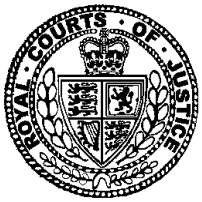

Neutral Citation Number: [2019] EWCA Civ 2281

Case No: B4/2019/2216

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM CENTRAL FAMILY COURT
HIS HONOUR JUDGE TOLSON QC
THE FAMILY COURT At The
CENTRAL FAMILY COURT
ZC19C00173

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20th December 2019

Before:
LORD JUSTICE HENDERSON
LORD JUSTICE MOYLAN
and
LORD JUSTICE ARNOLD

Re: C (A Child) (Special Guardianship Order)

- -

Miss S King QC and Miss C Baker (instructed by **Freeman Solicitors**) for the **Appellant Mother**
Miss N Hall (instructed by **Royal Borough of Greenwich**) for the **Respondent Local Authority**
Miss A Watts (instructed by **Creighton & Partners**) for the **Guardian**

Hearing date: 28th November 2019

- -

Approved Judgment

LORD JUSTICE MOYLAN:

Introduction:

1. The mother appeals from the special guardianship order made in respect of her daughter ("C") aged 5 by HHJ Tolson QC on 14th August 2019 at the conclusion of care proceedings. The order was made in favour of the paternal grandparents.

2. At this hearing the mother was represented by Ms King QC (who did not appear below) and Ms Baker. The Local Authority, the Royal Borough of Greenwich, was represented by Ms Hall and the Guardian by Ms Watts, (who did not appear below). The father has taken no part in the appeal. I am grateful to all counsel for their submissions.

3. As summarised at the hearing by Ms King, the two main points advanced in support of the appeal, which I will call grounds (a) and (b), are: (a) that the judge's decision offends against the principle that the courts "must be willing to tolerate very diverse standards of parenting", adopting the often quoted words from Hedley J's judgment in *Re L (Care: Threshold Criteria)* [2007] 1 FLR 2050, at [50]; and (b) that the judge was wrong to make a special guardianship order.

4. The Local Authority and the Guardian oppose the appeal. They submit that the judge was entitled to find that the threshold criteria, which were agreed, were established and that, in making his welfare decision, the judge applied the right legal approach and was entitled to decide that a special guardianship order was in C's best interests for the reasons he gave in his judgment.

Background

5. The parents are in their mid-twenties. C was largely brought up by both of them until March 2019 when the Local Authority obtained an Emergency Protection Order. Since then C has been living with her paternal grandparents.

6. The parents both have mental health difficulties. The mother was detained under section 2 of the Mental Health Act 1983 ("the MHA 1983") and remained in a psychiatric hospital for about three weeks in June/July 2018 after she had walked onto the tracks at a railway station. The diagnosis was "other acute and transient psychotic disorder". After her discharge she did not engage with the Home Treatment Team as recommended by the hospital.

7. The Local Authority carried out a Child and Family Assessment but without being permitted by the parents to go inside the family home. The assessment identified concerns, namely that C was socially isolated and not in "regular contact" with health professionals, but it was concluded that C was not at risk of immediate harm and the case was closed.

8. In September 2018 the mother was arrested and remanded in prison for about nine days until released on bail. She had been arrested for stalking and harassment (a previous charge in respect of the same victim had been dropped in 2017). She was also found to be in possession of cannabis. The mother was referred by the court for a psychiatric report.

9. In January 2019 the father was arrested for criminal damage and assault and then detained under the MHA 1983. He was discharged with no formal diagnosis and did not attend the subsequent mental health assessment appointments.

10. The Consultant Forensic Psychiatrist's report on the mother for the criminal proceedings was provided in February 2019. The psychiatrist's opinion was that the mother was "presenting with a psychotic illness which seems to have been developing for some years". The conclusion was that the mother "suffers with [a] delusional disorder" and that her "mental disorder [was] of a nature and degree which warrants her detention in hospital for assessment". The psychiatrist identified ongoing risks, being the risks the mother presented to herself from a further deterioration in her mental state, the risk to the victim, and also risks to C "in terms of neglect".

11. The report led to the mother being admitted to hospital on 20th February 2019 under the MHA 1983.

12. The Local Authority quickly became increasingly concerned about the father's ability to care for C because of the state of his mental health and because of his lack of engagement with both mental health and children's service. They decided to start care proceedings. When the father was informed about this he mentioned that he might just "go away". Added to this, the mother's detention under section 2 was initially due to end on 19th March 2019 and she said that, once she left the hospital, she would take C out of the country.

13. This led to the Local Authority applying for and obtaining an Emergency Protection Order on 19th March 2019 with C being placed with her paternal grandparents as referred to above.

14. The mother remained in hospital until 24th April 2019, the last part of which was voluntarily. Reports were subsequently obtained for the care proceedings from the Adult Consultant Psychiatrist who was the lead clinician dealing with the mother's treatment. This confirmed that the mother suffers from "a delusional disorder".

15. When the mother was first admitted she was "guarded", was "dismissive of suggestions that she possibly suffered from a mental illness" and "rationalised her alleged stalking behaviour as an 'exchange of energy' between people". She also declined medication for the first two weeks because of her "disapproval for the use of chemicals in medications in humans". Her condition led to the clinical decision that medication should be prescribed against her will. She then agreed to take the medication orally;

her change of mind was, at the time, considered to be mainly to avoid being injected rather than because she accepted the need for treatment.

16. Over the course of some weeks the mother "engaged more freely in reviews to explore her state of mind", with much better rapport and became "increasingly more relaxed and open". She "engaged meaningfully" in psychotherapy assessments which concluded with a recommendation for longer term psychotherapeutic intervention after her discharge. She also "engaged meaningfully in discussions on the need for continued medication treatment" after her discharge from hospital.

17. The prognosis on the mother's discharge from hospital was that she "has shown early signs of a promising response to medication and psychotherapy treatment". The "intensity of her symptoms has reduced" and she was "more amenable to psychiatric interventions considering her initial strong views against hospital admissions and medication treatment". Although the mother's insight had "improved significantly", it remained "limited". She did "not agree that she has a mental illness" and "her acceptance of interventions is based on its benefits of making her less anxious/distressed/reducing her unpleasant experiences". The report concluded by saying: "Initial signs of her recovery will suggest a good progress, however it is perhaps rather early to be exact … considering overall unfavourable prognostic evidence for sufferers of delusional disorders". It was also said that the mother's prognosis would "depend a lot on her engagement in her treatment and care plan as well as her support structure".

18. The psychiatrist provided a further report in July 2019. She noted that the mother had "overall … engaged reasonably in her care plan". This included that her "adherence to medication was reported as good". The mother had "achieved symptomatic relief with antipsychotic medication treatment but low grade residual symptoms persist". Her "insight into her mental health difficulties continues to improve". Psychotherapy had not commenced, the doctor noting that there was usually a long waiting list.

19. Asked to comment on the likely impact on the mother's parenting if she were to disengage from health services and not take her medication, the doctor said: "I would expect the intensity and frequency of her symptoms to increase within weeks/months" with a "gradual decline in her overall functioning". "This could potentially have significant effects on her parenting skills depending on the intensity and frequency of her symptoms at the time". She recommended a "robust crisis management plan" be agreed between the community health team, children's services and the mother and her family.

20. The psychiatrist was also asked to comment on the impact of the mother's beliefs on C. She replied that she was aware that the mother has "strongly held beliefs about orthodox treatments" which had led her not to register C with a GP but she considered that this was not a mental health issue.

21. In addition to C not being registered with a GP, she had not been receiving any medical attention whilst living with her parents. Following the commencement of the care proceedings, C was assessed by a paediatrician in April 2019. All her skills were age appropriate save that her locomotor and interactive social skills were delayed. The former was due to C having genu valgum (knock-knees) and her legs being of different lengths, of which the parents were aware but in respect of which they had not sought medical attention. The paediatrician noted that there "is a family history of musculoskeletal problems and idiopathic leg length discrepancy". C was also found to have a heart murmur. The issues with C's legs and her heart murmur led to further medical investigations. Following these, there were no ongoing concerns in respect of the heart murmur but the issues with C's legs required further attention.

22. The father was diagnosed with schizotypal disorder. He did not accept that he had a mental disorder and did not engage with mental health services. I should make clear that because this judgment is dealing with the mother's appeal, I only make brief references to the father.

23. By the date of the final hearing, in July 2019, the parents had separated.

Proceedings

24. As referred to above, the Local Authority obtained an Emergency Protection Order on 19th March 2019. An interim care order was obtained on 27th March 2019 which confirmed C's placement with the grandparents. C has had contact with her maternal family and supervised contact with her parents.

25. In addition to the psychiatric reports referred to above, evidence was provided by the Local Authority, including a parenting assessment of the mother and father, the parents and the Guardian. There was also a special guardianship assessment of the paternal grandparents.

26. In her final report the Guardian observed that the mother "clearly loves" C and that C "enjoys the time she spends with her mother". She also said that the father loves C and that C very much enjoyed contact with him. The parenting assessment said that C "is a lively little girl who enjoys lots of attention and cuddles from her parents" during contact. The social worker also saw that C "is clearly loved by her parents and it is obvious that she loves her parents".

27. At the final hearing, it was agreed that the threshold criteria were established. The final threshold document relied on the mother's and the father's mental health disorders and the consequent risk of harm to C; their respective substance abuse; and the neglect of C's health needs because of, what the judge described as, "their rejection of modern medical care".

28. The Local Authority, supported by the Guardian sought a special guardianship order. In the written position statement, the mother sought C's return to her care with a

supervision order. She additionally proposed that she would enter into an agreement with the Local Authority dealing with, among other matters, her medical treatment and C's schooling and medical treatment. The father supported the mother.

29. At the start of the final hearing, the mother sought an adjournment with C returning to her care under an interim care order or with a supervision order. It was proposed that the final hearing would then be listed in October. The judge decided to deal with this application after having heard the evidence. He heard oral evidence from the allocated social worker, the social worker who had undertaken the parenting assessment, the mother and the Guardian.

30. At the conclusion of the hearing, the Local Authority still sought a special guardianship order. This was supported by the Guardian but subject to what she said in her oral evidence as referred to below. The mother, supported by the father, proposed that C should be returned to her care under a child arrangements order with a supervision order; or, alternatively, that the final hearing should be adjourned with C returning to her care either under an interim care order or with an interim supervision order; or, alternatively, that C should live with the paternal grandparents under a child arrangements order rather than a special guardianship order.

The Judgment

31. The judgment was given ex tempore on the final day of the three day hearing.

32. At the outset of the judgment, the judge noted that the Guardian's written report appeared fully to support the Local Authority's case including as to the making of a special guardianship order. However, in the course of her oral evidence, she had said that she saw the making of a special guardianship order "not as a permanent solution … but as merely a stepping stone along the way to what she said … is the 'very likely' return of C to her mother's care in due course". As the judge then observed, this meant that there was "in fact a division of opinion" which he would have to address in his judgment. He dealt with this at the end of his judgment, as referred to below.

33. He also noted that, although he was being asked by the Local Authority to make only a private law order, the application had been for a care order and the parents sought a supervision order. He considered, accordingly, that he first needed to deal with the threshold criteria under section 31 of the Children Act 1989 and not "proceed simply to the application of a welfare test".

34. The threshold criteria were agreed, as referred to above, but the judge made his own determination. He decided that they were established based on the matters set out in the threshold document. "Key to the crossing of the threshold" were the parents' respective mental health difficulties. These had "rendered them effectively unable to care for C when these proceedings commenced". He was also satisfied that the parents' "rejection of modern medical care" had led to C's health needs being neglected in particular in respect of the discrepancy in the length of her legs which

affected her gait. This was "an example of the problems which the Local Authority say would arise if C's parents were to reject medicine entirely in the future". He identified one "controversial factual" dispute, namely whether the mother would continue to take the prescribed medication, to which I return below.

35. When dealing with the background, the judge referred to the parents' lifestyle and their beliefs. He commented that the mother has "adopted a lifestyle which can be said to go well beyond the merely alternative" and that her beliefs are "deep-rooted". She "has difficulty accepting not just the validity of Western medicine but that such medicine is not in itself harmful". He also said that: "Perhaps at its most extreme the mother has suggested that both she and C ought to be capable of being 'breatharians', meaning that they should be able to survive without food and possibly water".

36. The judge expressly "emphasised" that, having heard the mother give evidence, she "clearly loves her daughter dearly and wants by her own lights the very best for her". He also referred to the "full benefit which natural parenting brings to a child"; he attached "particular importance" to this. The judge separately addressed C's wishes and feelings, as set out below, but he also expressly recognised that C "will at some level want and she certainly needs a close relationship with her mother".

37. The judge summarised the evidence from the psychiatrist. He noted the mother's initial refusal to take anti-psychotic medication and that since then she has "abided by [her] medication regime". In her oral evidence the mother said that "she will continue to take that medication for so long as it is advised". The judge recorded the medical evidence that, if she "abides by her current regime, then there is … a good prospect that her condition will remain stable and continue to improve".

38. One issue had a significant impact on the judge's assessment of the mother and on his ultimate determination. This was whether the mother had or had not told the social worker who undertook the parenting assessment that "she would cease to take her medication when the proceedings come to an end". The mother disputed that she had said this. Her evidence was that she had told the parenting assessor that she had explored alternatives and found one in ginseng tea, adding that she "would not in fact, certainly if so advised, cease to take her medication".

39. The judge preferred the evidence of the social worker. He was "a professional assessor". The "answer had struck [the social worker] and he checked it with the mother". This was a "highly significant element within his assessment". Further, the judge noted that the mother "has for so long adhered to an alternative lifestyle that I cannot believe [she] only recently … discovered ginseng". Nor, he added, "is it in any way clear to me how the mother could rationally believe that ginseng was a potential cure for her mental illness".

40. The judge concluded that this issue indicated more than that the mother was "still merely lacking insight into her condition". He concluded that the mother's explanation of her conversation with the social worker had been untruthful, which led him to

question "how sincere the mother is in other aspects of her evidence". I return to this below.

41. This led the judge to have "difficulty in accepting the mother's evidence" that she would abide by the treatment programme, in particular medication, for her mental health disorder. This, in turn, led the judge to conclude that "there remains a significant chance … that the mother's current progress in terms of her mental health will not be sustained". If the mother did not continue with the treatment, there was "not simply a risk but, according to (the psychiatrist), close to a certainty of a relapse". The mother's condition would "deteriorate within weeks or months" and she would be "unavailable" to C. This "undoubtedly represents a potential source of future harm to" C.

42. The "other aspects" of the mother's evidence to which the judge was referring were those in which she had dealt with how she would care for C in particular in respect of schooling and medical attention. The parents had been proposing that C would be home schooled. In her oral evidence, the mother said that she "had seen that C … had benefited from her nursery placement". She "could see that C enjoyed it, and she was now … keen for it to continue". The mother also proposed that C would remain registered with a GP; that she would take her to all medical appointments and comply with recommended treatment.

43. The judge was concerned at the mother's "lack of complete honesty". But, in addition, even when "she probably meant what she had said to me", the judge noted the "considerable premium [which] attached to" the mother saying during the course of the care proceedings that she would adhere to the proposed care arrangements in the future. He also considered that the mother's long-standing beliefs about education and medication would make it "easy" for her to return to caring for C in a way which conformed with those beliefs and which the mother consequently would consider to be in C's best interests. It would be "so easy to return to the benefits of alternative medicine; to the benefits, in the mother's eyes, of not even causing C to be registered with a general practitioner". This would include C "not being presented, on time at least, to appropriate medical care". This was a potential source of harm as was "potentially the lack of formal education". The judge remarked how he had been "struck by the mother's answers, on more than one occasion, as to how she herself had got by without being ill as a child, and so, therefore, there was no such need".

44. The judge dealt with C's wishes and feelings. C said that she wanted to remain "where she is, with her grandmother, who gets her to school and ballet". The judge described this as a "straightforward statement" which was "relatively surprising" given C's age and "the undoubted qualities which her mother in particular has shown her in the past". In the judge's view C's comment "speaks … to the question of social isolation which … has been a concern now for a while on the part of the Local Authority".

45. The judge also addressed C's needs. In his view C "needs to go to school"; "needs to be registered with a GP"; "needs outlets beyond meditation and Tai Chi" – this was a

reference to the limited nature of the activities in which C engaged with the mother and the concern raised by the Local Authority that she was socially isolated. The judge added that C "needs to do … ordinary things … like go to ballet classes", which C had specifically mentioned in the context of her wishes and feelings.

46. The judge concluded that C could not return to her mother's care because of the risks of harm and because he was "not satisfied that the mother would, at the moment [or] in the longer term, be able to meet her needs". Remaining in "her grandparents' care is … undoubtedly a proportionate response".

47. The judge addressed separately the form of order under which she should live with the paternal grandparents. He again referred to the Guardian's evidence that a special guardianship order might "somehow [be] temporary". In his view, he could not make such an order "on that basis". There were other orders "which do not ring fence the position of the special guardians as permanently as does this order". He noted the impact of a special guardianship order on the exercise of parental responsibility and that the mother would require the court's permission to apply to discharge it. These features "would sit uneasily with the Guardian's oral evidence".

48. The judge also did not "entirely subscribe" to the Local Authority's assessment that this was "a long-term" order. In his view it was not possible "to say whether this is a case in which the mother will regain the care of her child". He hoped that she would. However, the judge's "concerns as to the mother's future mental health difficulties and the socially isolating way in which she might parent C in the future, give me too much cause for concern to say that I can in any way sanction this as an order which is merely temporary".

49. The judge was particularly concerned, "perhaps above any other [case] I have encountered", that because of the mother's "belief system … there are so many potential points of friction in future parenting that in my judgment it is important in C's best interests that parental responsibility is capable of being exercised exclusively by her primary carers". This was a "feature of a special guardianship order which" meant that it was very much "a fit with the circumstances of this case".

50. At the end of his judgment, the judge made some general remarks about what might assist the mother if she made an application for permission to apply to discharge the special guardianship order. These related to her mental health and her approach to "what is best for C and her belief system".

Submissions

51. I propose only to summarise the parties' respective submissions but I have, of course, taken all the matters raised by them into account.

52. I have referred above (paragraph 3) to the focus of Ms King's oral submissions. I should also set out the other grounds of appeal, (listing sequentially from (b) above): (c) that the judge was wrong to decide that the mother had been untruthful in her account of her conversation with the parenting assessor; (d) that the judge failed to undertake a proper, holistic, evaluation of all the available options which took into account "all of the positives and negatives, pros and cons, of each option"; and (e) that the judge was wrong to "determine" what the mother would need to demonstrate if she applied for permission to apply to discharge the special guardianship order.

53. Ms King began her submissions by pointing to the considerable progress which had been made in respect of the mother's mental health difficulties. The mother's insight had improved and she was voluntarily taking medication. Her mental health was stable and any deterioration would be gradual.

54. In support of her first main argument (a), namely that the judge's decision offends against the principle that the courts "must be willing to tolerate very diverse standards of parenting", Ms King submitted that the judge appears to have concluded that C's lifestyle and beliefs were by themselves a source of harm to C. In her submission the judge allowed his views about, and his disapproval of, the mother's lifestyle and beliefs to distort his welfare assessment so as to render it flawed.

55. In respect of (b), Ms King submitted that a special guardianship order should only be made when necessary to reflect permanence and that the required degree of permanence was not present in this case. She relied on *In re P-S (Children) (Care Proceedings: Special Guardianship Orders) (Association of Lawyers for Children intervening)* [2018] 4 WLR 99. In her submission there was no need in this case for such a degree of permanence, and such a degree of interference in the mother and C's family life, especially having regard to the Guardian's evidence that C was "very likely" to return to the mother's care. She submitted that the judge did not appear to have decided that the order was permanent because he said that it was not possible "to say whether this is a case in which the mother will regain the care" of C. Ms King also submitted that the judge's decision was flawed in so far as the judge made the order to place the special guardians above the mother in terms of the exercise of parental responsibility.

56. In respect of (c), it was submitted that, in the absence of the mother being asked in evidence whether her account of the conversation was untruthful, the judge was not entitled to make any such finding. It might have been that, alternatively, the mother had been misunderstood or had simply been wrong in her recollection.

57. As to (d), Ms King submitted that the judge did not engage properly with the options available in this case. Included within this was a submission that the judge needed to deal specifically with the mother's proposal that the case should be adjourned with C being restored to her care. This would have enabled the mother further to demonstrate, and the court and the Local Authority to assess, her adherence to her treatment programme and to C's attending school and medical appointments.

58. In addition, the judge failed properly to consider the terms of the agreement which the mother proposed as a proportionate means of guarding against the risks relied on as justifying C's removal from her care. This would have addressed or ameliorated the potential consequences of the mother not complying with her treatment programme and not meeting C's care needs. The agreement would enable the Local Authority to monitor the situation and step in if required. The judge did not explain why this combination was not consistent with C's welfare needs. Nor did the judge properly analyse the competing merits of C living with her paternal grandparents under a child arrangements order rather than a special guardianship order. For example, under the latter form of order there is no duty to promote contact or rehabilitation.

59. Ms Hall submitted that the judge did not disapprove of the mother's lifestyle and beliefs as submitted on behalf of the mother. She first pointed out that he was entitled to find that the threshold criteria were established. Secondly, she submitted that the judge analysed whether the mother's beliefs presented a risk of harm to C in the manner in which they impacted on her care of C. This was in addition to the risk of harm from the mother's mental health condition.

60. Ms Hall submitted that the judge carried out a holistic evaluation of the, essentially, two care options, namely either C returning to the care of the mother or remaining with the grandparents. She also submitted that the judge did not need specifically to address the application for an adjournment in his judgment. He made clear during the course of submissions that he did not consider an adjournment was justified. In addition, the application was on the basis that C should, in any event, be returned to the mother's care. Ms Hall submitted that by deciding this latter issue, it was clear why the judge decided not to adjourn. He considered that he was in a position to determine the proceedings substantively.

61. On the form of the order. Ms Hall submitted that the judge expressly considered the differences between a child arrangements order and a special guardianship order. He was aware of the long-term nature of the latter referring to it "cementing" the grandparents'' parental responsibility and to "other alternatives" not dealing with this "as permanently as … this order".

62. On the issue of whether the judge was entitled to find that the mother was untruthful, Ms Hall submitted simply that there was a direct conflict of evidence which the judge had to resolve. It was inevitable that one of the options was that the mother's account had been untruthful.

63. In respect of ground (a), Ms Watts submitted on behalf of the Guardian that the judge did not consider the issue of lifestyle and beliefs in isolation but in the context of their impact on C's care and welfare. They impacted in particular on her medical needs and her social isolation and put her at risk of harm.

64. As to ground (b), Ms Watts made the general submission that a special guardianship order is a lesser form of intervention, from the child's perspective, than a care order. She also submitted that the judge was right, or certainly entitled, to decide that C needed a long-term order which provided a greater degree of permanence and stability.

65. As to (d), Ms Watts submitted that the judge sufficiently addressed the two competing options. The judge can be seen to have applied the welfare checklist and, in her submission, can also be seen to have analysed the positives and negatives of each option. She submitted that the question of an adjournment would only have become potentially relevant if the judge was considering returning C to the mother's care. Having decided that this would not be in her best interests, there was no possible justification for an adjournment.

66. The parties also made broader submissions on the approach the court should take when deciding whether to make a special guardianship order at the conclusion of care proceedings. As part of these we were referred to the Family Justice Council's *Interim Guidance on Special Guardianship*, May 2019 and to the Nuffield Family Justice Observatory's, *Special guardianship: a review of the evidence, Summary Report*, 2019. I do not propose to set out these submissions because I do not consider this case provides an appropriate opportunity to consider these broader issues.

67. The only observation I would make is that I agree with the submission that, when a court is determining care proceedings, and even if the ultimate decision is to make a special guardianship order (which is legally not a public law order), there are good reasons for the court dealing with the threshold criteria. In particular, this will set out the court's conclusions on the evidence and provide a clear factual foundation both for the basis of the order and for any applications made in the future.

Legal Framework

68. It is not necessary for the purposes of this judgment to embark on any extensive analysis of the nature of a special guardianship order. The background to its introduction is set out in *Re S (Adoption Order of Special Guardianship Order)* [2007] 1 FLR 819. This case also contains a detailed consideration of the characteristics of a special guardianship order and addresses the differences with an adoption order. Perhaps the most significant difference is that the former preserves the legal status and connection between the child and his or her birth family, making them less intrusive orders for the purposes of Article 8 of the ECHR.

69. There are also significant differences between a special guardianship order and a child arrangements order, notably that the special guardians can exercise parental responsibility to the "exclusion" of any other person with parental responsibility: section 14C(1)(b), the Children Act 1989. The order provides, and is intended to provide, a greater degree of permanence. This is demonstrated both by the additional substantive procedural requirements, including the preparation of a specific report, section 14A(8) and 14A(11) of the 1989 Act and the provisions of the Special

Guardianship Regulations 2005, and by the fact that the court's permission is required before a parent can apply to discharge a special guardianship order: section 14D(3). As Wall LJ said when giving the judgment of the court in *Birmingham City Council v R* [2007] Fam 41, at [78]:

> "special guardianship is an issue of very great importance to everyone concerned with it, not least, of course, the child who is its subject. It is plainly not something to be embarked upon lightly or capriciously, not least because the status it gives the special guardian effectively prevents the exercise of parental responsibility on the part of the child's natural parents, and terminates the parental responsibility given to a local authority under a care order (whether interim or final). In this respect, it is substantially different from a residence order which, whilst it also brings a previously subsisting care order in relation to the same child to an end, does not confer on any person who holds the order the exclusivity in the exercise of parental responsibility which accompanies a special guardianship order."

That case did "not require [the court] to examine the circumstances in which a special guardianship order (as opposed to any other order in relation to a child) would be made on its merits", at [79]. But Wall LJ did make observations about the "circumstances in which such an order falls to be considered", at [79]. One of these was in care proceedings, in respect of which he said, at [80]:

> "Although firmly embedded in Part II of the 1989 Act, and thus part of its private law, as opposed to public law, provisions, it is none the less self-evident that special guardianship will frequently fall to be considered as one of the options for a child in care proceedings, once - as here - the threshold criteria under section 31 of the 1989 Act have been established, and the court has to consider, on a welfare basis, what (if any) order is in the best interests of the child or children concerned."

70. In *Re S* Wall LJ, again giving the judgment of the court, set out the "summary of the main features of the special guardianship regime" and "some helpful illustrations of some circumstances in which guardianship may be appropriate" contained in the December 2000 White Paper, *Adoption: A New Approach*, Cm 5017, para 11, at [41] and [42]. This included among its features that it provides "a firm foundation on which to build a lifelong permanent relationship between the carer and the child or young person", at [41]. One of the "illustrations" was: "children being cared for on a permanent basis by members of the wider birth family", at [42]. However, Wall LJ immediately emphasised that "these are only illustrations. There can be no routine solutions", at [43].

71. Later in the judgment further points were made about the statutory scheme, at [47]. These included that: "There is nothing in the statutory provisions themselves which limits the making of a special guardianship order or an adoption order to any given set of circumstances", at [47(ii)]; and that such an order will "only [be] appropriate if, in the particular circumstances of the particular case, it is best fitted to meet the needs of the child or children concerned", at [47(i)]. Wall LJ concluded by saying that: "Each case needs to be decided on the application of the statutory provisions to the best interests of the particular child or children concerned", at [61].

72. Ms King relied on what Ryder LJ said in *Re P-S*, at [35]: "special guardianship was introduced to provide permanence in the care of children who cannot return to their birth families but where adoption is not appropriate". In making this observation, I do not consider that he was intending to depart from what this court had said in *Re S*, which was not referred to in *Re P-S*, and introduce any particular permanence threshold for the making of a special guardianship order. He was contrasting adoption and special guardianship; the above comment follows him saying that: "whatever the degree of permanence a special guardianship order provides for a child, the order does not have the same characteristics as an adoption order". Simply stated, the order is intended to provide greater permanence than a child arrangements order. In my view, rather than becoming unduly focused on what might be meant by the word "permanence", what is important is that the court should analyse and explain why the child's welfare interests justify the making of this order rather than a child arrangements order.

73. It is also relevant to mention that "the assessment of welfare is not driven by presumptions", Peter Jackson LJ in *Re A (Special Guardianship: Competing Applicants)* [2019] 1 FLR 687, at [16]. He referred to *Re W (Adoption: Approach to Long-Term Welfare)* [2017] 2 FLR 31 in which McFarlane LJ made the same point, at [71].

74. Having regard to the mother's reliance on *Re L*, it is relevant to refer to what McFarlane LJ said in *Re H (A Child) (Appeal)* [2016] 2 FLR 1171. In that case the judge at first instance had quoted from *Re L* in support of there being a "presumption" in favour of a child's birth family.

75. McFarlane LJ first considered the position in private law disputes relating to children and said that "there is no presumption in favour of a parent", at [88]. He then added: "In a private law case, whilst the fact of parenthood is to be regarded as an important and significant factor in considering which proposals better advance the welfare of the child, the only principle is that the child's welfare is to be afforded paramount consideration", at [88]. He next dealt with the position in public law proceedings: "there is no authority to the effect that there is a 'presumption' in favour of a natural parent or family member", at [89].

76. When dealing with public law proceedings, McFarlane LJ dealt specifically with the relevance of Hedley J's remarks in *Re L*. They were "entirely directed to the question

of the threshold criteria", at [89], and were "describing the line that is to be crossed before the state may interfere in family life", at [91]. He also noted that although "Hedley J's words in para [50] are referred to in each of the main judgments in the Supreme Court in *Re B* [*Re B (a child) (care order: proportionality: criterion for review)* [2013] 3 All ER 929], such references are in the context of consideration of the s. 31 threshold rather than welfare", at [91]. He concluded, therefore, that the trial judge's reference to what Hedley J had said about the need for society to "be willing to tolerate very diverse standards of parenting" was "out of place, as a matter of law, in a case where the issue did not relate to the s. 31 threshold, but solely to an evaluation of welfare", at [93]. The judgment then addresses the issue of proportionality, at [94] and [95].

77. I would emphasise that, as Baroness Hale said in *Re G (Children)* [2006] 2 FLR 629, albeit in a very different context: "None of this means that the fact of parentage is irrelevant", at [31]. She also quotes from a number of other sources including the Law Commission's Working Paper No 96, *Review of Child Law: Custody* which referred to the welfare test being "able to encompass any special contribution which natural parents can make to the emotional needs of their child", at [3], and Australian authorities in which it was said that: "*the fact of parenthood is to be regarded as an important and significant factor in considering which proposals better advance the welfare of the child*", at [31].

Determination

78. I can state my conclusions shortly because, despite Ms King's well-argued submissions, it is clear to me that this appeal should be dismissed.

79. I deal first with ground (a), namely the submission that the decision in this case was based on a flawed approach to the mother's lifestyle and beliefs and offends against the principle that the courts "must be willing to tolerate very diverse standards of parenting".

80. As referred to above, the case of *Re L*, from which the words quoted above derive, was concerned with threshold. The present case is not concerned with threshold. However, although McFarlane LJ considered that, what might be called the *Re L* perspective, is "out of place" in a welfare evaluation, it is clear that the "character of the parents" is relevant "only to the extent that it affects the quality of their parenting", as referred to by Lord Wilson in *Re B,* at [30]. Although that case was also dealing with the issue of whether the section 31 threshold has been crossed, in my view the relevant consideration when the court is making a welfare determination remains the extent to which the character of the parents, in terms of lifestyle and beliefs, "affects the quality of their parenting", to adopt Lord Wilson's phrase from *Re B,* at [31]. This is because the court is assessing the welfare consequences for the child of that parenting.

81. The judge did describe the mother's beliefs as "very strange" but this was in relation to the mother's suggestion that she and C "ought to be capable of being 'breatharians". In

my view, it is clear from other references in the judgment and, indeed, the overall structure of the judgment that the judge was specifically considering the manner in which the mother's beliefs impacted on her care of C. The judge considered whether they were a potential source of harm and decided that they were. They were also relevant in the welfare analysis when the judge considered C's needs. He was "not satisfied" that the mother "would, at the moment [or] in the longer term, be able to meet those needs". None of these conclusions were based, as is submitted on behalf of the mother, on the judge's "disapproval" of the mother's beliefs but on the likely welfare consequences for C.

82. As to ground (b), the judge was plainly aware of the differences between and the different objectives of a child arrangements order and a special guardianship order. He expressly said that he did not consider he could make the latter order if, as suggested by the Guardian, it was intended to be "temporary". As he also said, there were other available alternatives which would not "ring fence" the position of the special guardians as "permanently" as this form of order. He concluded, for the reasons he gave, that he could not "sanction an order which is merely temporary". Accordingly, I do not accept Ms King's submission that the judge's assessment of the need for the requisite degree of permanence was either absent or flawed. He also considered that there were "so many potential points of friction in future parenting" that a special guardianship order provided the added advantage of enabling the special guardians to exercise parental responsibility "exclusively". This was in C's best interests.

83. As to ground (c), there is no basis on which this court could decide that the judge was wrong to find that the mother's account of her conversation with the parenting assessor was untruthful. The judge explained why he preferred the evidence of the assessor. He was a "professional assessor" who had "checked" the mother's answer because it "struck him". Conversely, there were "difficulties with the mother's" case, in that her account of the conversation clearly seemed implausible to the judge. Further, it is clear that this aspect of the evidence was sufficiently explored during the hearing to entitle the judge to find that the mother had been untruthful. There is no need for the mother to be asked whether she is lying. Apart from being, frankly, a hackneyed approach to cross-examination, it is difficult to see what would have been gained by the mother being asked this question.

84. As to ground (d), I start with the submission that the judge should have expressly dealt with the adjournment application in his judgment. In my view, there was no need for the judge to address this question separately. The judge had already informed the parties during the course of their final submissions that he did not propose to adjourn the case. It is clear from his judgment why he did this. He considered that he was able to determine the proceedings and, given his conclusion that C could not return to the mother's care, I agree that nothing would have been gained by an adjournment.

85. As for the substantive submission, that the judgment was deficient, I consider that the judge did sufficiently analyse the options of C returning to the mother's care and of her remaining in the care of the grandparents. The judge has explained why he decided

that C should remain with the grandparents. This was based on the risks of harm if she returned to the mother's care. There was a "significant chance … that the mother's current progress in terms of her mental health will not be sustained". The "deep-rooted" nature of the mother's beliefs about what was in C's best interests would make it "difficult" for the mother to change and "easy" for her to revert to caring for C without appropriate medical care or formal education and in a way which was socially isolating. In addition, he took into account C's wishes and feelings and how her needs would best be met.

86. The judge, accordingly, carried out a welfare assessment. One point which has caused me some hesitation is whether, as Ms King submits, the judge should have specifically addressed why a supervision order and the proposed agreement were not sufficient to support C's return to the mother's care. I agree that this would have been better. However, this was an ex tempore judgment, and given the judge's conclusions about the prospects in terms of the mother's mental health and the care she would provide C, it is clear that he must have decided that the imposition of an agreement would not be sufficient to change the welfare balance. He clearly did not have sufficient confidence in what the mother would do to consider that the existence of an agreement would have any real impact on her. The existence of an agreement would not, therefore, have addressed or ameliorated the reasons for the judge's decision.

87. As to ground (e), in my view the judge did not "determine" what the mother would need to demonstrate if she applied for permission to apply to discharge the special guardianship order. He was simply seeking to give what he intended to be a helpful indication of the issues which the mother should consider addressing.

88. In conclusion, for the reasons given above, I propose that this appeal should be dismissed.

Lord Justice Arnold:

89. I agree.

Lord Justice Henderson:

90. I also agree.