Judgment 13/2010 In re the S children - Juvenile Court - 19 March 2010

Children (Guernsey and Alderney) Law, 2008 – application by HSSD for a community parenting order – original application was for a fit person order under the Children and Young Persons (Guernsey) Law, 2009 – order now sought is similar, if not identical, to a fit person order – criteria to be satisfied under s.49 of the 2008 Law – mother's submission that the correct order for the Court to make would be a further interim order under s.53 – criteria to be satisfied by the department before an interim order can be made.

IN THE JUVENILE COURT OF THE ISLAND OF GUERNSEY

Re an application under The Children (Guernsey & Alderney) Law, 2008

In the matter of

2 children (the S children)

The States of Guernsey (Acting by and through the Health and Social Services Department)	Applicant
And	
The Mother	First Respondent
And	
The Father	Second Respondent
And	
The 2 children, through the Safeguarder	Third Respondent and Fourth Respondent

Counsel for the Applicant:	Advocate K Hill-Tout
Counsel for the First Respondent:	Advocate S Mallett
Counsel for the Second Respondent:	In person and did not attend
Counsel for the Third & Fourth Respondents:	Advocate S L Brehaut

Judgment handed down 19th March 2010

Statutes & Cases referred to:

The Children (Guernsey & Alderney) Law, 2008
The Family Proceedings (Guernsey and Alderney) Rules, 2009
The Children (Consequential Amendments etc) (Guernsey and Alderney) Ordinance, 2009
The Children and Young Persons (Guernsey) Law, 1967, As Amended
C v Solihull Metropolitan Borough Council [1993] 1FLR 290
Re B (Care Proceedings: standard of proof) [2008] 2 FLR 141
Re M (Interim Care Order: Removal) [2006] 1FLR 1043.
Re S and others: Re W and other sub nom Re W and B (Children); W (child) (care plan) [2002] UKHL

This is an edited and anonymised version of the relevant part of the Judgment of Judge McMillen in the Guernsey Juvenile Court, handed down on the 19th March 2010 in relation to an application by the HSSD for a community parenting order. This part of the judgment deals with the issue of interpretation of sections 49 and 53 of the Law.

1. This application is the first application for a community parenting order under the Children (Guernsey and Alderney) Law, 2008. For that reason, I set out the law in some detail.

2. As a consequence of this being the first such application under the new legislation, I took the unusual step of providing the first draft of this section of the judgment to the Advocates in order that I could be satisfied that I had received all relevant legal submissions. I have taken both the written submissions submitted by the department and the oral submissions of all three parties into account in this perfected draft.

3. The original application before the Court was for a fit person order under the Children and Young Persons (Guernsey) Law, 1967 as amended. That application was dated the 2nd of June 2009. The Children (Guernsey and Alderney) Law, 2008, came into force on the 4th January 2009. Section 4 (1) and (2) of Part 1 of Schedule 2 of the Children (Consequential Amendments etc) (Guernsey and Alderney), Ordinance, 2009 provides for the Court to continue making interim fit person orders until the 30th June 2010, when it was presumably anticipated that all of the pending proceedings under Section 3 of the Children and Young Persons (Guernsey) Law 1967, as amended, would have been resolved, either by final hearing or possibly by transfer to the Child Youth and Community Tribunal, or as in this case converted into an application for a community parenting order.

4. In the case before this Court, the department seek an order based on a care plan that the children be adopted. They therefore made an application on the 3rd February 2010 (on a CF1) for an order under Section 48 of the Children (Guernsey and Alderney) Law, 2008.

5. I am satisfied that the order that the department seeks under the Children (Guernsey and Alderney) Law, 2008, is in essence, similar if not identical to the nature of the original application sought under the Children and Young Persons (Guernsey) Law, 1967, as amended, namely they seek an order that would allow them to effect a care plan to place both children in an alternative permanent family placement which would in due course lead to an application for adoption, thereby severing the parental rights and obligations of both parents in relation to both children.

6. However, an application having now been filed under the new legislation, I have to consider the criteria that the department has to satisfy under that law in relation to the application.

7. Section 49(1) of the Children (Guernsey and Alderney) Law 2008 states:

> *"49(1) A relevant court shall not make a community parenting order in respect of a child, unless –*
>
> *(a) it has first approved the contents of a child's plan for the child, and*
> *(b) the circumstances described in subsection 2(a) or (b) apply.*
>
> *(2) The circumstances for the purposes of subsection (1) (b) are –*
>
> *(a) where –*
>
> *(i) at least one of the conditions set out in section 35(2), is satisfied, and*
> *(ii) there is no reasonable prospect of –*

(A) the child's parents, or
(B) any other member of the child's family,

being able, and willing, to provide adequate care, protection, guidance and control for the child, or

(b) where, in respect of every person who has parental responsibility for the child –

(i) that person consents to the making of the order, or
(ii) that person –

(A) is not known,
(B) cannot be found, or
(C) is incapable of giving consent."

8. In this case, the department submitted that the relevant conditions of Section 35(2) of the Law are:

"(a) The child has suffered, or is likely to suffer, significant impairment to his health or development."
(b) the child has suffered, or is likely to suffer, sexual or physical abuse

In regard to section 35(2) (b) it is my understanding that the department rely only on the likelihood that the children may suffer physical abuse.

9. The department submitted that if the Court is satisfied that the criteria set out in Section 49 have been met, the Court can and in this case should make a community parenting order. As previously stated, that application is supported by the safeguarder on behalf of the children, but opposed by the mother. In brief, the mother submitted that whilst the criteria set out in section 35 (2) (a) have been made out, the criteria in Section 49(2) (a) (ii) (A), have not been made out in that she submits that I can find that there is a reasonable prospect of her being able (and willing) to provide adequate care, protection, guidance and control for the children.

10. I am satisfied that under Section 49(2) (a) (ii) the Court has to be satisfied that there is no reasonable prospect of either (A) the child's parents, or (B) any other member of the child's family, being able, and willing, to provide adequate care, protection, guidance and control for the child, *within a timescale suitable to the needs and interests of the children"*. The italicised and underlined words are not written within section 49.

11. Section 49(2) (a) (ii) of the law does not specify a time frame when the Court has to be satisfied as to when there will be a reasonable prospect of the child's parents, or any other member of the child's family, would be able and willing to provide adequate care, protection, guidance and control for the child. I am satisfied that it was not intended that any anticipated time frame in relation to Section 49(2) (a) (ii) was intended to give the child's parents, or other members of the child's family, an open ended time scale in which to satisfy the Court that at some point in the child's childhood, they may be able (and willing) to provide the relevant adequate care etc.

12. The department and the safeguarder agreed this interpretation of the relevant subsection but the mother, after initially agreeing that interpretation, then altered her view, and submitted that as those words were not included in the legislation that it would be wrong to import them into it.

13. I am satisfied that this section 49 must be interpreted in the context of Section 3 of the Law, namely that the overriding principle is that the child's welfare is the paramount consideration

and therefore, where Section 49(2) (a) (ii) refers to a reasonable prospect, I am satisfied that this must be interpreted within a time frame or scale suitable for the individual child or children's needs and/or interests, applying the welfare principles set out in Section 3(1) and 3(2) of the law.

14. In this case, the mother sought an adjournment of the final hearing and she submits that the correct order the Court should make is a further interim order, whether it be under the Children (Consequential Amendments etc) (Guernsey and Alderney) Ordinance, 2009, in which case the Court could make further interim fit persons orders, at least until the 30th June 2010, or under Section 53 of The Children (Guernsey and Alderney) Law, 2008, which states:

> *"53(1) Where the provisions of section 49 are satisfied, a relevant court may, upon application by the department, make an interim community parenting order.*
> *(2) An interim community parenting order shall have the same effect as a community parenting order for such period (not exceeding 3 months) as the relevant court may order.*
> *(3) When making an interim community parenting order, a relevant court may exercise all the powers that are exercisable upon the making of a community parenting order.*
> *(4) An interim community parenting order may be made subject to such conditions as the relevant court thinks fit.*
> *(5) Any conditions attached to an interim community parenting order may be varied or discharged upon the application of any person referred to in section 52(2)."*

15. The mother has sought an adjournment in order that an assessment can be carried out as to the effectiveness of a course of cognitive behavioural therapy, which it is intended that she will undertake to assist her in improving her day to day functioning and therefore, in the hope and anticipation that it will indirectly assist her in functioning as an effective parent.

16. The interpretation of Section 53 was the subject of some extensive consideration and submissions by the Advocates. There was first of all consideration as to whether Section 53, whilst granting the power to the Court to make an interim community parenting order, only did so, on the basis that the Court found that the grounds under Section 49 of the Law were made out on a final or conclusive basis at the time the application for an interim order had been made, as per section 53(1) "*where the provisions of section 49 are satisfied, a relevant court may, upon the application of the department make an interim community parenting order"*

17. The department submitted that the correct interpretation of section 53 is " *that that the Court must be satisfied that the section 49(2) criteria are made out on an interim basis i.e. for the period up to three months for which the department are seeking an order. Any other interpretation would it is submitted be to stray outside the spirit and intention of the new legislation"*

18. The department submitted that when a CPO application is made the burden will be on them at or as soon as possible after the first listing of that application to satisfy the Court that the relevant criteria in section 49 are made out at the date of their application. The department accepted that this would have the consequence of the Court making findings on any section 49 (and if relevant, section 35) issues in dispute on any contested interim application.

19. Advocate Hill – Tout submitted on behalf of the department that "*whilst it is right that the department is entitled to adduce further relevant evidence after the commencement of proceedings the burden is on the department to satisfy the Court that the criteria in section 49 are made out from that point."*

20. This interpretation was not supported by the mother or indeed the safeguarder who submitted that the Court could interpret section 53 "*Where the provisions of section 49 are satisfied"* to mean that at the time the application is made the department have to satisfy the Court that " *there are reasonable grounds for believing that the circumstances with respect to the child are as mentioned in section 49 "* The Court would therefore not be in a position that it would be asked to make findings at an interim stage and such an interpretation would allow for the evidence to be fully contested, where relevant, at the conclusion of the case, as is the current experience. The burden on the department is still high in that there must be concrete evidence to establish a finding that section 49 criteria are met "*mere speculative concerns" 'may suffer' or 'might suffer'* are insufficient - as per *Re M (Interim Care Order: Removal)* [2006] 1FLR 1043.

21. There is a difference between the drafting of section 53 of The Children (Guernsey & Alderney) Law, 2008 and section 38(2) of the English legislation, namely the Children Act 1989. Section 38 (2) of the Children Act states "*A Court shall not make an interim care order or an interim supervision order, under this section, unless it is satisfied that there are reasonable grounds for believing that the circumstances with respect to the child are as mentioned in section 31 (2) "*Section 31(2) of the Children Act 1989 being the 'threshold criteria', the grounds for intervention by the English and Welsh equivalent of the department

22. There is no similar reference or guidance in the Children (Guernsey and Alderney) Law 2008, as to what criteria the department has to satisfy on an interim application. For this reason the department urged that I do not stray into adopting or adapting another jurisdiction's legislation and that I should interpret this jurisdiction's legislation exactly as drafted, and there was no need for further interpretation.

23. A not dissimilar issue arose when determining applications for interim fit person orders under The Children and Young Person's (Guernsey) Law 1967, as amended. In those proceedings, this Court applied the general test as that had been laid down in section 38(2) of the English law on the basis that it was a fair interpretation of what the Court should determine at an interim stage.

24. This Court has to develop and consistently apply a test for the making of an interim community parenting order.

25. The department submitted that the Court would be wrong to interpret the criteria which would allow the Court to exercise the power granted in section 53 as being that the department have to demonstrate that there are reasonable grounds for believing that they could satisfy the criteria in section 49(2) are made out and that instead the correct interpretation of section 53, in considering whether to grant an ICPO is that "*the Court must be satisfied that the section 49 criteria are made out even if that is on an interim basis i.e. for up to three months"* and "*any other interpretation would it is submitted be to stray outside the spirit and intention of the new legislation*"

26. The department submitted that there is no parallel to a CPO in either the English jurisdiction or indeed in the Scottish jurisdiction and that it would be wrong to look at either jurisdiction's law when considering the correct interpretation of section 53. "*A CPO is an entirely different order from a care order under the English legislation, to which the former fit person order under the 1967 law was more akin. It is also submitted that a CPO is also different again from a Parental Responsibility Order (contained in section 85 of the Children (Scotland) Act 1995 and now repealed) which was designed for cases of permanency and transferred parental rights and responsibilities to the local authority rather than sharing them under a CPO ....the CPO falls somewhere between the two being designed ...solely for cases of permanency but not removing all parental rights and responsibilities …"*

27. *"Section 53 provides that the Court must be satisfied that the provisions of section 49 are satisfied. To read into this that the department must satisfy the Court that there are*

"reasonable grounds for believing " that the circumstances in section 49 with respect to the child are made out is to introduce a different and indeed weaker test and it is submitted goes further than the Court should inn interpreting the legislation and strays into the competence of the Legislature" and the department referred me to *Re S and others: Re W and other sub nom Re W and B (Children); W (child) (care plan)* [2002] UKHL 10, in which the House of Lords considered an interpretation of the legislation "*which departed substantially from the wording of an Act of Parliament .....was likely to cross the boundary between intention and amendment which was the remit of Parliament."*

28. Sections 48 of the Children (Guernsey and Alderney) Law, 2008 defines the meaning and purpose of a community parenting order and section 51 defines the effect of a CPO on parental responsibility. I have considered the terms of section 33 Children Act, 1989 and can determine little difference in the express purpose and intention between that and a CPO and the terms of sections 48 and 51 of the Children (Guernsey and Alderney) Law, 2008. If a CPO is made in favour of the department this will enable the department to assume shared parental responsibility for the child and take action as set out there in. Indeed some of the wording between section 33 of the Children Act, 1989 and section 51 of the Children (Guernsey and Alderney) Law, 2008 is very similar in wording and, in my view also in intent behind the making of such orders.

29. Advocate Hill-Tout submitted that because it was more likely than not that applications for CPO's will only be made by the department when they seek a care plan based on permanency outside the child's family, that therefore such applications are therefore different in intent and purpose to Care Orders as applied for in the English and Welsh Courts. I do not accept this assertion in its entirety. I accept that the ethos behind the new legislation is that the Courts are only intended to deal with the more serious applications (putting aside their role in determining appeals from the CYCT and determining findings of fact) but sections 48 – 54 inclusive do not anticipate that an application for a CPO will automatically result in a CPO being granted, it is not a foregone conclusion, the department still have to satisfy the Court that it can establish the relevant criteria and that in the light of sections 3 and 4 it is a proper order to make. In addition if a CPO is made, the legal basis for the operation of that CPO by the department is in my view very similar indeed to the regime in relation to Care Orders made by the English and Welsh Courts.

30. I am advised by Advocate Hill-Tout that it is her understanding that there is no parallel legislation in Scotland in relation to this aspect (the making of a CPO and the effect there of) due to that legislation having been repealed.

31. It is obvious that I must not either adopt another jurisdiction's legislation or stray beyond the original purpose of the intention of this jurisdiction's legislation. It is important not to make any order that will undermine the ethos of the new legislation. However, I am satisfied that the new legislation is capable of interpretation beyond the literal words in the relevant sections.

32. Having taken all matters into consideration I am satisfied that the test that this Court should apply under the new legislation should not be any different to that applied by the Court previously and that the appropriate test under Section 53 (interim CPO's) is whether the department can establish that there are reasonable grounds for believing the circumstances with respect to the child are as made out as in section 49 of the Law. I am satisfied that in coming to this conclusion that this is not similar at all to the circumstances set out in *Re S and others: Re W and other sub nom Re W and B (Children); W (child) (care plan)* [2002] UKHL. In this judgment I do no more than clarify the interpretation of wording and do not seek to make an order that will substantially alter the intent or purpose of the legislation.

33. Having concluded that the Court has the power to make an interim community parenting order, the mother is content to ask the Court to make that order, rather than an interim Fit Person under Schedule 2 of the Children (Consequential Amendments etc) (Guernsey and

Alderney), Ordinance 2009. In my view, that is the correct approach. The application currently before the Court is under the new legislation and the Court ought to determine that the applications before it, under that legislation and whilst we remain in the transitional stages from one legislation to another, where the new legislation can be applied, it is appropriate to do so.

34. The mother has accepted that the grounds in sections 35(a) and (b) are made out and I will make reference in due course to those agreed findings of fact. In addition she has also accepted that if the Court were to agree that the final hearing should be adjourned pending a further assessment of her to ascertain if she engages in CBT and the results of that engagement, then the criteria in section 53 are made out. Her application for an adjournment is on the basis that the resulting delay in the care planning for the children would be constructive and purposeful.

35. I am satisfied that the issue in this case is whether the department can satisfy me that there is no reasonable prospect of the mother being able to provide adequate care, protection, guidance and control for the child within a time scale that is suitable for the children's individual and joint needs and interests. If I find that the department has satisfied me to the requisite standard, I must then still take into account that the overriding principle is that the child's welfare is the paramount consideration as set out in Section 3(1) (b) of the law, the child welfare principles in Section 3(2) and the issues set out in Section 4(1) (2) namely, the child welfare check list. The matters set out in Sections 3 and 4 must be at the forefront of the Court's mind when determining any application for a community parenting order. Indeed, I interpret those matters as both giving the Court additional discretion as to whether to make a community parenting order, or such order as is being sought at the relevant time.

36. In this case the mother has accepted that the criteria under section 35(2) (a) and (b) are made out but she has submitted that I can be satisfied that there is a reasonable prospect of her becoming an able parent as set out under Section 49(2) (a) (ii) of the law if and when she undergoes a course of cognitive behavioural therapy. The burden is on the department to show that that is not the case and even if I conclude that they have satisfied the grounds under sections 49 and 35 of the law, I must consider the principles set out in Section 3 and 4 of the Law, before coming to a final conclusion.

37. I refer to the judgment of Baroness Hale of Richmond in *Re B (Care Proceedings: Standard of Proof)* [2008] 2FLR 141:

> *"Taking a child away from her family is a momentous step, not only for her, but for her whole family, and for the local authority that does so. In a totalitarian society, uniformity and conformity are valued. Hence, the totalitarian state tries to separate the child from her family and mould her to its own design. Families, in all their subversive variety are the breeding ground of diversity and individuality. In a free and democratic society we value diversity and individuality. Hence the family is given special protection in all the modern human rights instruments including the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950, (Article 8)… as McReynolds J famously said in Pierce v Society of Sisters 268 US510 (1925), at 535 "The child is not the mere creature of the state".*

38. To make a community parenting endorsing a care plan which proposes the severance of the bond between these children and their parents and in particular in this case their mother, is a draconian step and not a step that this Court can or should take lightly. I have no doubt that all Courts making such orders bear this in mind, but it is helpful to restate these principles, taking into account that this is the first case or application of its kind under the new law.

C.A.McMILLEN
Judge of the Magistrate's Court