Neutral Citation Number: [2021] EWCA Civ 622

Case No: B4/2021/0275

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE FAMILY COURT AT LIVERPOOL
HH Judge Sharpe
LV20C01796

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30 April 2021

Before :

LORD JUSTICE PETER JACKSON
LORD JUSTICE BAKER
and
LADY JUSTICE ELISABETH LAING

- -

IN THE MATTER OF THE CHILDREN ACT 1989
AND IN THE MATTER OF F and G (DISCHARGE OF SPECIAL GUARDIANSHIP ORDER)

Between :

N	**Appellant**
- and -	
K (1)	**Respondents**
LIVERPOOL CITY COUNCIL (2)	
F and G (by their children's guardian) (3) and (4)	

- -
- -

Lisa Edmunds and Kerri O'Neill (instructed by **Broudie Jackson Canter**) for the **Appellant**
Deirdre Fottrell QC and Celestine Greenwood (instructed by **Morecrofts LLP**) for the **First Respondent**
Joanna Mallon (instructed by **Local Authority Solicitor**) for the **Second Respondent**
Mark Senior (instructed by **MSB Solicitors**) for the **Third and Fourth Respondents**

Hearing dates : 5 March 2021

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand down is deemed to be 10.30am on Friday 30 April 2021.

LORD JUSTICE BAKER :

1. This is an appeal against a judge's decision refusing to discharge a special guardianship order ("SGO"). The children who are the subject of the SGO are twin girls, F and G, now aged ten. Their special guardian is their former step-father, K. The appellant is the girls' mother.

2. The unusual – indeed almost unique – feature of this case is that the girls are subject not only to the SGO but also to a care order. The principal issues arising on this appeal are whether as a matter of law the two orders can coexist and, if they can, whether in the circumstances of this case the judge was wrong to allow the SGO to continue.

Background

3. In 2010, when the appellant was pregnant as a result of another relationship, she met and started a relationship with the first respondent, K. The twin girls, who were born in December 2010 and had no contact with their natural father, grew up regarding K as their father. In 2014, the mother and K were married.

4. The marriage was short-lived and, in 2017, the couple separated following incidents of violence perpetrated by the mother as a result of which she was convicted of battery and made subject to a restraining order. After the separation, the girls lived with their mother but continued to see K several times a week. In 2018, the couple were divorced and in the course of private law proceedings brought by K, the mother obtained a declaration of parentage following DNA testing that K was not the biological father.

5. The mother then formed a relationship with a violent partner, and, in April 2019, the local authority started care proceedings in respect of the girls. At that point, the children moved to live with K under interim care orders. It was the local authority's initial view that he coped well with caring for them, although he needed considerable support. A psychological assessment carried out during the proceedings found that K was a man of "extremely low cognitive ability". As a result of his limitations, the local authority decided that under the regulations he would not be approved as a foster parent. A special guardianship assessment carried out by a PAMS assessor (who had specialist training in assessing a parent with learning difficulties) concluded, however, that notwithstanding K's learning disability "he has evidenced his ability to meet the children's emotional needs successfully" and recommended that a SGO be made in his favour.

6. At a final hearing before HH Judge Sharpe on 9 April 2020, the care proceedings concluded with the making of an SGO in favour of K and a care order in favour of the local authority. No judgment was delivered setting out the reasons for this outcome. The order recorded that all parties agreed that the two orders should be made. It further recorded that the local authority had not yet filed final care plans, directed the authority to file the plans by 20 April, and recorded that the final orders would be made "administratively" assuming no party objected on receipt of the plan. A final plan was duly filed on 16 April and no party raised any objection at that stage.

7. Following the hearing, the children remained living with K but the arrangement quickly broke down for reasons which it is unnecessary to describe here. On 26 May 2020, the local authority gave fourteen days' notice to K that they were intending to terminate the

placement and remove the girls into foster care under the care order. On 8 June, K's solicitors filed an application to discharge the care order and for an injunction preventing the local authority removing the children. At a hearing on 16 June, Judge Sharpe dismissed the application for an injunction and adjourned the application for discharge of the care order to a case management hearing three weeks later. Following the hearing on 16 June, the local authority removed the girls from K's care and placed them in a foster home where they remain.

8. Prior to the case management hearing on 9 July, the local authority filed a statement from the social worker stating:

> "The local authority remains of the view that F and G should remain in their current foster placement long term …. This placement will allow the girls to have good positive contact with K and [the mother]. As a result, the local authority is requesting that the SGO be discharged today, as K no longer requires parental responsibility as the children will not be in his care, and I do not envisage a situation where we would have to consult K for his view regarding decisions regarding the girls' general care."

9. At the hearing on 9 July, K through his counsel indicated that he opposed the discharge of the order. Judge Sharpe observed that immediate discharge would not be in the children's interests. The matter was adjourned to a further case management hearing at the beginning of September at which it was listed for an issues resolution hearing on 28 September. At that hearing, the judge listed the matter for a final hearing on 30 November, with appropriate case management directions. The order dated 28 September recorded by way of recital that all parties agreed that the evidence did not currently support discharge of the care order; that K had undergone counselling and was proposing to undergo parenting work; and that the local authority's application for discharge of the SGO was supported by the mother and the children's guardian but opposed by K. The recitals to the order of 28 September continued, referring to K as "the father" to mark his significance to the children:

> "4. The father was concerned as to the consequence of the order being discharged in that he would lose parental responsibility. It was suggested that this could be overcome in practical terms by way of detailed recordings to ensure that he would not be excluded by the local authority.
>
> 5. The Judge confirmed that he was satisfied that a care order and SGO can co-exist. He noted that whilst the children do not presently live with their father, the SGO reflected the significant role that he plays in their lives and the relationship that he has with them. He noted that that relationship continues to exist and there is real value in the maintenance of the SGO for the sake of the children. He was troubled by the prospect of removing parental responsibility from this father.
>
> 6. The Judge noted the concerns of the mother that the father would have enhanced parental responsibility but confirmed that the primary order is the Care Order and s33(3)(b)(i) Children Act 1989 applies in that the Local Authority "have the power (subject to the following provisions of this section) to determine the extent to which a parent, guardian or special guardian of the child may meet his parental responsibility for him".

> 7. He further confirmed that conditions can be imposed which must be complied with by any person pursuant to s14 E (5) Children Act 1989 which confirms that s 11(7) Children Act 1989 applies in relation to SGOs. In this respect, the Court confirmed that the focus should be on achieving precise legal arrangements to govern the relationship between the parents and the local authority and that both the mother and father should be consulted and should be treated the same."

10. According to a chronology prepared for this appeal, on 27 November, three days before the "final" hearing, the mother filed a notice of application for discharge of the SGO. No copy of that application was included in any of the bundles filed in connection with this appeal. At that stage, the mother had not been granted leave to make the application. In the skeleton argument prepared for the hearing on 30 November, the mother's counsel invited the court to grant permission for an application for discharge of the SGO to be made "in the face of the court". It seems, however, that this application was either not pursued or not granted. There is no reference in the ultimate order to the mother being granted leave to apply and in paragraph 16 of the judgment the judge recorded that he was "content to regard the matter as being one which fell within s.14D(2), Children Act 1989 whereby the court of its own motion may vary or discharge existing SGOs even in the absence of an application by any party so entitled".

11. At the hearing on 30 November, the mother was the only party seeking discharge of the SGO. By that stage, the local authority and the guardian had changed their positions and concluded that there was a positive benefit to the order continuing alongside the care order. Having heard legal argument, Judge Sharpe indicated that he would not discharge the SGO. The hearing was adjourned for the delivery of a judgment which was distributed in draft before a hearing on 22 December and then ultimately handed down in its final form on 12 February 2021 setting out the judge's reasons for refusing to discharge the SGO, together with a supplemental judgment in which he gave reasons for attaching a condition to the SGO under s.11(7) of the Children Act and for refusing the mother permission to appeal. On this latter point, the judge stated that he was following convention in allowing this Court to decide whether to grant permission, and that, but for that convention, he would have been minded to grant permission "in order that the issues raised in this case could be considered at an authoritative level",

12. The order made following the hearing did not fully reflect the judge's decision. It referred to the father's application to discharge the order (which had not been pursued) but made no reference to the mother's application to discharge the SGO. It recorded that:

> "the hearing has been effective in respect of the determination of the issue of principle and further submissions have been received in relation to the question of whether a condition should be attached to the continuing Special Guardianship orders".

After further recitals, the terms of the order were set out as follows:

> "1. The Special Guardianship orders previously made on 9 April 2020 shall be varied so as to attach a condition that the Special Guardian shall inform the Local Authority and the mother in writing prior to seeking any information concerning the children from third parties whilst the care order remains in place.

2. Permission to appeal is refused.

3. There shall be no orders for costs save detailed assessment of the publicly funded costs of any assisted party."

13. The mother immediately filed notice of appeal against the judge's decision refusing to discharge the SGO. On 18 February 2021, I granted permission to appeal. On 25 February, the mother filed an application to amend the grounds of appeal to include an appeal against the condition attached to the SGO.

14. The appeal hearing took place on 5 March 2021. The mother's appeal was opposed by the father, the local authority and the children's guardian. At the outset of the hearing, we granted the mother permission to amend the grounds of appeal. At the conclusion of the hearing, judgment was reserved.

The grounds of appeal

15. The mother advanced three grounds of appeal, recrafted in her skeleton argument in these terms:

(1) SGOs and care orders cannot coexist in law: Parliament never intended that they could or would coexist. The two are plainly and simply incompatible. Any formulation and/or crafting and/or interpretation of the legislative framework to reach a conclusion that they can coexist is wrong.

(2) In the alternative, if the orders are lawfully permitted to coexist, on the facts of this case the judge was wrong to allow the SGOs to continue.

(3) The imposition of the singular specified condition, on the facts of this case, was wrong both in principle and, in the alternative, in its content.

The Law

16. Since the hearing of the appeal in the present case, this Court has delivered judgment in another case involving a different aspect of the statutory provisions governing the discharge of SGOs, reported as *Re M (Special Guardianship Order: Leave to Apply to Discharge)* [2021] EWCA Civ 442. In the course of his judgment, my Lord Peter Jackson LJ set out an overview of special guardianship which it is useful to recite here:

> "14. Special guardianship was created in 2005 as an alternative legal status that offered greater security for children than long-term fostering, but without the absolute legal severance from the birth family that stems from adoption. According to figures published by the Ministry of Justice, some 67,000 children were made subject to SGOs in the ten years since 2011, of whom three-quarters had been the subject of care proceedings. (In the same period, some 54,000 children were adopted.) Special guardianship has been much more popular than custodianship, its predecessor under the Children Act 1975, which was described by the Law Commission in 1988 (Law Com. No. 172) as little used.

15. The White Paper published in 2000, *Adoption: a new approach* Cm. 5017, stated that special guardianship would:

- give the guardian clear responsibility for all aspects of caring for the child and for taking the decisions to do with their upbringing
- provide a firm foundation on which to build a lifelong permanent relationship between the child and their guardian
- be legally secure
- preserve the basic link between the child and their birth family
- be accompanied by access to a full range of support services, including where appropriate, financial support.

16. The legal framework for special guardianship was created through amendments to the 1989 Act brought about by the Adoption and Children Act 2002 ('the 2002 Act'). Section 115(1) of the 2002 Act inserted new sections 14A-F into the 1989 Act. The new sections provide for:

- who may apply for an SGO
- the circumstances in which an SGO order may be made
- the nature and effect of special guardianship orders
- support services.

17. Under section 14C, the effect of an SGO is that the special guardian will have parental responsibility for the child. Subject to any later order, they may exercise parental responsibility to the exclusion of all others with parental responsibility.

18. The purpose of special guardianship is therefore to achieve permanence for the child. The term 'permanence' has a special meaning in care planning, as defined in *The Children Act 1989 Guidance and Regulations Volume 2: care planning, placement and case review*, June 2015, DFE-00169-2015:

> "2.3 Permanence is the long term plan for the child's upbringing and provides an underpinning framework for all social work with children and their families from family support through to adoption. The objective of planning for permanence is therefore to ensure that children have a secure, stable and loving family to support them through childhood

> and beyond and to give them a sense of security, continuity, commitment, identity and belonging."
>
> The concept of permanence is also found in the requirement under s. 31 (3B) of the 1989 Act for a court deciding whether to make a care order to consider the permanence provisions of a care plan. These include provisions setting out the long-term plan for the upbringing of the child and the way in which the plan would meet the child's needs."

17. A number of the provisions of the Children Act are relevant to this appeal. First, of course, s.1(1) applies so that when a court is considering an application for the discharge of an SGO, the child's welfare is the paramount consideration. Under s.1(4)(b), a court considering whether to make or discharge an SGO must have regard to the welfare checklist in s.1(3). That checklist includes, under s.1(3)(g), "the range of powers available to the court under this Act in the proceedings in question".

18. Turning to the specific provisions governing SGOs, s.14C(1) provides:

> "The effect of a [SGO] is that while the order remains in force
>
> (a) a special guardian appointed by the order has parental responsibility for the child in respect of whom it is made; and
>
> (b) subject to any other order in force with respect to the child under this Act, a special guardian is entitled to exercise parental responsibility to the exclusion of any other person with parental responsibility (apart from another special guardian)."

19. The statutory provisions governing the discharge of SGOs are set out in s.14D which provides, so far as relevant to this appeal, as follows:

> "(1) The court may vary or discharge a special guardianship order on the application of
>
> (a) the special guardian (or any of them, if there are more than one);
>
> (b) any parent or guardian of the child;
>
> …
>
> (f) a local authority designated in a care order with respect to the child.
>
> (2) In any family proceedings in which a question arises with respect to the welfare of a child with respect to whom a special guardianship order is in force, the court may also vary or discharge the special guardianship order if it considers that the order should be varied or discharged, even though no application has been made under subsection (1).
>
> (3) The following must obtain the leave of the court before making an application under subsection (1)

…

(b) any parent or guardian of his;

…

(5) The court may not grant leave to a person falling within subsection (3)(b), (c) or (d) unless it is satisfied that there has been a significant change in circumstances since the making of the special guardianship order."

20. S.33 of the Children Act 1989, headed "Effect of care order", provides, so far as relevant to this case:

"(1) Where a care order is made with respect to a child it shall be the duty of the local authority designated by the order to receive the child into their care and to keep him in their care while the order remains on force.

…

(3) While a care order is in force with respect to a child, the local authority designated by the order shall

(a) have parental responsibility for the child; and

(b) have the power (subject to the following provisions of this section) to determine the extent to which

(i) a parent, guardian or special guardian of the child; or

(ii) a person who by virtue of section 4A has parental responsibility for the child

may meet his parental responsibility for him.

(4) The authority may not exercise the power in subsection (3)(b) unless they are satisfied that it is necessary to do so in order to safeguard or promote the child's welfare.

(5) Nothing in subsection (3)(b) shall prevent a person mentioned in that provision who has care of the child from doing what is reasonable in all the circumstances of the case for the purpose of safeguarding or promoting his welfare.

…."

21. Under s.39(1):

"A care order may be discharged on the application of

(a) any person who has parental responsibility for the child;

(b) the child himself; or

(c) the local authority designated by the order."

22. The provisions governing the impact of the making of Children Act orders on pre-existing orders under the Act are set out in s.91, headed "Effect and duration of orders etc". The following provisions are relevant or illustrative:

> "(1) The making of a child arrangements order with respect to the living arrangements of a child who is the subject of a care order discharges the care order.
>
> (1A) For the purposes of subsection (1), a child arrangements order is one made with respect to the living arrangements of a child if the arrangements regulated by the order consist of, or include, arrangements which relate to either or both of the following:
>
> (a) with whom the child is to live, and
>
> (b) when the child is to live with any person.
>
> (2) The making of a care order with respect to a child who is the subject of any section 8 order discharges that order.
>
> …
>
> (3) The making of a care order with respect to a child who is the subject of a supervision order discharges that other order.
>
> (4) The making of a care order with respect to a child who is a ward of court brings that wardship to an end.
>
> (5) The making of a care order with respect to a child who is the subject of a school attendance order made under section 437 of the Education Act 1996 discharges the school attendance order.
>
> (5A) The making of a special guardianship order with respect to a child who is the subject of
>
> (a) a care order; or
>
> (b) an order under section 34 [contact to a child in care]
>
> discharges that order."

Whilst the statute provides that the making of an SGO discharges a pre-existing care order, there is no provision for the making of a care order to discharge a pre-existing SGO, unlike a pre-existing s.8 order, supervision order, wardship order or school attendance order. If an SGO is not discharged, it remains in force until the child is 18: s.91(13).

23. Counsel were only able to identify one reported case in which an SGO and care order had been made at the same hearing - *Re A and B* [2010] EWHC 3824 (Fam). The short judgment of Hogg J contains only a summary of the decision and no analysis of the legal provisions. In contrast, we were referred to a number of authorities containing judicial observations which the appellant asserted demonstrated that the two orders

could not coexist. One example was in *Re S (A Child)* [2007] EWCA Civ 54, where Wall LJ at paragraph 11 said that an SGO in that case would:

> "give the carer clear responsibility for all aspects of caring for the child or young person, and for making the decisions to do with their upbringing. The child or young person will no longer be looked after by the council."

More recently, in *Re C (A Child) (Special Guardianship Order)* [2019] EWCA Civ 2281 at paragraph 69, Moylan LJ identified amongst the significant differences between an SGO and a child arrangements order that, under s.14C(1)(b):

> "the special guardians can exercise parental responsibility to the 'exclusion' of any other persons with parental responsibility".

24. The use and operation of SGOs has been the subject of much scrutiny and analysis in recent years, but counsel were unable to cite any reference in the various reports and research papers in which the coexistence of SGOs and care orders had been directly considered. We were referred, however, to the Best Practice Guidance published in June 2020 by the Public Law Working Group (chaired by Keehan J) and drafted jointly with the Family Justice Council, and in particular to paragraph 34 (to which Judge Sharpe referred in his main judgment):

> "The making of a supervision order alongside an SGO is a 'red flag' where this is a result of the assessment and the SGSP [Special Guardianship Support Plan] not being sufficiently clear, thorough or robust to give confidence that either the placement is in the welfare best interests of the child or the support plan will meet the needs of the placement. A proposal to make a supervision order is likely to signify a lack of confidence in the making of an SGO at that time and/or results from the inadequacy of the support and services provided for in the SGSP. The cases where it would be appropriate/necessary to make a supervision order alongside an SGO are likely, in our view, to be very small in number."

The judgments under appeal

25. In the main judgment, the judge started by setting out the reasons for making the care order and SGO at the hearing in April 2020:

> "3. That highly unusual combination of orders was considered necessary by me in order to meet the welfare needs of the children ….
>
> 4. The thinking behind the final arrangements for the children was straightforward:
>
> (a) The children had a good relationship with K and whilst aware that he was not a natural parent to them considered him to be the father in a social and psychological sense.
>
> (b) The Local Authority had assessed both parents during the course of proceedings and had ruled out the mother as a permanent future carer for the children.

(c) The assessment of K, whilst not being without its own problems, was more positive and provided sufficient optimism to the Local Authority to consider that he could care for the children with support.

(d) It was anticipated and expected that the long term position for the children was that K would be their permanent carer and would do so without the high level of support and involvement by the Local Authority which necessarily accompanies a care order.

(e) That long term position was not capable of being immediately implemented but the expectation was that it would be within a timescale that enabled it to be considered realistic as opposed to aspirational.

(f) Despite his anticipated position as primary carer for the children and the de facto relationship of parent in which they held him, K did not hold Parental Responsibility for the children and could not acquire it due to a particular combination of circumstances arising from the facts of the case:

(i) by reason of his not being either a natural parent or a current step-parent of the children he could not have a Parental Responsibility order made in his favour (see s.4(1), Children Act 1989);

(ii) he could not enter into a Parental Responsibility agreement for the same reason (see s.4(1)(b));

(iii) as a former step-parent, he could not have a Parental Responsibility order made in his favour (see s.4A(1));

(iv) no Child Arrangements order could be made because of the necessity for a care order and the inability of the two orders to co-exist (see s.9(1) and s.91(1) and (2)) and therefore the deeming provision set out in s.12(2) and (2A) could not apply.

(g) However, it was appropriate, even necessary, for K to hold parental responsibility for the children and he undoubtedly met the test for the conferment of such status, having more than demonstrated his commitment and attachment to the children."

26. The judge then set out the circumstances which had led to the removal of the children from K's care in June 2020 and to the subsequent agreement between all parties that they should not be returned. He noted that the change of plan caused a question to arise as to whether the SGO should be discharged. He described the issue as:

> "highly unusual and required a more nuanced approach than the [simple] application of a formula that the absence of caring responsibilities should inevitably result in the removal of the one order which created a direct connection in law between the children and the man they regarded as their father."

He identified the issues to be determined as (1) whether a SGO can be made in circumstances where it would coexist with a care order, and (2) if so, whether on the

facts of this case such a combination of orders was required to meet the children's welfare needs.

27. He then analysed the law, starting with the purpose behind the introduction of SGOs implemented by amendments to the Children Act in 2002:

> "23. There is no doubt that the purpose of the new order was not to be an adjunct to a care order. The [SGO] was intended to avoid the need to make a care order through either or both of two ways. Firstly, by enabling a child placed within the wider family to be supported to a degree sufficient for it to be a proper alternative to a local authority arranged and controlled placement under a care order. Secondly, by securing that wider family placement against subsequent interference by parents who had demonstrated their own inadequacy to provide appropriate care ….
>
> 24. The [SGO] achieved both aims with a combination of a Support Plan resourced by a local authority and enhanced parental responsibility to ringfence the role of the Special Guardian as primary carer against a parent.
>
> 25. The idea therefore that [SGOs] could, let alone should, work in tandem with care orders was antithetical to the purpose for which they were created."

28. The judge noted that the direct question whether SGOs and care orders could as a matter of law coexist had not been definitively answered by the superior courts. He concluded, however, that such an outcome was lawful. He interpreted the statutory provisions as not only allowing the possibility of the two orders co-existing but also recognising the possibility of that occurrence and its consequences. He set out the relevant provisions of the Children Act, including parts of sections 14D, 33, 34, and 91. He interpreted the provisions as indicating that it was anticipated that cases will occur where a special guardian remained an important person in the child's life after making the care order, although he acknowledged that the terms in which the statute was drafted meant that the only situation where the two orders can coexist is where the SGO preceded the making of the care order. He took into account guidance provided as to the ambit and effectiveness of SGOs, including recent guidance published by the Public Law Working Group in June 2020 which had raised a "red flag" against the combination of an SGO with a supervision order. He recognised that it followed that:

> "if a view is taken that such a combination of orders is considered unhelpful save in a very small number of cases that the same is even more true of a possible combination of an [SGO] with a Care order."

29. Having concluded that the two orders can coexist, the judge turned to consider whether they should in the circumstances of this case. He summarised the arguments on both sides as follows:

> "43. There are several clear and obvious arguments against the [SGOs] continuing:
>
> (a) The orders were made on the basis that K would be the primary carer for the children … and that situation not only never came to pass and as matters stand is highly unlikely to do so.

(b) The removal of the children was as a direct result of K evidencing an inability … to care for [them] ….

(c) The children are now … only spending time with him which can properly be described as contact sessions rather than for any periods which could even creatively be regarded as a temporary caring role.

(d) The mother is opposed to his continuing to hold parental responsibility over her children in a situation in which he has no need exercise the same.

(e) K is the person having least involvement of the adults and yet benefits from the 'enhanced' parental responsibility which accompanies a special guardian. He therefore would hold a disproportionate amount of influence in the event of the absence of the local authority.

44. Against those matters there are arguments in favour of the retention of the orders:

(a) To discharge the [SGOs] automatically relegates K in terms of his status of someone of importance in the lives of the children ….

(b) The removal of Special Guardianship status for K in this case will impact upon his ability to connect with the children in several ways:

(i) His ability to pursue contact outside of the care plan is made less easy by the requirement to first secure leave to make an application.

(ii) His right to attend LAC reviews might be impacted in the absence of being a person holding parental responsibility.

(iii) He would not be informed about events of significance which happen in respect of the children.

(iv) He would not be consulted about matters upon which the Local Authority is required to take the views of parents or those with parental responsibility.

(c) There is a risk that any recordings, indications or promises made by the local authority to maintain communication with K in respect of the children will operate less effectively as time passes [and] personnel change …. A diminution of direct involvement in the lives of the children may be an unintended but real consequence of a change of status.

(d) The concern in respect of a potential abuse of the power bestowed on a Special Guardian through their 'enhanced' parental responsibility can be met through a combination of s.14E(5) and s.33(3)(b)."

30. The judge concluded that the SGO should continue:

"46. My reasons for so concluding are these:

(a) There is in my view little danger of K being in any position to seek to dictate terms in relation to the care arrangements for the children given the existence of the care orders and therefore the primary position of control being with the local authority.

(b) One of the issues in the original care proceedings was the fact that the mother was considered to be the dominant character in the adults' relationship who was in no way dictated to by K. I … assume that the possibility that [she] will accept being dictated to by K as having a very low probability.

(c) There is a far greater chance that without the status conferred by [SGOs] the place that K holds in the lives of the children as perceived by the local authority will diminish and that this will begin to undermine his relationship with them or, more importantly, their opportunities to spend time with, engage with and otherwise communicate with him will lessen and corrode. The net result might be that the lives of the children move on but K does not travel with them, not through any lack of interest or commitment on his part but because those who are responsible for ensuring that children's relationships are maintained not only do not see him as being significant but positively see him as being insignificant because of the discharge of the [SGOs].

(d) The long-term future for the children in foster care only enhances the importance for the children of maintaining ties beyond the world of foster care as a reminder to them of family life and the continuation of relationships beyond their minority ….

(e) The parental responsibility which K will exercise can be limited by the imposition of conditions which effectively can 'level down' his position vis-à-vis the mother and by the local authority vis-à-vis each adult. Accordingly the mechanism exists to specifically prevent the outcome about which the mother is concerned.

(f) To retain [SGO] status for K is an indicator to these children that despite his absence from the day-to-day lives he considered them to be important and to wish to be involved in their activities and interests. Children separated from former carers … can derive benefit from understanding that their lives are not parametered only by the immediacy of those currently caring for them but they have on-going attachments with those committed to their welfare despite limitations of time and problems of lack of proximity.

47. To know that someone outside your immediate circle cares about you and is interested in you is never a bad thing for a child. That is the position for these children and to remove K from the status he currently enjoys may just send a message to them that he is someone once involved with them who has now gone. That is a message I think they would benefit from not receiving."

31. In his supplemental judgment, having considered the terms of s.11(7) of the Children Act and the limited case law on that provision, the judge stated that the purpose of the

condition he was proposing to attach to the SGO was to limit the exercise of parental responsibility in such a way as to reflect the fact that the children were in care and to ensure "relative parity" between K and the mother. He noted that independent and unilateral decision-making by K was unlikely unless he obtained information about the children. He therefore attached a single condition, which he described as "clear and workable", requiring K to inform the local authority and the mother in writing prior to seeking any information from third parties concerning the children while the care order remains in place. He then set out his reasons for attaching the condition, noting that it "enables both the local authority and the mother to be made aware in advance of any step he might consider taking with regard to the children", that it "complements the existing care orders and does not create a conflict between the operation of the two orders" and that it was "a proportionate response to the concerns raised by the mother".

Submissions

32. It was submitted by Ms Edmunds and Ms O'Neill on behalf of the appellant that the judge's interpretation of the Act as allowing for the coexistence of an SGO and a final care order was wrong. Such an interpretation was inconsistent with the purpose and nature of SGOs as explained in the case law, in particular the decisions of this Court in *Re S (A Child)* and *Re C (A Child) (Special Guardianship Order)* cited above, and as reiterated by the Public Law Working Group. It would be perverse for a court to conclude that an applicant for an SGO met the rigorous standards required in the Special Guardianship Regulations whilst at the same time concluding that the circumstances required the local authority to have parental responsibility under a care order. They submitted that the fact that the Children Act as amended does not provide for the automatic discharge of an SGO on the making of a care order is intended to prevent the immediate termination of a special guardian's parental responsibility on the making of an *interim* care order. It was never Parliament's intention to allow the coexistence of an SGO with a *final* care order. The fact that the judge had to engage in what Ms Edmunds and Ms O'Neill characterised as "legal gymnastics" to achieve its end – making the SGO first, thereby discharging the interim care order, and then making a fresh care order – further illustrated the perversity of this approach. They submitted that the effect of making the SGO was to bring the whole proceedings to an end and that there was no lawful basis, in counsel's words, to "re-enter the public arena" by making a final care order.

33. In the alternative, the appellant submitted that, if the Act did permit an SGO to coexist alongside a care order, the judge was wrong in this case to allow the SGO to remain in force. He failed to give sufficient consideration to the changes that had occurred since the order was made in April 2020 and the fact that the continuation of the SGO was no longer consistent with the arrangements on the ground. The children have not lived with K since July 2020 and all parties accept that they should not return to his care in future. The purpose of an SGO is to provide a secure permanent home for children and once that purpose has come to an end the order should not be retained as a vehicle for securing parental responsibility. In any event, the children's welfare did not require K to retain parental responsibility and the judge attached too much weight to the needs of K rather than those of the children. By allowing the SGO to continue, the judge was maintaining K in a position superior to that of the mother and would put her at a disadvantage, for example if she sought the discharge of the care orders. It was

submitted that this disadvantage was not removed by the condition imposed under s.11(7).

34. Ms Edmunds submitted that the judge was excessively concerned about the local authority's commitment to continue to consult K about the children. To the extent that it was appropriate to require the local authority to consult K, the solution did not lie in retaining the SGO which otherwise had no useful purpose. There were other options available which could have ensured that K continued to play a role in the children's lives which would have been more proportionate and would not have infringed the mother's Article 8 rights. Before the judge, the mother argued that the judge could have invoked the court's inherent jurisdiction and declared that the local authority should treat K as a "significant person" for the children. In the course of argument before us, Ms Edmunds suggested that it would have been open to the judge to have taken other steps to protect K's relationship with the children and his involvement in decisions about their lives, by making an order under s.34(2) defining his contact with the children and by inviting the local authority to give an assurance that it would treat him as a person coming within s.22(4)(d) whose wishes and feelings were relevant to decisions about the children. That course was not suggested to the judge but Ms Edmunds submitted that it would have reduced the risk identified at paragraph 46(c) of the judgment that "the place that K holds in the lives of the children as perceived by the local authority will diminish and that this will begin to undermine his relationship with them."

35. On behalf of K, Ms Deirdre Fottrell QC and Ms Celestine Greenwood submitted that K is unquestionably a person of particular importance for these children. They have regarded him as their father throughout their lives and lived with him until July 2020. For over a year, he was their sole carer. There was unquestionably a close and strong bond between them. K is devoted to the girls and extremely upset that he can no longer care for them. The judge regarded it as crucial that this relationship was maintained, and that K should remain a person of importance to the children. He was fully entitled to use the flexibility afforded by the Act to achieve that end.

36. Ms Fottrell and Ms Greenwood accepted that the circumstances in which a court would make coexisting care orders and SGOs must be limited. It was not part of their case that public law orders should be wrapped around an SGO as a matter of practice. It is clear from the statutory provisions, however, that there can be circumstances where a child is subject to both orders. In this case, Judge Sharpe was faced with a novel set of facts which called for a degree of judicial creativity in order to ensure that the best interests of the children were met. There is nothing in the statute or in case law which limits the making of an SGO to any given set of circumstances. Each case turns on its own facts, the key question being: which order will best serve the welfare of this child?

37. The judge carried out a careful consideration of the arguments for and against retaining the SGO. His analysis was based on welfare considerations, in particular the impact on the children's longer-term care and the consequences for them if K had no legal status. Although he is not at present the children's carer, it cannot be said with any certainty that he will not resume care at some point in the future. In the event that he were to resume care under the SGO at some point in the future, he would be entitled to support at a level which would not be available if he was not a special guardian. The importance to the children of allowing K to continue to be their "father" and be recognised as a parent now and in the future was central to the decision. That approach was both child-

centred and properly analysed and could not be said to be wrong. His approach to the imposition of a condition under s.11(7) properly addressed any issue of balance in respect of the mother's position in the children's lives.

38. Ms Fottrell and Ms Greenwood emphasised the care which must be taken when a court is considering a case involving a parent with learning difficulties. With sufficient support, such a parent can often provide good enough care and the concept of "parenting with support" must underpin the way in which the courts and professionals approach such cases: *Re D (A Child) (No.3)* [2016] EWFC 1. Ms Fottrell relied on a passage from a judgment of Gillen J in *Re G and A (Care Order: Freeing Order: Parents with a Learning Disability)* [2006] NI Fam 8, cited by Sir James Munby P at paragraph 164 of his judgment in *Re D*:

> "In particular judges must make absolutely certain that parents with learning difficulties are not at risk of having their parental responsibilities terminated on the basis of evidence that would not hold up against normal parents. Their competences must not be judged against stricter criteria or harsher standards than other parents. Courts must be acutely aware of the distinction between direct and indirect discrimination and how this might be relevant to the treatment of parents with learning difficulties in care proceedings."

Whatever K's legal position, it was clear that he and the children had an established family life which the court was under an obligation to promote and protect. That required an innovative approach consistent with the court's obligation to ensure compliance with Article 8 rights. It would not have been sufficient to amend the care plan to make express provision for involving K in the children's lives through contact and participation in decision-making. It was in the children's interests for K's status as special guardian to be maintained.

39. On behalf of the local authority, Ms Mallon echoed Ms Fottrell's submissions as to the interpretation of the statute, and as to the judge's analysis of the pros and cons of retaining the SGO. His decision that it was necessary and proportionate for the order to remain in force was within his discretion. He was entitled to conclude that the children's welfare would be better supported if K retained his status as special guardian.

40. On behalf of the children's guardian, Mr Senior submitted that the inclusion of the words "special guardian" in s.33(3)(b) (inserted as part of the amendments introducing the special guardianship provisions to the Children Act) was a further indication that the making of a care order does not automatically discharge an SGO. He reminded this Court that contemporary family jurisprudence has for some time been careful to consider the diverse ways in which families may be constituted and the resulting psychological benefits to a child. It was submitted that there was no good reason why a step-parent such as K should not be afforded the same consideration, and that it was arguably discriminatory not to do so. In that context, when faced with the changed circumstances in which K as the children's step-father was not for the foreseeable future likely to be in a position to resume primary care of the children, the judge carried out a careful analysis of the advantages and disadvantages of his continuing to enjoy parental responsibility and arrived at a conclusion that was proportionate and could not be challenged in this Court. The maintenance of K's parental responsibility was in the children's welfare interests. This provided a cogent and proportionate reason for continuing the SGO alongside the care order as permitted by the statute.

Discussion and conclusion

41. It could be argued that the appellant's first ground of appeal, in which it is asserted as a point of principle that an SGO can never coexist with a final care order, is really directed at the making of the SGO in April 2020, against which no appeal was launched, rather than the judge's decision to refuse to discharge the order in February 2021. Be that as it may, I am quite satisfied that as a matter of law the first ground of appeal is wrong. The careful drafting of the amendments to the Children Act 1989 by which special guardianship was introduced in 2001 clearly allow for an SGO to continue after the making of a care order, be it an interim care order under s.38 or a final care order under s.31. My reasons for reaching this conclusion are as follows.

42. First, the specific provisions of s.91 make it crystal clear that an SGO is not automatically discharged by the making of a care order. Given the care with which that section is drafted, it is obvious that, had Parliament intended that an SGO would be discharged by the making of a final care order, it would have said so in express terms.

43. Secondly, the provisions in s.33 governing the effect of a care order would make no sense if an SGO was automatically discharged by the making of a care order. Under s.33(3)(b)(i), as amended in 2002, when a care order is in force the local authority has the power to determine the extent to which "a parent, guardian or special guardian … may exercise his parental responsibility" for the child. The words "special guardian" were inserted into this subsection in 2002 when the statutory provisions governing special guardianship were introduced. The fact that Parliament amended s.33(3)(b) of the Children Act so as to include the words "special guardian" confirms that it intended that an SGO could continue after the making of a care order. This interpretation is reinforced by the terms of s.33(4) which prevents a local authority from determining the extent to which the special guardian may meet his parental responsibility for the child save where "satisfied that it is necessary to do so in order to safeguard or promote the child's welfare".

44. Thirdly, the provisions in s.14D governing the discharge of an SGO would make no sense if an SGO was automatically discharged by the making of a care order. Where the circumstances are appropriate, a local authority "designated in a care order" with respect to the child may apply without leave for discharge of the SGO under s.14D(1)(f). Since a local authority is only entitled to apply for the discharge of the SGO if it is designated in a care order, and since the making of an SGO discharges any pre-existing care order, the clear implication of s.14D(1)(f) is that, where a care order comes into force, any existing SGO with respect to the child remains in force until discharged under s.14D.

45. The rationale for these provisions is plain. In some circumstances it will be appropriate for an SGO to be discharged on the making of a care order, in other circumstances not. Where an SGO has been in force for several years, the special guardians will usually have established a close relationship with the child. They may be the only persons with parental responsibility. In such circumstances, it would in all probability be wrong for the SGO to be discharged upon making a care order. Where, however, the SGO has only been in force for a short period, and the role of the special guardians in the child's life has not been established, it may be appropriate for the SGO to be discharged. Everything turns on the circumstances of the case and the welfare of the child.

46. It seems to me, however, that there is a more fundamental principle involved here. The purpose of an SGO is not merely to provide a stable and secure home. The passage in *The Children Act 1989 Guidance and Regulations Volume 2: care planning, placement and case review* cited by Peter Jackson LJ in *Re M (Special Guardianship Order: Leave to Apply to Discharge)* defines the objective of "permanence" in broad terms:

> "The objective of planning for permanence is … to ensure that children have a secure, stable and loving family to support them through childhood and beyond and to give them a sense of security, continuity, commitment, identity and belonging."

Like adoption, special guardianship is a relationship which provides long-term support for the child. There is no reason for "the sense of security, continuity, commitment, identity and belonging" to come to an end when the child moves away. On the contrary, the purpose and intention is that it will survive "through childhood and beyond". It would be contrary to the purpose of special guardianship for it to come to an end automatically upon the making of a care order.

47. I do not read any of the judicial observations cited on behalf of the mother as supporting the proposition that the two orders cannot as a matter of law coexist. The "exclusivity" of the exercise of parental responsibility granted to a special guardian by s.14C(1)(b) referred to by Moylan J in *Re C*, supra, is expressed as being "subject to any other order in force with respect to the child under this Act". A pre-existing care order will not be "in force" under the Act because under s.91(5A) it will have been automatically discharged by the making of the SGO but there is nothing in the statute to prevent a care order being made after the making of the SGO. It is important to note that the exclusivity granted by s.14C(1)(b) is as to the *exercise* of parental responsibility, not to the entitlement to parental responsibility. It is plain from other subsections in s.14C that other persons may hold parental responsibility notwithstanding the making of an SGO, even if their right to exercise it is precluded by s.14C(1)(b).

48. There is nothing in the Act to support the interpretation advanced by Ms Edmunds and Ms O'Neill that an SGO can coexist with an interim care order but not a final care order. Under s.31(11), except where express provision to the contrary is made, the phrase "a care order" in the Act includes an interim care order. The provisions of the Act under consideration in this case contain no such express provision. It is plainly easier to envisage circumstances in which an SGO will be in existence alongside an interim care order than circumstances in which an SGO will continue after the making of a final care order. Where care proceedings are started in respect of a child who is subject to an SGO, particularly where the SGO has been in existence for some time, it is unlikely that the SGO will be discharged at the outset of the proceedings. Instead it is more likely that it will continue alongside an interim care order until the proceedings reach or move closer to a conclusion. At that point, if a final care order is made, the SGO will in some cases be discharged. But there is nothing in the wording of the Act to *require* it to be discharged. The range of circumstances that arise in proceedings under the Act is so wide that it would be wholly wrong to adopt an interpretation of the statute that deprives the court of a flexibility that the circumstances may require. S.1(3)(g) and (4)(b) require any court considering whether to make, vary or discharge an SGO or a care order to have regard to "the range of powers available to the court under the Act in the proceedings in question". It is not for this Court to impose a restriction on the range of powers provided by Parliament.

49. I do not accept the submission that the making of the SGO on 20 April automatically brought the whole proceedings to an end and that there was no lawful basis to "re-enter the public arena" by making the care order. In any event, if that submission was correct, it would follow that the care order was nugatory, not the SGO. The submission provides no support for the appeal against the judge's refusal to discharge the SGO in February 2021.

50. The view of the Public Law Working Group and the Family Justice Council is that the cases where it will be appropriate or necessary to make a supervision order alongside an SGO are likely to be very small in number. Similarly, the circumstances in which a court concludes that a care order should be made alongside an SGO are likely to be rare. The most straightforward solution will normally be to make care orders on the basis of a plan that they will be replaced by an SGO at a later date if all goes well. I am, however, not inclined to say that an SGO can never be made alongside a care order. Given the complexity and gravity of cases that come before the family courts, it would not be right to deprive judges of an option which Parliament has made available through its carefully drafted provisions. In any event, as I have already noted, we are not concerned with an appeal against the *making* of the special guardianship order in April 2020 but rather the refusal to discharge it in February 2021.

51. It follows that I reject the first ground of appeal. A judge sitting in the family court does have jurisdiction to allow care orders and SGOs to coexist, although the circumstances in which this is will arise are likely to be rare. The more difficult question in this case is whether the judge was wrong to refuse to discharge the order in the circumstances of this case.

52. This is not a case where the SGO had been in place for years before the placement broke down. Rather, the children were taken into care only a few weeks after the SGO was made. On the other hand, the relationship underpinning the SGO had been in existence for much longer. This was not a case where the children had been removed from their primary carer and placed with extended family under an SGO. Rather it was a case where an SGO was made in favour of someone who had been involved in their care throughout their lives and the primary carer for over a year. K is unquestionably a person of particular importance for these children. They have always regarded him as their father. There was a close and strong bond between them. The judge regarded it as crucial that this relationship was maintained, and that K should remain a person of importance to the children. He concluded that it was necessary for these children going into long term foster care at the age of 10 to maintain ties as a reminder of family life and the continuation of relationships beyond their minority. By allowing K to retain his status as special guardian, the court would be indicating to the children that, despite his absence from their day-to-day lives, he considered them to be important and wants to be involved in their lives. In other words, he was seeking to enhance the children's "sense of security, continuity, commitment, identity and belonging".

53. In reaching this conclusion, the judge was drawing on his extensive experience of this case and his understanding of the particular circumstances of this family. He explained the reasons for his decision in a clear and comprehensive terms, identifying and balancing arguments on both sides. Nonetheless, the unavoidable fact is that, had the placement broken down only a few weeks earlier, the SGO would never have been made. K would have remained a person of great importance for the children but would not have been granted parental responsibility. In those circumstances, other ways would

in all probability have been found to preserve his relationship with the children and his involvement in decisions about their future.

54. The arguments advanced before the judge about the options for preserving this relationship and involvement were different from those which emerged in the course of the hearing before this Court. At first instance, counsel for the mother argued that the judge could have invoked the court's inherent jurisdiction and declared that the local authority should treat K as a "significant person" for the children. That argument was not considered in the judgment, but in any event, it has no merit because to adopt such a course would have been an impermissible use of the inherent jurisdiction. "The courts are not empowered to intervene in the way local authorities discharge their parental responsibilities under final care orders " (per Lord Nicholls of Birkenhead in *Re S (Minors) (Care Order: Implementation of Care Plan), Re W (Minors) Care Order: Adequacy of Care Plan* [2002] UKHL 10 at paragraph 42). The alternative option which emerged in the course of the appeal hearing, however, has greater merit.

55. The judge identified at paragraph 44(c) of his judgment that, if the SGO was discharged, there was:

> "a risk that any recordings, indications or promises made by the local authority to maintain communication with K in respect of the children will operate less effectively as time passes [and] personnel change …."

His conclusion at paragraph 46 was based in part on his perception that:

> "there is a far greater chance that without the status conferred by SGOs the place that K holds in the lives of the children as perceived by the local authority will diminish and that this will begin to undermine his relationship with them or, more importantly, their opportunities to spend time with, engage with and otherwise communicate with him will lessen and corrode"

and that :

> "those who are responsible for ensuring that children's relationships are maintained not only do not see him as being significant but positively see him as being insignificant because of the discharge of the SGOs."

Before us, however, all parties accepted that, in reaching this conclusion, the judge did not have his attention drawn to the option which emerged in the course of the appeal hearing. It would have been open to the court to make an order under s.34(2) of the Act requiring the local authority to arrange contact between the children and K and, if necessary, defining the arrangements for contact. Furthermore, it would have been open to the judge to have invited the local authority to amend its care plan to include an express provision that K was a person falling within the category identified in s.22(4) of the Act whose wishes and feelings it considered to be relevant when making decisions about all matters concerning the children's future.

56. There is no reason why a carefully drafted care plan should not include additional provisions to ensure that K remained a central figure in the children's lives. Indeed, there is every reason why it should. The plan could expressly provide that he should be invited to attend all LAC reviews, that he must be informed about all events of

significance happening to the children, and that he, alongside the mother, should be consulted about all matters upon which the local authority is required to take the views of parents and those with parental responsibility. It could expressly state that the removal of K's special guardian status must not lead to any diminution in his direct involvement in the children's lives.

57. These measures would remove many of the disadvantages which K would suffer if the SGO was discharged. It is true that, under s.39(1), without parental responsibility he could not apply directly for the discharge of the care order. In those circumstances, if the local authority failed to adhere to the care plan, his only legal remedy might be to seek permission to apply for judicial review. It is possible, however, that he might be able to achieve the discharge of the care order by applying for a child arrangements order which, if made with respect to the children's living arrangements, would discharge the care order under s.91(1). Whether he could make such an application would depend on the provisions of ss.9 and 10 of the Act which were not considered in the course of the hearing before us. Even if he could make such an application, there would no doubt be issues about the availability of public funding and wider issues of access to justice, which might be particularly acute given K's personal circumstances.

58. Nevertheless, a well drafted and detailed care plan could have provided substantial protection for K's relationship with the children and involvement in decisions about their future. In the appeal hearing, the local authority (who were, of course, opposing the discharge of the SGO) accepted that K was a person of importance in the children's lives who should be involved in making decisions about their future. That had not, however, been the local authority's position at the time the children were removed from his care. On 1 July 2020, as mentioned above, the local authority filed the statement from the social worker stating:

> "K no longer requires parental responsibility as the children will not be in his care, and I do not envisage a situation where we would have to consult K for his view regarding decisions regarding the girls' general care."

59. At the hearing before us, it was unclear whether, and if so at what point, the local authority changed its mind about the need to consult K about the children's care. None of the bundles filed in connection with this appeal included any care plans for the children nor any reports for or minutes of review meetings. At the hearing we asked the local authority to file those documents and subsequently received copies of care plans and review reports including care plans dated 3 July 2020, 14 October 2020 and 10 March 2021 (the last post-dating the appeal hearing) and looked after children review reports dated 3 July 2020 and 14 October 2021. It is important to record that these documents were prepared, and the meetings to which they relate took place, during the Covid-19 pandemic at a time when social work practice has been significantly compromised. It should also be noted that we have neither sought nor received any submissions about any of these documents. I am unclear whether any of them were seen by the judge and if so at what stage in the proceedings. With those caveats in mind, I record that the care plans were drafted on a standard form in the briefest of terms which were, to my mind, wholly inadequate. If the judge saw them, it is unsurprising that he reached the conclusion in the judgment as to the risks to K's involvement were the SGO to be discharged. Although the review minutes recorded that K had been consulted about the children, in none of the plans dating from July and October 2020 was there any record of his views, nor of any arrangements for his continued participation in

decisions about their lives. In contrast, the plans dated 10 March 2021, produced after the hearing at which this Court inquired about whether he would be consulted, asserted that he, along with the mother, "will continue to be consulted as part of the review process and invited to meetings".

60. It could therefore be said that the judge was not wrong to arrive at his decision to refuse to discharge the SGO on the material and arguments put before him. On the other hand, in these very unusual circumstances, I am uneasy about allowing a decision to stand which has very considerable consequences but which was arrived at after an unsatisfactory process without full consideration of the options. There was no formal application before the judge to discharge the SGO. Having initially proposed that it be discharged, the local authority and children's guardian had changed their minds, leaving the mother arguing for that course alone. Unlike the local authority, the mother required the court's leave before making such an application. In all probability she would have met the requirements for obtaining leave under s.14D(5) (as now explained by this Court in *Re M (Special Guardianship Order: Leave to Apply to Discharge)*, supra), but the fact is that she did not have leave at the date of the hearing on 30 November 2020 and the judge therefore decided to proceed by "regard[ing] the matter as being one which fell within s.14D(2)". After the judge decided not to discharge the SGO, the order drawn on 12 February 2021 was completely silent about the issue. Thus, the mother is trying to overturn a decision by the court not to exercise its power to make an order, a decision which was based on an incomplete analysis of the options and not recorded in the order drawn following the hearing.

61. As I have already mentioned, the judgment itself is clear, well-structured and coherent. But my concerns about the process by which the decision was reached, and the fact that it was based on an incomplete analysis, have persuaded me that the decision should not stand and must be set aside. The welfare checklist in s.1(3)(g) requires a court considering an application to discharge an SGO to have regard to the range of powers available under the Act. In this case, I do not consider that the judge had full regard to the range of powers available to address the issues before him.

62. I therefore conclude that the appeal should be allowed on the second ground and the matter remitted to Judge Sharpe for rehearing. I would propose that the mother should, if so advised, file an application seeking leave to apply to discharge the SGO and that the application be listed for a case management hearing at which the judge can give appropriate directions for the filing of evidence and a fully detailed care plan in which K's future role can be comprehensively described.

63. For my part, in reaching this conclusion, I am not indicating to the judge what his ultimate order should be. There may be considerable force in the arguments summarised in his judgment for allowing the SGO to continue. At the same time, when contemplating making what would be a highly unusual combination of orders, it is incumbent on the court to consider whether the result can be substantially achieved by more orthodox means. In these circumstances such a decision should only be made after full consideration of all relevant arguments and issues.

64. Having reached that conclusion, it is unnecessary to consider the third ground of appeal in any detail. Under s.14C(1)(b), a special guardian is entitled to exercise parental responsibility to the exclusion of any other person with parental responsibility, but only "subject to any other order in force with respect to the child" under the Act, including

a care order. Under s.33(3)(b)(i), the local authority has the power to determine the extent to which a parent or special guardian may exercise parental responsibility, provided it is satisfied it is necessary to do so to safeguard or promote the child's welfare. The consequence is that, once a care order is made, a special guardian's power to exercise exclusive parental responsibility is overridden by the local authority's power to determine the extent to which any person holding parental responsibility may exercise it. The judge considered that the condition imposed under s.11(7) would achieve "relative parity" between K and the mother. I see no reason to disagree with that analysis and would therefore have dismissed the third ground of appeal.

65. On the basis set out above, however, I conclude that the appeal succeeds on the second ground. If my Lord and my Lady agree, the question whether to discharge the SGO should now be remitted to the judge for reconsideration.

LADY JUSTICE ELISABETH LAING

66. I agree.

LORD JUSTICE PETER JACKSON

67. I also agree.