**Judgment 15/2005** **Re K (an Infant) – Juvenile Court – 14 March 2005**

**Children and Young Persons (Guernsey) Law, 1967 – application for Fit Person Order – proposal that K be moved to foster carers in England – Order granted and conditional leave to place K in foster care outside Guernsey**

**IN THE GUERNSEY JUVENILE COURT**

**Re K (an Infant)**

**14th March 2005**

**(Advocate R Sewards appeared for the States of Guernsey Department of Health and Social Services, Advocate Miss C M Fooks for the Mother and Advocate Miss S Mallett for the infant K, instructed by the Guardian ad Litem)**

**In delivering the Judgment of the Court, Assistant Magistrate Cherry McMillen set out the law as follows in paragraphs 31-44 and 46-74**

The Law

31. The application by the Department for a FPO is made under The Children and Young Persons (Guernsey) Law 1967, as amended. It was acknowledged by all parties that the law is silent in relation to certain issues for example, the criteria that the Court should apply when determining an application that a FPO should be granted based on the care plan that a child be placed out of the jurisdiction of Guernsey (off island). Advocate Fooks in her written submissions went as far as to submit (paragraph 1 of her Skeleton Argument of 7th March 2005)

*" Accepted that the Children and Young Persons (Guernsey) Law 1967 is out of date and requires interpretation, supplementation and guidance to ensure conformity to modern requirements of child proceedings and ECHR"*

32. Interpretation of the current legislation was the subject of much debate between the Advocates when they made their closing submissions to the Court. There were areas of disagreement, particularly between the Advocates for the mother and the Department.

33. It is clear that it is Guernsey legislation which must be applied to the application before the Court. Reference can and should be made to English law, practice and procedure as helpful guidance but Guernsey legislation is what the Court must apply.

Advocate Sewards helpfully referred the Court to the case of A v A – Matrimonial Causes Division (1994) digested at 17 GLJ 3 which held inter alia :

"*Although the Children Act 1989 did not apply in Guernsey, the Children Board was entitled to take on board any new thinking regarding the best way to protect the best interests of children provided that it was not in conflict with the statutory provisions currently pertaining in Guernsey."*

In our view the same would apply to any application before this court.

 

34. It is agreed by all parties that in any application by the Department for a FPO the Department must satisfy a two-stage test. The burden of proof is on the Department and the requisite standard is that they must prove the relevant facts on the balance of probabilities.

Threshold Test

35. The first hurdle or stage that the Department has to satisfy is the test set out in Section 2 of the Children and Young Persons (Guernsey) Law 1967, as amended. We refer to that as the threshold test.

36. This Court expects that in any application for an order under Section 3 of the of the Children and Young Persons (Guernsey) Law 1967, as amended, that the Department will (as it did in this case) set out in writing the proposed basis of what it seeks to prove under section 2 of the Children and Young Persons (Guernsey) Law 1967, as amended. This should be filed by the Department as close to the commencement of the proceedings as possible (the Court can give leave to amend if further information comes to light during the proceedings which makes it necessary to apply to amend or add to the factual basis of the application). The Court would then expect the other parties, within a reasonable period of time to set out where there are areas of agreement or disagreement in relation to the facts that the Department will seek to prove and if necessary provide to the Court and the other parties their own draft facts if they accept the court can find that the test in section 2 is satisfied, albeit not on identical terms as proposed by the Department.

37. If there is dissension on the detail of the facts that the Department seeks to prove, the Department is not bound to accept all of the proposed amendments by the other parties and retains discretion to ask the Court to make findings of fact not necessarily agreed by the other parties. What is important that the Department is aware of what evidence it will be expected to call. The Department will not be able to prepare properly unless the other parties notify the Department, within a reasonable time scale, of which facts are accepted and which are challenged

38. It is expected that the parents (through their Advocates) will be proactive in acquiescing or proposing amendments to the Department's draft findings of fact. However the child's Advocate and the GAL retain a role in ensuring that the proposed final draft properly reflects those facts, which are relevant to the application that the Court is being asked to determine. The GAL must satisfy him/herself that the facts reflect the degree of seriousness of the case. The GAL can ask the Court to hear evidence relating to facts s/he considers the Court should hear which do not form part of the agreed draft between the other parties. However, where the other parties agree it is likely to be a rare case where the GAL asks the Court to find further or alternative findings of fact.

39. If the parties cannot come to an agreement on the findings of fact the Court will hear evidence and determine whether the Department have satisfied the test set out in section 2 and if so on what basis. If the Court determines that the Department cannot satisfy the test as set out in section 2 of the Children and Young Persons (Guernsey) Law 1967, as amended, then the case concludes at that point. It is only if the threshold test is satisfied, either by agreement or by the Court finding it is so satisfied, that the Court can then proceed to consider the second stage, the disposal stage of the case.

40. For the instant case, the relevant paragraphs of section 2 of the Children and Young Persons (Guernsey) Law 1967, as amended, states

*"2. (1) A child or young person is in need of care, protection or control within the meaning on this Law if-*

 

*(a) any of the conditions mentioned in subsection (2) of this section is satisfied with respect to him, and he is not receiving ,or is not likely to receive, such care, protection and guidance as a good parent may reasonably be expected to give;*

*2. (2) The conditions referred to in paragraph (a) of subsection (1) of this section are that-*

*(b) the lack of care, protection guidance is or would be, likely to cause him unnecessary suffering or seriously to affect his health or proper development."*

In this case all parties are satisfied that the conditions as set out in Section (1) (a) and 2(2) (B) are satisfied and the parties have drawn up and presented to the court signed and agreed findings of fact. These are at A36A and A36B in the bundle and the Court approve and adopt that document and find that the Department have satisfied the Court that the test in section 2 of the Children and Young Persons (Guernsey) Law 1967, as amended.

Disposal Stage

41. In this case the Department seeks a FPO under section 3 (3) (b) of the Children and Young Persons (Guernsey) Law 1967, as amended –

*" 3(3) If the Juvenile Court is satisfied that any person brought before it under this section is a child or young person in need of care, protection or control, the Juvenile Court may-*

*(a) make a special care order in respect of him, or*

*(b) commit him to the care of any fit person, whether a relative or not who is willing to undertake the care of him; or*

*(c) order his parent or guardian to enter into a recognizance with or without sureties, to exercise proper care and guardianship; or*

*(d) without making any other order or in addition to making an order under the last 2 foregoing paragraphs, make an order placing him for a specified period, not exceeding three years under the supervision of a probation officer or of some other person appointed for the purpose by the Juvenile Court*

42. In this case the Department seeks a FPO and is supported in that application by the GAL. The mother opposes the making of a FPO and submits to the Court that the disposal test is discretionary and that even if the test in section 2 of the law is satisfied the Court retains jurisdiction to make no order on the application of the Department.

43. All of the parties agree that legal principle. Section 3 of the law in stating that the Court "***may*****"** make any of the orders in subsections (a) – (d) inclusive gives the Court a discretion whether to make any of the orders in subsection (3) or not to make any order, which if that was the decision of the Court, would have the practical effect of the child returning home to the mother.

44. It is also agreed by all the parties that apart from either making any of the orders in section 3 (3) of the law or not making any order, the Court also has the discretion to make an interim care order, thereby involving an adjournment of the final hearing (again).

45. […….]

 

46. The Advocates made submissions to the Court as to the criteria which the Court should apply when determining how to exercise its discretion in deciding which order to make (or indeed whether to make no order).

47. Advocate Sewards submitted that the Court should have regard to Section 1 of the Children Act 1989 and the principles contained therein and should further be guided by the English case law relating to the exercise of the Court's discretion at this stage. We are grateful to Advocate Sewards to providing the Court with the following authorities, which primarily deal with the issue when the Court should exercise its discretion between making an interim care order rather than making a final disposal-

    (1) Re L Minors – (Sexual Abuse: Standard of Proof) (1996) 1 FLR 116 CA

    (2) Re J Minors – (Minors) (Care: Care Plan) (1994) 1 FLR 253

    (3) Re CH (Care or Interim Care Order) (1998) 1 FLR 402

48. Advocates Fooks and Advocate Mallett agreed with the submissions of Advocate Sewards on this point and there was a general consensus of agreement that the Court may look to the principles in Section 1 of the Children Act 1989 and also to the above cases as guidance when considering whether to grant a final order or an interim order.

49. Where there was disagreement between the Advocates was which criteria the Court should apply when considering a care plan that involved a proposal that a child in the care of the Department should be placed off island, as is the proposal by the Department in this case.

50. Advocate Sewards submitted that the only criteria the Court should consider is the guidance in section 1 of the Children Act 1989 with particular emphasis on the welfare checklist in Section 1 (3) of the Children Act.

51. Advocate Fooks submitted that the Court must consider and apply Paragraph 6 of the Practice Direction 5 of 2002, which specifically deals with off island placements arranged by the Department. Advocate Fooks submitted that the PD created an extra hurdle, which the Department had to satisfy before the Court, approved a plan, which entailed a child being placed off island. This was also the view of Advocate Mallett.

52. However, Advocate Sewards initially expressed the view that the Practice Direction was not helpful in assisting the Court to come to a decision in relation to which order should be made, but appeared to ameliorate his view somewhat during the course of his submissions and accept that if it was relevant then it must be interpreted in conjunction with Re J (Minors) as above. His stance was that the PD did not create an additional hurdle for the Department. Advocate Sewards submitted that once the Court was satisfied that the time had come to make a final order and decided that the order should be a FPO then in accordance with Re J (Minors) the Court should make that order, whether the plan entailed a placement off island or not.

53. In Guernsey the Department has been given guidance from the Court in paragraphs 3 and 4 of the Practice Direction number 5 of 2002 that sets out a minimum of what is required in a care plan.

54. There may be a tension between the views of the Court and the Department as expressed in its care plan. If the Court is concerned that the care plan is deficient in a material way it may decline to make a final order. However, subject to the provisions of section 8 of the Children and Young Persons (Guernsey) Law 1967, as amended, the scheme of the Law is to provide that upon making a final care order, responsibility for the child's welfare passes from the Court to the Department. Accordingly, it is wrong when all the material evidence is available

 

to use interim orders as a means of achieving a supervisory power. On the other hand, it is perfectly proper to decline to make a final order and to make a further interim order where the Court is not satisfied about any material aspect of the care plan so that it can reasonably and properly be said that further evidence is required before the plan is approved.

55. In this case, Advocates Sewards submits that the Department has provided the Court with sufficient evidence along with a sufficiently detailed care plan, which would allow the court to make a FPO. He submits that it is wrong in principle to state that there is in this case an additional hurdle and the final decision as to where the infant lives must be left to the Department whether or not her proposed placement is off island.

56. In response to this Advocate Fooks directs the Court to the wording of PD number 5 of 2002. She submits that the wording in Paragraph 6 could not be clearer:

"*Off-island placements*

*The CB is concerned to regularise the uncertain legal position of children placed off-island, whether under voluntary agreements, fit person orders or special care orders. It wishes to set in place a protective legal regime that recognises its responsibilities to such children, even when they are not physically on Guernsey soil. Pending the necessary negotiations with the UK authorities and change in legislation, the Board* ***will*** *(our emphasis) take action as follows:*

- *Placements off-island will be made, wherever possible, with the* ***sanction*** *(our emphasis) of the court and subject to a tightly drawn care plan.*
- *The Board will normally avoid the use of special care orders in civil proceedings*
- *The Board would prefer to make such placements under a fit person order (usually on an interim basis where no final order has been made). Such orders will contain a direction granting leave to be placed off-island, subject to 'fundamental' conditions as to family contact, timescales and the other matters set out in the care plan. At the hearing granting leave for the placement, a further hearing date will be fixed, to coincide with the next stage of the approved care plan.*
- *The child will normally be represented by an Advocate, and a guardian or other independent expert will be appointed to report to the court on the child's best interests.*
- *Ideally a mirror order will be negotiated with the UK judicial authorities to clarify the child's legal status and assist speedy resolution of any difficulties that may occur while the child is in the UK."*

57. Advocate Fooks submits that the use of the words "***sanction"*** and ***"will contain a direction granting leave"*** in the PD creates an additional hurdle that the Department must satisfy, where the application involves an off island placement.

58. All parties were agreed that it was not possible in English law for the Department to seek a mirror order in England. Advocate Sewards advised the Court that the Law Officers are in negotiation with the English authorities, but those negotiations have not yet been resolved. The Advocates submitted that the only possibility is that the Department could commence wardship proceedings but it was made clear that this was not the intention in this case.

59. None of the parties submitted that if the Court made a FPO on the current care plan that it should fix a further hearing in accordance with the 3rd bullet point of paragraph 6. It appears that may well have been intended to apply when the child is placed on an interim care order and not a final order. Advocate Fooks does submit however, that the Court should specify the

 

*"fundamental conditions"* if it proceeds to make a final order and in this regard she refers the Court to the 3rd bullet point of paragraph 6 above and to the contents of Paragraph 4 of the PD.

60. In Paragraph 4 the PD states-

- "*On the making of a final order (or any other order which has significant consequences e.g.: in respect of off-island placements), the court will consider whether to identify any aspect of the plan as being 'fundamental'. This is likely to include matters such as contact, placement and whether the eventual proposal is for rehabilitation or permanent non-family placement"*

- *Without the consent of the Court, major changes to the 'fundamental aspects should not be made'. Where such change is proposed, application will be made to the Court for variation of the care plan under section 8……Where the inevitable 'grey areas' cannot be agreed, it will be for the Court to decide whether the proposed change goes to the root of the plan."*

61. Advocate Sewards submits the Court should not specify any '*fundamental conditions'.* He is insistent that the whole PD was only a consultation document, which was not intended to create new legislation. He submits the Court should not follow paragraph 4 in particular because it purports to create new law by Practice Direction rather than by primary legislation.

62. Paragraph 4 refers to section 8 of the Children and Young Persons (Guernsey) Law 1967, as amended. This section provides "*an order committing a child or young person to the care of a fit person may be varied or revoked by the Juvenile Court".*

63. There is no parallel in English Law to the provision, which allows an application to vary a final order. In England and Wales it is not possible to apply to vary a final care order once it is made. It is however, possible to apply to discharge it in its entirety or to make a specific application in relation to contact with a child in care. There are no parallel provisions in relation to the variation of a final order.

64. The Court is of the view that it is in this context that the contents of the PD 5 of 2002 must be read. It is the Court's view that the intention was to provide assistance to the Court and the parties in providing criteria for any future applications regarding the variation of a fit persons order. The specification of *'fundamental conditions'* would ensure the Court and the parties including the Department had guide posts as to when it was appropriate for the Court to hear an application for variation.

65. Advocate Fooks submitted the Court could take notice of the fact that in England (and Wales) the relevant Local Authority had to apply to the Court for approval if they intended to place a child in care outside the jurisdiction.

66. The Court is also of the view that the contents of paragraph 6 of the PD provides an additional test at the disposal stage that must be satisfied by the Department before an application based on a care plan for an off island placement is successful. The Court agrees with the mother's Advocate that the wording is unequivocal when reference is made to the fact the Court must *sanction placements made off-island* and further, the PD clearly states that *such orders (FPO) will contain a direction granting leave for the child to be placed off island.*

67. If Advocate Sewards was correct in his submissions and the Court should only be satisfied as to the sufficiency of detail of the care plan then this paragraph makes no sense. We are

satisfied it was intended that the Court provide an additional safety net when the plan was for off-island placement and the use of terminology as *"sanction*" and "*granting leave"* bears this out.

68. The next area of dissension between the Advocates was what criteria the Court should apply to such an application (for an off island placement).

69. Advocate Fooks and Advocate Sewards referred the Court to Schedule 2, para 19(2) of the Children Act 1989 which provides the criteria that must be satisfied before the English Courts can give approval to a plan to place a child in care outside the jurisdiction.

70. Advocate Sewards submitted that the Court must not adopt the same criteria because it would be inappropriately incorporating English legislation into Guernsey law. Advocate Fooks submitted that that position was wrong as Advocate Sewards was asking the Court to "*cherry pick"* which sections of the CA 1989 he wished the Court to apply in determining the applications before the Court. She referred to the fact that Advocate Sewards was asking the Court to use the guidance set out in Section 1 of the CA 1989 when considering the application before the Court whilst simultaneously rejecting the criteria in Schedule 2.

71. We agree with Advocate Sewards. In determining whether to grant a FPO the Court may refer to the principles in Section 1 CA 1989, but we stress it is only guidance – a useful tool which reflects good legal principles when matters concerning children in certain proceedings are before the Court. It does not replace Guernsey legislation. To adopt the entirety of Schedule 2 (paragraph 19 thereof) of the same Act in its entirety would be wrong.

72. We take the view that in deciding whether to allow the application by the Department to place a child in care, off island, the Court should have reference to the PD 5 of 2002 and may use as supplemental guidance, the principles of section 1 of the CA 1989.

73. Therefore, in the application before this Court, the Department have satisfied the threshold criteria test as set out in Section 2. The agreed findings of fact at A36A and A36B in general terms [refers to concerns as to the mother's ability to care for the infant etc.]

74. The Court must now consider the disposal test (section 3) including what order should be made and whether to grant leave for the infant to be placed off island.

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