

WHAT IS REALISTIC & ACHIEVABLE WHEN GRANDPARENTS WISH TO SECURE CONTACT? HOW ARE JUDGES REACTING?

Introduction

1. Grandparents can be an integral and helpful part of a settled family life. But when the parents fall out there may be reprisals for the grandparents, whether the children are in care proceedings or in private proceedings under section 8, or even where no proceedings have been issued at all.
2. When a family starts to disintegrate, grandparents can provide a safe haven for children, especially where the children have had a long and happy relationship with them. But beware, there may be pitfalls ahead.
3. So there are two kinds of grandparents: those involved in care proceedings (much harder to run successfully) & those in private law proceedings. In care proceedings, a Guardian is automatically appointed but in complex private law proceedings, one such might also be appointed, especially where there are internecine disputes or where the family, whether all parties or children, are highly conflicted and/or would benefit from therapy. The second category might lead to a Special Guardianship Order being made so as to secure the future of the child within the birth family.

Care proceedings

4. If there are care proceedings afoot, the Local Authority is under a statutory duty to investigate whether the child can be safely placed within the extended family and so may support an application by grandparents for eg a Special Guardianship Order, under Children Act 1989, section 14 A-F. Of course, this will be carefully scrutinised by the court, which will be advised by the Social Worker and the Guardian. It is necessary to proceed with this in a timely fashion, as the applicants (ie the grandparents) have to give the respondent (probably the LA) 3 months' notice of the application, to allow for a report to be prepared as to their suitability for the placement.
5. In practice, leave would probably be granted initially but getting a substantive order is much more difficult, because the perceived flaws in the parental relationship with the children are likely to have originated with their own parents.

6. Judges are enormously helped by the work of the Guardian in almost all cases. This was carefully analysed by Cobb J in Re H (Care & Adoption – Assessment of wider family) [2019] EWFC 10. The case concerned a 5-month-old baby in foster care at the date of the hearing. The parties did not even agree as to who in the family should be informed of their respective interests in the application. Some of them wished to be considered as potential carers for the baby, but other did not. Clearly in such a dysfunctional scenario, the Guardian has a wide-ranging duty: see section 41 of the CA 1989 – which includes a "*duty to safeguard the interests of the child in the manner prescribed by such rules*" (section 41(2)(b)). Under the Family Proceedings Rules 2010, rule 16.20, the Guardian has "*the duty of safeguarding the interests of the child*", and this is buttressed by *PD16A, Pts 3 and 4* which contains the following responsibilities:

"6.1 The children's guardian must make such investigations as are necessary to carry out the children's guardian's duties and must, in particular –

- a. contact or seek to interview such persons as the children's guardian thinks appropriate or as the court directs; and*
- b. obtain such professional assistance as is available which the children's guardian thinks appropriate or which the court directs be obtained.*

6.6 The children's guardian must advise the court on the following matters: ... "

Private law proceedings

7. In private law proceedings, the flaws in the family may run very deep and might well have led to estrangements within the family. Grandparents in these proceedings are often desperate to take on responsibility for their grandchildren but they might be shocked to learn that they do not have an automatic right to apply for contact with their grandchildren, unless the children have already lived with them for at least 3 years prior to the making of the application. In order to be able to apply to the court under section 8 for a contact order or a residence order, they first need to make an application to the court for 'leave', ie permission to do so. It is necessary to proceed with this in a timely fashion

The law

8. In determining the application for leave, the court must have regard to the factors set out in s.10(9) Children Act 1989:

“(9) Where the person applying for leave to make an application for a section 8 order is not the child concerned, the court shall, in deciding whether or not to grant leave, have particular regard to—

- (a) the nature of the proposed application for the section 8 order;*
- (b) the applicant's connection with the child;*
- (c) any risk there might be of that proposed application disrupting the child's life to such an extent that he would be harmed by it...*

9. *“(a) nature of the proposed application...”*. This is tricky. On the face of it, it should be a straightforward application for contact, but even this is open to an element of interpretation. Is the relationship between the mother and the grandmother a healthy one? Does the grandmother blame her daughter (or the father of the children) for the family breakdown? If so, could her application be double-edged? At the very least, could she have a divided agenda?

10. *“(b) the applicant’s connection with the child...”*. Again, this should be straightforward. If the grandmother has played a substantial part in the child’s life, by e.g., frequent baby-sitting, holidays spent together, respite care etc, she will qualify under this criterion. But a placement of the child with grandparents will only prove workable where the parties are substantially in agreement. So often in these cases, the application is made in the first place because of a fundamental difference of opinion within the family.

11. *“Any risk... disruption so as to cause harm to the child...”*. This is a minefield. If the grandmother has become involved in the family fall-out (and how could she not?), it is almost certain that some blame can be attached to her, rightly or wrongly, such that a social worker might question how beneficial it would be for the child to have contact with its grandmother. An example would be where, in private law proceedings, the father is removed from the family for alleged abuse of a stepdaughter and his own parents step in to hold the ring by staying in touch with their grandsons [Re D, Coleridge J...].

Special Guardianship Orders

12. On their introduction, SGOs were widely praised as a means of keeping the child in touch in the family for the most part and conferring appropriate legal status on the applicant. The President issued Best Practice Guidance in June 2020, summarising the approach to be adopted. The main principles were:

- *Alternative carers should be identified at an early stage, if possible, before proceedings are issued;*
- *Where this does not happen, as is often the case where the family hopes to rescue the position without the need for a SGO, further time will have to be allowed to assess the relationship between the child and the potential new carer. This contradicts the principle of minimum delay;*
- *Where a viability assessment is positive, the child should spend time with the carer, as that an evidence-based assessment will be available for the court. Anything less would risk being considered incomplete;*
- *SG orders and plans should be more robust & SGOs should be prepared for their new role and trained;*
- *There should be a reduction in supervision orders with SGOs;*
- *A renewed emphasis on parental contact should be implemented;*
- *Assessments should be commenced promptly; a full one should take 3 months.*

The paramountcy principle

13. It has been established that the paramountcy principle under CA 1989, s1(1) does not apply to the issue of whether to grant permission, because when the court is concerned with an application for leave, it is not determining a question with regard to the upbringing of the child. The welfare of the child is the court's paramount consideration only when it goes on (if it does, and it did in Re D above) to hear the substantive application. There are some complex cases where it is suggested that the judge who grants the application for leave later repents of that decision when applying the criteria on the substantive application. There has been a lively academic discussion as to whether the court can rescind the leave once granted, but the prevailing view is that, once granted, leave should not be rescinded.

14. The matters listed are not exclusive. The fact that the factors set out in CA 1989, s 10(9) require '*particular regard*' to be paid by the court acknowledges, by implication, that there may be other factors for the court to take into account. The court may of its own volition take into account any others that are relevant. This can include the ascertainable wishes and feelings of the child, considered in the light of their age and understanding, and also the possible disruption to their life were the application to succeed [see eg: A v A and Newham LBC [1993] 1 FLR 425 and Re G; Re Z (a child) (sperm donor: contact order) [2013] EWHC 134 (Fam)].

15. In *Re A (A Child: Application for leave to apply for a child arrangements order)* [2015] AER (D), HHJ Clifford Bellamy, sitting as a High Court Judge, summarised the guidance on the approach to be taken when considering an application for leave to apply for a CAO found in the authorities (see para 53 of his judgment) and set out the following key points:
- a) *every case is fact specific*
 - b) *s 10(9) CA 1989, noting that*
 - c) *s10(9) does not set out criteria which must be satisfied but factors to which the court must have regard;*
 - d) *the factors set out in CA 1989, s10(9) are not exhaustive;*
 - e) *the court should take account of all the material features of the case;*
 - f) *in particular, the court is entitled to consider the merits of the application and whether the applicant has an arguable case;*
 - g) *the fact that an applicant has an arguable case is not necessarily sufficient to entitle them to be granted leave under s10, CA 1989;*
 - h) *in reaching its decision, the welfare of the child is relevant but is not the court's paramount consideration.*
16. The above case specifically refers at para 40 to *Re B (A Child)* [2012] EWCA, in which the lead judgment was given by Black LJ. It concerned an application by a grandmother for joinder as a party to care proceedings. HHJ Bellamy quotes with approval the following paragraphs of Black LJ's judgment:
- '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"...*
- 39. ...section 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 section 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...*
- 48. ...I do not see section 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 prospects 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 section 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 section 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 section 10 or to joinder as a party. I say this because section 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] 2 FLR 289 and **Re N; A v G and N** [2009] EWHC 1807 (Fam)."*

Judicial attitudes to the application

17. The judicial tendency is to grant leave because judges always strive to keep a child within the birth family if that can be safely achieved and so the court will need to hear as much as possible about the applicant. The same judicial reaction applies whatever the proceedings, although obviously the odds are more heavily stacked against the family in the latter cases, because there will almost certainly be a long history of neglect or maltreatment. In the **Re D** case before Coleridge, which were private law proceedings, the paternal grandparents had paid the school fees for the boys & historically had been a good influence but once the father was excluded from the pool of appropriate carers, the case shifted and contact orders in favour of the grandparents became unenforceable. The ultimate sanction would be a change of residence (which is precisely what Coleridge J ordered) but that proved to be even more problematic. The case went to the Court of Appeal which overturned the first instance decision, on the basis that the change of residence order was unenforceable. The balance the court has to strike is where the application proves more harmful to the child than leaving him in his current situation, even where the effect would be no contact with the extended family.

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