Neutral Citation Number: [2020] EWCA Civ 501

Case No: B4/2019/2859

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE CENTRAL FAMILY COURT
HER HONOUR JUDGE WRIGHT
ZC18C00455

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/04/2020

Before:

LORD JUSTICE LEWISON
and
LORD JUSTICE MOYLAN
- -

Re C-D (A Child)

- -

Ms M Jones and Ms M Walters-Thompson (instructed by **Morrison Spowart Solicitors**) for the **Appellant Mother**
Mr R Beddoe (instructed by **Camden Legal Services**) for the **Local Authority**
Ms A Musgrave (instructed by **Duncan Lewis Services**) for the **Child's Guardian**
Mr R Carroll (instructed by Swain and Co) for the **Father**

Hearing date: 24th March 2020
- -

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 8th April 2020.

Lord Justice Moylan:

1. The mother appeals from the order made by HHJ Wright on 28th October 2019 in respect of her son (who I will call B) aged 10. The judge made a care order and an order under s. 91(14) of the Children Act 1989 ("the 1989 Act").

2. B has been in the care of the Local Authority since 25th October 2018. He previously lived with his mother. His father has been in prison since 2011.

3. On this appeal, the mother is represented by Ms Jones and Ms Walters-Thompson (who did not appear below); Mr Carroll has provided written submissions on behalf of the father; the Local Authority is represented by Mr Beddoe; the Guardian is represented by Ms Musgrave (who did not appear below). The Local Authority and the Guardian both oppose the appeal, as does the father.

4. During the course of the hearing, Ms Jones told us that the order she sought was for the matter to be remitted with the mother's sister being given the opportunity to have legal advice and representation to enable her to have effective access to justice so that the option of B living with her pursuant to a special guardianship order could be properly assessed. This was based significantly on this court's decision in *In re P-S (Children) (Care Proceedings: Special Guardianship Orders) (Association of Lawyers for Children intervening)* [2018] 4 WLR 99.

5. At the end of the hearing, which took place remotely, we informed the parties that the appeal would be dismissed. These are my reasons for agreeing with that decision.

Summary

6. The order of 28th October 2019 was made at the conclusion of what had become a split final hearing. The first part, which was intended to be the final hearing, took place in July 2019. The maternal aunt ("MA") was expressly given permission to and did attend that hearing. At that hearing the Local Authority sought a care order, the care plan providing that B would either live with foster carers or in a residential home. The mother had sought B's return to her care but, on the first day of the July hearing, she accepted that this could not happen. The mother, alternatively, and the father sought B's placement with his maternal aunt under a special guardianship order. The Guardian supported the Local Authority's position.

7. The judge gave her substantive judgment on 23rd August 2019. She determined that the threshold criteria under s. 31 of the 1989 Act were established. She also determined that B "would be at risk of significant harm in the care of either of his parents in the short and the longer term". She also accepted the, effectively unanimous, professional evidence that a special guardianship order ("SGO") in favour of MA would not meet B's needs and would place him at risk of further unacceptable harm. The only "realistic option" which the judge considered would meet B's future needs was a care order.

8. However, the judge decided, based principally on the evidence of an Independent Social Worker ("the ISW"), that before the proceedings were finally determined further assessments should be undertaken of MA to see whether B might be able to live with her as a kinship foster carer. This was because, as the judge said in her August 2019

judgment, placement with MA had "many advantages" compared with "foster/residential placement".

9. The Local Authority agreed to amend its care plan and to instruct an ISW to undertake a kinship foster assessment of MA.

10. A case management hearing took place on 4th October 2019. The judge was informed that a foster placement for B, which could be either short or long term, had been identified. B had been in a residential placement since early June 2019 following the breakdown of his then foster placement. The judge refused the mother's application for MA to be joined as a party. She also informed the parties that she proposed, at the next hearing, to consider whether to make an order under s.91(14). She asked the Guardian specifically to address the likely effect on B and the stability of his placement of further litigation.

11. At the adjourned hearing on 28th October 2019 the judge made a final care order. She decided that it was "not in B's welfare interests for further investigations as to his placement and contact arrangements to be made outside the looked-after children process". The judge also made an order under s.91(14) in respect of both the mother and the father until 18th October 2021.

12. One other matter which I should address in this summary introduction is that of contact between B and his mother. In her August 2019 judgment, the judge approved the arrangements for contact set out in the care plan. They provided for a staged reduction in direct contact to once every two months together with contact between B and MA.

Grounds of Appeal

13. The grounds of appeal challenge both the care order and the s.91(14) order. Although, in her oral submissions, Ms Jones focused on grounds (2), (4) and (5), I set them all out and will deal with each of them later in this judgment. I will use the paragraph numbers as they appear in the grounds but I propose to set them out in a different order.

14. A number of procedural issues are raised: (5) that appropriate provision was not made to ensure that MA had effective access to justice; and (1) that the arrangements for contact between B and his mother were approved without the court hearing evidence or submissions.

15. In respect of the care order, the following grounds are advanced: (2) that the judge was wrong to make a care order in the absence of any or any sufficient analysis of the available options; (3) that the judge wrongly equated foster care with a family member to foster care with a non-family member resulting in no consideration of proportionality; (4) that the final care order was made prior to the completion of MA's assessment as a foster carer and without any support plans; and (6) that the judge failed to consider the welfare checklist in full and omitted other relevant factors.

16. In respect of the s.91(14) order: (7) that the court was wrong to make this order.

Background

17. I need only set out a very brief summary of the background to the commencement of the care proceedings in June 2018.

18. There had been longstanding concerns about the parents and their care of B. This was because of a number of issues including domestic violence; the father's criminality culminating in a significant term of imprisonment in 2011; and the mother's mental health and generally neglectful care of B. The family had received a high level of support including from CAMHS; the Anna Freud Centre; social workers; and adult social care.

19. B had been the subject of child protection plans in 2009, 2011 and 2015. The Public Law Outline process was commenced in 2017. The latter followed, to quote from the August 2019 judgment, "poor attendances (at school), increasing inappropriate and challenging behaviour from B, inconsistent care from the mother, as well as poor home conditions, the mother being unwell and depressed and struggling to manage". The mother and B were offered "systemic family therapy with CAMHS but this was discontinued due to sporadic engagement". The mother was "obstructive (and) often refused home visits".

20. In early 2018 "a similar pattern continued of B's poor school attendance combined with disruptive behaviour, the mother's inability to co-operate with professionals as well as refusal to allow home visits and missed appointments". In early June 2018 the mother said that she and B would be travelling but refused to give any other details. B returned to school in late June and "refused to give any details about where he had been".

21. In late July 2018 the mother and B again disappeared. This led to the commencement of care proceedings at the end of July.

The Proceedings

22. An interim care order was made on 25th July 2018 together with a recovery order.

23. B was not found until the end of October when the mother brought him to court following a nationwide search. The mother said that they had stayed at various places in different parts of the country. During this time "B had no access to education, no stable home, no access to professional support and the mother was unwell with no appropriate medical and social support system around her". As referred to above, B has been living with foster carers or in a residential home since the end of October 2018.

24. A raft of evidence was obtained for the proceedings. This included a psychiatric report of the mother; an ISW's assessment of the mother; an initial viability assessment of MA as a carer for B; a special guardianship assessment of MA by the ISW; and a psychological assessment of B.

25. Because the mother's case on this appeal relies on aspects of the evidence from the psychologist, I propose to deal with it in some detail. However, I first set out the effect, as summarised in the August judgment, of the psychiatrist's evidence. The mother's "history and presentation [are] indicative of adult ADHD and/or emotionally unstable personality disorder [and] … also consistent with obsessive compulsive disorder". The psychiatrist recommended further assessment but his prognosis for the mother's "engagement in any therapeutic intervention is poor".

26. The psychologist described B as "very pleasing, empathetic, kind, intelligent and thoughtful" and as "bright, enthusiastic and capable" with "significant … potential". In

his opinion, B's "only difficulty has been lack of stability of care including poor school attendances"; B is "very delayed academically". He also considered that B "has clearly had to act both as a carer for his mother … and has had to take considerable levels of responsibility for himself". After referring to the mother and B having attended CAMHS and the Anna Freud Centre, the psychologist said: "B may have been acting out through anger at the time and it is clear that on a number of occasions the mother considered that B had a developmental disorder. It would seem quite evident that the actual difficulty was (a) the mother's instability of care; (b) her emotional and mood instability, chronic medical difficulties and probably depression at times; and (c) B having to assume a caring role with his mother and too high a level of responsibility for himself for a boy of his age". The relationship between B and his mother was "too enmeshed" and "co-dependent".

27. In the opinion of the psychologist B had a pressing need for "stability". He recommended that B needed "above good enough care in the sense that limits, boundaries and social guidelines and stability of care have to be set in a confident, careful way". In one of the professionals' meetings, the psychologist accepted as an accurate summary of his opinion that, what he called, "strong parental leadership" was required to avoid B becoming "more defiant [and] moving into the dangerous territory of having an oppositional [defiant] disorder".

28. On the issue of placement, the psychologist made the uncontroversial observation that "a successful placement within the family would be much preferable to placement outside the family". However, because he had assessed neither the mother nor MA, he accepted that he would have to defer on some key issues, in particular, to the ISW because she had carried out assessments of both of them. For example, he agreed with the significant concerns expressed about MA "not being able to stop … a continuation of mother's enmeshed relationship with B and mother's blurring of boundaries as to who is responsible for what with regard to B's care given … that in my opinion he needs above average care". In the second professionals' meeting he agreed that "only" the ISW was in a position to assess whether the mother would be "able to take a step back" in the sense of not undermining B living with MA. His opinion on B living with MA was, as with contact, "contingent" on the mother being able to do this. He also said that "overt conflict" between the mother and MA would "pose a significant risk of emotional harm" to B and have "a serious effect on him".

29. The psychologist addressed the issue of contact between B and his mother. The mother's case on appeal has focused on his observation in his first report that there should be "as high a level of contact with his mother and other relevant family members as possible". However, at the same time, the psychologist recognised that, if B was not living with his mother, "this would be very difficult for [her] … and [she] may not be able to emotionally adjust to fully supporting B in his new placement and support him to progress and develop". This latter observation was reflected in his second report when he said that the issue seemed to be "to ensure that the mother acts reasonably and responsibly around B". In the second professionals' meeting, he described it as "absolutely essential" that the mother did not seek to undermine B's placement and the manner in which he was being cared for in that placement; as referred to above, in his opinion contact was "contingent" on this.

30. A viability assessment of MA was completed by the Local Authority in January 2019. This analysed the strengths and vulnerabilities of B living with MA and concluded that,

for a number of reasons, placement with MA would not be in B's best interests. MA was committed to B but caring for him would be "likely to bring significant difficulties for MA" including managing her relationship with the mother "which is already fractious at times". In the Social Worker's opinion, MA would not be able to meet B's emotional needs and keep him safe "due to her lack of insight into the harm B has suffered while being parented by his mother and her ongoing difficult relationship with the mother".

31. Despite this assessment, HHJ Wright ordered an ISW to provide a special guardianship assessment of MA. This was completed in early June 2019. It is a comprehensive report and sets out the "strengths" and the "concerns and vulnerabilities" of an SGO in favour of MA. It identified MA's "many qualities as B's aunt" and that she and B have a "lovely relationship" but it concluded that the concerns and vulnerabilities outweighed the benefits and that a placement with MA under an SGO would be "unlikely to provide B with the stability and security" that he needs.

32. The concerns included that: (i) MA had "at times been extremely vague … particularly with regard to her early life"; (ii) that she "lacked insight and understanding into the concerns" about the mother's care of B; (iii) that she did not have a detailed understanding of "B's needs based on his experiences"; and (iv) that the mother had "indicated her intention to remain involved in the decision-making for B along with MA" and that managing this relationship would make it difficult for MA and deflect her "from her efforts to care for B". The ISW's "overriding concern" was the mother's likely inability to accept B living with MA and MA's ability to manage that relationship. The mother and MA had a troubled relationship with MA having been "subject to frequent demands and unpleasantness". On many occasions the mother had been "argumentative, accusatory and confrontational" and this had, at times, been seen by B.

33. In addition, when assessing the mother, the ISW had found that she "saw everything through the prism of her own needs and found it difficult to differentiate B's needs from her own". The relationship between the mother and B was "distorted and often dysfunctional". The ISW's opinion was that there was "little prospect" of the mother changing her "beliefs, outlook, [or] actions". In one of the professionals' meetings, the ISW gave a blunt assessment, namely that MA would not be able to care for B on her own; she would be too "exposed". There would need to be "significant local authority involvement and intervention to try to protect that placement" which was not compatible with an SGO; the ISW "wouldn't want to cut [MA] adrift with" an SGO.

34. The Guardian's final report also contained a detailed analysis of, as it stated, "the range of orders and placement options for B". The Guardian recognised "the complexities, strengths and weaknesses in all placement options". It was her opinion that the conclusion of the care proceedings should not be further delayed and that a care order should be made.

35. Having regard to the focus of the mother's appeal, I propose to quote passages from the Guardian's report in which she dealt with the option of an SGO and with the mother's contact.

36. As to the former, the Guardian referred to "persuasive reasons" supporting B being placed with MA under an SGO including that MA is "committed to B and able to

provide good basic care of him as well as ensuring that his identity and cultural needs are met". In addition, B "wants to be with his aunt if he cannot return to his mother's care". The Guardian then set out her assessment of the risks in such a placement. These were that MA had "demonstrated little evidence of insight into her sister's parenting concerns"; this included her having minimised or accepted "such parenting despite being aware of the professional worries". This might "not affect her care on a day to day basis" but it "questions how robustly she will protect B from any intervention by" his mother. Although both the mother and MA said that "boundaries would be respected", the mother had "not demonstrated that she can respect and abide by restrictions".

37. The Guardian's conclusion was that B would "continue to experience poor emotional care, instability and possible poor academic attainment". Further, while, in her opinion, the placement might "work" in the short term, she doubted whether it would be sustainable:

> "If [the mother] were to disrupt the placement the impact on B would be immense. B is loyal to his mother; he would witness his mother and aunt falling out, his mother being confrontational to his carer and B would feel responsible for his mother's feelings. This has been demonstrated during the proceedings. In addition, [the mother] may make contacts difficult by placing emotional pressure on B. All of the above requires skilled care giving and a high level of resilience. [MA] is likely to feel isolated from her family as they do not wish to be involved and managing these very difficult, exhausting dynamics frequently is an exceptionally high level of responsibility. Due to these pressures, if the placement with [MA] were to break down then that would cause B further harm, feeling rejected by the only member of his family that felt able to care for him."

38. The Guardian described contact as a "complicated issue". B wanted to have contact with his family and they with him but it was "fraught with difficulties". The mother had at times "been inappropriate in contact". The Guardian supported the contact proposed in the care plan in respect of both the mother and MA.

39. In her August 2019 judgment, the judge set out the family's history and the progress of the proceedings. She summarised the written evidence and the oral evidence given by the ISW. No party sought to adduce oral evidence from, or to ask questions of, any other witness no doubt largely because there had been a significant measure of agreement in the professionals' meeting which had taken place shortly before the July hearing.

40. The judge set out a brief summary of the law including that B's welfare was her paramount consideration; that it was "helpful to bear in mind" the welfare checklist; and that Article 8 of the European Convention on Human Rights required any interference with "those rights" to be "justified, proportionate and necessary".

41. The judge accepted the professional assessments, including the Guardian's final analysis, which "have not been challenged". These included that an SGO in favour of MA was not in B's best interests including because the "risk of disruption from the

mother and of MA not being able to maintain a distance" was too great. The clear conclusion of the ISW was that the Local Authority would need to remain involved at a level which was not compatible with an SGO because they would need to share parental responsibility. Further, as referred to by the Guardian, the consequences for B of this placement breaking down as a result of conflict between the mother and MA "would be immense".

42. The ISW recommended that further work should be undertaken with MA. This focused on MA being "assessed as a foster carer with support from [the Local Authority] particularly concerning protection, risk and [the] need for support longer term". This was "particularly important given the advantages for B in being placed with a family member rather than remaining in residential/foster care".

43. The judge accepted this evidence and determined, as referred to above, that the "only remaining realistic option" was a care order with B living either with MA or in foster care. The judge included the former because of its "many advantages" for B. In addition, the judge urged the Local Authority "to keep an open mind as to MA's potential ability to care for B in the longer term".

44. The judge recognised the importance to B of his relationship with his mother but was clearly very concerned about the agreed assessment that the prospect of the mother's approach "in relation to contact" changing was "limited" and, accordingly, that contact would disrupt B's placement and undermine his care. There needed to be a clear "structure" around contact which included limiting the frequency of contact. This led the judge to approve the proposals for contact between B and his mother as set out in the care plan. This was in addition to contact between B and MA.

45. When dealing with the adjournment of the proceedings the judge also mentioned that it was "inappropriate to conclude these proceedings given MA requires representation". This is relied on by Ms Jones as supporting her submission that the absence of such representation means that the proceedings were not properly or fairly determined.

46. A professionals' meeting took place shortly before the hearing on 28th October 2019. It was clear from this that MA was unlikely to be approved as a foster carer.

47. At the hearing, the judge heard submissions on behalf of each of the parties. There was no application for her to hear any further oral evidence. I would also note that the mother did not attend the hearing and was said to have given limited instructions.

48. The judge made a final care order. B was "litigation weary" and he needed "to achieve stability". Implicit in her decision was the conclusion that it was not necessary to await the determination of MA's assessment as a foster care before the proceedings concluded. There was sufficient clarity as to how B's needs would be met under a care order.

49. The judge noted that she had already approved the proposed arrangements for contact between the mother and B but also recorded that, since the hearing in July, this contact had "been inconsistent".

50. MA's continuing, important involvement in B's life was reflected in the arrangements for contact between B and MA being incorporated as a recital in the order as was the

fact that MA would be invited to all looked after child ("LAC") reviews. In her judgment, the judge emphasised MA's commitment to B "which has remained consistent throughout his life" and that it was "really important" that the Local Authority continued to involve her. It was "really important" that B knew that his aunt was "looking out for him and has his best welfare interests at heart".

51. The judge, in addition as referred to above, made an order under s.91(14). Although this had initially been raised by the judge, the need for an order was strongly supported by the Guardian. She submitted that an order was justified in particular because B had "been subjected to very chaotic life experiences" and would already have much to deal with following the conclusion of the proceedings and the decision that he should remain in foster care. There was a "serious risk that if the order was not made [B] would be subjected to further stresses and strains brought on by yet more litigation". It was the Guardian's opinion that any further proceedings would be "extremely difficult for him" and would be "detrimental to his emotional wellbeing". The Guardian also pointed out that the mother would continue to be involved, in particular through LAC reviews, giving her "other ways in which she can raise issues" than through applications to the court.

52. The judge noted the "legal test" for the making of an order under s.91(14). She acknowledged that this was not a case "where there have been repeated applications" and analysed whether the risk to B's welfare from further applications to court was such as to justify an order. She identified a number of factors which persuaded her that an order was required. These included the following. B had been involved in proceedings since October 2018 and he needed "to achieve stability". The mother had a "history of failing to cooperate with professionals"; the prognosis for her engagement in any therapeutic work was "poor". She did not accept the contact plan or B's placement in foster care. The mother "regularly undermines boundaries; when she doesn't get what she wants she makes it very difficult and she also seeks to undermine B's placement". This reflected both the mother's own issues and the fact that she and B had "an enmeshed relationship".

53. The judge considered it "likely that the mother will not cooperate within the looked after children process and at some stage she may well attempt to return this matter back to court". B was about to move to his fifth placement and the judge clearly considered it essential that his need "to achieve stability" was not undermined by his being involved in further proceedings at least until October 2021. The judge was "satisfied that B needs to have a break from further potential" applications to court.

54. Following the conclusion of the proceedings on 28th October 2019, the assessment of MA as a foster carer was completed on 6th November and was negative. The final amended care plan set out the proposals for B to move to live with the previously identified foster carer.

55. Finally, before turning to my determination of this appeal, I need to deal with B's wishes and feelings because it is submitted that the judge failed or failed sufficiently to take these into account. I would first note that B's wishes and feelings were fully addressed in the evidence of the Guardian and the psychologist. The judge made express reference to B's wishes and feelings in both her August and her October 2019 judgments. The references were brief but they identify aspects of his wishes and feelings.

Determination

56. I propose to set out my reasons for determining this appeal by reference to the grounds of appeal, in the order set out above. In doing so, I have taken into account all the matters raised on behalf of the parties.

57. (5) Appropriate provision was not made to ensure MA had effective assess to justice.

Ms Jones submitted that the judge should have taken steps to ensure that MA had access to advice and that she was represented. Without MA being represented, there was, Ms Jones submitted, "no-one there to put the case for" MA. As referred to above, the judge herself had said that MA "requires representation". This should have been achieved by the court directing that an application for an SGO be made and/or by joining MA as a party. This was required, as set out in *In re P-S* at [52]-[56], to ensure that MA had "effective access to justice".

58. I would first note that the circumstances of the present case are very different from those in *In re P-S*. In that case both the Local Authority and the Guardian proposed that the children should live with their respective grandparents following positive special guardianship assessments. The failure to make them parties in those circumstances meant that, as set out in Ryder LJ's judgment, at [56], they "did not have effective access to justice" such that the "procedure was unfair".

59. That this conclusion depended on the situation in that case and is not of more general application can be seen from the judgment of Sir James Munby P in the same case. In the course of his judgment, at [67], he referred to what had been said by McFarlane LJ in *In re W (A Child) (Adoption: Grandparents' Competing Claim)* [2017] 1 WLR 889 and what he had said in *In re S (A Child) (Interim Care Order: Residential Assessment) (Note)* [2015] 1 WLR 925. This was in the context of how the court should respond to a prospective special guardian being "identified late", at [66], but is clearly of more general application. In the former case, McFarlane LJ had said, at [70], that, using colloquial language, the first question was whether the proposed special guardian was "a runner". In the latter case, Sir James Munby P had referred, at [38], to the need for the court's appraisal to be "evidence based, with a solid foundation" and, at [68], for the court to determine what evidence was "necessary to enable the judge to come to a properly informed conclusion". I would also draw attention to what Black LJ said in *Re B (Paternal Grandmother: Joinder as Party)* [2012] 2 FLR 1358 about the relevant factors when the court is deciding whether to join a party to care proceedings including, at [48], "plainly the prospect of success of the application that is proposed".

60. Although, in her August 2019 judgment, the judge did refer to MA requiring representation, when an application was then made for her to be joined at the hearing on 4th October 2019, she rejected it. In my view she was right to do so. By then she had decided that making an SGO in favour of MA was not a viable option.

61. However, the issue as advanced on behalf of the mother on this appeal is whether the failure to take some step in respect of MA earlier in the proceedings resulted in a flawed or unfair determination, in particular, in the August 2019 judgment. The alternatives which have been advanced are that the court either should have directed that an application for an SGO be made or that MA should have joined MA as a party.

62. As to the former, a court could invite or suggest that an application for an SGO be made but, unless clear that someone was intending to make such an application, I find it difficult to see how the court could direct the making of such an application. As to the latter, although no application had been made for MA to be joined as a party, the judge could, no doubt, have raised this issue herself.

63. In either event the court would have had to consider the prospects of success of any application for an SGO and whether the court could fairly and properly determine the care proceedings without MA being joined as a party. In my view, the court's clear response would have been to decline even to invite MA to make any application and to refuse to join her as a party.

64. As to the former, MA could not make an application for an SGO without the permission of the court. If she had applied for permission, the judge would clearly have refused the application having regard, in particular, to the absence of any sufficient merit. Both the viability assessment and the ISW's specific special guardianship assessment were "negative".

65. As to the latter, there was no need for MA to be joined as a party to enable the judge properly and fairly to determine whether making a special guardianship order was a viable, realistic option for B's future care. The judge had ample evidence and was able fully to consider the issue. As Ms Musgrave submitted, there would have been no justification for MA being joined as a party; she had made no application and the evidence gave insufficient support for an SGO being made in her favour.

66. The judge's determination in her August 2019 judgment was, therefore, not undermined by the absence of MA as a party.

67. (1) That the arrangements for contact between B and his mother were approved without the court hearing evidence or submissions.

    This ground is not sustainable. The judge approved the arrangements for contact in the care plan in her August 2019 judgment which followed the substantive hearing in July. There is no suggestion that any party sought to adduce any further evidence at this hearing and they were plainly able to make submissions as they considered appropriate. In any event, the judge had more than sufficient evidence to determine this issue.

68. I propose to consider grounds (2), (3), (4) and (6) together because they collectively challenge the judge's decision to make a care order.

69. Ms Jones submitted that the court was not in a position properly to determine the care proceedings because there was no information available as to the support services which might be available to MA and/or the work which might take place with the mother and MA to support B living with MA. This meant, in particular, that the option of an SGO was rejected without the court having any analysis of how the concerns identified about this option might be ameliorated or addressed.

70. I will deal with the specific issues raised in the separate grounds below, but I first propose to deal with this general submission. Contrary to Ms Jones' submission, I consider that the judge was able to reach, to adopt Sir James Munby's words, "a properly informed conclusion". The ISW and the Guardian had both provided the court

with a very careful analysis of the available care options including that of an SGO in favour of MA. They fully explained why they had concluded that an SGO was not in B's welfare interests. They had both effectively come to the conclusion that there was nothing which could be put in place which would prevent the mother acting so as to undermine that placement to the detriment of B. The consequences of conflict between the mother and MA and of that placement breaking down were starkly set out by the psychologist and the Guardian.

71. Ms Jones relied on what the psychologist had said as to, for example, a "tight written agreement". This observation cannot be taken in isolation because, as referred to in paragraph 28 above, it is clear from the professionals' meeting that he deferred to the ISW's assessment of whether the mother would be "able to take a step back". The ISW and, I would add, the Guardian had concluded that the mother would not. As stated by the ISW, she "can't see how a written agreement could be observed by [the mother] in a consistent manner" because there was no "evidence to date where she's been able to show that she can do that". The judge was entitled to accept this evidence and decide that the mother would not change and was unlikely to engage in therapy. There was therefore, in my view, no gap in the evidence.

72. Accordingly, in respect of ground (2), the court had comprehensive assessments which provided a full analysis of the available care options. The judge was plainly entitled to accept that evidence and decide that an SGO in favour of MA was not a realistic care option.

73. As to ground (3), the judge did not equate foster care with a family member to foster care with a non-family member. The judge expressly referred to the "many advantages" of B living with MA. There is no basis for contending that her order was not proportionate.

74. (4) The final care order *was* made prior to the completion of MA's assessment as a foster carer. Does this undermine the order?

75. A care order is made on the basis of a care plan prepared as provided by s.31A of the 1989 Act. The court is required to consider the "permanence provisions" of the care plan, s.31(3A), and the contact arrangements, s.34(11). The permanence provisions are defined in s.31(3B) and include the Local Authority's long-term plan for the child's care.

76. In the seminal case of *In re S (Minors) (Care Order: Implementation of Care Plan)* [2002] 2 AC 291, Lord Nicholls made a number of observations, at [92]-[100], directed towards the question of "how far courts should go in attempting to resolve … uncertainties before making a care order and passing responsibility to the local authority", at [92]. He considered, at [97], that there was a "somewhat imprecise line" with, on one side, cases in which uncertainties should be resolved, in particular if they needed to be resolved "before the court can decide whether it is in the best interests of the child to make a care order at all", at [93], and, on the other side, those cases in which "the uncertainties involved in a care plan will have to be worked out after a care order has been made and while the plan is being implemented". His conclusions were as follows:

> "99 Despite all the inevitable uncertainties, when deciding whether to make a care order the court should normally have before it a care plan which is sufficiently firm and particularised for all concerned to have a reasonably clear picture of the likely way ahead for the child for the foreseeable future. The degree of firmness to be expected, as well as the amount of detail in the plan, will vary from case to case depending on how far the local authority can foresee what will be best for the child at that time. This is necessarily so. But making a care order is always a serious interference in the lives of the child and his parents. Although article 8 contains no explicit procedural requirements, the decision-making process leading to a care order must be fair and such as to afford due respect to the interests safeguarded by article 8: see *TP and KM v United Kingdom* [2001] 2 FLR 549, 569, para 72. If the parents and the child's guardian are to have a fair and adequate opportunity to make representations to the court on whether a care order should be made, the care plan must be appropriately specific.
>
> 100 Cases vary so widely that it is impossible to be more precise about the test to be applied by a court when deciding whether to continue interim relief rather than proceed to make a care order. It would be foolish to attempt to be more precise. One further general point may be noted. When postponing a decision on whether to make a care order a court will need to have in mind the general statutory principle that any delay in determining issues relating to a child's upbringing is likely to prejudice the child's welfare: section 1(2) of the Children Act."

77. Did the judge's decision in the present case fall on the wrong side of the line or was there sufficient clarity "of the likely way ahead for the child for the foreseeable future"?

78. In my view, the clear answer is that the judge's decision fell on the right side of the line. This was plainly not a case in which, to adopt what Lord Nicholls said, there was an uncertainty which needed to be resolved before the court could decide whether it was in B's best interests to make a care order at all. Further, the care plan was sufficiently specific as to the Local Authority's long-term plan for B's care that there was no uncertainty which required resolution before the court made a care order. The judge did not need to await the formal outcome of the assessment of MA as a foster carer not only because that outcome was sufficiently clear but also because, as the judge decided, this did not justify further delaying the determination of the proceedings.

79. (6) Did the judge fail to consider the welfare checklist in full and omit other relevant factors?

80. This ground focuses, in particular, on B's wishes and feelings. It is submitted that the judge's brief references in her judgments to B's wishes and feelings were insufficient to show that she had properly taken them into account.

81. The overarching question is, as set out by Peter Jackson LJ in *Re DAM (Children: Care Proceedings)* [2018] 2 FLR 676, at [7], whether the judgment is "adequately reasoned"

and enables "the reader, and above all the family itself, to know that the judge asked and answered the right questions".

82. The judgments in this case, and in particular the August 2019 judgment, contain an analysis of the evidence and the relevant factors which explains and supports the judge's decision. The judge did not need to refer expressly to each of the factors set out in the welfare checklist. Again as Peter Jackson LJ said in *Re DAM*, at [42(3)], the question is whether "it is evident that in substance all the relevant, significant welfare factors have been taken into account". In my view it is clear from the judgments that the judge took into account all the relevant welfare factors. In particular, as it is specifically advanced by the mother, the judge expressly referred to B's wishes and feelings and, although only brief references, they were sufficient to confirm that she did, indeed, take them into account. I would add that, even if there had been no express reference, the overwhelming effect of the professional and other evidence, which had taken them into account, was clear and any other decision by the judge would have been difficult to explain.

83. Ms Jones' reliance on aspects of the psychologist's evidence is misplaced because this does not reflect the effect of his evidence overall, in particular as set out in the professionals' meetings as referred to above. Again, the judge was plainly entitled to accept the evidence from the ISW and the Guardian that an SGO was not a viable option as it would not only not meet B's needs but would be likely to be detrimental to his welfare.

84. Finally, ground (7): was the judge wrong to make an order under s.91(14)?

85. The court's decision as to whether to make such an order is discretionary. The guidelines set out in *Re P (Section 91(14) Guidelines) (Residence and Religious Heritage)* [1999] 2 FLR 573 are, self-evidently, *guidelines*. As was said in *Re P*, the power is to be used with "great care", but it is clear that the circumstances in which a child's welfare will justify the making of such an order are many and varied. They are not confined to cases of repeated and unreasonable applications.

86. A similar case to the present one is *Re K (Special Guardianship Order)* [2013] 1 FLR 1265. In that case Black LJ said, at [53]:

> "[53] The evidence was such that it was difficult for the judge to trust the parents to put AK's interests before their own as would be necessary if there were to be the period of calm which the judge considered to be necessary. A period of calm was an entirely justifiable objective as AK's welfare required that she should be able to settle into her placement with MGM in the context of the special guardianship order and, as the judge said in her conclusion, come to 'know that her home is with MGM and [her partner]'. This case was not, in my view, a run-of-the-mill case but an unusual one and it was open to the judge to conclude that AK's welfare required the imposition of a s 91(14) order. The period of the restriction was very much a matter for her discretion, knowing the parents as she did, and having formed her own assessment of the prognosis for change in the future."

87. In my view, HHJ Wright was equally entitled to conclude that B's welfare required the imposition of a s.91(14) order for the reasons she gave, as summarised above. There were powerful reasons for concluding that B required a "period of calm" and that the mother could not be trusted not to "attempt to return the matter to court".

88. In conclusion, the above are my reasons for deciding that this appeal must be dismissed. I would merely repeat, having regard to the order sought by Ms Jones, as referred to in paragraph 4 above, that, as I have sought to explain, "the option of B living with [MA] pursuant to" an SGO was comprehensively considered and the judge was able properly and fairly to determine this issue without MA being represented.

Lord Justice Lewison:

89. I agree.