.14B (1)

7. When can a SGO be revoked?

7.1 Unlike an adoption order a SG order is revocable or variable on the application of:

- a) the SG
- b) any parent/guardian of child;
- c) any person with a RO in force;
- d) any other person who had PR for the child immediately before the SGO was made; and
- e) a LA which has a care order. S.14D (1)

7.2 The court may vary or discharge the SG if a question about the welfare of the child arises in any family proceedings of its own motion i.e. no application for discharge made.

7.3 The following need leave to apply to discharge the order:

- a) child concerned (provided s/he has sufficient understanding of the proposed application);
- b) parent/guardian;
- c) step \parent who has PR under s.4A; and
- d) any other person who had PR for the child immediately before the SGO was made s.14D (3) & (4)

7.4 Such leave may only be granted in respect of all of the above except the child if the court is satisfied that there has been a significant change of circumstances since the making of the SGO. S.14D (5).

8. Who can receive support services in SG cases?

The following provisions have been enacted regarding support services:

8.1 Each LA must make arrangement for the provision of SG support services (SGSS) in their area including counselling, advice, information and other support services (to be prescribed);

8.2 Regulations must ensure that these other services include financial support (s.14F (2));

8.3 LA may carry out an assessment for support services at the request of:

- a) the child who is subject to SGO;
- b) SG;
- c) parent;
- d) anyone else within a prescribed description (se Regulations); and
- e) any other person

NB: LA **must** carry out this assessment if requested by anyone in categories a-d above if the Regulations so prescribe – again see regulations when they are published s.14F (3) & (4);

8.4 If LA decides as a result of assessment that a person has need for SGSS, they must decide whether to provide services to that person, and if the circumstances fall within a prescribed description:

- draw up a plan for service provision, and
- keep any such plan under review (s.14F (5) & (6));

8.5 Regulations may provide:

- how such assessments, preparation and review of plans and the provision of SGSS will occur;
- as to circs in which LAs can charge for services or the repayment of financial support;
- as to circs in which LA can recover from another authority the expenses of providing SGSS s.14F (7) & (8);

- 8.6 LA may provide SGSS by ensuring that they are provided by another authority or person and s.27 (co-operation between authorities) applies in relation to the provision of SGSS as well as any other Part III services s.14F (9) & (11);
- 8.7 Assessment for SGSS may be carried out at the same time as any other assessment of need under CA (e.g.: s.17) s.14F (10).

9. What about Complaints regarding the provision of SGSS?

- 9.1 LA must have a procedure for dealing with complaints about the provision of SGSS; and
- 9.2 Regulations may prescribe time limits regarding the complaints procedure.

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