STATES OF JERSEY

CHILDREN (JERSEY) LAW 2002: APPOINTMENT OF CHILDREN'S GUARDIANS AND ADVOCATES IN CERTAIN COURT PROCEEDINGS

Lodged au Greffe on 7th October 2010
by the Deputy of St. Martin

STATES GREFFE

PROPOSITION

THE STATES are asked to decide whether they are of opinion −

(a) to agree that the Children (Jersey) Law 2002 should be amended so that where children may be – (i) separated from their parents by virtue of a care order; or (ii) confined by virtue of a secure accommodation order, a children's guardian and an advocate for the child will be appointed by the Court in all cases;

(b) to request the Minister for Health and Social Services to bring forward for approval amendments to the Children (Jersey) Law 2002 to give effect to the proposal.

DEPUTY OF ST. MARTIN

REPORT

In the eyes of many observers, there is still much work to be done to safeguard the welfare of our children. This includes the *mandatory* appointment of a Children's guardian and an advocate for all children caught up in the most serious types of legal proceedings before the Court under the Children (Jersey) 2002 Law ("the 2002 Law"). It is apparent that the 2002 Law is at variance with the U.K. Children's Act 1989 (upon which it was based) in this crucial area.

Background

To assist Members, it might be helpful to know the background to the 1989 Children's Act. The Act followed on from a series of influential public inquiries as to child deaths, such as Jasmine Beckford in 1985, Kimberley Carlile in 1987 and Tyra Henry in 1987; where agencies failed to work together successfully so as to protect children and failed to intervene. On the other side of the coin, there was also the Cleveland report where professionals were criticized for being over-zealous in their diagnosis of sexual abuse and hasty removal of children from their parents. The law was also fragmented and unsatisfactory for a great many reasons.

The 1989 Children Act marked a radical break with the past. Sir Geoffrey Howe described the legislation as –

> *"The most comprehensive and far-reaching reform of this branch of the law ever introduced. It meets a long-felt need for a comprehensive and integrated statutory framework to ensure the welfare of children."*

One of the pillars of the 1989 Act was in its emphasis in affording the child the opportunity of communicating his/her own views and, where appropriate, to be explained through independent representation. As Sir Thomas Bingham explained in *Re S (A Minor) (Independent Representation) [1993] 2 FLR 437*, the Act and Rules of Court introduced an exception to the general law, in that a minor was now permitted to conduct a case in person or to instruct his own solicitor in certain prescribed circumstances. In addition, in cases in the public field where the State intervened (such as applications for care orders or secure accommodation orders) section 41 made it mandatory for a specialist social worker, or other appropriately qualified person, to be appointed as a guardian for the child in those legal proceedings. Only in exceptional cases was the Court permitted not to follow that course. The child also had the assistance of a lawyer who was appointed by the guardian.

The view was accepted in the 1993 case of *Re S [1993] 2 FLR 437* that the public law regime was different to that of the private law and "*no doubt… because the Court has a greater need for assistance from a guardian in public law cases where there is the possibility of State intervention and severance of the parent/child relationship than in private law cases which proceed on the premise that the parents can care for the child appropriately.*" The point is that children need a voice in proceedings, and particularly so where the stakes are so great, as in the public law sphere involving care proceedings or secure accommodation orders, where in the latter case the child can effectively be locked up.

The Jersey perspective

The Children (Jersey) Law 2002 came onto our statute book on February 26th 2002 via P.200/2001, but was not brought into force until 1st August 2005. It represents a break with the past, but there are various difficulties with its current provisions and that is the subject of this Proposition.

It is not difficult to spot some key differences, and principally in the public law sphere. The position of the guardian under the Children Act 1989 was of fundamental importance in the public law sphere (and of relevance in certain categories of private law proceedings) yet (in this context) it is not expressly referred to in the 2002 Law. Nevertheless, the Royal Court for several years has been content to appoint guardians for children caught in care and other proceedings. As long ago as the Jersey case of *Re TS & others [2005] JRC 178* the Royal Court made known its wish to make more use of guardians to safeguard the interests of children in appropriate Jersey cases. A lawyer was also appointed to work with the guardian. Over the past few years in particular, the Royal Court has been true to that sentiment and routinely appointed a guardian and an advocate to safeguard and represent the interests of the child. A panel of lawyers with experience in this area has also now been set up through the Deputy Judicial Greffier, so that appropriately qualified lawyers act for children and rates of payment have further been agreed.

The recent decision of the Royal Court in *Re B [2010] JRC 150* demonstrates a deviation from previous settled practice of appointing a guardian and a lawyer for the child in all care cases. Instead, the Royal Court has emphasized that under the 2002 Law (as it stands) neither the appointment of a guardian or a lawyer will automatically follow, even where the child that is the subject of proceedings may be removed from its parents for good. This places Jersey not only at odds with practice in England and Wales, but also with that of Guernsey and, moreover, is likely to contravene Article 9 of the U.N. Convention on the Rights of the Child. This provides that where children may be separated from their parents; they have to be "given an opportunity to participate in the proceedings and make their views known".

Amendments to the Children (Jersey) Law 2002

My previous Proposition sought to ensure the *mandatory* appointment of a Children's guardian and an advocate for children caught up in the most serious type of legal proceedings before the Court under the 2002 Law, being all care proceedings and secure accommodation orders. In respect of secure accommodation orders, my position has not altered. However, after further discussion, I have agreed to amend that original Proposition so as to confer a greater discretion on the part of the Courts so that it is mandatory only to make such appointments where the application for a care order may involve the separation of children from their parents. This, it will be recalled, is consistent with Article 9 of the UN Convention on the Rights of the Child. However, I have only agreed to watering down my original Proposition upon the basis that the Court is required in all applications under Article 24 (care and supervision orders) to appoint a guardian and lawyer *unless* satisfied that it is not necessary to do so in order to safeguard the child's interests. This mirrors the position in England and Wales and would, in overall terms, bring Jersey into line with best practice there.

This Proposition therefore continues to put forward proposed amendments to the 2002 Law and seeks Members' support.

It should be noted that there is further a corresponding amendment to Article 22 in respect of the current, more limited, provision as to representation in secure accommodation orders (which would be deleted), and to the interpretation section so as to define a "children's guardian." It will also require an amendment to clarify the power of the Court under Article 75 of the 2002 Law in respect of the representation of children.

Financial and manpower implications

It is apparent that from the recent court case known as *Re B [2010] JRC 150* above, that the Royal Court was mindful of costs. As the NSPCC also pointed out in that case, however, there are minimum rights that must be respected and this includes the right of children to participate fully in legal proceedings that fundamentally affect their lives. As already observed, this is also a principle contained in the U.N. Convention on the Rights of the Child and shared by many jurisdictions.

The proposed amendments to the 2002 Law will not have any additional financial and manpower implications over and above those that already existed prior to the *Re B [2010] JCR 150* decision, where established practice was to appoint a Children's Guardian and an Advocate. The decision in *Re B [2010] JRC 150* would have led to a financial saving which will be forgone if this proposition is adopted, but Members should also be mindful that the 2002 Law (as presently interpreted by the Royal Court) is likely to be challenged on Human Rights grounds. Moreover, the 2002 Law will probably need to be amended when Jersey eventually seeks an extension of the U.K. ratification of the United Nations Convention on the Rights of the Child. This is in line with the 2009 Strategic Plan, as amended by Deputy Le Claire's amendment.

I do not believe, therefore, that my proposed amendments will require additional funding. In any event, were competitive tendering processes to be adopted for the selection and payment of advocates, even the existing budget for children's cases could be significantly curtailed.