

THRESHOLD STATEMENTS

WHAT IS REALISTIC AND ACHIEVABLE WHEN CONTESTING OR  
DEFENDING THRESHOLD STATEMENTS FOR (1) SPECIAL  
GUARDIANSHIP ORDERS AND (2) SUPERVISION ORDERS IN LIGHT OF  
NEW GUIDANCE?

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## SGO

- A special guardianship order is an order (s 14A CA 1989) appointing one or more individuals to be a child's 'special guardian' (or special guardians). The effect of a special guardianship order is that while it is in force:
  - a special guardian has parental responsibility for the child named in the order; and
  - subject to any other order in force, a special guardian is entitled to exercise parental responsibility to the exclusion of any other person who has parental responsibility for the child (apart from any other special guardian).

## Main Features

- The main features of special guardianship are to:
  - give the carer clear responsibility for all aspects of caring for the child or young person, and for making the decisions concerning their upbringing;
  - provide a firm foundation on which to build a lifelong permanent relationship between the carer and the child or young person;
  - preserve the legal link between the child or young person and their birth family;
  - allow proper access to a full range of support services including, where appropriate, financial support.

## When

- Subject to procedural requirements a court may make a special guardianship order in private or public law CA 1989 proceedings or in proceedings under ACA 2002.
- The topic for this talk contemplates the situation in which an SGO is under consideration for a family placement at the conclusion of care proceedings.
- What considerations apply to approach to threshold when no one is seeking a public law order

## PLWG/FJC Guidance

- The President's Public Law Working Group, together with the Family Justice Council, has produced a report on special guardianship which contains recommendations and suggested practice guidance.
- The President has endorsed the report and confirmed that the guidance should be applied in every case where special guardianship is an option. Key features of the guidance include:
  - The need in every case for a 'robust and comprehensive' special guardianship assessment and support plan;
  - A suggested reduction in the use of supervision orders in conjunction with special guardianship orders: if a supervision order is thought to be necessary, that may indicate a lack of confidence in the sustainability of the arrangement;

## SGO and SO

- GUIDANCE:-
  - The purpose of an SGO is to provide a firm foundation on which to build a lifelong permanent relationship between the child and the carer.
  - A supervision order should not need to be used as a vehicle by which support and services are provided by the local authority. All support and services to be provided to the SG and to the child by the local authority or other organisations should be set out in the SGSP which should be attached as an appendix to the order. The cases where it would be appropriate or necessary to make a supervision order alongside an SGO will be very small in number.
  - The issues that are intended to be addressed in the making of a supervision order are most likely to be achieved through the process as set out above.

C (A Child) (Special Guardianship Order) [2019] EWCA Civ 2281 per  
Moylan LJ

66. *“The parties also made broader submissions on the approach the court should take when deciding whether to make a special guardianship order at the conclusion of care proceedings. As part of these we were referred to the Family Justice Council's Interim Guidance on Special Guardianship, May 2019 and to the Nuffield Family Justice Observatory's, Special guardianship: a review of the evidence, Summary Report, 2019. I do not propose to set out these submissions because I do not consider this case provides an appropriate opportunity to consider these broader issues.*
67. *The only observation I would make is that I agree with the submission that, when a court is determining care proceedings, and even if the ultimate decision is to make a special guardianship order (which is legally not a public law order), there are good reasons for the court dealing with the threshold criteria. In particular, this will set out the court's conclusions on the evidence and provide a clear factual foundation both for the basis of the order and for any applications made in the future”.*

## Fact Finding in every case ?

- Classically this comes down to the *Oxfordshire* question.
- In *Oxfordshire County Council v DP, RS and BS* : The question in every case is whether, on the individual facts of each case, it is 'right and necessary' to conduct a fact-finding exercise. The Court of Appeal held that the non-exhaustive list of relevant factors set out in paragraph 24 of *Oxfordshire* should be approached flexibly and in the light of the overriding objective in order to do justice efficiently in the individual case.

## Oxfordshire 1

- (i) When considering *the welfare of the child*, the significance to the individual child of knowing the truth can be considered, as can the effect on the child's welfare of an allegation being investigated or not.
- (ii) *The likely cost to public funds* can extend to the expenditure of court resources and their diversion from other cases.
- (iii) *The time that the investigation will take* allows the court to take account of the nature of the evidence. For example, an incident that has been recorded electronically may be swifter to prove than one that relies on contested witness evidence or circumstantial argument.
- (iv) *The evidential result* may relate not only to the case before the court but also to other existing or likely future cases in which a finding one way or the other is likely to be of importance. The public interest in the identification of perpetrators of child abuse can also be considered.

## Oxfordshire 2

- (v) *The relevance of the potential result of the investigation to the future care plans for the child* should be seen in the light of the s. 31(3B) obligation on the court to consider the impact of harm on the child and the way in which his or her resulting needs are to be met.
- (vi) *The impact of any fact finding process upon the other parties* can also take account of the opportunity costs for the local authority, even if it is the party seeking the investigation, in terms of resources and professional time that might be devoted to other children.
- (vii) *The prospects of a fair trial* may also encompass the advantages of a trial now over a trial at a possibly distant and unpredictable future date.
- (viii) *The justice of the case* gives the court the opportunity to stand back and ensure that all matters relevant to the overriding objective have been taken into account. One such matter is whether the contested allegation may be investigated within criminal proceedings. Another is the extent of any gulf between the factual basis for the court's decision with or without a fact-finding hearing. The level of seriousness of the disputed allegation may inform this assessment. As I have said, the court must ask itself whether its process will do justice to the reality of the case.'

## Oxfordshire 3

- In *Re H-W* the Court of Appeal observed that no further guidance was required beyond that set out in the *Oxfordshire* and *Re H-D-H* cases, save in one respect:
- ‘28. [...] When considering the potential evidential result of a fact-finding hearing it may sometimes be appropriate for the judge to have regard to the apparent quality of the evidence. It will never be appropriate, however, to carry out a detailed evaluation, not least because the court can only make findings on the totality of the evidence and at the case management stage not all of the evidence will have been filed. Anything akin to a mini-trial of the allegations would therefore be wrong in principle and wasteful of time and resources. Although each decision will depend upon the circumstances of the case, the apparent quality of the evidence is accordingly unlikely to be a powerful factor in the overall decision unless it is clear without the need for detailed assessment that the evidence appears to be particularly strong or particularly weak.’

## Relevant factors in SGO

- Is the welfare outcome agreed or not.
- Are threshold findings opposed or not.
- If not are the particular threshold findings necessary to justify permanent separation from birth parents.
- Is there a prospect of a future application for discharge.
- Contact – is threshold relevant to future risk and quantum of contact.
- Touchstone is necessity.

Thank you for listening!

For any queries, please either  
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