When is a final order not the last word?

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When is a final order not the last word? Questions that have been settled at the end of litigation can sometimes be re-opened if certain conditions are met. Final orders in children proceedings can be revisited either by way of applications to vary, or for discharge or revocation. In the case of discharge and revocation there is a prior leave requirement imposed on the applicant. This leave requirement protects the stability of a child who has already been the subject of proceedings.

The recent case of *Re M* [2021] *(Special Guardianship Order: Leave to Apply to Discharge)* EWCA Civ 442 has clarified the law in relation to the test for permission to apply to discharge Special Guardianship Orders [SGOs]. It also considers how applications for Child Arrangements Orders [CAOs] should be considered when an SGO is in place. There is an increasing number of SGOs made at the conclusion of care proceedings, and often this feels like a happy ending. But these orders, while final, are not impossible to set aside, though the test for leave is stringent. This test is considered in some detail in *Re M* and guidance is given both on how such leave applications should be approached and the importance of recording the circumstances which gave rise to the SGO being made in the first place should an applicant ever seek to re-open the matter.

Re M also considers (more briefly) whether an application for a CAO ('spends time with' order) by a parent whose child is subject to an SGO is an abuse of process when the applicant wishes for the SGO to be discharged. It reminds us that the overriding parental responsibility of special guardians does not prevent parents from making CAO applications and relying on the courts to increase or change the parameters of their contact.

The case dealt with a young child who had been exposed to very frightening and disturbing behaviour by the mother who had a very long history of ill mental health. During the care proceedings, the child moved to the care of other family members who then became the child's special guardians. A psychiatric assessment of the mother diagnosed her with Emotionally

Unstable Personality Disorder and recommended that the mother engage with the local complex needs service over a long period of time to address her mental health difficulties.

Since the SGO was made in 2017, the mother has continued to have a comparatively high level of contact. Having engaged with complex needs over more than a year, Mother made an application for permission to apply to discharge the care order pursuant to section 14D(5) CA 1989 so that the child could return to her care. The special guardians opposed the application and leave was refused at the first instance. The matter was then leapfrogged to the Court of Appeal as there was a compelling reason for the case to be heard, namely to clarify the section 14D test for permission.

The test for permission under section 14D(5) is as follows:

The Court may not grant leave [to apply to discharge a special guardianship order] *unless it is satisfied that there has been a significant change in circumstances since the making of the special guardianship order.*

Prior to *Re M*, there was only one case on how this test should be interpreted. In *Re G (A Child) (Special Guardianship Order)* [2010] EWCA Civ 300, Wilson LJ (as he then was) equated the section 14D(5) test—ie 'significant change in circumstances'—to the test for leave to apply for a revocation of a Placement Order under section 24(3) ACA 2002—ie '*that there has been a change of circumstances since the order was made.*' Eagle eyed lawyers will note the difference: change of circumstances (for Placement Orders) v significant change of circumstances (for SGOs). In *Re G*, and in the absence of legal argument on this point, Wilson LJ's view (at §12) was that this must have a been a drafting error; or that the change of circumstances requirement would have to be a 'not insignificant' change which, he said, was the same as 'significant.'

In *Re M*, the Court agreed that there is significance in the word 'significant'; that the test for leave to apply to discharge an SGO is higher in law than that of the test to revoke a Placement Order. At §§27-28 Peter Jackson LJ said:

> *Rather than being an error of drafting, it is coherent with the statutory scheme for the drafter to have set out to buttress an SGO from challenge by requiring any change in circumstances to be significant. There is no reason why the test should be the same across SGOs, placement orders and adoption orders. An application relating to an SGO is an attempt to disturb what is intended to be a long-term status, while the other*

applications concern impermanent situations where a child has not yet been placed or adopted, as the case may be. Moreover, the drafting of the two Acts shows that the word 'significant' has real meaning in this area of the law. In the welfare checklists in s. 1 of both Acts, the reference is to harm, while in the threshold condition in the 1989 Act it is to significant harm. In our context, the fact that change is not described as significant does not mean (pace Wilson LJ) that it is insignificant. As a matter of ordinary language, change can be described as significant or insignificant, or it can just be described as change. The absence of an adjective does not imply the presence of its opposite – a person who is not described as happy cannot be assumed to be unhappy.'

I therefore conclude that the requirement under s. 14D(5) for a change in circumstances to be significant means what it says and, to this extent only, I would not follow the provisional reasoning in Re G. If more is needed, 'significant' in the context of the s. 31 threshold condition means 'considerable, noteworthy or important', according to the dictionary definition cited in the Guidance when the 1989 Act first came into force (The Children Act 1989: Guidance and Regulations (Volume 1, Court Orders)(HMSO 1991)), as approved by Baroness Hale in Re B (Care Proceedings: Appeal) [2013] UKSC 33; [2013] 2 FLR 1075 at [185].

In *Re M*, the Court determined that the first instance judge was wrong in her evaluation of the significance of the Appellant's steps to address her mental health difficulties. It determined that the steps were significant enough in the context of the history of the case as to be considerable, noteworthy or important.

'Significant change of circumstances' is the first limb of the test for leave. The second limb remains as set out in *Re G*, namely reasonable prospect of success. Prospects of success are more likely to be reasonable if the change is significant. As Peter Jackson LJ observes in *Re M* at §29, *'the degree of any change in circumstances is likely to be intertwined with the prospects of success, and the greater the prospects of success, the more cogent the welfare arguments must be if leave is to be refused*.'

However it is important to note that the child's best interest is not, in fact, the paramount consideration in the leave test. The child's welfare at this stage is only relevant insofar as it may be affected by the substantive application being considered (or not) by the court. It is only once leave is granted that the question of whether it is in the child's interest for an SGO to be discharged that welfare considerations become paramount. (See §30.)

Evidence supporting applications for leave will almost necessarily be incomplete but it should nevertheless be credible enough to warrant a re-opening of the question of where the child should be placed. The court is not expected to making findings at this stage; instead it can only make a fair and realistic assessment on the evidence in the context of the original facts that gave rise the SGO being made in the first place. In public law proceedings, this will be the final threshold document. In private law proceedings there should similarly be a recording of the circumstances that gave rise to the SGO. (See §33.)

In summary, the approach to be taken when considering applications for leave under section 14D(5) is found at §34, which bears inclusion here in its entirety:

> 34. *To sum up, when a court is considering an application for leave to apply to discharge a special guardianship order, it must first consider whether the applicant has shown, by means of credible evidence, that there has been a significant change of circumstances since the order was made. If there has not been, the application will fail. If there has, the court will decide whether leave should be granted, based on a realistic evaluation of the applicant's prospects of success in the context of the effect on the child's welfare of the application being heard or not heard. The prospects of success must be real. The child's welfare is an important factor but it is not the paramount consideration. The degree of any change in circumstances is likely to be intertwined with the prospects of success, and the greater the prospects of success, the more likely it is that leave will be granted. The provisions of s. 10 (9) of the 1989 Act are not applicable to an application under s. 14D (5).*

As for whether a CAO ('spends time with') application can ever summarily be dismissed when it is made alongside an application for leave under section 14D(5): the Court found that while this may be possible in certain extreme examples, there is nothing objectionable in principle about a contact order being made for a child who is subject to an SGO. A parent has an unfettered right to apply for contact with such a child and this is an important detraction from the overriding parental responsibility.

The Court allowed the appeal, granted leave for the application for discharge of the SGO to be made, and remitted the matter back down to be determined. Litigation is ongoing.

Jennifer Kotilaine, instructed by Boardman, Hawkins & Osborne, continues to represent the Special Guardians.

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