WESTGATE
CHAMBERS

Grandparents in Child Arrangements

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No presumption of contact with a grandparent

1. Re A (Section 8 Order: Grandparent Application) [1995] 2 FLR 153

   Butler Sloss and Otton LJJ

   The parents were divorced. The father's contact to the child had ceased. The father lived with the paternal grandmother and there was considerable hostility between the two families. The child did not have a close or existing relationship with the grandmother and the mother was fearful of the grandmother. The judge held that the grandmother's application was premature and she appealed.

   Held – dismissing the appeal – two groups of people could apply for contact, those who had a right to apply and those who could apply only with leave. The grandmother fell into the latter group where leave was required to make such an application. In deciding whether to grant leave the court had to have regard to a number of particular matters (see pp 155H – 156A). Although there was a presumption that a parent should have contact unless there were cogent reasons to the contrary, that was not the approach towards any other member of the family (see pp 156C – 157E). There could not be a presumption that a grandmother who obtained leave was entitled to contact unless there were cogent reasons for denying it to her. In reaching his decision, the judge had considered what was in the best interests of the child (see pp 157H – 158A).

2. Of course it remains the applicant's burden to prove their case for contact, the burden is not shifted to the respondent to prove a case for no contact.

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

   Hollis J

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

Held – dismissing the appeal –

(1) The court of first instance had not, on the facts and upon an analysis of the reasons for the decision, made an order which was plainly wrong on any analysis. The court was right to treat the child's stability in settling in with his mother as first and foremost in the child's interests. All the court had decided was that there should be no direct contact for the time being.

(2) The granting of leave to make an application for contact did not place a grandparent (nor any other relative or person) in the same position as a natural parent. Upon the substantive application, the court had to apply s 1 of the Children Act 1989, together with the 'welfare checklist' AND must show grounds for it. Once a case for contact had been established, a respondent had to show why there should not be contact. However, there was not a presumption that a grandparent who had been granted leave was entitled to contact unless it could be shown by cogent reasons that there should be no contact.

Per curiam:

(1) It would be nonsense in the long term for a child to be denied contact with his grandmother because of bitterness between the mother and the grandmother. Grandparents play an important role in children's lives, especially young children,

and their influence is extremely beneficial, provided it is exercised with care and not too frequently.

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

An application without leave

4. The categories of person who can make an application for a child arrangements order without leave are set out in section 10 of the Children Act 1989 namely: -

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

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

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

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

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

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

9. There are distinct differences between the one year and three year provision of s10(5)(b) set out above:

- the period of one year must have run continuously.
- the application must be made immediately, in contrast to the three year residential qualification where there is a three month leeway in making the application.
- It is confined to making orders about with whom and when a child is to live with a person [s10(5C)] A 'relative' in relation to a child means a grandparent, brother, sister, uncle or aunt (whether of the full blood or half blood or by marriage or civil partnership or step-parent) [s 105(1)].

  (ii) Pursuant to (CA 1989, s 10(5)(c) Any person may apply for a residence or contact order with respect to the child, without the need to obtain the leave of the court, provided:

  - he has the consent of all those with parental responsibility; or
  - if the child is in care, he has the consent of the local authority; or
  - where there is a lives with or spends time with child arrangements order in force and the applicant has the consent of each person named in the order as a person with whom **the child is to live.**

Section 8 order: an application for leave

10. Many family members will not fall into the above categories, and will need to seek leave to make a s 8 application. As we have seen from the csaselaw the grant of leave does not raise any presumption in itself that the application will succeed it is merely the first hurdle.

11. The application procedure is governed by part 18 FPR. An applicant must file:

- When the an application notice in Form C2, which must briefly state why leave is being sought (unless the court dispenses with the need for a notice);

a draft of the proposed substantive application in Form C100, with sufficient copies to be served on each respondent;

- a draft of the order sought;
- a copy of any written evidence in support of the application.

12. When the court receives an application for leave to apply it must:

    - serve a copy of the documents filed by the applicant on each respondent (and on the children's guardian, if any);
    - include notice of the date and place where the application will be heard.

15. It has been held that a failure to comply with the rules and procedure need not invalidate an order giving leave. It is a matter for the court to decide whether a written request is actually required *[Re O (Minors) (Leave to Seek Residence Order) [1994] 1 FLR 172].*

Necessity of an Oral hearing

16. Under the rules, the court may deal with the application without a hearing if it does not consider a hearing is appropriate or the court endorses the parties' agreement that a hearing is inappropriate. The court may refuse the application for leave without holding a hearing; in such a case, if the applicant requests it, the court must re-list the application for an oral hearing.

17. There are, however, a number of cases which emphasise the fact that normally such applications should be heard on notice. See: *In Re M (Prohibited Steps Order: Application for Leave) [1993] 1 FLR 273 (Johnson J)*; In Re F and R (Section 8 Order: Grandparent's Application)[1995] 1 FLR 524 (Cazalet J):

18. More recently in Re W (Contact Application: Procedure)[2000] 1 FLR 263 in which Wilson J, following Re M and Re F and R, held that a grant of leave to apply for a s 8 order was a substantial judicial decision and should be undertaken in the ordinary case

in the presence of all parties, and said that Justices are required to give written reasons for any decision on such an application.

19. The child was born in May 1998 and is cared for by her mother. The father was sent to prison in July 1998 for assault on the mother, and in February 1999 was sentenced to a further term of imprisonment for assault on a third person. The paternal grandmother saw the baby regularly until the father went to prison, when contact ceased. In June 1999 the grandmother applied to the family proceedings court under s 10(9) of the Children Act 1989 for leave to apply for a contact order. On 18 June 1999 the magistrates granted leave. The grandmother had been told that she need not attend the hearing, the mother had not been apprised of it at all, nor did the magistrates furnish any reasons for their decision. The mother appealed against the grant of leave.

Held – dismissing the appeal –

(1) The grant of leave to apply for a s 8 order was a substantial judicial decision which fell to be determined by reference to s 10(9) of the 1989 Act and by consideration of the prima facie merits of the application, undertaken, in the ordinary case, in the presence in court of both parties. Furthermore, in a case like the present, the reasons for the court's decision were required by r 21(5) of the Family Proceedings Courts (Children Act 1989) Rules 1991 to be recorded in writing.

Re M (Prohibited Steps Order: Application for Leave) followed.

(2) Since the magistrates had erred (a) in dealing with the application for leave without arranging for a hearing in the presence of both parties, and (b)

in failing to record their reasons, the question whether leave should be granted had to be readdressed and would now be decided after the hearing of limited oral evidence by the parties.

Re F and R (Section 8 Order: Grandparent's Application) followed.

(3) On the facts, although there was no presumption in English law that it was in the interests of a grandchild to have contact with a grandparent nevertheless the grandmother's case, for contact order is arguable. In the light of that conclusion and after an analysis of the factors set out in s 10(9) the grandmother's application for leave to apply would be granted and her application heard in the county court.

Statutory provision for an application for leave to apply as supported by Caselaw

20. CA 1989, s 10(9) provides court have regard to-

    (a) the nature of the proposed application for the s 8 order; (b) the applicant's connection with the child;

    (c) any risk there might be of that proposed application disrupting the child's life to such an extent that he would be harmed by it; and

    (d) where the child is being looked after by a local authority- (i) the authority's plans for the future; and

    (ii) the wishes and feelings of the child's parents."

21. This section has been discussed in a number of cases. In Re M (Care: Contact: Grandmother's Application for Leave) [1995] 2 F|

    LR 86 (where the Court of Appeal [Butler Sloss, Simon Brown and Ward LJJ) held that in weighing up the factors the following test should be applied:

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

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

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

whether or not to grant leave, Cazalet J attempted to decide whether the grandmother's application had any remote and realistic prospect of success. He was hampered in this because no party had sought the views of either the prospective adopter or the children, who were by then of an age to articulate their wishes. The judge therefore declined to determine whether the application would have any prospect of success but decided that contact was not in the best interests of the

children pending the adoption proceedings. He refused to grant leave and indicated that the issue of contact should be considered at the same time as the application to adopt. The grandmother appealed.

Held – allowing the appeal –

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

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

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

> (a) the nature of the contact sought, whether frequent, infrequent, direct or indirect;
>
> (b) the applicant's connection to the child – the more important and meaningful the connection, the greater the weight to be given to the application;
>
> (c) any disruption – the need for stability and security is vital and the foster placement should not be put at risk. It follows that the risk must arise from the proposed application. The risk is contemplated in relation to private law

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

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

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

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

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

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

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

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

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

Held – allowing the appeal –

(1) When considering a grandparent's application for leave to make an application for a residence order, the statutory checklist needed to be given its proper recognition and weight. Whilst the decision in *Re M (Care: Contact: Grandmother's Application for Leave)* had served a valuable purpose in its day and in relation to s 34(3) applications, it was not appropriate to substitute the test 'has the applicant

satisfied the court that he or she has a good arguable case' for the test that Parliament set out in s 10(9) of the Children Act 1989 (see paras [13], [18], [19]).

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

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

24. And, most recently, *Re B (Paternal Grandmother: Joinder as Party) [2012] EWCA Civ 737, [2012] 2 FLR 1358.* In this case Black LJ made a wide ranging review of the authorities. She took the view that:

- s 10(9) does not contain a test. It serves to identify some factors which require particular attention;

- having an arguable case may not be sufficient to justify granting permission;

- the court has a wide discretion as to the stage at which the application is determined and the amount of evidence required in order to do so. There is no absolute entitlement to an assessment prior to determining the application.

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

withdrawn or dismissed. In the social work report, allegations were made against the grandmother that she drank excessively and that she was aggressive and violent. The very young mother claimed that the grandmother had permitted her and the father to have a sexual relationship in her home when the mother was only 13 years old. The grandmother admitted that her previous partners had been violent and also drank excessively, but otherwise denied the allegations and they had not been

tested by oral evidence. It was reported that neither the mother nor the father wished her to care for the child as they considered he would suffer significant harm in her care. The social worker's conclusion was that the grandmother would need a psychological assessment before a decision on whether to recommend her as a potential carer could be made. The judge refused her application and the grandmother appealed.

Held – dismissing the appeal –

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

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

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

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

For convenience, I copied out some important parts of the judgment.

"[35] The application upon which Her Honour Judge Raeside was adjudicating was PGM's application to become a party to the care proceedings. It was not an

application for directions under s 38(6) of the Children Act 1989 or under any other provision to be found in statute or rules for an order for assessment involving PGM and J, still less an application for leave to apply for a substantive order such as a residence order. At first sight, it may, therefore, seem curious that all parties agreed, and the judge accepted, that the provisions of s 10(9) were relevant, as s 10(9) relates to a 'person applying for leave to make an application for a s 8 order'. However, I am satisfied that this was an appropriate approach.

[36] There is no guidance in the Children Act 1989 or the Family Procedure Rules 2010 which specifically assists as to the approach that should be taken to an application for joinder and the welfare of the child is not the paramount consideration in either an application for party status or an application for leave to

make a substantive application because neither of these applications involves the court in determining 'any question with respect to ... the upbringing of a child', see for example (in relation to joinder/discharge of a party) *North Yorkshire County Council v G*[1993] 2 FLR 732, [1993] Fam Law 623 and*ReW (Discharge of Party to Proceedings)*[1997] 1 FLR 128and (in relation to leave to apply for a s 8 order) *Re A (Minors) (Residence Orders: Leave to Apply)* [1992] Fam 182, [1992] 3 WLR 422, [1992] 2 FLR 154.

[37] There is authority to the effect that although no s 8 order is actually being sought by the person who is seeking to be joined as a party, reference must be had to s 10(9), see *W v Wakefield City Council* [1995] 1 FLR 170 in which Wall J (as he then was) also considered two other decisions by Family Division judges, *G v Kirklees Metropolitan Borough Council* [1993] 1 FLR 805 and *North Yorkshire County Council v G*. It was not argued before us that these authorities were wrong or that the introduction by r1 of the Family Procedure Rules 2010 of an overriding objective required them to be reconsidered and I can see no reason why they should be questioned. It is logical that a judge determining an application to become a party to proceedings should have an eye to what may follow joinder. To illustrate this with an obvious example, there would be no point in joining someone as a party if they would

then inevitably be refused leave to bring an application in relation to the child and would have no other legitimate role in the proceedings.

European Convention for the Protection of Human Rights

24. As can be seen from some of the cases referred to above, rights under the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, and particularly Art 8 and Art 6, need to be bourne in mind when such applications are made. 'Family life' for the purposes of Art 8 has been interpreted by the ECtHR in a manner which may include grandparents and other family members. In K v UK (1986) 50 DR 199 the Commission said that 'the question of the existence or non-existence of "family life" is essentially a question of fact depending upon the real existence in practice of close personal ties.' In Bronda v Italy [1998] HRCD 641 it was accepted that, on the facts, a grandparent had sufficient relationship with her grandchild to establish 'family life'. (See also Marckx v Belgium (1979) 2 EHRR 330)

25. In Boyle v UK 1995) 19 EHRR 179 the Commission held that, depending on the circumstances, the relationship between an uncle and nephew could fall within the concept of 'family life'.

26. In The Queen on the application of L v Secretary of State for Health [2001] 1 FLR 406, Scott Baker J held that 'family life' is an elastic concept that depends on the facts of the individual case. In some cases, the existence of family life will be immediately obvious; in others, the reverse will be true. The onus on establishing the existence of family life is always on the applicant.