Neutral Citation Number: [2021] EWCA Civ 442

Case No: B4/2020/2052

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE OXFORD COMBINED COURT CENTRE
Her Honour Judge Vincent
OX20P00090

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26 March 2021

Before :

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

- -

Re M (Special Guardianship Order: Leave to Apply to Discharge)

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- -

Ruth Cabeza for the **Appellant Mother** (by Direct Access)
Jennifer Kotilaine (instructed by **Boardman, Hawkins & Osborne LLP**) for the **Respondent Grandparents**

Hearing date : 4 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 at 10:30am on Friday, 26 March 2021.

Lord Justice Peter Jackson:

Introduction

1. This appeal is about the test for granting leave to apply to discharge a special guardianship order ('SGO'). That turns on the construction of section 14D (5) of the Children Act 1989 ('the 1989 Act') in the context of an appreciation of the nature and effect of SGOs. The appeal also concerns the circumstances in which an application for a Child Arrangements Order ('CAO') can be summarily dismissed.

2. The proceedings concern C, a boy who is now aged 9. His mother, the Appellant, is in her late 20s. His father has never been on the scene. The mother's parents divorced during her teenage years and in 2007 she left home. She then experienced serious problems with her mental health and over the years she had hospital admissions and various forms of treatment. In October 2016, following a breakdown in his mother's health, C (then 4½) moved to live with his maternal grandmother and her partner ('the grandparents'), who live a seven minute walk from the home the mother shares with her partner, Mr D.

3. The local authority took care proceedings. Its parenting assessment concluded that the mother could meet most of C's needs when well, but that her recurrent ill health meant that she was unable to care for him adequately overall. Other family members had stepped in to look after him or to provide support in the home. C had experienced frightening situations, and had become persistently anxious about his mother's wellbeing. The mother's relationship with Mr D was fairly new and the local authority identified serious deficits in his parenting. Concern was also felt about the behaviour of his own young son towards C when that child had visited.

4. The mother was assessed by a consultant psychiatrist, Dr Ratnam, as having an Emotionally Unstable Personality Disorder and as needing long-term therapy. It was suggested that she work with the Complex Needs Service over 12-18 months to assist her in managing her condition. However, at the time of the assessment in May 2017, the mother did not recognise the need for a referral.

5. The care proceedings ended in July 2017 with the threshold being carefully defined in these terms:

> "**Mother's mental health/neglect/emotional harm**
>
> 1. The Mother is diagnosed as having an emotionally unstable personality disorder and has a long history of emotional deregulation, self-harm and depression. C is at risk of, neglect and emotional harm due to his mother's inability to meet his needs when she is unwell. C reports feelings of anxiety about his mother and that she might need to go to hospital again. The mother understands that this was as a result of her previously being admitted to hospital as a result of an asthma attack.
>
> 2. The Mother reports auditory hallucinations telling her to self-harm and to harm her partner and C. She reports complying

with the directions to self-harm but not those relating to C or Mr D. The mother has self-harmed including:

(i) In September 2015 the mother drank three bottles of Calpol and consumed alcohol. C was not in her care at this time and she sought medical support the following day.

(ii) In May 2016 the mother took 15 Venlafaxine (antidepressant) and got into bed with C while at the Maternal Grandmother's home. She sought medical help the following day.

(iii) On 24th October 2016, at home, the mother burned herself using a cigarette lighter while C was in her sole care. She sought medical help the following day.

(iv) On 12th November 2016 the mother took 32 paracetamol in the lunchbreak at day hospital. She informed staff 1.5 hours after her overdose.

C is at risk of neglect, emotional and physical harm through exposure to such episodes.

3. At times the mother has engaged well and accepted advice and support. At other times when she has suffered mental ill health she has not been in a position to meet C's needs fully and has relied on her family members to support her."

6. The outcome was that an SGO was made in the grandparents' favour without opposition. It was accompanied by a written agreement, signed by the grandparents, the mother and Mr D, and approved by the local authority and the court. The agreement, which describes itself as "underpinning" the SGO, spelled out how decisions for C would be taken and how information would be exchanged. It provided for the mother to have contact of up to five hours twice a week, supervised by the grandparents, extending in due course to staying contact at the grandparents' home once a month. For a "settling in period" of three months, C was not to have contact with Mr D and his son except for monthly Skype contact, but after that the expectation was that they would also have contact. The local authority agreed to fund mediation.

These proceedings

7. In February 2020, the mother applied for leave to make an application to discharge the SGO with a view to C returning to her care. In July 2020 she also applied for a child arrangements order for C to spend time with her while the proceedings continued, or in the longer term.

8. The parties filed statements. The mother stated that since 2017, her mental health had greatly improved and that her mood has been stable, without relapses or further

episodes of self-harm. By the end of the care proceedings she had signed up to the Complex Needs Service and described it as life-transforming. She had also completed a course in Mentalisation-Based Therapy and attends another support group. She takes her medication regularly and maintains supportive contact with her GP. Since September 2017 she has had responsible employment as a team coordinator for an autism service. Mediation has not been successful and the grandparents have hindered contact, which the mother describes as rigid, inflexible and minimal. C is unhappy and should be returned to her care. Her relationship with Mr D continues and they plan to marry.

9. The grandparents acknowledged the improvements in the mother's mental health but believe that they are insufficient to enable her to care for C. They stated that it would not be in his interests to have a change of care and it would be traumatic for him to return to the home from which he was removed. Mr D is not a good parenting model. C is settled, happy and broadly doing well, but it has not been easy. The impact of his early life experiences is still very significant and it does not help that his mother has not accepted this should be his permanent placement, and that she gives him mixed messages and causes him to feel unsettled. In addition, some family members have taken the mother's side. Contact may have to be further reduced for C's sake.

10. A report was commissioned from the local authority and provided in June 2020. This describes the position in impartial terms, referring to the degree of involvement that the grandparents and the mother have had with local authority and other services, and their different perspectives. The difficulties include the fact that it has not been possible to complete Life Story work with C because of the distress that it causes him. He is on the SEND register. He finds school difficult and was referred to CAMHS. The social worker concluded that C is struggling with managing his emotions. Life Story work should be completed. C needs to be reassured about his long-term living arrangements and they need to be supported by the family members. In conclusion, it was stated that:

> "A Special Guardianship Order was made for C as the courts identified the care he was receiving was not adequate and was neglectful. There were concerns for [the mother]'s mental health and treatment history showed clear periods of being very unwell, getting better, being discharged, self-harming, hospital admissions, renewed engagement with services, getting better and then a decline in her health. These cycles created instability for C. Therefore, to ensure C had permanency and stability he was placed in the long-term care of his Grandmother. Careful consideration and a thorough assessment would need to be completed to consider [the mother]'s application to revoke the Special Guardianship Order and whether this would be in C's best interests.
>
> I am unable to make recommendations about how C is doing in his current placement… or recommendations in respect of the Special Guardianship Order or contact arrangements as there has not been a recent assessment to inform my view."

11. The mother's applications came before Her Honour Judge Vincent ('the Judge') on 24 August 2020. The mother appeared in person with a McKenzie Friend, Ms Crystal

Lowe, and the grandparents (whose legal costs are met by the local authority) were represented by counsel, Ms Jennifer Kotilaine. Having heard submissions and considered the evidence from the 2017 proceedings and the present proceedings, the Judge delivered a written judgment later the same day. She refused leave to the mother to apply for the discharge of the SGO and she dismissed the application for contact.

12. Then mother promptly sought permission to appeal, which was granted by Judd J on 12 November 2020, when she transferred the appeal to this court under rule 30.13 of the Family Procedure Rules 2010. We heard the appeal on 4 March 2021 and reserved our decision.

13. I shall first consider the law as it concerns applications to discharge SGOs and the summary disposal of applications for CAOs. I will then describe the Judge's reasoning and state my conclusion in relation to the appeal.

Special Guardianship

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."

1. 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.

19. Special guardianship is therefore one way of ensuring that a child grows up in a loving family with a sense of security, continuity and belonging. A much fuller early account of its origins and nature and of the legislative scheme can be found in the judgment of Wall LJ in *Re S (Adoption Order or Special Guardianship Order)* [2007] EWCA Civ 54; [2007] 1 FLR 819.

20. More recently, no doubt due its prevalence, a great deal of attention has been paid to special guardianship. In 2015 the Government carried out a review. Its consultation response in December 2015 (DFE-00309-2015) identified a significant minority of cases where there were difficulties involving poor quality assessments of prospective special guardians, potentially risky placements being made alongside a supervision order, and inadequate support for special guardians. Amendments to primary and secondary legislation have followed, but there is a perception that the problems have not yet been resolved: see the report of the Public Law Working Group in June 2020.

21. After this brief overview, I turn to the discharge of SGOs and to parental contact.

Variation and discharge of SGOs

22. Section 14D of the 1989 Act concerns the manner in which SGOs, unlike adoption orders, can be varied or discharged:

> "**14D Special guardianship orders: variation and discharge**

(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 concerned;

(c) any individual who is named in a child arrangements order as a person with whom the child is to live;

(d) any individual not falling within any of paragraphs (a) to (c) who has, or immediately before the making of the special guardianship order had, parental responsibility for the child;

(e) the child himself; or

(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)—

(a) the child;

(b) any parent or guardian of his;

(c) any step-parent of his who has acquired, and has not lost, parental responsibility for him by virtue of section 4A;

(d) any individual falling within subsection (1)(d) who immediately before the making of the special guardianship order had, but no longer has, parental responsibility for him.

(4) Where the person applying for leave to make an application under subsection (1) is the child, the court may only grant leave if it is satisfied that he has sufficient understanding to make the proposed application under subsection (1).

(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."

2. Accordingly, a parent seeking to discharge an SGO requires the leave of the court under ss. (3) (b), which can only be given if the court is satisfied under ss. (5) that there has been a significant change in circumstances since the making of the order. Ss. (2) also allows the court hearing family proceedings about a child to vary or discharge an SGO on its own initiative.

23. The condition in s. 14D (5) (introduced into the 1989 Act by the 2002 Act) calls to mind the somewhat analogous leave provisions in the later Act in relation to applications to revoke a placement order (s. 24 (3)) or to oppose the making of an adoption order (s. 47 (5)), both of which require *"a change in circumstances"*. In *Re G (Special Guardianship Order)* [2010] EWCA Civ 300; [2010] 2 FLR 696 at [13]), it was said that, when considering an application for leave to apply to discharge an SGO, the court should follow the two-stage approach applicable to applications for leave to revoke a placement order set out in *M v Warwickshire County Council* [2007] EWCA Civ 1084; [2008] 1 FLR 1093 at [29]. That case established that a change in circumstances is necessary but not sufficient for leave to be granted and that, if there has been a change in circumstances, the court has to make an evaluation in which the welfare of the child and the prospects of success should both be weighed.

24. A question arises as to correct interpretation of s 14D (5), which provides that leave may not be granted to a parent unless there has been a *significant* change of circumstances since the making of the SGO. That was considered by Ward LJ and Wilson LJ in *Re G* (above) in a somewhat unusual situation. A judge had refused to grant leave to apply to discharge a SGO. He accepted that there had been change, but not that it had been significant change, and he applied the checklist of factors in s. 10 (9) of the 1989 Act, which ostensibly relates only to an application for leave to apply for a s. 8 order. Before the appeal was heard, the parties agreed that leave should be granted and the appeal was allowed by consent. Because of the legal issues, Wilson LJ gave a judgment, with which Ward LJ agreed. It was prefaced in this way:

> "1. … The remarks which I will make in this short judgment must be considered in the light of the absence of adversarial argument; but possibly they will be of some use to family judges and practitioners on an interim basis pending a more satisfactory examination, at whatever level of court, of the issues raised."

3. and later:

> "14. I suggest that, until the emergence of more robust jurisprudence in relation to the proper approach to the determination of applications for leave to apply for the discharge (or variation) of special guardianship orders, the approach should be that commended in the *Warwickshire* case."

25. I agree that the two-stage approach taken in *Warwickshire* is the appropriate structure for a decision about granting leave under s. 14D (5).

26. In relation to the first stage, there has been some debate about the exact nature of the change in circumstances required by s. 14D (5). Wilson LJ considered this in *Re G* at [12]:

> "… In the absence of full argument I am perplexed as to why, in relation to an application for leave to apply for revocation of a placement order, Parliament should there have required that the court should be satisfied of 'a change' in circumstances, whereas, in relation to an application for leave to apply for discharge of a special guardianship order, Parliament, by s 14D(5) of the Act of 1989, has required the court to be satisfied that there has been 'a significant change' in circumstances. Important though it is to ascribe a value to every word favoured by Parliament, I cannot think that, by s 24(3) of the Act of 2002, it was requiring proof only of an insignificant change in circumstances, whereas, in its insertion, by s 115 of the same Act, of s 14D(5) into the Act of 1989, it was requiring something different. On a more appropriate occasion we may have to consider whether there is indeed any significance in the absence of the word 'significant' in s 24(3) or whether the difference in the language is immaterial and possibly even the product of poor drafting under pressure. For the time being I proceed upon the basis that there is no relevant difference between the reference in s 24(3) to 'a change' in circumstances and the reference in s 14D(5) to 'a significant change' in circumstances. If, then, we have for practical purposes identical language, my view is that we should adopt an identical approach; and thus that, to the extent that in *M v Warwickshire County Council* [2007] EWCA Civ 1084, [2008] 1 WLR 991, [2008] 1 FLR 1093, this court gave guidance as to the approach to an application for leave to apply for revocation of a placement order, it should apply similarly to an application for leave to apply for the discharge of a special guardianship order. Indeed in *Re A; Coventry County Council v CC and A* [2007] EWCA Civ 1383, [2008] 1 FLR 959, this court – again in an attempt to keep things as simple as possible – suggested, at [10], that the factors relevant to the exercise of the discretion under s 24(3) of the Act of 2002, as identified in the Warwickshire case, were identical to those relevant to the exercise of the discretion whether to grant leave to apply for an adoption order under s 42(6) of the Act of 2002."

27. In this case we have had the benefit of full and thoughtful argument from Ms Ruth Cabeza for the mother and from Ms Kotilaine on the question of whether the qualifier 'significant' adds anything. They were in broad agreement that it does, and I am sure that they are right. Rather than being an error of drafting, it is coherent with the statutory scheme for the drafter to have set out to buttress an SGO from challenge by requiring any change in circumstances to be significant. There is no reason why the test should be the same across SGOs, placement orders and adoption orders. An application relating to an SGO is an attempt to disturb what is intended to be a long-term status, while the other applications concern impermanent situations were a child has not yet been placed or adopted, as the case may be. Moreover, the drafting of the two Acts shows that the word 'significant' has real meaning in this area of the law. In the welfare checklists in s. 1 of both Acts, the reference is to harm, while in the threshold condition in the 1989 Act it is to significant harm. In our context, the fact that change

is not described as significant does not mean (*pace* Wilson LJ) that it is insignificant. As a matter of ordinary language, change can be described as significant or insignificant, or it can just be described as change. The absence of an adjective does not imply the presence of its opposite – a person who is not described as happy cannot be assumed to be unhappy.

28. I therefore conclude that the requirement under s. 14D (5) for a change in circumstances to be significant means what it says and, to this extent only, I would not follow the provisional reasoning in *Re G*. If more is needed, 'significant' in the context of the s. 31 threshold condition means 'considerable, noteworthy or important', according to the dictionary definition cited in the Guidance when the 1989 Act first came into force (*The Children Act 1989: Guidance and Regulations (Volume 1, Court Orders)* (HMSO 1991)), as approved by Baroness Hale in *Re B (Care Proceedings: Appeal)* [2013] UKSC 33; [2013] 2 FLR 1075 at [185]. As Ms Cabeza says, it does not mean trivial or unimportant, and neither does it mean exceptional, immense, or insurmountable.

29. Turning to the second stage, what has to be shown in a case under s. 24 (3) is broadly "a real prospect" of success: see *Warwickshire* at [29]. In my view, the same approach should be taken in a case under s. 14D (5). Likewise, echoing relevant elements of the guidance given in the adoption context in *Re B-S (Adoption: Application of s. 47(5))* [2013] EWCA Civ 1146; [2014] 1 FLR 1035 at [74], the degree of any change in circumstances is likely to be intertwined with the prospects of success, and the greater the prospects of success, the more cogent the welfare arguments must be if leave is to be refused.

30. Further, following the approach taken under s. 24 (3) in *Warwickshire*, the welfare of the child is an important, but not paramount factor at the second stage (For no obvious good reason, the position is different under s. 47 (5): see *Re P (Adoption: Leave Provisions*) [2007] EWCA Civ 616); [2007] 2 FLR 1069 at [26] and [35].) It must be remembered that at this stage the assessment concerns the effect on the child's welfare of the application to discharge the SGO being heard or not heard: the question of whether it is in the child's interests for the SGO to be discharged only arises if leave is granted, at which point welfare is undoubtedly paramount.

31. Lastly, I agree with Wilson LJ in *Re G* that s. 10 (9) of the 1989 Act does not formally apply to an application under s. 14D (5), and that it is not helpful to use it by analogy. The sub-section reads:

> "(9) Where the person applying for leave to make an application for a section 8 order is not the child concerned, the court shall, in deciding whether or not to grant leave, have particular regard to—
>
> (a) the nature of the proposed application for the section 8 order;
>
> (b) the applicant's connection with the child;
>
> (c) any risk there might be of that proposed application disrupting the child's life to such an extent that he would be harmed by it; and

(d) where the child is being looked after by a local authority—

(i)the authority's plans for the child's future; and

(ii)the wishes and feelings of the child's parents."

4. This provision is not used when considering applications under s. 24 (3) or s. 47 (5) of the 2002 Act and it does not comfortably sit alongside s. 14D (5) either. Factor (a) is irrelevant unless it includes taking a view of the prospects of success, which must be done anyway. Factor (d) is by definition inapplicable where there is an SGO. Factors (b) and (c) are obviously matters that would be considered, but even then there is a danger that the requirement for disruption to be so extensive as to be harmful may skew what ought to be a broad evaluation of welfare and prospects of success.

32. The power conferred by s. 14D (5) is to be exercised firmly within the context of the overall statutory scheme governing SGOs. As Ms Kotilaine puts it, the door to reunification of children with their parents is not locked under an SGO, as it is when an adoption order is made, but the intention of the legislation is that the door will remain closed unless the court allows it to be opened to the extent of granting leave for a discharge application to be made. The parties skirmished about whether the discharge of an SGO was to be considered exceptional, but the argument goes nowhere as the concept of exceptionality commonly begs as many questions as it answers.

33. As to the quality of the evidence, when considering applications for leave (whether under s. 14D (5), s. 24 (3) or s. 47 (5)), the court is evaluating information that will usually be incomplete. It is not required to make findings of fact, but the applicant must provide credible evidence to show that there has been the necessary change and that leave should be granted. The court will seek to make a fair and realistic assessment, and where the available information is mixed or conflicting, it will no doubt be guided by undisputed facts and by corroborative evidence from independent sources. When assessing change, it will be important to establish the baseline facts that led to the making of the original order. Where there were care proceedings, there will be threshold findings, and where an SGO had been made in private law proceedings, there should similarly be a record of why that was the outcome.

34. To sum up, when a court is considering an application for leave to apply to discharge a special guardianship order, it must first consider whether the applicant has shown, by means of credible evidence, that there has been a significant change of circumstances since the order was made. If there has not been, the application will fail. If there has, the court will decide whether leave should be granted, based on a realistic evaluation of the applicant's prospects of success in the context of the effect on the child's welfare of the application being heard or not heard. The prospects of success must be real. The child's welfare is an important factor but it is not the paramount consideration. The degree of any change in circumstances is likely to be intertwined with the prospects of success, and the greater the prospects of success, the more likely it is that leave will be granted. The provisions of s. 10 (9) of the 1989 Act are not applicable to an application under s. 14D (5).

Parental contact

35. The report of the Public Law Working Group identifies the issue of parental contact during an SGO as requiring careful consideration and notes that insufficient planning and support in relation to contact can have a significant impact on placement stability. It devotes one of its four recommendations for immediate change to this issue:

> "Recommendation 4: Renewed emphasis on parental contact. Prior to the making of an SGO, the issue of parental contact with the child who may be made the subject of an SGO should be given careful consideration, in terms of (1) the purpose of contact; (2) the factors which are relevant in determining the form of contact, direct or indirect, and the frequency of contact; (3) the professional input required to support carers in facilitating the same over time and (4) the planning and support required to ensure the stability of the placement in the context of ongoing contact."

36. Where an SGO is in effect, an application for an order regulating with whom a child is to live can only be made with leave of the court: s. 10 (7A) and (7B) of the 1989 Act. However, a parent does not require leave to apply for other forms of CAO, including an order that the child should spend time with them. As Wall LJ noted in *Re S*, this is unexpected:

> "65. The absence of a general requirement for leave may seem surprising. Special guardianship orders are designed to produce finality, and there is, accordingly, logic in the proposition that a parent requires the leave of the court to reopen the issue of the order itself or of the child's residence. But, if so, one might expect similar considerations to apply to other forms of order under s 8. An essential component of the advantages produced by an adoption order for both adopters and children is that they are in most cases then free from the threat of future litigation. If the same protection is not available in respect of special guardianship orders, this may be a substantial derogation from the security provided.
>
> 66. It is true that the court may invoke s 91(14) to place a filter on further applications by parents for other s 8 orders (including contact, and specific issue orders such as schooling). Furthermore, there is, we think, no doubt that the court has jurisdiction to make indefinite orders under s 91(14) of the 1989 Act. …
>
> 67. In a statutory structure designed to achieve permanence and security for children and their carers outside adoption, it may seem an anomaly that the natural parent, whose parental responsibility is effectively and largely neutered, should nonetheless have an automatic right to apply to the court for s 8 relief (other than a change of residence). The very nature of such an application may be to interfere with the exercise of parental

> responsibility by the special guardian which is meant to be exclusive. The need to invoke s 91(14) to protect special guardians and children from the anxiety imposed by the prospect of future litigation is a possible weakness in the scheme.
>
> [68] In any event, anomalous or not, it is plain to us that the statutory scheme for making special guardianship orders was designed generally to allow unfettered access to the court thereafter by parents in relation to all s 8 orders apart from residence. In this respect it must be accepted that special guardianship does not always provide the same permanency of protection as adoption. In our judgment, this is a factor, which, in a finely balanced case, could well tip the scales in favour of adoption."

37. *Re S* was a case in which an SGO had been made after a foster mother had sought an adoption order. One of her reasons for preferring adoption was the protection it gave from applications by the child's mother. In the present case, Ms Kotilaine takes issue with the statement by Wall LJ, which she describes as *obiter*, that a parent will have unfettered access to the court where there is an SGO. She points to s. 14C:

> "**14C Special guardianship orders: effect**
>
> (1) The effect of a special guardianship order 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 for the child (apart from another special guardian)."

5. Ms Kotilaine argues that under any SGO, the special guardians are expected to use their enhanced parental responsibility to manage contact arrangements between a child and a parent. An order increasing or otherwise changing the parameters of contact between a parent and a child interferes with this. An application for contact, particularly when allied with an application leave to discharge the SGO, amounts in substance to an attempt to vary the SGO, a step for which leave to apply is required.

38. I cannot accept this. As the words *"subject to any other order"* show, the legislation contemplates the possibility of a contact order co-existing with an SGO. I share Wall LJ's view that a parent has an unfettered right to apply for contact with a child subject to an SGO and that this is an important detraction from the overriding parental responsibility possessed by special guardians. However, as he noted, the court has the power to restrain unmeritorious applications by making orders under s. 91 (14). I would add that it also has a general power to tailor its procedure to the circumstances of the case (see *Re B (Minors)(Contact)* [1994] 2 FLR 1) and also the power to dispose of abusive applications summarily. So, for example, an application for contact with a

child subject to an SGO may be suitable for determination with little or no oral evidence. Or, to take an extreme example, a parent issuing an application for the child to spend most of his time with him, could expect the application to be summarily dismissed as a poorly-disguised application for residence seeking to evade the leave provision. But in the normal run of events, there is nothing objectionable in principle about a contact application issued in respect of a child subject to an SGO, and in the course of argument Ms Kotilaine came to accept this.

39. Against that account of the legal framework, I turn to the present appeal.

The Judge's decision

40. Having set out the background, the Judge gave herself a concise legal self-direction. She referred to section 14D and to the decisions in *Re G* and *Re P*. She noted that the *Re G* states that the court should treat the application in the same two-stage manner mandated by *Re P* for applications for leave to apply to revoke a placement order and that the first question is whether there has been a sufficient change of circumstances. Then:

> "13. In considering the second question, the court must consider all the circumstances. In particular the Court must think about the parent's chances of success (of succeeding in having the special guardianship order discharged) if given leave to apply, and the impact on the child if the parent is, or is not, given leave. The child's welfare is the Court's paramount consideration."

41. The Judge next set out the mother's case on change of circumstances and C's welfare. The mother argued that the short-term disruption to C of allowing the application to proceed would be worth it, when balanced against the possibility of him returning to her care. The Judge was impressed by the mother's evidence and by the restrained way in which she had argued her case. She described her as rightly proud of herself for undertaking the challenging Complex Needs Service programme. She referred to her as having support from her partner and a network of family and friends, and as working in a challenging but very rewarding job with significant responsibility. However, in relation to change of circumstances, the Judge found:

> "26. Without wanting to take away from her efforts, and the progress she has made, I am afraid that I do not think it could be said that she is at a point now where it could be said that she will now and throughout C's minority be in a situation where she is not vulnerable to a relapse in her mental health such that it might impact on her care of her child.
>
> 27. I should make absolutely clear that having a history of mental health issues does not disqualify any person from being a parent, it just may signal a need for additional support. However, that is not the question I have to ask myself. I have to ask whether or not the undoubted change in her circumstances is significant enough to lead me to open the door to the Court's discretion so far as the application is concerned.

> 28. In answer to that question, I am not satisfied that the change is significant enough.
>
> 29. Having regard to the other circumstances, [the mother] is in the same relationship, which is a source of security and stability to her. However, it should be noted that at the time of the last proceedings, this relationship was an area of concern for the Court, in particular Mr D's son's behaviour towards C, his parenting capacity, and his and the mother's ability to work openly and honestly with the local authority. There is no evidence before me at the moment to suggest that there has been a significant change here, other than the endurance of the relationship.
>
> 30 C's situation has not changed. His grandmother and step-grandfather are still healthy and able to provide a home for him throughout his childhood as was envisaged at the time the special guardianship order was made.
>
> 31.For all these reasons, I am not satisfied that there has been a change of circumstances sufficient to justify opening the door to the exercise of the Court's discretion and for the application to be reopened."

42. The Judge then addressed the second stage, under the heading 'C's welfare'. I will cite her careful analysis in full.

> "32. Even if I thought there had been sufficient changes in the mother's circumstances, I would not give permission to apply to discharge the Special guardianship orders because I do not consider it would be in C's welfare to reopen the proceedings.
>
> 33.1 know the mother is desperate to have the chance to care for C again. If permission were given, he might have the chance to live with her again.
>
> 34. [The mother] told me that she does not understand why the special guardians and the local authority suggest that she is not accepting of his placement. She says she has done everything she has been told to do and not said anything to C that she should not have done.
>
> 35.Although she says it is with C's best interests at heart, the fact is that [she] does not support the placement because she thinks C is unhappy and unsettled and she thinks he should be returned to her care. In her submissions she said that she found it difficult because she could not explain to him the reasons that he was not living with her, or even that contact was coming to an end, or why he could not come to her house. I understand that these conversations are hard and that she may need further help and support with this. However, although C will over time need to

develop more of an understanding of why he is not living with his mother, it is of some concern that these conversations are cropping up at all, because it indicates that he is hearing from his mother - whether unconsciously or not - that there is a theoretical option for him to be with her, but someone else is creating a rule that means it cannot happen. So while the mother is to be credited for trying not to attribute personal blame to anyone, it would appear that she has not felt able over the past few years to convey to C that she supports him living with his special guardians.

36. The concern is that this has created uncertainty, instability and confusion in C's mind. The information from the special guardians and [the social worker] is that the wider family have become involved in the situation and have added voice to mother's views that C's placement ought properly to be regarded as temporary, until such time as his mother is able to resume his care.

37. Even if I had thought the change of circumstances sufficient, I do not think it would be good for C if his mother were given permission to make her application. I think it could do him harm. These are my reasons:

(i) if permission was given there would be yet another set of care proceedings about C. Decisions about his future would be delayed. His future would once again be uncertain. It would put even more pressure on the relationship between mother and special guardians and that might even mean the placement was at risk of breakdown;

(ii) if the placement breaks down, then there is a risk that C would then be put into foster care, which would be extremely disruptive to him and would mean he is likely to see less of his mother not more;

(iii) [after referring to the divide in the wider family and the difficulties with Life Story work]… If proceedings were re-opened C is likely to experience significant confusion and upset and he is less likely to get the reassurance he needs to feel stable and secure at home;

(iv) The mother has made some changes in her life but there are still worries that she really understands or accepts the reasons that the special guardianship orders were made. She seems to say it was just about her mental health situation at that time but in fact the concerns seem to have been longstanding and there were other concerns about her relationship, and her ability to work with the local authority and other professionals. She does not seem to accept that there were things about her as a parent that she needed to change;

> (v) The evidence from mother is that C says he wants to, go home to his mother but also evidence from his special guardians that he is confused about the arrangements. His wishes and feelings are important but they are not determinative and it is not helpful for him to be led to believe that a return to his mother is a possibility if in fact that were not safe;
>
> (vi) There is evidence from the previous proceedings that an element of C's wishes to live with his mother were borne out of feelings of responsibility for her and for being worried for her. Although the mother is confident that her situation is different, C does not know that, and there is a concern that these feelings may be difficult for him to experience again;
>
> (vii) All these concerns mean that even if permission were given to seek to discharge the order, it would be difficult for her to succeed in her application. The prospects of success are relevant to my consideration;
>
> (viii) I also have to consider the impact upon C and his mother of giving permission for the application to be made, the intrusiveness of further assessments and stress of court hearings, and then the situation if in the event that did not bring about the change that the mother hoped for. I consider it would be very difficult for all concerned, but especially C;
>
> (ix) If the application were successful, it would still have represented a very significant period of uncertainty and upheaval fer C. Because of his early life experiences, he is a child who has particular need for security, stability and certainty;
>
> (x) C loves his grandmother and step-grandfather. They love him and are devoted to caring for him. There is no question of their commitment and that they have provided him with a very high standard of care for the last four years. There are no professional concerns about the placement and the special guardians are engaging well with the local authority and other agencies to do all they can to support C.

Conclusions

> 38. I know that the mother is certain that she can provide her son with the care that he needs. I know that she loves him. However, having regard to all the circumstances, and with C's welfare as my paramount consideration, I refuse the application for leave to apply to discharge the order."

43. Finally, the Judge turned to the mother's contact application.

> "39. The special guardianship orders gave the grandmother and her husband an enhanced parenting status including the ability to

> use their discretion and knowledge of C to make decisions about contact.
>
> 40. Although it is very hard for the mother to hear, because C loves to spend time with her and she is doing everything she can to make the contact fun and beneficial for him, the reality is that the more contact C has with her, the harder it is going to be for him, and his mother, to accept that it is his special guardians who will raise him in their home throughout his childhood.
>
> 41.My concern in this case is that the relationship between the mother and maternal grandmother is difficult, and the mother is not accepting of the placement at the moment. Even though she may not have said anything outright, she appears to have made it clear to C that she would wish it to be the case that they spent more time together, that he could live with her, but that it is not to be. She is not yet in a place where she is able fully to support him in settling into the placement long-term.
>
> 42.His special guardians are sensitive to the situation and they have done all they can to promote contact between C and his mother, even during the lockdown restrictions. They have been assessed by the Court as able to make judgement calls in C's best interests about contact and have continued to demonstrate for the past few years that they can support and facilitate contact, even when the adult relationships have been strained.
>
> 43.1 am not persuaded it is in his C's welfare interests to have a contact order at the moment and think there is a positive danger that it could cause more harm and tension between the adults, and for C to be confused and conflicted. Contact should progress at C's own pace, and in consultation with the local authority and the […] team as needed.
>
> 44. The mother has done everything she can to fight for her son. She has made her position very clearly and powerfully. But for all the reasons given I do not grant her leave to bring an application to discharge the special guardianship order and I dismiss her application for a contact order."

The arguments on appeal

44. In a most effective skeleton argument, prepared when she was a litigant in person assisted by her McKenzie Friend, the mother accepted that special guardianship orders are with good reason difficult to revoke, but argued that the bar should not be set so high as to make it an impossibility. She advanced nine grounds of appeal:

    (1) It is perplexing that the Judge did not consider her progress to amount to a significant change in circumstances. The Judge had broadened out the reasons why the SGO had been made, wrongly extending them beyond problems with her mental health to include *"things about her as a parent that she needed to change"*. That

had led to a domino effect where change was found to be insufficient, the prospects of success to be difficult, and the effect on C's welfare to be harmful.

(2) The Judge based her decision on the grandparents' account of matters such as C's wishes and the reasons for them, and rejected the mother's account without any basis for doing so. She considered that the placement had been destabilised because the mother does not support it, rather than the mother not supporting the placement because it is unstable.

(3) The Judge erred in law in relying on s.10 (9) and in treating C's welfare as paramount.

(4) It was not fair to refer adversely to Mr D, when no assessment had been undertaken of his situation.

(5) The Judge made findings about the mother's mental health being subject to relapse without a current assessment and in the face of evidence that she had made a sustained recovery.

(6) The Judge made findings that C's circumstances had not changed without having evidence about the difficulties at school and the referral to CAMHS, or taking into account that the local authority had not (as it said) carried out an assessment.

(7) The Judge had no basis for saying that if permission was given, there would be another set of care proceedings and there would be a risk of C being put into foster care, and seeing less of his mother as a result. There is no link between granting permission and the starting of care proceedings.

(8) Contrary to *Re B-S*, the Judge set the bar far too high, making it impossible for the test of change ever to be met. Her approach means that any parent who makes a discharge application is considered to show a lack of support for a placement. The statement that the mother is and will remain vulnerable for relapse for the entirety of C's minority is oppressive.

(9) The Judge was wrong to dismiss the application for contact despite contact not having taken place in accordance with the working agreement. She was not entitled to accept that the grandparents had done their best to promote contact, when the mother's evidence was to the opposite effect.

45. When granting permission to appeal, Judd J considered that there was a compelling reason for the appeal to be heard because there was very limited authority as to the application of the test to be satisfied by an applicant for permission to apply to discharge an SGO. She also considered that an appeal would have a real prospect of success in three respects:

(1) Whether the Judge was wrong to find that the change of circumstances found to have taken place was not enough to surmount the first hurdle in the leave application, given the decision of Wilson LJ in *Re G (Special Guardianship Order)* [2010] 2 FLR 696.

(2) Whether the Judge applied the correct test to the exercise of her discretion.

(3) Whether the application for contact should have been dismissed on submissions only; it was not clear from the judgment why the appellant was not permitted to have the case dealt with after more investigation.

46. On the first matter, Ms Cabeza identified the evidence that existed at the time the SGO was made. She contrasted that with the evidence that the Judge had before her. This consisted of clear evidence in the form of letters from the mother's GP and the Complex Needs Team, corroborating her assertions in her witness statement that she had demonstrated motivation and commitment to address the shortfalls in her mental health, had undertaken the majority of the work recommended by Dr Ratnam, and had been free from any form of mental health relapse or crisis for several years. The mother had also provided an outstanding reference showing that she has obtained and maintained employment and been promoted to a managerial role. The Judge should therefore have found that the first stage of the test was satisfied. Her requirement that the mother had to establish the absence of any risk of relapse and the possibility of any impact of C over the next ten years created an insurmountable hurdle which would preclude any parent with a history of mental health difficulties from ever being able to open the door to the second stage of a permission application. Further, there had been improvements in Mr D's parenting and advances in the understanding of his son's behaviour, but these had not been taken into account and an assumption to the contrary had been made.

47. At the second stage, the Judge appears to have taken the approach that if there was any risk that proceedings might undermine the stability of C's placement, the application for permission should be dismissed. This was not the right test. There was no real assessment of the prospect of success. A range of facts were assumed against the mother, while the grandparents' narrative was taken at face value. The statement that there would be care proceedings or placement in foster care was unsound. There is no consideration of the possible advantages of proceedings for C. Any court applying the correct test would conclude that the mother's case had solidity and should be investigated.

48. As to contact, that had been set at a high level at the time of the SGO to maintain C's strong attachment to his mother. When the mother issued a contact application it was treated by the grandparents as seeking to overturn the SGO by the back door and as an abuse of process, when its intention was only to achieve consistency of contact. The Judge nevertheless proceeded on the basis that the grandparent's account was reliable and that the mother's evidence was unreliable, despite the failure to promote contact in accordance with the written agreement. To reach the conclusion that the grandparents *"have done all they can to promote contact between C and his mother"* was perverse.

49. In response, Ms Kotilaine argues that, irrespective of the correct legal test, the Judge was entitled to refuse leave and her decision is certainly not one with which this court should interfere. The mother had not shown that she could provide good enough care to C throughout his minority and there were other aspects of the wider picture where she had not shown evidence of change, particularly concerning Mr D and his son. The mother had been undergoing treatment of one kind or another for 14 years, and the Judge was entitled to find that recent progress had been a good beginning, but not significant enough. If the Judge was wrong in following *Re* G, the correct test could only be less advantageous to the mother. At the second stage, the court had copious evidence of C's insecurity, which meant that any destabilising events would be damaging. The grandparents perceived the mother as *"waiting until she can get him*

back". The Judge was entitled to find the mother's prospects of success to be *"difficult"* and for it not to be in C's interests for the SGO to be reopened. In that she accepted the grandparents' account at the permission stage, she was obliged to found her decision on some basis, otherwise what is a judge to do?

50. The grandparents had been entitled to reduce contact for C's sake. The contact application was nested in the application to discharge the SGO. It was in reality an attempt to vary the SGO and the Judge was in effect refusing leave to apply to vary the SGO when dismissing the application for a contact order. Further, the court has the power to strike out a statement of case under Family Procedure Rules 2010 rule 4.4 (b) if it is an abuse of the court's process. The Judge was correct in determining that the application for contact was an abuse of the court process.

Conclusion

51. Special guardianship can arise in a number of ways. C's situation is a common one, where grandparents have admirably given a home to a child who could not be looked after by his own parents. However, it is also not uncommon for the parents' difficulties to stretch back to their own childhoods and for there to be unresolved difficulties in the relationships between the generations. This can leave the child at the heart of a complex family situation. Co-operation and trust are needed if an SGO with a high level of contact is to succeed. The design of this SGO was ambitious, placing great demands on all the adults. They agree that it is not currently working well in at least some of its aspects, though they disagree about why that is. Their differences are unfortunately amplified by members of the wider family taking sides. This situation is troubling for everyone, and most of all for young C, who is living with such a painful conflict of loyalties that he has not been able to tolerate Life Story work.

52. I commend the Judge for the careful thought she gave to this matter. It was very much a considered decision, as the above extracts show. She was considerate of the mother's efforts but also motivated by her perception of C's welfare. I am naturally reluctant to interfere with such a conscientious evaluation in a sensitive case. Despite that, I have reached the clear conclusion that the appeal should succeed, for these reasons.

    (1) The test that the Judge set for change in circumstances in paragraphs 26 to 28 of her judgment was too high. She required the mother to be *"at a point now where it could be said that she will now and throughout C's minority be in a situation where she is not vulnerable to a relapse in her mental health such that it might impact on her care of her child."* That went far beyond the statutory requirement for significant change and in effect asked for a guarantee that all the problems that had led to the SGO had been eliminated.

    (2) It is clear that the Judge's conclusion flowed directly from the test she had set. She asked *"whether or not the undoubted change in her circumstances is significant enough"* and found that it failed that elevated test. Had she applied a simple test of significant change in circumstances, she would, I think, have been bound to find that the very considerable improvement in the mother's mental health satisfied that requirement.

    (3) The Judge was in any case not in a position to reach the conclusion that she did about the mother's current mental health. There were independent circumstantial

indicators that it had greatly improved, but deeper assessment would be needed for a longer-term prognosis to be known. She also approached matters on the basis that there were wider problems with the mother's parenting when it was at least unclear that those were a significant reason for the SGO being made.

(4) The Judge did not make any real assessment of the mother's prospects of success, beyond saying, without elaboration, that it would be difficult for her to succeed. At the same time she expressed concern that *"If the application were successful, it would still have represented a very significant period of uncertainty and upheaval for C".* The difficulty with this approach was vividly expressed by Wilson LJ in *Re G*:

> "That observation, made by a judge held in high regard in this court, causes me a degree of astonishment. Were the substantive application for discharge of the special guardianship order to succeed, such would only be because it would serve D's welfare that the order should be so discharged: s 1(1) of the Act. Thus, so it seems to me, and with respect, the perceived disruption to D in the event that the substantive application were to succeed is a nonsensical assessment of its effect."

(5) Turning to the second stage, the Judge's opening reasons for declining to grant leave concerned the risk of the placement breaking down and C going into foster care if leave was granted. That worst-case speculation had no obvious origin in the evidence.

(6) The Judge's evaluation was based on one view of the matter, as seen in paragraph 35, where she states that *"the fact is"* that the mother does not support the placement and that she has not been able to convey to C that she supports him living with his grandparents. The mother's case is that the difficulties arise from the working agreement not being honoured. Without investigation, or at least some independent input, the Judge had no reliable way of knowing which account was closer to the truth.

(7) The Judge was wrong to treat C's welfare as the paramount consideration when determining this application.

(8) Finally, and fundamentally, the Judge did not look at welfare in the round. As I have noted above, the SGO is not currently bringing C the sense of security, stability and belonging that he needs. The situation cries out for investigation and remedy, whether that is achieved by a change of attitude on the part of the family members, or by the fortification of the SGO, or by its discharge. The outcome of the Judge's decision is that none of these will happen and the family is left to carry on as it is. In a situation in which inaction is not an option, the Judge did not appreciate that the mother's applications offered an opportunity to resolve the current difficulties and she did not factor this important consideration into her thinking at the second stage. She instead focused exclusively on her concern about proceedings making a bad situation worse in the short term, without taking account of how the situation might be improved in the medium to long term by investigation and resolution.

(9) In relation to contact, there was no good reason for the summary dismissal of the mother's application. Despite Ms Kotilaine's submissions to this court, the application was not abusive, and the Judge was not asked to treat it as such. She dismissed it because she was not persuaded that a contact order would be in C's interests and because contact should progress at C's own pace and in consultation with the local authority: see her paragraph 43. That was a conclusion that the court might reach after collecting and assessing the necessary evidence, but there are other possible conclusions and it was not open to the Judge to pre-empt the outcome in this way. In foreclosing on any investigation, she did not explain why the mother's case about the working agreement did not deserve consideration, nor how contact "at C's own pace" was going to work in practice. If leave to apply to discharge the SGO was to be refused, the issue of contact remained, and the Judge should have ensured that it was fairly decided.

53. For these reasons, I would allow the appeal and set aside the Judge's orders. I would grant leave to the mother to apply to discharge the SGO and restore her application for contact, and I would direct that the applications are referred for directions and determination by another Circuit Judge, to be nominated by the Family Division Liaison Judge. In doing so, I evidently do not make any prediction about the eventual outcome. Whatever it is, I hope that all members of the family will show their devotion to C in a meaningful way by doing whatever they can to reconcile differences that may otherwise overshadow the rest of his childhood.

Lord Justice Baker

54. I agree.

Lady Justice Elisabeth Laing

55. I also agree.
