# Family ties

*Victoria Ellis and Cordelia Williams outline common problems that arise when representing grandparents in public law proceedings.*

*Victoria Ellis (pictured top) and Cordelia Williams are barristers at Pump Court Chambers*

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Grandparents are often important figures in their grandchildren's lives. This article discusses the position of grandparents when local authority involvement forces them to take a much more central role.

With a 26-week timetable, as provided for by the Public Law Outline 2014, the importance of quickly identifying grandparents as potential carers cannot be underestimated. While the local authority has a duty to consider wider family members as potential carers, proactive grandparents who ensure that they are on the local authority's radar can gain an advantage by being involved from the start. In particular, an early direction that the parents disclose the name of any person they wish to be assessed is vital, as matters are often complicated by such a direction not being made until the case management hearing.

## Interim care orders

If the local authority makes an application for an interim care order, it is prudent to ensure, when acting for grandparents, that the local authority, the guardian and the parents know in advance if grandparents wish to be considered to provide the child (or children's) interim placement. If appropriate, grandparents may be encouraged to put themselves forward at this early stage to be included in the interim care order care plan. If the court determines that the child should be placed with the grandparents for the interim, and it progresses well, this can help to achieve a new status quo.

If the child is already placed with the grandparents, consideration should be given to the impact on the child of a further disruptive move. A report from a child psychologist could assess the risk to the child's short, mid and long-term welfare were they to move from living with their grandparents.

## Joinder of grandparents

If grandparents wish to take a full part in proceedings, they may apply for the leave (permission) of the court to make an application to be joined as parties. A helpful summary of the law in relation to joinder of grandparents can be found in *B (A child)* [2012], which concerned a paternal grandmother who appealed a refusal of leave to be joined as a party in care proceedings involving her four and a half year old grandson, for whom she sought to be considered as his primary carer.

Both parents objected to the paternal grandmother's application. A report under s37, Children Act 1989 (ChA 1989) in private law proceedings had raised concerns as to the grandmother, and noted that the parents alleged excessive drinking, aggression and violent behaviour. The report concluded it could not assess whether the child was likely to suffer significant harm in the grandmother's care until a further assessment was conducted of her alcohol use.

Shortly after the s37 report, care proceedings were issued and the grandmother applied to be a party to those proceedings. A preliminary assessment of the grandmother repeated the concerns raised in the s37 report and recommended there be a psychological assessment of her, together with alcohol testing.

At first instance, it was agreed that the correct way to proceed was for consideration to be given to s10(9), ChA 1989. The judge refused the grandmother's application on the basis that her prospects of a successful outcome were very slim. The grandmother appealed, stating

that the judge was wrong to conclude that the assessments were negative, and instead should have made provision for further assessment. Further, that the judge had wrongly concluded that the grandmother's prospects of success were so slim that her application should not be allowed to proceed.

The Court of Appeal held that the judge had not erred in considering that the grandmother's prospects were so slim that her application should not be allowed to proceed, and dismissed the appeal. Black LJ then helpfully went on to provide some much-needed guidance as to joinder in such circumstances.

Black LJ confirmed that consideration of the provisions of s10(9), ChA 1989 was the correct approach. Section 10, ChA 1989 outlines that certain people are entitled to make an application for a s8, ChA 1989 order in relation to a child, and others require leave to make such an application. The factors that should be considered when such leave is sought are set out in s10(9), ChA 1989, which provides that where the person applying for leave to make an application for a s8 order is not the child concerned, the court, in deciding whether or not to grant leave, will have particular regard to:

- the nature of the proposed application for a s8 order;
- the applicant's connection with the child;
- any risk there might be of that proposed application disrupting the child's life to such an extent that they would be harmed by it; and
- where the child is being looked after by a local authority, the authority's plans for the child's future and the wishes and feelings of the child's parents.

Black LJ stated that (para 36):

> There is no guidance in the Children Act 1989 or the Family Procedure Rules 2010 which specifically assists as to the approach that should be taken to an application for joinder and the welfare of the child is not the paramount consideration in either an application for party status or an application for leave to make a substantive application because neither of these applications involves the court in determining 'any question with respect to... the upbringing of a child'.

Black LJ added (at para 37) that 'there is authority to the effect that although no section 8 order is actually being sought by the person who is seeking to be joined as a party, reference must be had to section 10(9)' (see *W v Wakefield City Council* [1995]).

Section 10(9) does not assist as to the nature of the test by which an application should be judged, nor the criteria that must be satisfied before leave can be given. The merit of the proposed application is not a feature of s10(9), but has been acknowledged as relevant (per *G v Kirklees Metropolitan Borough Council* [1993]).

Black LJ considered the decision in *Re J* [2002], in which a local authority ruled out a grandmother who had been significantly involved in the child's life, on the basis that bringing up the child would be too much of a burden because of her age. In *Re J*, Thorpe LJ stated that 'judges should be careful not to dismiss such opportunities without full inquiry. That seems to me the minimum essential protection of Arts 6 and 8 rights [of the European Convention on Human Rights] that [the grandmother] enjoys, given the very sad circumstances of the family'.

Black LJ adopted Thorpe LJ's analysis and emphasised that while the merits of the applicant's case are relevant, it is 'too much to ask for a good arguable case and all that should be required is that the case be arguable' (para 47). However, she made it clear that merely having an arguable case may not be sufficient to succeed in being granted leave to be joined as a party to the proceedings, as the other factors of s10(9) must be considered.

It is important to remember that there is no absolute entitlement to an assessment with a view to caring for a child (*TL v The London Borough of Hammersmith and Fulham* [2011]).

### Assessments

It is important to ensure that viability assessments and any special guardianship assessments are disclosed to the individual being assessed. They are usually not a party to proceedings so will not be automatically served or have permission to see the document. Suggested wording for a direction is:

> All viability and/or full assessments shall be served on the individual(s) assessed by the local authority forthwith upon completion, together with, if negative, a covering letter setting out that in the event they wish to challenge the assessment and seek to apply for a special guardianship order or child arrangements order they must issue such application within (for example) 21 days of receipt of the assessment.

## Legal funding

Grandparents do not have the benefit of an automatic right to legal aid within public law proceedings. The practical reality of this discrepancy is that grandparents wishing to put themselves forward to care for their grandchildren find themselves with the difficult choice of trying to pay privately for representation or navigating the complex and emotive proceedings alone.

When grandparents are a viable placement, the local authority should be requested to fund some initial advice for grandparents, especially if placement with the grandparents is part of the care plan. In this time of cutbacks, some local authorities are less proactive in offering such funding, but a well-placed comment in open court can lead to encouragement from the judge and funding becoming available. This is particularly relevant when the care plan is to place a child with grandparents under the auspices of a special guardianship order. It is standard practice now that prospective special guardians are encouraged to take legal advice before committing themselves to such a long-term order.

When faced with such a situation it is advisable to check the relevant local authority's policy as to the financial support it provides to special guardians. Such policies are published and accessible online – some may even specifically state that they will offer legal funding. Grandparents seeking to become special guardians should keep the local authority up-to-date with any changes to their finances, living arrangements etc – as this may change their eligibility or amount of special guardian funding provided.

If the local authority's relationship with the grandparents is difficult, consider asking the court for an independent social worker to carry out the special guardianship assessment rather than an in-house social worker. Of course, this will require an application for permission to adduce expert evidence under Pt 25, Family Procedure Rules 2010, complete with proposals for the identity of the independent social worker, costs and time estimates for preparing the report.

## Special guardianship orders

Whenever a child is placed with grandparents, there will be a need to formalise the situation. A common outcome is the making of a special guardianship order. The effect of a special guardianship order is outlined in s14C, ChA 1989, notably that:

- a special guardian has parental responsibility for the child or children 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).

While a special guardian has overriding parental responsibility, they also must take the views of the parents into account.

Importantly, the making of a special guardianship order in favour of grandparents will trigger access to local authority resources and financial support. The exact support available should be detailed by the local authority. Such resources can be an important practical reason in support of why a special guardianship order is necessary. A particularly useful resource is often access to mediation, to assist child-focused cooperation between special guardians and parents.

A supporting factor for making a special guardianship order rather than a child arrangements order in favour of the grandparents is that the parents would need to demonstrate a change of circumstances in order to successfully apply to change the child's living arrangements in the future. This is not a bar to future applications, but it can be relevant where one of the parents has threatened to make repeated applications to the court to 'fight' the decision made.

Often a child arrangements order to regulate the parents' contact is made at the same time as a special guardianship order.

In order to avoid conflict as to holidays and travel, s14C(4) allows special guardians to remove a child from the jurisdiction for up to three months without the consent of others with parental responsibility. This is because a special guardianship order does not extinguish the parental responsibilities of the parents.

## Crossing boundaries

Grandparents (or other family members) who put themselves forward to care for children who live in a different area of the country should take care when finalising the terms of a special guardianship order, care order or any other order that places the children in their care. The reason for such caution is funding and resources. Resources that have been identified as needed by the children in one area may not be available in another. Furthermore, when a child is permanently placed in a different area, complications arise as both local authorities are likely to want to avoid meeting any bill for such resources.

As such, the support offered in the final special guardianship order support plan should be carefully scrutinised, to ensure there is clarity in how it will be funded. Should difficulties arise after the hearing is concluded, it is going to greatly assist the grandparents to have a commitment in writing to point towards.

## Practical tips

A frequent concern about grandparents can be their age and health. Early liaison with any medical professionals, to ensure an accurate assessment of the grandparents' health, is important. If a grandparent has a medical condition, confirmation that it is well managed and does not restrict day-to-day activities can be crucial. In addition, ensure that Disclosure and Barring Service (formerly Criminal Records Bureau) and NSPCC checks are available in time for the final hearing and chase them if not.

Another common concern is how grandparents will be able to manage boundaries and the behaviour of the parents. It can be incredibly hard for a grandparent to have to put the needs of their grandchild before their own child. Many can struggle with what they perceive to be turning their back on their child, at an incredibly difficult time in their life. The more practical steps the grandparents can put in place to enforce boundaries, the more chance they will achieve a favourable outcome in proceedings and create a stable placement.

It is usually considered a positive attribute if the grandparents are able to appropriately reflect on things they could have done differently with their own parenting if there are safeguarding concerns preventing placement with their own child.

The aim for grandparents is of course to shield the child from safeguarding concerns and provide them with a stable home environment.

## Contact

In cases where contact with the parents is regarded as safe, hopefully grandparents will wish to make clear they are willing and able to properly facilitate the child spending time with their parents. Grandparents should be encouraged to consider adopting the guardian's proposals for contact. Child-focused cooperative behaviour with the parents is to be encouraged. The grandparents will often need to forge a working relationship with the parents if contact is recommended and ordered.

Finally, it may be that one parent or both make allegations regarding the grandparents prior/during the proceedings. If the allegations, if found to be true, would be relevant to the court's welfare decision then the court may need to make a determination. Clearly it is exceptionally difficult for grandparents if false allegations are made about them during proceedings. Despite this, it is best to try and maintain as amicable a relationship with parents as can possibly be achieved in such circumstances. ■

*B (A child)*
[2012] EWCA Civ 737
*G v Kirklees Metropolitan Borough Council*
[1993] 1 FLR 805
*Re J (Leave to issue application for resident order)*
[2002] EWCA Civ 1346
*TL v The London Borough of Hammersmith and Fulham*
[2011] EWCA Civ 812
*W v Wakefield City Council*
[1995] 1 FLR 170