Grandparents

How can grandparents and family members create a role for themselves to play in child arrangements proceedings? When do they become parties to air their case or serve as witnesses for others?

Introduction

1. Much of today's discussion during this conference relates to the role parents will play in their children's lives when the relationship between those parents has broken down. In this talk I am going to take a different perspective, outside the direct relationship between parent and child, to consider the role of members of the wider family. Because of the limited time, my focus will be particularly on the prospective role of grandparents, although I shall say something about other family members at the end.
2. As we all know and recognise, the role of the grandparent in a child's life can be enormously valuable. The grandparent can provide love, support and a sense of continuity for the child, and indeed, welcome help for busy parents. But if the parents' relationship breaks down, what then? In particular, how can grandparents be helped to secure contact, or even in some cases, become the carers of a grandchild, in circumstances where the parental relationship has fractured badly?
3. Most frequently, the grandparent is going to be anxious to have a continuing relationship with the child through contact rather than as a caregiver. When both parents support this, of course, there is no problem. In many cases, grandparents will continue to see their grandchild on occasions when the grandchild is spending time with the parent who is their own child. In other cases, the grandparents will simply wish to support the position of their own child who is making an application that a child lives with or spends time with them. The grandparents in such cases may become involved as witnesses, but

it will not be appropriate or necessary for them to make any application on their own behalf.

4. However in other cases, grandparents will need advice and assistance about whether they should make any applications in their own right, and if so what, and how. Sometimes they will want to be allowed to spend time with their grandchild. Sometimes they will put themselves forward as caregivers: a situation only likely to arise when both the parents themselves are for some reason unable to care for the child. In some extreme circumstances the grandparents may find themselves facing a situation where a local authority has become involved in a grandchild's life and has issued care proceedings.
5. It is those kinds of practical problems I shall look at here.

No presumption of contact to a grandparent

6. Let me deal first of all with the most commonly arising problem: where the grandparents want to continue to see and spend time with a grandchild but that relationship is not being promoted by the parent with whom the child is living.
7. The first thing to be born in mind is that there is no presumption that a grandparent should have contact with a grandchild.

> Re A (Section 8 Order: Grandparent Application) [1995] 2 FLR 153
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> **Butler Sloss and Otton LJJ**
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> The parents were divorced. The father's contact to the child had ceased. The father lived with the paternal grandmother and there was considerable hostility between the two families. The child did not have a close or existing relationship with the grandmother and the mother was fearful of the grandmother. The judge held that the grandmother's application was premature and she appealed.
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> **Held** – dismissing the appeal – two groups of people could apply for contact, those who had a right to apply and those who could apply only with leave. The grandmother fell into the latter group where leave was required to make such an application. In deciding whether to grant leave the court had to have regard to a number of particular matters (see pp 155H – 156A). Although there was a presumption that a parent should have contact unless there were cogent reasons to the contrary, that was not the approach towards any other member of the family (see pp 156C – 157E). There could not be a presumption that a grandmother who obtained leave was entitled to contact unless there were cogent reasons for denying it to her. In reaching his decision, the judge had considered what was in the best interests of the child (see pp 157H – 158A).
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> **Per curiam**: a judge dealing with an application for leave to seek a s 8 order usually has only partial information. It would be to fly in the face of common sense to say that the fact that an applicant had obtained leave shifted the burden of proof to the respondent, and that was not the law.

8. The approach to an application by a grandparent is always going to be case specific. The outcome is going to governed by the welfare of the child and the consideration of matters contained in section 1 of the Children Act 2089.
9. It has been said that a child should not be denied contact in the long term with a grandparent because of bitterness between the grandparent and the child's mother. Grandparents play an important role in children's lives, especially in the lives of young children, and their influence is likely to be beneficial if exercised with care and not too frequently.

Re W (Contact: Application by Grandparent) [1997] 1 FLR 793

Hollis J

The mother and maternal grandmother of a child were not on good terms with each other. The grandmother used to have extensive contact with the child when the child was living with his father, but, following a change of residence by the child to live with his mother, contact between the child and grandmother was stopped by the mother. The grandmother successfully applied for leave to apply for a contact order, but following a full hearing contact was refused because the court found that the child was at risk of suffering emotional harm as a result of the hostility between the mother and the grandmother. The court considered that the child should be allowed to settle in with his mother. The grandmother appealed.

Held – dismissing the appeal –

(1) The court of first instance had not, on the facts and upon an analysis of the reasons for the decision, made an order which was plainly wrong nor had it carried out the balancing exercise wrongly. The court was right to treat the child's stability in settling in with his mother as first and foremost in the child's interests. All the court had decided was that there should be no direct contact for the time being.

(2) The granting of leave to make an application for contact did not place a grandparent (nor any other relative or person) in the same position as a natural parent. An application for leave was almost always made on the papers and without the benefit of a welfare officer's report. Upon the substantive application, the court had to apply s 1 of the Children Act 1989, together with the 'welfare checklist' in s 1(3) of that Act. Save in the case of a natural parent, anyone applying for contact must show grounds for it. Once a case for contact had been established, a respondent had to show why there should not be contact. However, there was not a presumption that a grandparent who had been granted leave was entitled to contact unless it could be shown by cogent reasons that there should be no contact.

Per curiam:

(1) It would be nonsense in the long term for a child to be denied contact with his grandmother because of bitterness between the mother and the grandmother. Grandparents play an important role in children's lives, especially young children, and their influence is extremely beneficial, provided it is exercised with care and not too frequently.

(2) The refusal by the mother to allow her children to receive birthday cards from the grandmother because of strong negative feelings about the grandmother's behaviour was not in the children's best interests. The grandmother was a family member and the stopping of cards and possibly presents on appropriate occasions was not justified.

There should be some indirect contact if it could be arranged. The grandmother would be advised to send cards and presents on appropriate occasions and the mother would be expected to hand them over to the child.

The mechanism for making an application

10. Applications for orders under section 8 of the Children Act 1989 can be made in certain circumstances without leave and, and, in others, leave is required. Section 10 of the Children Act 1989 provides:

> "(1) In any family proceedings in which a question arises with respect to the welfare of any child, the court may make a section 8 order with respect to the child if –
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> (a) an application for the order has been made by a person who –
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> (i) is entitled to apply for a section 8 order with respect to the child; or
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> (ii) has obtained the leave of the Court to make the application; or
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> (b) the Court considers that the order should be made even though no such application has been made.
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> (2) The Court may also make a section 8 order with respect to any child on the application of a person who –
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> (a) is entitled to apply for a section 8 order with respect to the child; or
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> (b) has obtained the leave of the Court to make the application."

An application without leave

11. The categories of person who can make an application for a child arrangements order without leave are set out in section 10 of the Children Act 1989. The terms of the categories require full and careful reading. Of particular potential relevance here may be the following: -

(i) Any person with whom the child has lived for a period of at least three years (CA 1989 s10(5)(b))

The required three-year period is defined by CA 1989, s 10(10) as not necessarily being a continuous three years, but:

- it must have begun not more than five years before the making of the application; and
- it must not have ended more than three months before the making of the application.

When a child is removed from the care of a potential applicant, that potential applicant therefore has three months in which to apply for a child arrangements order as of right. After that time he must obtain leave before making such an application

(ii) A relative with whom child has lived for one year (CA 1989, s 10(5B)).

A relative of a child is entitled to apply for a child arrangements order that regulates arrangements relating to with whom the child is to live, and/or when the child is to live with any person, with respect to the child if the child has lived with the relative for a period of at least one year immediately preceding the application.

NB: This is in contrast to the three year provision of s10(5)(b) set out above in the following ways

- the period of one year must have run continuously.
- the application must be made immediately, in contrast to the three year residential qualification where there is a three month leeway in making the application.
- It is confined to making orders about with whom and when a child is to live with a person [s10(5C)]

A 'relative' in relation to a child means a grandparent, brother, sister, uncle or aunt (whether of the full blood or half blood or by marriage or civil partnership or step-parent) [s 105(1)].

(ii) In some circumstances, with consent (CA 1989, s 10(5)(c)

Any person may apply for a residence or contact order with respect to the child, without the need to obtain the leave of the court, provided:

- he has the consent of all those with parental responsibility; or
- if the child is in care, he has the consent of the local authority; or
- where there is a child arrangements order in force that regulates arrangements relating to with whom the child is to live, or when the child is to live with any person, he has the consent of each person named in the order as a person with whom the child is to live.

A successful application for a child arrangements order that relates to the living arrangements of a child will discharge a care order.

12. Where the proposed applicant is entitled to apply for a child arrangements order, but not a specific issue or prohibited steps order, he may nevertheless apply for a specific issue or prohibited steps order with leave of the court

Section 8 order: an application for leave

13. Many family members will not fall into the above categories, and will need to seek leave to make a s 8 application. The grant of leave does not raise any presumption in itself that the application will succeed.
14. The procedure is governed by FPR 2010 part 18. An applicant must file:
    - an application notice in Form C2, which must briefly state why leave is being sought (unless the court dispenses with the need for a notice);
    - a draft of the proposed substantive application in Form C100, with sufficient copies to be served on each respondent;
    - a draft of the order sought;
    - a copy of any written evidence in support of the application.

    When the court receives an application for leave to apply it must:
    - serve a copy of the documents filed by the applicant on each respondent (and on the children's guardian, if any);
    - include notice of the date and place where the application will be heard.
15. It has been held that a failure to comply with the rules and procedure need not invalidate an order giving leave. It is a matter for the court to decide whether a written request is actually required [Re O (Minors) (Leave to Seek Residence Order) [1994] 1 FLR 172].
16. Under the rules, the court may deal with the application without a hearing if it does not consider a hearing is appropriate or the court endorses the parties' agreement that a hearing is inappropriate. The court may refuse the application for leave without holding a hearing; in such a case, if the applicant requests it, the court must re-list the application for an oral hearing.
17. There are, however, a number of cases which emphasise the fact that normally such applications should be heard on notice. See: -

- In Re M (Prohibited Steps Order: Application for Leave) [1993] 1 FLR 273 (Johnson J)
- In Re F and R (Section 8 Order: Grandparent's Application)[1995] 1 FLR 524 (Cazalet J): and, more recently

- In Re W (Contact Application: Procedure)[2000] 1 FLR 263 in which Wilson J, following Re M and Re F and R, held that a grant of leave to apply for a s 8 order was a substantial judicial decision and should be undertaken in the ordinary case in the presence of all parties, and said that Justices are required to give written reasons for any decision on such an application.

> The child was born in May 1998 and is cared for by her mother. The father was sent to prison in July 1998 for assault on the mother, and in February 1999 was sentenced to a further term of imprisonment for assault on a third person. He is still in prison. The paternal grandmother saw the baby regularly until the father went to prison, when contact ceased. In June 1999 the grandmother applied to the family proceedings court under s 10(9) of the Children Act 1989 for leave to apply for a contact order. On 18 June 1999 the magistrates granted leave. The grandmother had been told that she need not attend the hearing, the mother had not been apprised of it at all, nor did the magistrates furnish any reasons for their decision. The mother appealed against the grant of leave.
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> **Held –** dismissing the appeal –
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> (1) The grant of leave to apply for a s 8 order was a substantial judicial decision which fell to be determined by reference to s 10(9) of the 1989 Act and by consideration of the prima facie merits of the application, undertaken, in the ordinary case, in the presence in court of both parties. Furthermore, in a case like the present, the reasons for the court's decision were required by r 21(5) of the Family Proceedings Courts (Children Act 1989) Rules 1991 to be recorded in writing.
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> *Re M (Prohibited Steps Order: Application for Leave)* followed.
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> (2) Since the magistrates had erred (a) in dealing with the application for leave without arranging for a hearing in the presence of both parties, and (b) in failing to record their reasons, the question whether leave should be granted had to be readdressed and would now be decided after the hearing of limited oral evidence by the parties.
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> *Re F and R (Section 8 Order: Grandparent's Application)* followed.
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> (3) On the facts, although there was no presumption in English law that it was in the interests of a grandchild to have contact with a grandparent – an absence of presumption that might be revised when the Human Rights Act 1998 comes into force – nevertheless the grandmother's case, that a contact order would be for the welfare of the child, could be described as arguable. In the light of that conclusion

and after an analysis of the factors set out in s 10(9) the grandmother's application for leave to apply would be granted and her application heard in the county court.

The test to be applied by the Court when considering whether to give leave

18. In deciding an application for leave, the court is not determining a question with respect to the upbringing of a child (which is the matter to be considered at the substantive hearing). The Court does not apply CA 1989 s 1 but must have regard to the considerations of CA 1989, s 10(9).

19. CA 1989, s 10(9) provides that: -

> "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-
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> (a) the nature of the proposed application for the s 8 order;
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> (b) the applicant's connection with the child;
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> (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
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> (d) where the child is being looked after by a local authority-
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> (i) the authority's plans for the future; and
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> (ii) the wishes and feelings of the child's parents."

20. This section has been discussed in a number of cases.

- In Re M (Care: Contact: Grandmother's Application for Leave) [1995] 2 FLR 86 (where the Court of Appeal [Butler Sloss, Simon Brown and Ward LJJ) held that in weighing up the factors the following test should be applied:

    - if the application is frivolous, vexatious or an abuse of process, it must fail;
    - if the applicant fails to disclose that there is any eventual real prospect of success, or the prospect is so remote as to make the application unsustainable, the application for leave should be dismissed;
    - the applicant must satisfy the court that there is a serious issue to try and must present a good, arguable case).

The children were made the subject of care orders in 1987. There was delay in placing them with an alternative family. They remained in a children's home and continued to have contact to their mother, who had psychiatric problems, and to their grandmother. The local authority sought to terminate contact to the natural family altogether because of its concerns regarding the mother's illness. A psychiatrist recommended that contact to both women should cease because the mother's behaviour at contact was inappropriate and because the grandmother lacked insight to her daughter's problems and did not share the children's common language, which was English. At first instance Ewbank J ordered that contact should be reduced and then terminated as soon as suitable long-term carers were identified. The children remained in a children's home until 1991 and continued seeing their mother and grandmother. Contact was therefore suspended pending review by the High Court. The judge suspended the contact and urged the local authority to bring the matter before the fostering and adoption panel as a matter of urgency. In May 1992 the grandmother sought care and control of the children. This was beyond the jurisdiction of the court as by then the Children Act 1989 was in force. In October 1992 Hollings J terminated contact. In February 1994, some 3 years after contact had been suspended, the grandmother applied to the High Court for leave to make an application under s 34 of the 1989 Act. Also, at the same time, the children had been placed and their carer was considering making an application to the High Court to adopt them both. The mother made no application. In considering whether or not to grant leave, Cazalet J attempted to decide whether the grandmother's application had any remote and realistic prospect of success. He was hampered in this because no party had sought the views of either the prospective adopter or the children, who were by then of an age to articulate their wishes. The judge therefore declined to determine whether the application would have any prospect of success but decided that contact was not in the best interests of the children pending the adoption proceedings. He refused to grant leave and indicated that the issue of contact should be considered at the same time as the application to adopt. The grandmother appealed.

Held – allowing the appeal –

(1) Grandparents are not allowed reasonable contact with children in care as of right. They and other persons without parental responsibility need leave to apply for contact. The special position of relatives is acknowledged and protected by Sch 2, para 15 to the Act. Grandparents should have a special place in any child's affections. Any contact between a child and its natural family should be assumed to be beneficial and the local authority must file evidence to justify why it is not consistent with the child's welfare to promote contact with relatives.

(2) Section 10(9) does not govern applications for contact to a child in care by virtue of s 9(1). However, s 10(9)(d) allows children in care to be the subject of s 10(9) applications, including a residence order. It would therefore be anomalous if the court, in exercising its discretion under s 34 of the Act, did not have in mind the criteria laid out under s 10(9). Those criteria are also apposite for s 34(3).

(3) In exercising the discretion under s 34 of the Act therefore, the court must at least have regard to the following factors:

(a) the nature of the contact sought, whether frequent, infrequent, direct or indirect;

(b) the applicant's connection to the child – the more important and meaningful the connection, the greater the weight to be given to the application;

(c) any disruption – the need for stability and security is vital and the foster placement should not be put at risk. It follows that the risk must arise

from the proposed application. The risk is contemplated in relation to private law applications under s 10(9)(c) of the Act – the risk 'there might be of that proposed application disrupting the child's life to such an extent that he would be harmed by it'. The very knowledge of pending litigation can be sufficiently disruptive;

(d) the wishes of the parents and the local authority are very material though not determinative. The exercise of the local authority's duty under s 22(3) of the Act is to 'safeguard and promote [the child's] welfare'.

(4) In weighing up the factors the following test should be applied :

(a) if the application is frivolous, vexatious or an abuse of process it must fail;

(b) if the applicant fails to disclose that there is any eventual real prospect of success, or the prospect is so remote as to make the application unsustainable, then the application for leave should be dismissed;

(c) the applicant must satisfy the court that there is a serious issue to try and must present a good arguable case.

(5) The court should not approach the matter in a restrictive way but in the loosest way. It would be unwise to restrict the discretion of the court by imposing strict formulae. It would be equally unwise to circumscribe rigidly the manner in which the court exercises its discretion.

The matter was remitted back to the Family Division for reconsideration.

- Re G (Child Case: Parental Involvement) [1996] 1 FLR 857 (Butler Sloss and Ward LJJ) (a case relating to a father who had been prohibited from making an application under a s 91(4) order in which the Court of Appeal said the was whether there was an arguable case and not whether there was a reasonable likelihood that the substantive action would succeed)

- Re J (Leave to Issue Application for Residence Order)[2003 1 FLR 114] (Thorpe LJ and Ferris J)

The mother had a long psychiatric history which meant she was unable to care for the child, born in January 2001. The mother's elder daughter, now 18 years old, had been brought up largely by her paternal grandparents, but her maternal grandmother had played a significant part in her life. The local authority considered placing the younger child with the maternal grandmother whom they assessed, but it was concluded that at the age of 59, bringing up the child would simply be too great a burden. The authority took the view that the needs of this very young child could only be met by a care order leading to a closed adoption placement. Nevertheless the maternal grandmother applied for party status and for leave to issue an application for a residence order. Neither parent objected to the grandmother's application, whereas the local authority and the guardian objected on the basis that while the grandmother's intervention was understandable, it was not a realistic option meriting judicial consideration. The judge refused the application and the grandmother appealed.

Held – allowing the appeal –

(1) When considering a grandparent's application for leave to make an application for a residence order, the statutory checklist needed to be given its proper recognition and weight. Whilst the decision in *Re M (Care: Contact:*

Grandmother's Application for Leave) had served a valuable purpose in its day and in relation to s 34(3) applications, it was not appropriate to substitute the test 'has the applicant satisfied the court that he or she has a good arguable case' for the test that Parliament set out in s 10(9) of the Children Act 1989 (see paras [13], [18], [19]).

(2) Applicants under s 10(9) now enjoyed rights under the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, certainly rights to a fair trial and, usually, rights to a family life under Art 8. The minimum essential protection of a grandparent's Arts 6 and 8 rights when making such an application was that judges were careful not to dismiss their applications without full inquiry (see paras [18], [19]).

(3) It was important that trial judges should recognise the greater appreciation that had developed of the value of what grandparents had to offer, particularly to children of disabled parents

NB: Thorpe LJ warned against the substitution of an 'arguable case' test for the factors in CA 1989, s 10(9) and said:

> 'I am particularly anxious at the development of a practice that seems to substitute the test "has the applicant satisfied the court that he or she has a good arguable case" for the test Parliament applied in s 10(9). That anxiety is heightened in modern times where applicants under s 10(9) enjoy Art 6 rights to a fair trial and, in the nature of things, are also likely to enjoy Art 8 rights.'

- And, most recently, Re B (Paternal Grandmother: Joinder as Party) [2012] EWCA Civ 737, [2012] 2 FLR 1358. In this case Black LJ made a wide ranging review of the authorities. She took the view that:
    - s 10(9) does not contain a test. It serves to identify some factors which require particular attention;
    - having an arguable case may not be sufficient to justify granting permission;
    - the court has a wide discretion as to the stage at which the application is determined and the amount of evidence required in order to do so. There is no absolute entitlement to an assessment prior to determining the application.

    The 4-1/2-year-old boy was placed with foster carers on a voluntary basis for almost a year. The paternal grandmother wished to be considered as a potential carer for the child and applied to be joined as a party to the care proceedings. By the time those proceedings were underway the grandmother had already been granted leave to apply for residence and contact in private law proceedings which were now in limbo as they were neither joined with the public law care proceedings nor withdrawn or dismissed. In the social work

report, allegations were made against the grandmother that she drank excessively and that she was aggressive and violent. The very young mother claimed that the grandmother had permitted her and the father to have a sexual relationship in her home when the mother was only 13 years old. The grandmother admitted that her previous partners had been violent and also drank excessively, but otherwise denied the allegations and they had not been tested by oral evidence. It was reported that neither the mother nor the father wished her to care for the child as they considered he would suffer significant harm in her care. The social worker's conclusion was that the grandmother would need a psychological assessment before a decision on whether to recommend her as a potential carer could be made. The judge refused her application and the grandmother appealed.

Held – dismissing the appeal –

(1) The judge had not erred in her direction to herself as to the proper approach to the decision she had to make. Although s 10(9) of the Children Act 1989 applied to the grant of leave to make an application under s 8 it was the appropriate approach in the present case. Despite no guidance in the Children Act 1989 or the Family Procedure Rules 2010, there was authority for that approach to be taken even where no s 8 application was being made: *W v Wakefield City Council* [1995] 1 FLR 170 (see paras [37], [53]).

(2) The judge had not erred in her treatment of the reports on the grandmother as unfavourable or negative. While they did not say in terms that the grandmother was definitely unsuitable to care for the child or that further assessment should be ruled out they did contain a significant amount of negative material so far as the grandmother was concerned and the judge was entitled to describe the reports in those terms (see paras [25]–[27], [53]).

(3) The judge took into account the favourable points that were made on behalf of the grandmother, in particular the high importance of placing the child within the family and the grandmother's rights under the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950. However, the judge recognised that there were issues that needed full exploration and there was evidence to justify her view that the grandmother's prospect of success in her application for residence was very slim (see paras [57]–[59]).

(4) The judge was entitled to take into account the likely delay that further assessment of the grandmother would cause and to decide that it was not necessary to adjourn for further evidence as there was already sufficient material to lead to her view that further assessment would take a significant amount of time (see paras [64]–[66]).

For convenience, I shall put in here some important parts of the judgment.

"[35] The application upon which Her Honour Judge Raeside was adjudicating was PGM's application to become a party to the care proceedings. It was not an application for directions under s 38(6) of the Children Act 1989 or under any other provision to be found in statute or rules for an order for assessment involving PGM and J, still less an application for leave to apply for a substantive order such as a residence order. At first sight, it may, therefore, seem curious that all parties agreed, and the judge accepted, that the provisions of s 10(9) were relevant, as s 10(9) relates to a 'person applying for leave to make an application for a s 8 order'. However, I am satisfied that this was an appropriate approach.

[36] There is no guidance in the Children Act 1989 or the Family Procedure Rules 2010 which specifically assists as to the approach that should be taken to an application for joinder and the welfare of the child is not the paramount consideration in either an application for party status or an application for leave to make a substantive application because neither of these applications involves the court in determining 'any question with respect to … the upbringing of a child', see for example (in relation to joinder/discharge of a party) *North Yorkshire County Council v G* [1993] 2 FLR 732, [1993] Fam Law 623 and *Re W (Discharge of Party to Proceedings)* [1997] 1 FLR 128and (in relation to leave to apply for a s 8 order) *Re A (Minors) (Residence Orders: Leave to Apply)* [1992] Fam 182, [1992] 3 WLR 422, [1992] 2 FLR 154.

[37] There is authority to the effect that although no s 8 order is actually being sought by the person who is seeking to be joined as a party, reference must be had to s 10(9), see *W v Wakefield City Council* [1995] 1 FLR 170 in which Wall J (as he then was) also considered two other decisions by Family Division judges, *G v Kirklees Metropolitan Borough Council* [1993] 1 FLR 805 and *North Yorkshire County Council v G*. It was not argued before us that these authorities were wrong or that the introduction by r 1 of the Family Procedure Rules 2010 of an overriding objective required them to be reconsidered and I can see no reason why they should be questioned. It is logical that a judge determining an application to become a party to proceedings should have an eye to what may follow joinder. To illustrate this with an obvious example, there would be no point in joining someone as a party if they would then inevitably be refused leave to bring an application in relation to the child and would have no other legitimate role in the proceedings.

[38] Section 10 sets out when the court may make a s 8 order in relation to a child. Certain people are entitled to apply for such an order, certain people require leave to make the application, and there are also situations in which the court can make an order even though no application has been made. Section 10(9) is concerned with the factors that may be particularly relevant where someone other than the child is applying for leave to seek a s 8 order. It provides:

'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.'

[39] It can be seen that s 10(9) does not contain anything in the nature of a test by which an application should be judged, nor even criteria which must be satisfied before leave can be given, nor is anything of the kind to be derived from the rest of s 10. Neither does the subsection circumscribe the factors that can be taken into account in determining the leave application; it leaves the court to take into account all the material features of the case and merely highlights certain matters which are of particular relevance.

[40] A feature which is not specifically picked out in s 10(9) but has been acknowledged in the authorities to be of relevance is the merit of the proposed application. The first authority to which we were taken in this regard was *G v Kirklees Metropolitan Borough Council* (see above). There a child's aunt applied to be made a party to care proceedings in relation to the child with the object of seeking leave to apply for a residence order. Booth J held that s 10(9) did not preclude the court from considering all the circumstances of the case or from having regard to the merits of the application. She pointed out that in *Re A (Minors) (Residence Orders: Leave to Apply)* (see above) the Court of Appeal

examined, on a broad basis, the merits of the proposed substantive application and considered whether it was one which had a reasonable likelihood of success. Counsel for the aunt contended that that was too stringent a test at that stage and that it was sufficient for the aunt to show that she had an arguable case but Booth J did not accept that, requiring the aunt to 'establish a case that is reasonably likely to succeed if she is going to be joined as a party in order to seek relief'.

[41] From 1995, the Court of Appeal decision of *Re M (Care: Contact: Grandmother's Application for Leave)* [1995] 2 FLR 86 became for some time the guide to the proper approach to an application for leave to make a s 8 application. *Re M (Care: Contact: Grandmother's Application for Leave)* in fact concerned an application by a grandmother for leave to apply under s 34 for contact with a child in care and s 10(9) does not apply to such an application. However, the Court of Appeal considered the factors set out in s 10(9) to be relevant also to a s 34 application and, therefore, commented upon s 10(9) and, in that connection, dealt with the question of the relevance of the merits of the proposed application. In the course of so doing, Ward LJ set out the approach he thought should be taken to this consideration. He said that the application for leave would of course fail if it was frivolous, vexatious or otherwise an abuse of the process of the court, and that it would also be dismissed 'if it failed to disclose that there is any eventual real prospect of success, if those prospects of success are remote so that the application is obviously unsustainable'. He said (at 98) that the applicant:

'… must satisfy the court that there is a serious issue to try and must present a good arguable case. "A good arguable case" has acquired a distinct meaning: see the long line of authorities setting out this as the convenient approach for the grant of leave to commence proceedings and serve out of the jurisdiction under RSC Ord 11. One should avoid unprofitable inquiry into what precisely these turns of phrase mean. Their sense is well enough known – is there a real issue which the applicant may reasonably ask the court to try and has he a case which is shown to have a better-than-even chance, a fair chance, of success? One should avoid over-analysis of these "tests" and one should approach the matter in the loosest way possible, looking at the matter in the round because only by such imprecision can one reinforce the importance of leaving the exercise of the discretion unfettered.'

[42] The next authority in time is *Re G (Child Case: Parental Involvement)* [1996] 1 FLR 857which was cited to us as authority that the test propounded by Booth J in *G v Kirklees Metropolitan Borough Council* (see above) was too high. However I did not find it particularly helpful. It is clear that such comments as Butler-Sloss LJ made at 865 were obiter and the context seems to have been the rather different one of a s 91(14) order.

[43] The next authority which requires more detailed consideration is, therefore, the decision of the Court of Appeal in *Re J (Leave to Issue Application for Residence Order)*. The local authority had ruled out a grandmother who had been significantly involved in the child's life on the basis that bringing up the child would be too much of a burden because of her age. She applied for party status in the care proceedings and for leave to issue an application for a residence order. The Court of Appeal stressed the importance of appreciating the value of what grandparents have to offer. Thorpe LJ said at para [19]: 'Judges should be careful not to dismiss such opportunities without full inquiry. That seems to me the minimum essential protection of Arts 6 and 8 rights that Mrs J enjoys, given the very sad circumstances of the family.'

[44] The judge below had applied the approach set out by Ward LJ in *Re M (Care: Contact: Grandmother's Application for Leave)*. Thorpe LJ observed that what was said in *Re M (Care: Contact: Grandmother's Application for Leave)* was said in relation to the discharge of the judicial task under s 34(3) and not directly in relation to the discharge of the judicial task under s 10(9). He commented (at para [17]) that judges had applied 'the three-fold test formulated

by Ward LJ' 'in the determination of applications under s 10(9)' which, he said, 'has had the laudable purpose of excluding from the litigation exercise applications which are plainly hopeless'. However, he refocused attention on the terms of s 10(9).

[45] At para [14] he said:

'The statutory language is transparent. Nowhere does it import any obligation on the judge to carry out independently a review of future prospects.'

[46] Later he said:

'[18] I am particularly anxious at the development of a practice that seems to substitute the test, "has the applicant satisfied the court that he or she has a good arguable case" for the test that Parliament applied in s 10(9). That anxiety is heightened in modern times where applicants under s 10(9) manifestly enjoy Art 6 rights to a fair trial and, in the nature of things, are also likely to enjoy Art 8 rights.'

[47] I asked Ms Loeb in argument to assist me as to where this left the position in relation to the relevance of the merits of the applicant's proposed case. She did not seek to argue that the merits were irrelevant but simply that, as I have set out above in summarising her submissions, it was too much to ask for a good arguable case and all that should be required is that the case be arguable. This seems to me to be consistent with the thinking behind Thorpe LJ's judgment in *Re J (Leave to Issue Application for Residence Order)* [2002] EWCA Civ 1364, [2003] 1 FLR 114. His approval at para [17] of the exclusion of applications that are plainly hopeless shows that he did not consider the merits to be irrelevant even though they are not mentioned specifically in s 10(9) and I take it from what he says in that paragraph and in para [18] that he would look for an arguable case and not something higher than that. Equally, however, he was clearly anxious to prevent the grant of leave hinging entirely on the merits of the proposed application when that was not a factor singled out for mention in s 10(9).

[48] I hope I might be forgiven for indulging myself with my own summary of the position which I hope reflects Thorpe LJ's view albeit put in slightly different terms. As I said earlier, I do not see s 10(9) as containing a test. By picking out some factors to which the court should have 'particular regard', it acknowledges by implication that there may be other factors which the court has to consider. It would be wrong, in my view, to try to list or limit these factors which will vary infinitely from case to case. One amongst them is plainly the prospect of success of the application that is proposed; leave will not be given for an application that is not arguable. I do not intend to attempt a definition of what is arguable but I would make a few observations before I leave the question of the proper approach to an application to which s 10(9) applies, whether directly or through an application to be joined as a party with a view to seeking the sort of outcome that could be the subject of a s 8 order.

[49] The first observation is that the fact that a person has an arguable case may not necessarily be sufficient to entitle him or her to leave under s 10 or to joinder as a party. I say this because s 10(9) picks out other factors as requiring particular regard and I think it must follow that there may be situations in which, when the judge exercises his or her discretion, balancing all the relevant factors, the presence of an arguable case is outweighed by those other factors or, indeed, by any other factor that carries particular weight in the individual circumstances of the case. Suppose, for example, that the applicant wishes to advance a barely arguable case with many attendant problems in relation to a child with special needs who is securely placed with an irreplaceable long-term family who will be unable to withstand the rigours of any further litigation.

[50] The second observation is that there is room, in cases concerning children, for applications or proposed applications to be checked at a very early stage and without wholesale investigation. The court has a broad discretion to conduct the case as is most appropriate given the issues involved and the evidence available; see, for example, *Re B (Minors) (Contact)* [1994] 2 FLR

1, *Re C (Contact: Conduct of Hearings)* [2006] EWCA Civ 144, [2006] 2 FLR 289 and *Re N; A v G and N* [2009] EWHC 1807 (Fam), [2010] 1 FLR 272. Accordingly, some cases can appropriately be determined on submissions alone, for example. Furthermore, it is not always necessary for findings to be made in relation to all (or sometimes any) disputed facts, perhaps because the result does not depend upon them or because there are quite sufficient undisputed facts to form the foundation of the decision that needs to be taken. What is more, there is no absolute entitlement to assessment with a view to caring for a child; *Re T (Residential Parenting Assessment)* [2011] EWCA Civ 812 contains observations relevant to this point.

[51] It is for the judge to ensure in each case that there is a fair determination of the claims of the parties and the issues in the case. Thorpe LJ's statement in *Re J (Leave to Issue Application for Residence Order)* that judges should be careful not to dismiss the possibility of a child being cared for by grandparents 'without full inquiry' must be read in the context of the facts of the particular case he was considering. The prospects of a grandparent taking over the child's care must, of course, always be looked into carefully because it can be greatly to a child's benefit to be kept within the family by such a placement. Our attention was invited also to *Re C (Family Placement)* [2009] EWCA Civ 72, [2009] 1 FLR 1425 which exemplifies this. But there are various levels of investigation of the possibilities. At one end of the spectrum, the grandparent's proposals may need to be explored at a full hearing with reports and on oral evidence; at the other a careful but limited examination of the situation by the local authority may disclose overwhelming reasons why care by the grandparent is obviously not an option. I do not think, therefore, that what Thorpe LJ said should properly be interpreted as a requirement that any grandparent who wishes to put forward proposals should be joined as a party to existing care proceedings or given leave to issue a s 8 application or still less permitted to air their case at a full hearing on evidence. Sometimes some or all of these things will be appropriate, sometimes none and it is for the judge to weigh the various factors and decide what the proper order is in the individual case. This court is slow to interfere with discretionary decisions of this kind.

[52] Finally, a word about delay. Section 10(9)(c) provides that the court must have particular regard to 'any risk there might be of [the] proposed application disrupting the child's life to such an extent that he would be harmed by it'. In *Re M (Care: Contact: Grandmother's Application for Leave)* (above), Ward LJ said (at paras [95]–[96]) that this particular provision was directed at risk to the child arising from the proposed application rather than arising from the making of any order that might result from it. Delay occasioned by or associated with the application is an obvious source of disruption and harm, and must properly be considered under this heading."

Order by the Court of its own volition

21. The court has the power in family proceedings to make a s 8 order of its own motion in favour of a person who is ineligible as of right to apply for the order. However, this power should be used sparingly and only where there are cogent reasons justifying it in the interests of the child. (Gloucestershire County Council v P [1999] 2 FLR 61.

European Convention for the Protection of Human Rights

22. As can be seen from some of the cases referred to above, rights under the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, and particularly Art 8 and Art 6, need to be bourne in mind when such applications are made. 'Family life' for the purposes of Art 8 has been interpreted by the ECtHR in a manner which may include grandparents and other family members. In K v UK (1986) 50 DR 199 the Commission said that 'the question of the existence or non-existence of "family life" is essentially a question of fact depending upon the real existence in practice of close personal ties.' In Bronda v Italy [1998] HRCD 641 it was accepted that, on the facts, a grandparent had sufficient relationship with her grandchild to establish 'family life'. (See also Marckx v Belgium (1979) 2 EHRR 330)
23. In Boyle v UK 1995) 19 EHRR 179 the Commission held that, depending on the circumstances, the relationship between an uncle and nephew could fall within the concept of 'family life'.
24. In The Queen on the application of L v Secretary of State for Health[2001] 1 FLR 406, Scott Baker J held that 'family life' is an elastic concept that depends on the facts of the individual case. In some cases, the existence of family life will be immediately obvious; in others, the reverse will be true. The onus on establishing the existence of family life is always on the applicant.

Care Proceedings

25. In care proceedings, where the choice of placement is between adoption by strangers or placement with the child's grandmother, the law's bias in favour of placement with family members is engaged (Re C (Family Placement) [2009] EWCA Civ 72, [2009] 1 FLR 1425.)
26. An important recent illustration of this can be found in the case of Re LG (Adoption: Leave to Oppose) [2015] EWFC 52, [2016] 1 FLR 607, in which Baker J gave a father leave to oppose an adoption where the change of circumstances was that the paternal grandparents, who had previously been

unaware of the child's existence, presented a realistic long term option to care for him and there was a good prospect of the adoption application being refused, despite the child having spent 8 months in the adopters' care. This is an important case. It is to be noted that, in that case, the application was made by the father, who proposed and supported placement with the grandparents, and not by the grandparents themselves.

> The child was born in 2014 to young parents. On discharge from hospital, the mother and child attended a mother and baby foster placement but it broke down after only a few days. The mother agreed to the child being placed in foster care under s 20 of the Children Act 1989 and care proceedings were initiated. The father failed to inform his family about the child and, as a result, they played no part in the proceedings. He falsely informed the social worker that the paternal grandfather had physically abused him and that was why he did not want them to be informed. Care and placement orders were made after the local authority failed to identify anyone in the wider family network who could care for the child. The child was placed with prospective adopters but, 3 months later, when the father informed his family of the child's existence, they immediately contacted the local authority expressing a wish to care for him. The adopters applied for an adoption order and the father sought leave to oppose on the basis that the child could be placed with his family. An independent social work assessment of three members of the family was positive and a special guardianship report concluded with a recommendation that the child be placed with the paternal grandfather. The local authority and the guardian supported that plan. The prospective adopters argued that the application should have been for a special guardianship order under s 29(5)(b) of the Adoption and Children Act 2002 (ACA 2002) rather than under s 47(5). Following the hearing, the prospective adopters withdrew their application for an adoption order and arrangements were made for the child to be moved to live with the paternal grandfather.
>
> **Held** – granting the father leave to oppose the adoption order under s 47(5) of the ACA 2002 –
>
> (1) It was not the correct approach to consider the application under s 47(5) as an application under s 29(5)(b) for a special guardianship order. The application made by the father, supported by the mother, was not a device to get round a statutory or regulatory hurdle but, rather, the obvious application to make in all the circumstances. It was a legal and appropriate application, and it would be quite wrong to disregard it on the basis that there was another application that was open to the birth family. On the contrary, were the court to adopt the approach suggested it could be said to be resorting to a device to get round the approach stipulated in statute as explained by the Court of Appeal in *Re P (A Child) (Adoption Proceedings)* [2007] EWCA Civ 616, sub nom *Re P (Adoption: Leave Provisions)*[2007] 2 FLR 1069 and *Re B-S (Children) (Adoption Order: Leave to Oppose)* [2013] EWCA Civ 1146, sub nom *Re B-S (Adoption: Application of s 47(5))* [2014] 1 FLR 1035, namely one that required proof of a change of circumstances and, if such a change was established, a holistic evaluative analysis in which welfare was the paramount consideration (see para [26]).
>
> (2) The court was satisfied that there had been a change of circumstances of a nature and degree to open the door to the evaluative exercise. There was nothing in the statute to limit the change of circumstances to a change in the parents' circumstances. The developments that had occurred in this case were of very great

> significance. The discovery that the father's relations, far from being the dysfunctional family as portrayed by the father during the currency of the care proceedings, were in fact able and willing to offer the child a home, was manifestly a change of circumstances of a degree sufficient to satisfy s 47(7) (see para [27]).
>
> (3) The prospects of an adoption order being refused were good, bearing in mind the President's observation in *Re B-S*, that, in considering the prospects of success in such circumstances, the court was looking at the prospect of resisting the making of an adoption order as opposed to the prospect of the child being moved to the care of the birth family. Although the child had been with the prospective adopters for over 8 months and was likely to suffer a degree of emotional distress and harm if removed from their care, she was probably still young enough to be moved successfully with care and support. The father and his family had been subject to positive assessments and it was likely that if the paternal family had been assessed during the care proceedings he would have been placed with them at that stage. The risk of distress and upheaval arising from drawn-out proceedings did not arise in this instance as the contested hearing was scheduled to take place immediately after the leave hearing (see paras [28]–[30]).

27. The ability to apply for leave to oppose adoption under s 47 is only available to 'a parent or guardian'. Any other person may seek to apply for a child arrangements order (concerning living arrangements) within adoption proceedings but must first apply for leave to do so under CA 1989, s 10(9) or ACA 2002, s 29(4). In determining an application under s 29(4), the child's welfare is a relevant, but not paramount, consideration. There is no explicit requirement for an applicant for leave to establish a 'change of circumstance' since the making of the placement for adoption order, but whether or not there has been a change of circumstance is likely to be of great relevance.

Contact to a child in care

28. A local authority has a positive duty to promote contact to parents and limited others, for example, a guardian. Grandparents are not usually in those categories. Nonetheless, a local authority also has a general duty in relation to any child whom it is looking after, which includes children in care, to endeavour to promote contact between the child and any relative, friend or other person connected with him unless it is not reasonably practicable or consistent with his welfare to do so (CA 1989, Sch 2, para 15(1)). As already discussed, a 'relative' means a grandparent, brother, sister, uncle or aunt (CA

1989, s 105(1)), and a grandparent may apply to the court for leave to make an application for contact to the grandchild in care.

Becoming involved in care proceedings

29. The Court is reluctant to allow joinder of a grandparent if a parent is supporting a grandparents desire to care for a child (eg Re M (Minors) (Sexual Abuse: Evidence), [1993] 1 FLR 822, where the Court of Appeal held that, in circumstances where the child's grandparents were offering a 'fallback' position to that of the mother, and were presenting the same case as her, there was no purpose in their separate representation and they should not have been made parties unless they had a separate point to advance).

Role of a sibling or other family members

30. There has not been time to look specifically at the potential role in proceedings of a sibling, or other family members. The same procedural provisions will apply. If a family member is unable to apply as a matter of right, leave will have to be sought. Such cases are always likely to be highly fact specific. (Take an obvious illustration: the difference between, on the one hand, an aunt who has cared for a child for most of his life although who falls just outside the statutory residential qualifications of CA 1989 s 5(b) or (5B), and, on the other hand, an aunt who has lived abroad and has seen very little of the child who barely knows her).
31. As far as siblings are concerned, the following case is of note. In Re H (Children) [2010] EWCA Civ 1200, an application was made by a sister for indirect contact with her siblings. It was refused at first instance but granted on appeal. Thorpe LJ held that "the Judge fell into the fundamental error of elevating the father's anxiety above the potential gain for these children". Where there was no contact with the mother, contact with their sister offered them the opportunity of maintaining links with the maternal side of their

family. This outweighed the risk, as perceived by the father, of indirect contact with the sister paving the way to a contact application by the mother.

> The children's sister made an application for indirect contact and a CAFCASS report was produced that was positive to the extent that indirect contact should be started and facilitated by the CAFCASS officer over a six month period with a letter to the children every three weeks. The officer attended the hearing.
>
> The respondent was the children's father and he was concerned that the application was a "backdoor" attempt to allow the children's mother (who had fallen out of their lives some time ago) to be reintroduced to the children.
>
> The judge (despite appreciating the CAFCASS officer's report and hearing her oral evidence) dismissed the application. The Court of Appeal held that the judge had attached insufficient weight to the rights of the children to a wider family life, including the applicant, if the processes of cautious experimentation succeeded.
>
> The appeal was principally allowed on the ground that the judge fell into fundamental error in elevating the father's anxiety above the importance of the potential gain for the children. In addition it was held that his reasons for departing appeared somewhat scant.
>
> Thorpe LJ stated: "I simply hold a fundamentally different position to the judge on the essential balance between advantage to the children and risk of harm to the children. It seems to me that was the essential question. It seems to me that the balance comes down firmly in favour of a positive approach, since the potential benefit to the children is real. I do not believe that the risk to the children is of anything like the same magnitude, given all the safeguards that are written into this limited experiment."
>
> Permission to appeal and the appeal allowed.

Special Guardianship

32. One final thought. Where a grandparent, or other family member, seeks to become a long term carer, consideration should be given to the possibility of applying for, and the suitability of, a special guardianship order. This type of order, of course, has the benefit of entitling the special guardian to exercise parental responsibility to the exclusion of any other person with parental responsibility for the child. It is particularly useful where there is likely to be difficulty with the parents.
33. The special guardianship provisions were introduced by ACA 2002 with the aim of placing a child through a private law order with a non-parent with a degree of permanence, which is greater than a simple child arrangements order, but is less final and immutable than a full adoption. The main features of special guardianship are to:

- give the carer clear responsibility for all aspects of caring for the child or young person, and for making the decisions concerning their upbringing;
- provide a firm foundation on which to build a lifelong permanent relationship between the carer and the child or young person;
- preserve the legal link between the child or young person and their birth family;
- allow proper access to a full range of support services including, where appropriate, financial support.

34. Subject to giving notice to the relevant local authority, specified individuals may apply for a special guardianship order without having to obtain the leave of the Court. The provisions are similar to those which relate to who may make a section 8 application without leave (see CA 1989 s 14A (5)). Any other person (other than a parent) may apply for a special guardianship order if he has obtained the leave of the court to make the application. The provisions in CA 1989, s 10(8) and (9) relating to an application for leave to make a s 8 order apply in like manner to an application for leave to apply for a special guardianship order.

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