St Ives Chambers Family Law Group Update Summer 2021

"With the first day of summer comes a lengthening of my usual stride, as if somehow I am solar-powered and my joy battery is recharging." Angela Abraham

After such extraordinary times, we are not sure how many of you are feeling "solar-powered" but we hope that summer holidays now long overdue recharge your batteries. We also hope that this latest Family Group Newsletter will provide a useful update on recent caselaw and topics of interest.

Subject to restrictions being lifted as planned on 19th July 2021, we hope to provide our usual full programme of events in 2022 but also to hold our Child Care Conference in October 2021 where we can see you all again in person!

SAVE THE DATE – 1ST OCTOBER 2021

ST IVES CHILD CARE CONFERENCE

Tracy Lakin
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Facts

1. This matter concerned an appeal to the Court of Appeal ('CA') against the refusal of the mother's ('M') application for the discharge of care orders in respect of three children, aged 4, 5 and 6.

2. M did not have the care of any of her 6 children. In September 2016, the eldest child was taken to hospital with serious injuries, later found to be due to sexual abuse perpetrated by the father of the three children who are the subject of this appeal ('F'). The children were placed with their maternal grandmother ('MGM') and M later joined them.

3. In June 2017, the children were made subject to care orders and M signed a safety plan which specified that there should be no contact between them and F.

4. The local authority ('LA') subsequently discovered that the parents were still in a relationship and they were preparing to abscond to Spain, and gave notice to remove the children in June 2018.

5. In July 2018, M applied for discharge of the care orders with the children to be returned to her care. Some 2 years and 4 months later in what became extremely delayed proceedings, the application was refused by HHJ Whybrow in November 2020.

6. Permission to appeal was granted in part in March 2021. In doing so, Jackson LJ observed that it was doubtful that any of the grounds of appeal had a real prospect of success, but there was a compelling reason for the appeal to be heard, namely, the opportunity for the CA to consider the correctness of the decision of Mostyn J in **GM v Camarthenshire County Council [2018] EWFC 36.**

The appeal

7. The grounds of appeal were:

a. The judge incorrectly stated the law and misdirected himself as to the test to be applied to an application for the discharge of care orders;
b. The judge wrongly suggested that the test applied made no difference to the outcome;
c. The judge took an incorrect approach to the question of risk..

The CA dismissed all three grounds of appeal.

8. In arriving at that conclusion, the CA did an expansive trawl of the authorities in respect of discharge of care orders and helpfully set out a summary of the legal principles that can be drawn from these:

In summary, when a court is considering an application to discharge a care order the legal principles are clear:

(1) The decision must be made in accordance with s. 1 of the Act, by which ***the child's welfare is the court's paramount consideration****. The welfare evaluation is at large and the relevant factors in the welfare checklist must be considered and given appropriate weight.*

(2) Once the welfare evaluation has been carried out, ***the court will cross-check the outcome*** *to ensure that it will be exercising its powers in such a way that* ***any interference with Convention rights is necessary and proportionate****.*

(3) ***The applicant must make out a case for the discharge of the care order by bringing forward evidence to show that this would be in the interests of the child****. The findings of fact that underpinned the making of the care order will be relevant to the court's assessment but the weight to be given to them will vary from case to case.*

> **(4)** *The welfare evaluation is made at the time of the decision.* ***The s. 31(2) threshold, applicable to the making of a care order, is of no relevance to an application for its discharge.*** *The local authority does not have to re-prove the threshold and the applicant does not have to prove that it no longer applies. Any questions of harm and risk of harm form part of the overall welfare evaluation*. **[31, emphasis added]**

The decision in **GM v Carmarthenshire**

9. In **GM,** Mostyn J was concerned with an application by a mother for discharge of a care order. He adjourned the application and directed that there should be a six-month contact regime. At the final hearing, after the subject child had been in foster care for over two years, he granted mother's application, substituting the care order for a supervision order.

10. The court in **TT** found that Mostyn J's analysis in **GM** was flawed. He approached his analysis as though this issue was "*untrodden ground*", despite there being a well-established body of case law which set out the principles to be applied.

11. Mostyn J referred to something "*close to*" the threshold requirement under **s31 of the Children Act 1989** needing to be applied when dealing with such applications. He went on to conclude that:

> *"The proposal by the local authority and the guardian that the discharge application should be refused and that contact should be severely reduced (a) can only prevail if they can show that the circumstances are exceptional; and (b) can only be justified if they are motivated by an overriding requirement pertaining to the child's best interests. As Baroness Hale JSC says, this test is 'very strict'."* **[9(iv)]**

12. The CA in **TT** overruled those propositions and agreed with the advocates' submissions that the:

> "*construct of a 'near threshold' is imprecise, does not fit into any statutory framework, and distracts from a full and balanced welfare evaluation and proportionality check… The implication that there is a presumption in favour of discharge in anything other than exceptional circumstances is not right*". [**41**]

13. The CA also observed that the reference to Baroness Hale's "*very strict*" test in **Re B** is in respect of cases where the relationship between parent and child is to be severed (namely, adoption); it does not apply to this sort of application.

14. HHJ Whybrow did refer to **GM** in his first-instance judgment, however the CA found that, despite this, he approached the law correctly.

Still a place for attachment theory post-**GM**?

15. This was not an issue which arose in **TT,** but in **GM**, Mostyn J effectively rubbished attachment theory, referring to it as "*a statement of the obvious*" and "*only a theory*". Mostyn J understood that attachment theory is not subject to any body of expertise governed by recognised standards and therefore should not qualify as expert evidence. He went so far as to suggest:

> "*The very premise of section 39 is that the parent will not have been caring for his or her child for an appreciable period but that someone else will have been, and with whom the child would, no doubt, have formed a strong attachment. The stance of the local authority and of the guardian in this case is that the strength of the attachment developed by L with his foster parents over the years he has been in their care, coupled with the lack of a track-record of hands-on parenting by the mother and her partner, Mr M, of themselves mean that her application should fail. If this approach be right then in my judgment it would rob section 39 of any meaningful content. It would be a largely meaningless provision – a dead letter – accessible, I suppose, only in those cases where the discharge was agreed*." [**3**]

16. Jackson LJ strongly resisted Mostyn J's attempts to undermine the overall validity of attachment theory or to suggest that it cannot be admissible as evidence. He also criticised the suggestion that refusing to discharge a care order because of a child's attachment to their carers would rob s39 of meaning:

"That approach risks looking at matters from the point of view of the parent at the expense of a rounded assessment of the welfare of the child. The decisions to which I have referred in the two preceding paragraphs make clear that the court has to give appropriate weight to all the relationships that are important to a child, and that there may be a role for expert advice about attachment in cases of difficulty. Insofar as the observations in **GM v Carmarthenshire** *suggest otherwise, they cannot stand."* [**49**]

Malvika Jaganmohan

July 2021

Malvika Jaganmohan

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How Not To Conduct A Placement Application (part 2)

Rebecca Cross

Readers may recall the article on **Re A,** the January 2020 decision of HHJ Lazarus, which appeared in the spring 2020 newsletter. It is available to re-read **here.**

In **Re N [2021] EWCA Civ 785** the mother of the child M, aged 6, was successful in her application to appeal the making of the placement order (though not her appeal to the dismissal of the application for the discharge of the care order). M has an older brother T, aged 13, placed in a specialist residential placement pursuant to a care order. No application to appeal was made in relation to T.

The mother's sole ground of appeal was that the trial Judge failed to demonstrate that adoption was the only option for M in circumstances where the mother had separated from the abusive father and where T, whose behaviour had been extremely challenging, was no longer at home. The LA and Guardian contested that ground of appeal though agreed the placement order should be set aside for a procedural reason: non-compliance with the **Adoption Agency Regulations 2005**.

At the time the ADM made their decision, they did not have a health report as required by **Regulation 15(2)(b)**, nor advice that no such report was required. Furthermore, the Child Permanence Report did not include a medical summary prepared by a medical adviser as required by **Regulation 17(1)(b).**

The LA sought permission to withdraw its previous application for a placement order and present M's case anew to the ADM, thereafter issuing a new application for a placement order if the plan for adoption was approved.

In allowing the appeal and setting aside the placement order, the CA:-

- Reminded the parties that granting the appeal is the gift of the court even when all parties are in agreement
- Also reminded practitioners that not every breach of regulations will justify the upsetting of an 'otherwise regular' placement order.
- Identified that it was unlikely that this was the only case where breaches of the regulations had occurred
- Further High Court guidance rulings about the consequences of breach are likely to follow.

The CA declined to comment on the substantive merits of the mother's ground of appeal. Even if her appeal was successful, the 'best outcome that the mother could have hoped for is for the application to be remitted to the Family Court'.

Practitioners advising in cases where the care plan is one of adoption should ensure that the health report requirements are satisfied when providing their advice to the ADM. If the ADM does not properly carry out its duties prior to the application for a placement order, the process is fatally flawed, cannot be cured by the court, and the case should go back to the ADM.

Such breaches inevitably cause delay for the child.

Rebecca Cross

June 2021

Rebecca Cross

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"Egregious", "disgraceful", "lamentable", words used by Mr Justice Keehan in **YY (Children: Conduct of the Local Authority) [2021] EWHC 749** to outline local authority failings. One can picture such evocative terms in tabloid headlines, such was the repeated actions of this local authority.

A full reading of this case is recommended. The applications concerned:

- the mother's (M) for contact (no order was made),
- discharge of the care orders to be replaced with special guardianship orders to the foster carers (adjourned on the care order application)
- a change in the children's surnames (granted by consent).

Much of those applications were not the focus of the points to deduce from the judgment. The relevant background was:

a) 2012: Four siblings move to foster carers, with whom they remain.

b) Late 2012: Last direct contact between the children and parents.

c) 2013: Finding of fact. Allegations of sexual abuse made by the children not proven, albeit there was a finding they had been exposed to sexual activity. An expert recommended the children needed therapeutic support.

d) 2014: Care proceedings conclude. Therapy recommended with the children to target the false narrative.

e) 2014: The necessity of that work was repeated.

f) 2016: The necessity of that work was repeated again, only a limited amount having been undertaken.

g) 2016: The children wished to use their carers' surname. The court expressed concern that the carers had been unable to accept the fact find decision, and queried whether the children needed to move placements in view of their emotional needs.

h) 2019: The fourth sibling became seriously unwell. The LA authorised life-support withdrawal. That child died before M arrived at hospital.

Key findings about the LA included:-

a) A failure to undertake the recommended work with the children to overcome the false narrative – expert opinion was ignored.

b) A failure to promote the children's identity needs.

c) Disregard of the court's observations about the placement – the local authority did nothing.

d) A failure to apply to the High Court for permission to withdraw life support. There was no internal policy on how to deal with issues of this kind.

e) A failure to give due regard to the PR shared with M or to include her in decision-making.

f) An expectation that a social worker conducting an assessment ought to be 'told' what recommendation to make by senior management.

g) A failure to provide proper disclosure (2000+ pages only being available after the hearing commenced).

h) Delays in progressing final plans for the children and in changing their surname in accordance with their wishes and feelings.

i) The LA having adopted a mindset which caused the children emotional and psychological harm.

Those representing respondents often find themselves criticising the local authority - I know, I have done it myself! Rare is it that failings are as stark as in this case. It is worth remembering that the shortcomings identified in **YY** occurred pre-Covid, which has regrettably had a significant impact on the way in which local authorities can exercise statutory functions.

This article could not possibly identify one solution with regard to the required changes, and the writer fears that things may well get worse before they get better. However, an attempt to offer some suggestions as to what may alleviate themes that appear time and time again are:

a) Retain social worker continuity, where possible – frequent changes can be unsettling for children and families.

b) Request judicial continuity – points get missed, not least because that Judge is usually only fire-fighting what become the pertinent issues on the day of the hearing.

c) Get a policy! - **Re C (Children) [2016] EWCA 374** requires local authorities to have a policy for actions to be taken in response to a child requiring serious medical treatment/withdrawal of life sustaining treatment.

d) Oversight of the social work team from legal and management - not only is this relevant to determining disclosure (which should be left to legal), but is also relevant to ensuring correct (and legal) decisions are made for children. For management, quality assurance needs to be undertaken and expectations on social worker's need to be fair (they should not be asked to make recommendations contrary to personal opinion).

e) Don't ignore experts - if the court has endorsed them as necessary, they will likely have something useful to say!

f) Remember welfare - it is trite to say that the child's welfare is paramount. Their identity and needs must be protected and preserved.

Natalie Cross

July 2021

Natalie Cross

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The Court of Appeal confirmed that a Special Guardianship Order can coexist alongside a Care Order.

Background

1. This appeal concerned twin girls, now aged ten. Their special guardian is their former stepfather, K. Unusually, the children are also subject to care orders.

2. The mother (M) met K in 2010 while pregnant with the children. The children had no contact with their natural father and grew up regarding K as their father. In 2014 M and K married. They separated in 2017.

3. M entered a new relationship with a violent partner and care proceedings were issued in 2019. The children were placed with K under an ICO. K was not approved as a foster carer but was approved as a special guardian (SG). At a final hearing in 2020, a special guardianship order (SGO) was made in K's favour.

4. Shortly after, the placement broke down and the children were removed into LA foster care under a CO. M made an application to discharge the SGO.

5. HH Judge Sharpe refused the application but attached a condition to the SGO under **s11(7) of the Children Act 1989**, limiting K's power to seek information from third parties while the CO was in force.

The Appeal

6. M appealed, advancing the following 3 grounds of appeal:
    i. SGOs and COs cannot coexist in law;
    ii. If they can coexist in law, the judge was wrong to allow the SGO to continue in this case; and
    iii. Imposing the condition to the SGO, was wrong in law and / or on the facts of this case.

The Decision

7. Various amendments to the **Children Act 1989** established the legal framework for special guardianship. Within those amendments, Parliament legislated:

   i. An SGO is not automatically discharged by the making of a final care order;

   ii. **s33(3)(b)(i),** as amended, allows the LA to determine the extent to which a "parent, guardian or special guardian" may exercise parental responsibility when a care order is in force; and

   S91 Children Act 1989

   iii. **s14D** allows the LA designated in a care order to apply for the discharge of an SGO.

8. The court made clear that the objective of permanence planning is to ensure that children have a secure, loving family to support them through childhood and beyond. Like adoption, special guardianship is a long-term and supportive relationship. It would be contrary to the purpose of special guardianship for it to come to an end automatically upon the making of a CO.

9. As such, the Court of Appeal dismissed Ground 1 of the appeal. If SGO's and care orders could not coexist, Parliament would have legislated differently.

10. In relation to Ground 2, there were welfare arguments in both directions. The judge wanted to ensure that the children maintained their relationship with K and was concerned that the LA would cease to involve him in the children's lives over time. However, consideration was not given to making an order for contact under **s34(2)** coupled with a well drafted care plan. Given this option was not considered, the appeal was successful, and the matter remitted back to the judge for rehearing.

11. Given the above, Ground 3 was not considered in detail, but would have been dismissed in any event.

Comment

12. While SGOs and COs can coexist, they will do so sparingly. Best Practice Guidance published in June 2020 by the Public Law Working Group (chaired by Keehan J) make clear that making a supervision order alongside an SGO is a *"red flag",* and the number of appropriate cases will be *"very small in number".*

13. Clearly in some circumstances it will be appropriate for an SGO to be discharged on the making of a CO, and in other circumstances it will not. Factors to consider include:

- How long the SGO has been in force for.
- Who else, if anyone, shares parental responsibility.
- The nature of the relationship between the child and the special guardian.
- The views of anyone else sharing parental responsibility.

14. As ever, the appropriateness of combining these two orders will turn on the facts of the case and the welfare needs of the child.

Thomas Duggan

July 2021

Thomas Duggan

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