1 **THE FAMILY COURT SITTING AT OXFORD**

2 **BEFORE HER HONOUR JUDGE OWENS**

3 **CASE NO: OX18C00147**

4 **21ST MARCH 2019**

5

6 **OCC v D & DJ**

7

8 **Mr Sampson, Counsel, for OCC**
9 **Ms Pugh, Solicitor, for the First Respondent Mother, M**
10 **Second Respondent Father, F, in person**
11 **Mr Ferry, Solicitor, for the Third and Second Respondents, acting through their**
12 **Children's Guardian**
13
14
15 This judgment is being handed down [in private] on 21st March 2019. It consists of 18
16 pages and has been signed and dated by the judge. The Judge has given
17 permission for the judgment (and any of the facts and matters contained in it) to be
18 published and noting in any report, no person other than the advocates or the solicitors
19 instructing them (and other persons identified by name in the judgment itself) may be
20 identified by name, current address or location [including school or work place]. In
21 particular the anonymity of the children and the adult members of their family must
22 be strictly preserved. All persons, including representatives of the media, must ensure
23 that these conditions are strictly complied with. Failure to do so will be a contempt of
24 court. For the avoidance of doubt, the strict prohibition on publishing the names and
25 current addresses of the parties and the child will continue to apply where that
26 information has been obtained by using the contents of this judgment to discover
27 information already in the public domain.
28
29
30 **Introduction**

31

32 I am dealing with an application to discharge Care Orders which were made on 10th

33 December 2015. The Applicant is OCC, the Local Authority. The two children who

34 are subject to the Care Orders are A and B. They are aged 5 and 4 years respectively.
35 Their mother is M and their father is F.
36
37 **Background**
38
39 The original care proceedings took place in 2015. The primary issue in those
40 proceedings was causation and perpetration of injuries which B suffered whilst in the
41 care of her parents. Those injuries were a fractured clavicle and bruising. On 24th
42 February 2015 I gave judgment in respect of fact-finding concerning those injuries
43 and found that they were non-accidental and inflicted by one or other of the parents.
44 On 8th December 2015 I dealt with the final part of the care proceedings and gave
45 judgment on the welfare stage of those proceedings. By that point both parents had
46 been assessed by Dr Melissa Jackaman, clinical psychologist. Her conclusions were
47 that neither parent seemed to accept that the other could have caused the injuries and
48 there seemed to be little understanding from either parent as to how the other may be
49 more proactive in ensuring greater safety for the children given what had taken place.
50 Dr Jackaman also concluded that M had a number of complex issues which needed
51 addressing, including allowing her emotions to build up until she had an aggressive
52 outburst which she struggled to control. In relation to F, Dr Jackaman concluded that
53 she had concerns about his ability to recognise his own levels of stress and that F was
54 not able to ask for help appropriately. Considering Dr Jackaman's evidence, that of
55 the social worker and various parenting and kinship assessments filed, and the
56 evidence of the Guardian, as well as the parents themselves, I concluded that it was
57 not safe to return A and B to the care of their parents and that the only remaining
58 realistic option for their long-term care was placement with their paternal aunt and

59 uncle in Madeira. This was the final care plan of the Local Authority for each child,
60 supported by the Guardian. I granted full Care Orders with that placement plan. For
61 the purposes of this judgment, being aware that the authorities in Portugal will need to
62 have full judgment for the purposes of Brussels II Revised, I adopt my two earlier
63 judgments and the findings made in those which I have just summarised. A and B
64 moved to live with their paternal aunt and uncle in Madeira, and their paternal cousin
65 who is also a child, on 18th January 2016. They have remained there since.
66
67 The application I am now dealing with is brought by OCC on the basis that the Care
68 Orders can now be discharged and replaced with private law orders to enable A and B
69 to remain living with their paternal aunt and uncle. OCC specifically seek Special
70 Guardianship Orders supported by Child Arrangements, Specific Issues and
71 Prohibited Steps Orders governing where the children should live and with whom, as
72 well as setting out parameters for the exercise of parental responsibility. The
73 application for discharge was made on 14th November 2018. Proceedings were
74 allocated to me as the application was for discharge of orders that I had made and I
75 conducted a case management hearing on 30th November 2018. At that hearing the
76 case was initially timetabled to an Issues Resolution/Early Final Hearing before me on
77 11th February 2019. On 11th March 2019 the issues were narrowed considerably in
78 that neither parent sought to actively oppose the discharge of the care orders or for
79 orders to be granted to enable A and B to remain living with their aunt and uncle in
80 Madeira. There was potentially an issue around the arrangements for the contact that
81 A and B would have with their parents, though parties indicated that they were not
82 necessarily seeking an order to define that contact. The Guardian's final analysis and
83 recommendations, dated 8th February 2019, had only been received on 9th February

2019. In it the Guardian (at paragraph 20) made some recommendations for more contact than was either outlined in the Special Guardianship Support plan or requested by M or F. The uncle and aunt had not been fully appraised of the Guardian's recommendations about contact, and the Local Authority were also proposing to amend the Special Guardianship Order support plan in relation to contact in any event. To enable the aunt and uncle to be fully informed of what was proposed, and if need be make any necessary representations or applications to me, I therefore adjourned the case to this final hearing.

By agreement of all concerned, it has not been necessary for me to hear oral evidence in deciding the outcome of this case. I have therefore made my decision having read the contents of the Court Bundle, having considered the written case summary of the Local Authority, the position statements of M and the Guardian, as well as oral submissions made by the parties at this hearing.

Parties' positions

As I have already noted in this judgment, the Local Authority are asking me to discharge the existing Care Orders, to make Special Guardianship Orders appointing paternal aunt and uncle Special Guardians for A and B of my own motion, and to make orders under section 8 of the Children Act 1989 setting out where and with whom the children should live and to govern the exercise of parental responsibility.

M does not actively oppose the Local Authority application and does not seek an order setting out what contact A and B should have with her.

109 F also does not actively oppose the Local Authority application and does not seek an
110 order setting out what contact A and B should have with him.
111
112 The Guardian supports the Local Authority application.
113
114 **Relevant legal considerations**
115
116 An application for discharge of a Care Order is made under section 39 of the Children
117 Act 1989. I have to consider whether it is in the welfare interests of the children that
118 the Orders should be discharged. Section14A (6) (b) of the Children Act 1989
119 empowers a court to make a Special Guardianship Order of its own motion in any
120 Family Proceedings, ie without a separate application from a party for a Special
121 Guardianship Order, as long as there are other Family Proceedings underway. Before
122 a Court can make a Special Guardianship Order, even of its own motion under section
123 14A, it needs a Special Guardianship Report (section 14A (11)). That report must be
124 prepared by the Local Authority addressing the suitability of the proposed special
125 guardians to be special guardians, the matters specified in the Special Guardianship
126 Regulations 2005 and as amended by the Special Guardianship (Amendment)
127 Regulations 2016, and any other matter which the Local Authority considers to be
128 relevant (section 14A (8)). If a Court considers that an order under section 8 of the
129 Children Act 1989 should be made, then no application is necessary (section
130 10(1)(b)).
131
132 The recognition and enforceability of any orders made in this jurisdiction in Madeira
133 is governed by the procedure established by virtue of Brussels II Revised (BIIR)

134 regulations. Enforceability flows from Article 28 of BIIR, and there is provision
135 under Articles 39 and 41 for a Court to issue a certificate of enforceability in a
136 standard form specified in Annex III if certain criteria are met with regard to giving
137 parties an opportunity to be heard (potentially including the children concerned unless
138 this is inappropriate in view of their age or degree of maturity), and there is also scope
139 for judgment in default to be sufficient as long as certain other requirements are met
140 with regard to adequate notice and establishing that the person concerned has
141 accepted the decision unequivocally. An Article 41 or Article 39 certificate avoids
142 the need for someone to obtain a declaration of recognition of enforceability under
143 Articles 21 and 28 before asking the authorities in another EU member state to
144 recognise and enforce (if required) a judgment. The term judgment is also significant
145 in legal terms in view of the issues in this case as BIIR relates to the recognition and
146 enforceability of judgments rather than orders since an order is simply the mechanism
147 by which a judgment is enforced. In light of the advice provided by Mr Sampson at
148 C222-272 in the Bundle with regard to the fact that Special Guardianship Orders do
149 not exist in an equivalent form in Portuguese law with regard to where and with
150 whom the children should live, it may also be necessary for this Court to consider
151 orders under section 8 of the Children Act 1989 to set out where A and B should live,
152 with whom they should live and how parental responsibility should be exercised.
153 Section 9(6) of the Children Act 1989 is also therefore relevant, as this sets out that
154 section 8 orders should ordinarily last until a child is sixteen years of age unless a
155 Court considers that there are exceptional circumstances to justify orders lasting until
156 a child reaches 18 years of age. Section 1 of the Children Act 1989 is also relevant to
157 these proceedings, setting out as it does the matters potentially to consider in relation
158 to the welfare of the children concerned (welfare checklist contained in section 1(3))

159 and that the welfare of the children shall be paramount in these sorts of proceedings
160 (section 1(1). It also sets out the presumption of there being no order unless a Court
161 considers that making an order would be better for the child than making no order at
162 all (section 1(5).
163
164 **Findings and orders**
165
166 Firstly, I am satisfied that it is in the welfare interests of A and B for them to remain
167 permanently in the care of the proposed Special Guardians and for the care orders
168 made on 10th December 2015 to be discharged. The evidence contained in section C
169 of the Bundle make it abundantly clear that they are thriving living with their paternal
170 aunt and uncle despite having had some issues in adjusting to this placement initially.
171 As is noted by the social services department of Madeira in their report dated 30th
172 August 2018: *"As a result of the monitoring of this household, we consider that the*
173 *uncle and aunt continue, by and large, to present as responsible, dynamic and loving*
174 *carers, assuming a position of proactiveness and assertion with regard to this*
175 *placement. For that reason and considering their own intention in continuing with*
176 *the placement on a permanent basis and considering the degree of integration of the*
177 *children in the household, we consider that the conditions for the application of a*
178 *definitive procedure have been met, namely in respect of a Special Guardianship*
179 *Order" (C13).*
180
181 Both children are too young to be able to reliably and independently articulate their
182 wishes and feelings, but it is clear from the evidence in section C that they have a
183 close and loving bond with their aunt and uncle. The evidence from the Guardian in

184 section E in his final analysis and recommendations dated 8th February 2019 also sets
185 out that the children have adjusted to their new home and are now settled. He also
186 notes that the parents have been supportive of the placement. The children have also
187 been supported by their aunt and uncle to maintain their relationships with their birth
188 parents and other relatives residing in the UK. Whilst they may not be able to
189 articulate this, I have no doubt that they would want to maintain those relationships
190 but also to remain with their aunt and uncle where they are now settled and happy.
191
192 The placement with their aunt and uncle is also one that meets all their needs, but
193 particularly their physical, emotional and educational needs (the next relevant welfare
194 checklist heading). Again, the unchallenged evidence in the Bundle provides ample
195 support for this conclusion, particularly the report from the Madeira social services at
196 C7-13.
197
198 Likely effect on the children of any change of circumstances is the next welfare
199 checklist heading. In this case, it is proposed that the children should remain in a
200 placement that is meeting their needs and in which they are settled and happy. It
201 would potentially be a harmful change to their circumstances if they were to have to
202 leave this placement and it is therefore in their welfare interests to remain where they
203 are for the long term.
204
205 Age, sex, background and any characteristics of the children is the next relevant
206 welfare checklist heading. As both the social worker and Guardian acknowledge in
207 their evidence in the Bundle, the children are of mixed English and Portuguese
208 heritage. They are both also comparatively young and A has had a period where he

209 has struggled to adjust to being the eldest in the placement. Placement where they are
210 settled and happy, and where their mixed heritage identity needs can be met by
211 exposure to Portuguese culture and life but also ensuring that they maintain their
212 English language skills and have contact with their English family members, is
213 important for these children.
214
215 The next relevant welfare checklist heading is any harm which the children have
216 suffered or are at risk of suffering. Given the findings that I made in the previous
217 proceedings, the starting point for these proceedings is that the children would be at
218 risk of further significant harm if they were to be returned to the care of their parents.
219 The evidence in the Bundle about how settled and happy the children now are also
220 supports a finding that they would be at risk of harm if they were to have to move
221 from their current placement. The professional evidence before me in the Bundle also
222 notes that the children had experienced instability and insecurity the past - see
223 particularly the Guardian's report at paragraph 12 which notes that they moved from
224 the care of their parents to separate kinship placements before moving in January
225 2016 to live with their aunt and uncle in Madeira. It is greatly to the credit of the
226 parents in this matter that they do not oppose the children remaining with their aunt
227 and uncle as a permanent placement.
228
229 The penultimate welfare checklist heading is how capable each of their parents, and
230 any other person to whom the Court considers the question to be relevant, is of
231 meeting their needs. Again, my previous welfare findings were that neither parent
232 was capable of meeting the needs of A and B. They have very bravely accepted that
233 they are not in a position to argue that anything has significantly altered since I made

234 those previous findings. This inability on their part to parent A and B to a good
235 enough standard is also well-documented in the unchallenged evidence in the Bundle.
236 I therefore find that the parents in this case remain unable to parent A and B to a good
237 enough standard. In contrast, the evidence from the social services department in
238 Madeira in section C of the Bundle, the Special Guardianship Order assessment and
239 addendum also in section C, and the evidence from the Guardian at section E, shows
240 that the aunt and uncle are more than capable of meeting the needs of A and B. In
241 particular, they have not only met their needs to a good enough standard, but have
242 weathered some significant challenges arising from the children undergoing a period
243 of adjustment to their new family. The aunt and uncle have coped with some
244 challenging behaviours, particularly from A, and have appropriately sought advice
245 and support from social services in Madeira. The letter in the Bundle at C232-333
246 from the aunt and uncle about contact proposals contains some very moving evidence
247 about the impact on their family of providing a home for A and B, and the
248 extraordinary efforts that they have taken to overcome the challenges this has posed
249 for them. As a result, there is compelling evidence before me of the aunt and uncle
250 providing better than good enough care to A and B, I find.
251
252 Finally, the range of powers available to the Court under the Children Act in the
253 proceedings in question have to be considered. As I have already noted in this
254 judgment, I am being asked by all parties to consider making Special Guardianship
255 Orders appointing the paternal aunt and uncle Special Guardians for A and B and to
256 do that of my own motion, rather than on an application from a party. I also earlier
257 noted that there are certain procedural requirements which have to be met before I can
258 make such an order. I have the required Special Guardianship Order reports for the

259 prospective Special Guardians at C80-146 and C216-217 in the Bundle. The Special
260 Guardianship Order support plan is at C46-61. Before making a Special Guardianship
261 Order, a court must also consider *"whether, if the order were made, a child*
262 *arrangements order containing contact provision should also be made with respect to*
263 *the child" (section 14B Children Act 1989).* I also have before me the views of the
264 proposed Special Guardians about contact and the exercise of parental responsibility
265 at C323-333 and in an updating statement from the social worker at C307-308.
266
267 The proposed Special Guardians are supportive of direct contact between the children
268 and their parents continuing. They have been responsible for arranging and
269 facilitating this contact for at least the last year, as the social worker and Guardian
270 acknowledge. Both the Guardian and social worker are of the opinion that contact
271 needs to be led by the aunt and uncle as the people caring for A and B. The social
272 worker in particular notes that the views of A's psychologist are very significant to
273 this aspect as the psychologist *"states that A a) continues to have difficulties*
274 *managing change, and b) has expressed anxiety about being removed from [paternal*
275 *uncle and aunt's] care" (C307).* Whilst M has been content with the current contact
276 arrangements, in her witness statement at C292 paragraph 8 she set out that she would
277 ideally like consideration to be given to the contact increasing from 5 hours on one
278 day to contact over two consecutive days during the summer visits as these coincide
279 with birthday celebrations for the children. This increase is one that the Guardian not
280 only supported but suggested could apply to all contacts so that they would be over
281 two consecutive days (E1-8). However, the proposed Special Guardians' response at
282 C323-333 makes it very clear that they do not feel able to increase contact to two days
283 at this stage, nor host the contact in their own home. They have not entirely ruled out

284 an increase in future and do not rule out visits taking place at their home in future. As
285 they say *"We believe it will be reassuring to them to see the place where their*
286 *children live and to get to know a bit about their routines and their belongings. This*
287 *will not happen right now, but we believe that it will take place in the near future"*
288 *(C326).* They also point out the impact on the whole family of the time commitment
289 that contact already entails for them, as well as the impact on the children emotionally
290 after they have seen their parents.
291
292 It is very clear to me on the evidence before me, particularly from the social work
293 evidence indicating the views of A's psychologist, that contact is potentially very
294 unsettling for the children and does need to be managed sensitively in the welfare
295 interests of the children. All parties agree that this is the case, including the
296 respondent mother who has noted how child-focussed the reasons provided by the
297 aunt and uncle are and is not asking me to make an order for contact. This is very
298 encouraging as it suggests to me that they are all working hard to put the needs of A
299 and B first. I find that is it necessary for the purposes of providing clarity and to aid
300 recognition of my orders in Portugal to make a Child Arrangements Order for the aunt
301 and uncle to make the children available for contact with their parents as is set out in
302 the Special Guardianship Support plan, namely in Madeira for up to five hours on one
303 day four times per year and this to be supervised or supported by the Special
304 Guardians, but there may be such other contact arrangements as is either agreed
305 between the Special Guardians and the parents or that the Special Guardians consider
306 is in the welfare interests of the children.
307

I am satisfied that the welfare of A and B requires that I make Special Guardianship Orders appointing their paternal aunt and uncle Special Guardians for them and endorse the Special Guardianship Support plan which will provide them with necessary support and assistance considering the ongoing challenges they face caring for A and B. A child arrangements order setting out where the children will live and with whom is also required in this case. This is because, as I have earlier noted, a Special Guardianship Order does not have an equivalent in Portuguese law.

I am also satisfied that it is necessary and proportionate to protect the welfare of the children in this case to make an order setting out that the children are not to live with either or both of their parents unless a risk assessment confirming that they no longer pose a risk of harm to the children has been completed by a child assessment service or social services, or there is a court order permitting the children to live with either or both parent.

It is abundantly clear on the evidence before me that the children need certainty and stability which is best achieved by confirming that they will permanently live with their paternal aunt and uncle. The Special Guardianship Orders will last until the children reach 18 years of age in accordance with section 91(13) of the Children Act 1989. The effect of making the Special Guardianship Orders will be as set out in section 14C (1) of the Children Act 1989: *"while the order remains in force – (a) a special guardian appointed by the order has parental responsibility for the child in respect of whom it is made; and (b) subject to any other order in force with respect to the child under this Act, a special guardian is entitled to exercise parental responsibility to the exclusion of any other person with parental responsibility for the*

333 *child (apart from another special guardian).* As set out in Mr Sampson's advice at
334 C230, I find that it is also necessary to make an order granting the Special Guardians
335 parental responsibility to ensure recognition of this aspect in Portugal.
336
337 As part of the exercise of their parental responsibility under the Special Guardianship
338 Orders, I will also order that the Special Guardians have power to appoint a
339 testamentary guardian and that they may select and place the child in schools and
340 arrange for such medical treatment as they see fit without consultation with the
341 parents. This is necessary to provide them in Portugal with similar powers to those
342 held by Special Guardians in this jurisdiction, as again is set out in the advice from Mr
343 Sampson at C230. The Special Guardianship Orders would also have the effect of
344 discharging the Care Orders in accordance with section 91(5A) of the Children Act
345 1989 even if no application to discharge had been made by the Local Authority. In
346 accordance with section 14D of the Children Act 1989, the parents would need leave
347 of the court before they can make an application for discharge of these Special
348 Guardianship Orders. I will direct that a recital shall be recorded on the face of the
349 order from today setting out that the test for obtaining such leave is that the court may
350 only grant such leave to apply where it is satisfied that there has been a significant
351 change in circumstances since the making of the Special Guardianship Orders (section
352 14D (5) Children Act 1989.
353
354 The other aspect of Special Guardianship Orders which would apply in this
355 jurisdiction is that no person may cause the children to be known by a new surname or
356 to be removed from the jurisdiction without either the consent of every person who
357 has parental responsibility or the leave of the court (section 14C (3) Children Act

358 1989). Section 14C(4) of the Children Act 1989 does allow a Special Guardian to
359 remove the children from the jurisdiction for up to three months without the consent
360 of every person with parental responsibility. I will make equivalent Prohibited Steps
361 Orders to ensure that these provisions also apply in respect of the children not being
362 removed from Portugal for a period of more than three months by their Special
363 Guardians without the consent of every person with parental responsibility, and
364 similarly no person shall cause the children to be known by a different surname
365 without the consent of every person with parental responsibility. Those Prohibited
366 Steps Orders shall last until the children reach 18 years of age since I am satisfied that
367 this case is exceptional for reasons that I will expand upon below when I consider
368 other section 8 orders.
369
370 As part of ensuring that my orders from today are clear and enforceable in Portugal,
371 and again in line with the advice of Mr Sampson at C230, I find that it is also
372 necessary to make a Prohibited Steps Order under to prevent any person from
373 removing the children from the care of their Special Guardians or from the
374 jurisdiction of Portugal without the express written consent of the Special Guardians
375 or a court order. This order shall also last until the children are 18 years old, again for
376 reasons that I will expand upon below.
377
378 As I have earlier said, I will also make a Child Arrangements Order setting out that A
379 and B will live with their aunt and uncle and that they will live with them in Portugal,
380 therefore confirming that they continue to have permission for the children to reside
381 outside of the jurisdiction of England and Wales and determining where they will live
382 and with whom. Normally a Child Arrangements Order or any order which is made

383 under section 8 of the Children Act 1989 would only last until a child reaches the age
384 of 16 years old (section 9(6) Children Act 1989). However, the Court may under that
385 section make an order which last beyond the age of 16 if satisfied that the
386 circumstances of the case are exceptional. There are exceptional circumstances in this
387 case which require that the Child Arrangements Order should continue until A and B
388 are 18 years of age because this will match the period of the Special Guardianship
389 Orders and provide the necessary legal framework to give them stability and
390 permanency in Portugal by recognition of the Child Arrangements Orders setting out
391 where they will live and with whom since this aspect of the Special Guardianship
392 Orders is not something that has an equivalent in Portuguese law.
393
394 Finally, I must consider the exercise of parental responsibility as this issue has been
395 raised in light of the response from the Special Guardians at C323-333. They state
396 that they do not wish to share details about the children's health, education and
397 development with the parents. Ordinarily this is information which a parent with
398 parental responsibility would be entitled to have. However, to be required to provide
399 this on top of providing day to day care for A and B and managing direct contact is
400 clearly a pressure which the Special Guardians feel they cannot manage. The social
401 worker and Guardian acknowledge this, but the Guardian also pointed out that the
402 parents will not lose parental responsibility and having information about the children
403 will help with making contact more meaningful for the children. Ms Pugh for the
404 mother also points out that the information will be helpful to enable the mother to
405 understand decisions taken about whether there should be any changes to contact. In
406 fact, as I heard in submissions on this point today, information is being provided to

407 the parents by the aunt and uncle and that this can be dealt with under a recital to the
408 order. I am satisfied that this is the appropriate way to resolve this issue.
409
410 I will also issue a certificate of enforceability under Article 41 of BIIR and Annex III
411 in respect of all of the Orders that I have made today. I will also issue the certificate
412 of enforceability under article 39. The standard forms will be provided to the
413 authorities in Portugal as soon as possible.
414
415 **Conclusions**
416
417 I have given a very full judgment in this case to try to ensure that the authorities in
418 Portugal understand the orders that I have made and why. I also wanted to put on
419 record how well the Special Guardians are coping with caring for the children in what
420 have been very challenging circumstances. They deserve much praise for this and for
421 continuing to care for the children even when, in their words, they gave up their
422 *"tranquillity, peace, emotional stability and privacy in order to give a new*
423 *opportunity in life to two little children who had a very hard beginning in life. We*
424 *accepted this enormous challenge and to this day we strive for this story to have a*
425 *better end that its beginning. We spend hours without sleep when the children are*
426 *sick. We spend hours in appointments with professionals in order to try and*
427 *understand the children's behavioural difficulties and help them have a good*
428 *development. We spend sleepless nights thinking about what to do to overcome the*
429 *day-to-day difficulties" (C331).* In addition, the parents have also very bravely
430 accepted that the children need to remain with their aunt and uncle permanently. This
431 is a very difficult decision for any parent to take and is one that I acknowledge shows

432 they are putting the needs of A and B first. They also deserve praise for this child-

433 focussed approach.

434

435

436 21st March 2019

437

438

439