



Neutral Citation Number: [2023] EWCA Civ 768

Case No: CA-2023-000295

**IN THE COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM THE FAMILY COURT SITTING AT DERBY**  
**HH Judge Williscroft**  
**DE22C00024**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 6 July 2023

Before :

**LADY JUSTICE KING**  
**LORD JUSTICE BAKER**  
and  
**LORD JUSTICE LEWIS**

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**G AND H (LEAVE TO REVOKE PLACEMENT ORDER)**  
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**Zoe Henry** (instructed by **Elliott Mather**) for the **Appellant**  
**Joshua Hazelwood** (instructed by **Local Authority Solicitor**) for the **First Respondent**  
**Nick Brown** (instructed by **Nelsons Law**) for the **Second and Third Respondents by their children's guardian**

Hearing date : 24 May 2023  
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**Approved Judgment**

This judgment was handed down by the judges remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:30 on 6 July 2023.

## **LORD JUSTICE BAKER :**

1. This is an appeal by a grandmother against an order refusing her application under s.24(2)(a) of the Adoption and Children Act 2002 (“the 2002 Act”) for leave to apply to revoke placement orders in respect of two grandchildren, G, a girl aged 3, and H, a girl aged 2. The appeal raises two issues relating to such applications: (1) whether the children are automatic parties to an application for leave under s.24(2)(a), and (2) whether a change of mind by a family member about putting themselves forward as a potential carer for the children can, without more, amount to a change of circumstances within the meaning of s.24(3).
2. The relevant background can be summarised briefly. In April 2022, the local authority issued care proceedings in respect of G and H on the basis of a range of concerns including neglect, conflict between adults within the family, exposure to risky third parties, and an unwillingness on the part of the parents to work with professionals. In May, the children moved into foster care under interim care orders.
3. The appellant, who is the children’s paternal grandmother (hereafter referred to as “the grandmother”), is employed as a school support worker and looks after her younger son who has some special needs. During the care proceedings, she was not assessed as a kinship carer for G and H. There is a dispute between the grandmother and the local authority as to why. Two conversations took place between the grandmother and a social worker. The grandmother’s case is that after those conversations she was expecting to be assessed as a carer for the girls. The local authority’s case is that she did not put herself forward as a carer.
4. On 7 November 2022, the care proceedings concluded with the making of care and placement orders.
5. A few days later, the grandmother asked the local authority whether they were going to assess her. On 17 November, the local authority responded that they were not intending to do so. On 21 December, the grandmother as a litigant in person filed an application for the discharge of the care orders and for leave to apply to revoke the placement orders.
6. On 10 January 2023, HH Judge Williscroft made a directions order listing a hearing for the leave application and making directions for the local authority to file a statement in reply to the application. The order included the following paragraph:

“2. At this time it is not necessary for the children to be party to proceedings or to have a Cafcass Guardian until the application for leave (or permission) has been determined.”
7. At the hearing 19 January 2023, the judge had the benefit of two position statements from the grandmother and of hearing submissions on behalf of the grandmother and the local authority. She gave a short ex tempore judgment which I shall recite in full:

“1. In this application there are some disputes of fact about the circumstances of [the grandmother] contacting the local authority and so forth, facts which I have not heard oral evidence to determine, but it is clear that she knew that the children were

subject to proceedings, she was in contact with her son because she said she asked him to pass on messages, and it appears it is only after a Placement Order has been made, and I am sure the gravity and pain of that, that she now makes a formal application to be assessed as a carer.

2. The difficulty I have is that clearly, whatever the outcome of these discussions, she discussed the care of the children with social workers more than six months ago, and during that course of time social services' offices remained open and she knew the court proceedings were ongoing and she did not let them know that she had changed her mind and was now clearer about what she wanted to do; and she could have attended the final hearing with her son and put herself forward at that point, as a carer.

3. The court is not in the same position as if we were mid-care proceedings in which a family member comes forward and says, "I need a thorough assessment because I'm in a position to care". We are in a position after care proceedings have ended and a plan for adoption has been supported by the court in which her wishes were not before the court; and, frankly, whatever was said by social workers, whatever was said by her son, she is the adult here who had the responsibility to make that absolutely clear. Is the reality not more likely that those concerns that she had right back in May, realistic ones because she had a lot of responsibility that she is obviously exercising very well, meant that there was not clarity until after the Adoption Order was made? I am afraid there is a point at which it is too late because her circumstances have not changed in any way over these last months and her circumstances would have to have changed in order for the court to consider her application.

4. For that reason I am afraid I have to turn down her application. I know that she did want to discuss with social workers, if I did, the prospect of some kind of contact, of some kind of communication with the children and it is part of their life story work of course that she wanted to care for them.

5. The court has not formally issued the discharge of the Care Order application but effectively I will now have to dismiss it as a result."

8. On 13 February 2023, the grandmother, at that point acting in person, filed a notice of appeal against the judge's orders. The two grounds of appeal put forward were, in summary (1) the hearing was procedurally incorrect because the children's guardian ought to have been joined as a respondent and (2) the decision to refuse leave was wrong. On 19 April 2023, I granted permission to appeal against the dismissal of the application and for leave to apply to revoke the placement orders but refused permission to appeal against the dismissal of the application for discharge of the care orders. The reason for this latter decision was that under s.39(1) of the Children Act 1989 the applicant was not entitled to apply for discharge of the care order.

## The law

9. Before addressing the issues and submissions, I must set out in some detail the relevant provisions in the statute and rules, together with citations from applicable case law.

10. A placement order is defined in s.21(1) of the 2002 Act as

“an order made by the court authorising a local authority to place a child for adoption with any prospective adopters who may be chosen by the authority.”

Under s.21(4),

“a placement order continues in force until

- (a) it is revoked under section 24,
- (b) an adoption order is made in respect of the child, or
- (c) the child marries, forms a civil partnership or attains the age of 18 years.”

11. S.24, headed “revoking placement orders”, provides, so far as relevant:

“(1) The court may revoke a placement order on the application of any person.

(2) But an application may not be made by a person other than the child or the local authority authorised by the order to place the child for adoption unless—

- (a) the court has given leave to apply, and
- (b) the child is not placed for adoption by the authority.

(3) The court cannot give leave under subsection (2)(a) unless satisfied that there has been a change in circumstances since the order was made.”

12. Under s.29(1),

“Where a placement order is made in respect of a child and

- (a) the child is subject to a care order, or
- (b) the court at the same time makes a care order in respect of the child,

the care order does not have effect at any time when the placement order is in force.”

13. The statutory provisions for the appointment of a children’s guardian to represent a child in placement order proceedings are found not in the 2002 Act itself but in the

Children Act 1989 as amended by the 2002 Act. S.41(1) of the 1989 Act, headed “Representation of child”, provides:

“For the purpose of any specified proceedings, the court shall appoint an officer of the service [Cafcass] or a Welsh family proceedings officer for the child concerned unless satisfied that it is not necessary to do so in order to safeguard his interests.”

The proceedings falling within the meaning of “specified proceedings” are defined in s.41(6). Paragraphs (a) to (h) of the subsection list various applications under the 1989 Act. Paragraph (hh), inserted by the 2002 Act, includes proceedings

“on an application for the making or revocation of a placement order (within the meaning of section 21 of the Adoption and Children Act 2002”.

Paragraph (i) includes proceedings

“which are specified for the time being, for the purposes of this section, by rules of court”.

14. The principles to be applied by a court considering an application to revoke a placement order under s.24 are well established and were summarised most recently by this court in *Re D (Leave to Apply to Revoke Placement Orders)* [2022] EWCA 299 at paragraph 4:

“(1) There is a two-stage process. Has there been a change in circumstances? If so, should leave to apply be given?

(2) The change in circumstances does not have to be ‘significant’ but needs to be of a nature and degree sufficient to open the door to a consideration of whether leave to apply should be given. That principle, identified by this Court in *Re P (Adoption: Leave Provisions)* [2007] EWCA Civ 616, [2007] 2 FLR 1069 in relation to an application under s.47 of the 2002 Act for leave to oppose an adoption order, has been held to apply also in relation to applications under s.24: *Re B-S* [2013] EWCA Civ 1146, [2014] 1 FLR 1035.

(3) At the second stage, the child's welfare is relevant but not paramount: *M v Warwickshire County Council* [2007] EWCA Civ 1084, [2008] 1 FLR 1093.

(4) The question for the court at the second stage is ... "whether in all the circumstances, including the mother's prospect of success in securing revocation of the placement order and [the child's] interests, leave should be given": *NS-H v. Kingston upon Hull City Council and MC* [2008] EWCA Civ 493, [2008] 2 FLR 918.

(5) If leave is granted, the substantive application to revoke the placement order must be determined by applying s.1 of the 2002

Act. The child's welfare is the paramount consideration, any delay in coming to a decision is likely to prejudice the child's welfare, and the court must have regard to the factors in the checklist in s.1(4). Furthermore, as this Court stated in Re C (Revocation of Placement Order) [2020] EWCA Civ 1598, on a substantive application to revoke a placement order, the court must abide by the principles established in the case law on adoption generally, in particular the decision of the Supreme Court in Re B [2013] UKSC 33, so that the permanent severing of ties between a child and her birth parents is an outcome "only to be ordered in exceptional circumstances and where motivated by overriding requirements pertaining to the child's welfare" (per Baroness Hale of Richmond at [198])."

15. In the course of legal submissions, we were referred to various provisions in the Family Procedure Rules 2010 ("the FPR").

16. Rule 1.1, headed "The overriding objective", provides:

"(1) These rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly, having regard to any welfare issues involved.

(2) Dealing with a case justly includes, so far as practicable

(a) ensuring that it is dealt with expeditiously and fairly;

(b) dealing with the case in ways which are proportionate to the nature, importance and complexity of the issues;

(c) ensuring that the parties are on an equal footing;

(d) saving expense; and

(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases."

Rule 1.2, headed "Application by the court of the overriding objective", provides:

"The court must seek to give effect to the overriding objective when it

(a) exercises any power given to it by these rules; or

(b) interprets any rule."

17. Part 4 is headed "General case management powers". Rule 4.1(3) contains an extensive list of powers, including that the court may

"(o) take any other step or make any other order for the purpose of managing the case and furthering the overriding objective."

18. Part 14 of the FPR governs “Procedure for applications in adoption, placement and related proceedings”. Rule 14.1(1) states that the rules in Part 14 apply to adoption proceedings, placement proceedings, and proceedings under various sections of the 2002 Act identified in rule 14.1(1)(c). “Placement proceedings” means “proceedings for the making, varying or revoking of a placement order”: rule 2.3(1).
19. Rule 14.3 is headed “Who the parties are”. Rule 14.3(1) identifies the applicants and respondents in various proceedings in a table. In proceedings for a placement order under s.21, the list of respondents includes the child. In “proceedings for an order revoking a placement order”, the respondents are identified as “The parties to the proceedings leading to the placement order which it is sought to have revoked; and any person in whose favour there is provision for contact.” Rule 14.3 continues with the following provisions:
  - “(2) The court may at any time direct that a child, who is not already a respondent to proceedings, be made a respondent to proceedings where
    - (a) the child
      - (i) wishes to make an application; or
      - (ii) has evidence to give to the court or a legal submission to make which has not been given or made by any other party; or
    - (b) there are other special circumstances.
  - (3) The court may at any time direct that
    - (a) any other person or body be made a respondent to proceedings; or
    - (b) a party be removed.
  - (4) If the court makes a direction for the addition or removal of a party, it may give consequential directions about  
...
    - (c) the management of the proceedings.”
20. Part 16 of the FPR is headed “Representation of children and reports in proceedings involving children”. At the hearing of the appeal the following rules under Part 16 were cited.
21. Rule 16.2, headed “When the court may make a child a party to proceedings”, provides:
  - “(1) The court may make a child a party to proceedings if it considers it is in the best interests of the child to do so.

(2) This rule does not apply to a child who is the subject of proceedings

- (a) which are specified proceedings; or
- (b) to which Part 14 applies.

(The Practice Direction 16A sets out the matters which the court will take into consideration before making a child a party under this rule.)”

22. Rule 16.3, headed “Appointment of a children’s guardian in specified proceedings or proceedings to which Part 14 applies”, provides (so far as relevant to this appeal):

“(1) Unless it is satisfied that it is not necessary to do so to safeguard the interests of the child, the court must appoint a children’s guardian for a child who is

- (a) the subject of; and
- (b) a party to,  
proceedings
  - (i) which are specified proceedings; or
  - (ii) to which Part 14 applies

(2) At any stage in the proceedings,

- (a) a party may apply, without notice to the other parties unless the court directs otherwise, for the appointment of a children’s guardian; or
- (b) the court may of its own initiative appoint a children’s guardian.

...

(4) When appointing a children’s guardian the court will consider the appointment of anyone who has previously acted as children’s guardian of the same child.”

23. Rule 16.4, headed “Appointment of a children’s guardian in proceedings not being specified proceedings or proceedings to which Part 14 applies”, provides (so far as relevant to this appeal):

“(1) ....the court must appoint a children’s guardian for a child who is the subject of proceedings which are not proceedings of a type referred to in rule 16.3(1) if

- (a) the child is an applicant in the proceedings;



- (b) a provision in these rules provides for the child to be a party to the proceedings, or
- (c) the court has made the child a party in accordance with rule 16.2.”

24. Rules about the powers and duties of the children’s guardian are set out in rule 16.20 and in Practice Direction 16A.
25. Part 18 of the FPR is headed “Procedure for other applications in proceedings”. Rule 18.1, headed “Types of application for which Part 18 procedure may be followed”, provides (inter alia):

“(1) The Part 18 procedure is the procedure set out in this Part.

(2) An applicant may use the Part 18 procedure if the application is made

- (a) in the course of existing proceedings;
- (b) to start proceedings except where some other Part of these rules prescribes the procedure to start proceedings; or
- (c) in connection with proceedings which have been concluded.

(3) Paragraph (2) does not apply

- (a) to applications where any other rule in any other Part of these rules sets out the procedure for that type of application;
- (b) if a practice direction provides that the Part 19 procedure may not be used in relation to the type of application in question.”

26. Rule 18.2 provides that “an application for permission to start proceedings must be made to the court where the proceedings will be started if permission is granted.”

27. Rule 18.3, headed “Respondents to applications under this Part”, provides (so far as relevant):

“The following persons are to be respondents to an application under this Part:

- (a) where there are existing proceedings or the proceedings have been concluded
  - (i) the parties to those proceedings ....

(b) where there are no existing proceedings,

....

(ii) if an application is made for permission to apply for an order in proceedings, any person who will be a party to the proceedings brought if permission is granted; and

(c) any other person as the court may direct.”

28. Rule 18.5, headed “Notice of an application”, provides (so far as relevant):

“(1) Subject to paragraph (2), a copy of the application notice must be served on

(a) each respondent;

...

(c) in relation to proceedings under Parts 12 and 14, the children’s guardian (if any).

(2) An application may be made without serving a copy of the application notice if that is permitted by

(a) a rule;

(b) a practice direction; or

(c) the court.”

29. Rule 18.9(1) allows the court to deal with an application without a hearing if it does not consider that a hearing would be appropriate. Under rule 18.9(2), where an application for permission to make an application in proceedings under the Children Act 1989 is refused without a hearing, the applicant has the right to ask for the application to be re-listed at a hearing. The rule does not, however, extend that right to an applicant for leave to bring an application under the 2002 Act.

30. Part 18 is supplemented by Practice Direction 18A. Paragraph 1.1 of the PD provides:

“Part 18 makes general provision for a procedure for making applications. All applications for the court’s permission should be made under this Part, with the exception of applications for permission for which specific provision is made in other Parts of the FPR, in which case the application should be made under the specific provision. Examples of where specific provision has been made in another Part of the FPR for applications for permission are rule 11.3 (Permission to apply for a forced marriage protection order) and rule 30.4 (permission to appeal).”

**Ground one**

### *Submissions*

31. Under ground one, it was argued that “the hearing was procedurally incorrect because the children’s guardian ought to have been joined as a respondent”. The grandmother submitted that an application for leave to apply to revoke a placement order fell within the definition of specified proceedings under s.41(6)(hh) (“proceedings on ... an application for the ... revocation of a placement order”) and within FPR rule 14.3(1) (“proceedings for ... an order revoking a placement order”). In those circumstances, the judge had been wrong to direct that it was “not necessary for the children to be party to proceedings or to have a Cafcass Guardian until the application for leave (or permission) has been determined” and wrong to determine the application without joining and hearing from the guardian. There was an obvious need for the children’s voices to be heard, given the grave consequences of an adoption order, and the judge’s decision suffered from the absence of the independent analysis of the children’s welfare which the guardian would have provided. On behalf of the grandmother, Ms Zoe Henry cited the decision of this Court in *Re JL (A Child) (Leave to Apply to Revoke Placement Order)* [2020] EWCA Civ 1253, in which the guardian’s analysis had been available, and the earlier decision of this Court in *Re T (Children)* [2014] EWCA Civ 1369, in which the Court had expressed regret at the fact that the children had not been represented on an appeal against the refusal of an application for leave to revoke a placement order.
  
32. On behalf of the local authority, Mr Joshua Hazelwood submitted that the child is not a party to an application for leave to revoke a placement order. Such applications are not included in the list of specified proceedings in s.41(6) or in the table in rule 14.3(1) and as a result, fall outside rules 16.3 and 16.4. He relied on the obiter observation of Wilson LJ in *M v Warwickshire CC* [2007] EWCA Civ 1084 at paragraph 3:

“An application for revocation is included, at (hh), in the list of “specified proceedings” in s.41(6) ... with the result that the court must appoint a guardian to represent the children unless satisfied that it is unnecessary to do so. Thus the children are parties to the applications for revocation and the judge has appointed a guardian to represent them... An application for leave to apply for revocation is not included in the list of “specified proceedings”. Thus the children were not parties to the mother’s applications for leave and the guardian took no part in them.”

Mr Hazelwood submitted that the judge would have been aware of the gravity of the plan for adoption. At the leave stage it was a matter for the judge’s discretion as to whether a guardian should be appointed. *Re JL* was an example where the welfare considerations were such that an analysis by the guardian was plainly required at the leave stage.
  
33. On behalf of the guardian opposing the appeal, Mr Nick Brown adopted Mr Hazelwood’s interpretation of the statute and rules. He added that this was consistent with the desirability of judges being able in appropriate cases to deal with unmeritorious cases expeditiously without being obliged to bring in a Cafcass guardian and solicitor for the child, adding unnecessarily to delay and costs.

34. In giving permission to appeal, I had invited the parties to address various matters of law including, inter alia, Part 18. As none of the skeleton arguments had referred to Part 18 at all, I renewed that invitation. In supplemental submissions, Ms Henry acknowledged that, on the basis of Wilson LJ's dicta in *M v Warwickshire* cited above, her initial argument based on s.41 and rule 14.3(1) was not correct. Instead she argued that either rule 18.3(a)(i) or rule 18.3(b)(ii) (or a combination of both) applied and as a result the child should have been joined as a party. Mr Hazelwood and Mr Brown submitted that an application to revoke a placement order falls under Part 14. Mr Brown relied in particular on the heading to Part 14 ("Procedure for applications in adoption, placement and related proceedings") and argued that applications for leave to apply were "related proceedings". As a result, Part 18 did not apply, because rule 18.1(3) made it clear that it did not apply to applications where any other Part of the rules sets out the procedure.

### *Discussion*

35. There is plainly a degree of uncertainty about this issue. A study of the reported cases involving applications for leave to apply to revoke reveals that sometimes the child is a party represented by a guardian, sometimes not. This is the first case in which the issue has been directly addressed.
36. In my judgment, it is clear from PD 18A that the Part 18 procedure must be used for all applications for permission save where specific provision is made elsewhere in the rules. There is nothing in Part 14 which makes specific provision for applications for leave to apply to revoke a placement order under s.24 of the 2002 Act. The reference to "related proceedings" in the title of Part 14 is to the proceedings identified in rule 14.1(1)(c), not to any proceedings related to an adoption or placement order. The references in Part 14 to proceedings for an application to revoke a placement order under s.24 – specifically, in the table in rule 14.3(1) – are to the substantive application, not an application for leave. It follows that an application for leave to apply for an order revoking a placement order is to be made under Part 18, not Part 14.
37. At first sight, it is not clear whether an application for leave to apply to revoke a placement order falls into the category of applications "where the proceedings have concluded" or applications "where there are no existing proceedings". One could argue it either way. On balance, it seems more apposite to regard it as falling in the former category. In the event, however, it makes no difference which category applies. If, as I consider the right interpretation, an application for leave to revoke a placement order falls into the category of applications "where the proceedings have concluded", the respondents to the application for leave will be (under rule 18.3(a)(i)) the parties to the concluded proceedings, which, as set out above, includes the child. If such an application falls into the category of applications "where there are no existing proceedings", the respondents will be (under rule 18.3(b)(ii)) "any person who will be a party to the proceedings brought if permission is granted", which, as set out above, will be "the parties to the proceedings leading to the placement order", including the child.
38. It should be noted that, even if, contrary to the conclusion I have reached, an application for leave to apply to revoke a placement order falls within the meaning of "proceedings for an order revoking a placement order" under Part 14, the outcome is the same.

39. In short, under the rules, the child is a party to the application for leave to revoke.
40. This leads, however, to an anomaly. Applications for leave to revoke a placement order are not specified proceedings, nor, if the analysis set out above is correct, are they proceedings under FPR Part 14. Consequently, the provisions for appointment of a children’s guardian in rule 16.3 do not apply. Instead, the appointment is governed by rule 16.4(1)(b), under which a guardian is appointed if “a provision in these rules provides for the child to be a party to the proceedings”. But whereas s.41 and rule 16.3(1) stipulate that a court shall, or must, appoint a guardian for the child “unless satisfied that it is not necessary to do so to safeguard his interests”, rule 16.4(1) simply says, without exception, that, in proceedings covered by the paragraph, “the court must appoint a guardian for the child”. Thus on the face of the rules it would appear that the discretion which the court has not to appoint a guardian to the substantive application to revoke a placement order where satisfied that it is not necessary to do so to safeguard the child’s interests is not available on a preliminary application for leave to apply to revoke.
41. I cannot at the moment think of any reason for this anomaly. My feeling is that this was an unintended consequence of the changes to the rules in 2010. This feeling is strengthened by a study of the position under the previous rules.
42. The principal predecessor of the FPR was the Family Proceedings Rules 1991 (“the 1991 Rules”). But whereas the FPR is a comprehensive code covering all family proceedings, including (under Part 14) adoption proceedings, the 1991 Rules did not cover adoption and placement order proceedings which instead were subject to the Family Procedure (Adoption) Rules 2005 (“the 2005 Rules”). In many ways, the previous rules under these instruments were couched in the same terms as found in the FPR. There were, however, points of difference of which the following are relevant to the issues arising on this appeal.
43. First, the rules governing the “Procedure for applications in adoption, placement and related proceedings”, now found in Part 14 of the FPR, were derived from Part 5 of the 2005 Rules (rules 22 to 33), which had the same heading. The persons identified as respondents to an application to revoke a placement order are the same in both rules. The list in FPR rule 14.1 of the proceedings to which Part 14 applies follows (with one addition) the list in rule 22 of the 2005 Rules. I note, however, that rule 22 concludes with an additional sentence in brackets:
- “(Parts 9 and 10 set out the procedure for making an application in proceedings not dealt with in this Part.)”
44. Secondly, the main rules previously governing family proceedings (the 1991 Rules) contained no equivalent to the FPR Part 18 procedure. The rules governing adoption and placement proceedings (the 2005 Rules), however, do contain an equivalent, in Part 9 (rules 86 to 96). Paragraph 1 of the Practice Direction which supplemented Part 9 provided:
- “All applications for the court’s permission should be made under this Part other than applications for permission to:
- (a) change a child’s surname; or

- (b) remove a child from the jurisdiction,  
which should be made in accordance with Part 5.”

Part 9 therefore governed an application for leave to apply to revoke a placement order.

45. Thirdly, the identity of the respondents to an application under Part 9 was governed by rule 86(4) which provided:

“The following persons are to be respondents to an application under this Part—

- (a) where there are existing proceedings or the proceedings have concluded, the parties to those proceedings;
- (b) where there are no existing proceedings—
  - (i) if notice has been given under section 44 (notice of intention to adopt or apply for a section 84 order), the local authority to whom notice has been given; and
  - (ii) if an application is made in accordance with—
    - (aa) section 26(3)(f) (permission to apply for contact order);
    - or
    - (bb) section 42(6) (permission to apply for an adoption order),any person who, in accordance with rule 23, will be a party to the proceedings brought if permission is granted; and
- (c) any other person as the court may direct.”

Thus, unlike FPR 18.3(b)(ii) which is an open provision, only two types of application were identified in Part 9 of the 2005 Rules in the category of “where there are no existing proceedings”, neither being leave to apply to revoke a placement order. In my judgment, this provides further support for the view that an application for leave to apply to revoke a placement order falls into the category of “where proceedings have concluded”. Thus under the 2005 Rules, as the child would have been a party to the proceedings in which the placement order was made, he or she was a party to the application for leave to apply to revoke it. It follows that Wilson LJ’s obiter observation to the contrary in *M v Warwickshire CC*, supra (“An application for leave to apply for revocation is not included in the list of ‘specified proceedings’. Thus the children were not parties to the mother’s application for leave...”), was, with respect, not correct.

46. Fourthly, the provisions governing children’s guardians in the 2005 Rules were found in section 2 of Part 7 (rules 59 to 68). Rule 59, headed “Appointment of children’s guardian”, read:
- “59.—(1) In proceedings to which Part 5 applies, the court will appoint a children’s guardian where the child is a party to the proceedings unless it is satisfied that it is not necessary to do so to safeguard the interests of the child.
- (2) At any stage in proceedings where the child is a party to the proceedings—
- (a) a party may apply, without notice to the other parties unless the court directs otherwise, for the appointment of a children’s guardian; or
- (b) the court may of its own initiative appoint a children’s guardian.
- (3) The court will grant an application under paragraph (2)(a) unless it considers that such an appointment is not necessary to safeguard the interests of the child.
- (4) When appointing a children’s guardian the court will consider the appointment of anyone who has previously acted as a children’s guardian of the same child.”
47. Thus rule 59(1) of the 2005 Rules was in substantially the same terms as FPR rule 16.3. But the court’s power to appoint a children’s guardian “of its own initiative” applied (through rule 59(2)(b)) to all proceedings governed by the 2005 Rules, including proceedings on an application for leave to apply to revoke a placement order, whereas under the FPR it is confined (under rule 16.3(2)(b)) to specified proceedings or proceedings to which Part 14 applies.
48. Finally, the 2005 Rules contain no provision equivalent to FPR rule 16.4(1)(b), the unqualified mandatory requirement to appoint a children’s guardian if a provision in the rules provides for the child to be a party to the proceedings.
49. Therefore, the position under the 2005 Rules seems more logical than under the FPR. On an application for leave to apply to revoke a placement order, a guardian was not appointed unless a party applied for one or the court appointed one of its own initiative. If a party applied for a guardian to be appointed, the court had to appoint one unless it considered that such an appointment was not necessary to safeguard the interests of the child. On a substantive revocation application, the court appointed a guardian unless it considered that such an appointment was not necessary to safeguard the interests of the child. Under the FPR, the court has the power not to appoint a guardian at the substantive hearing if it considers such an appointment to be unnecessary to safeguard the child’s interests but is seemingly under a mandatory obligation to appoint a guardian at the leave stage.

50. This reinforces my feeling that this situation is an unintended consequence of the reforms implemented by the FPR. If my Lady and my Lord agree, I would propose referring this matter to the Family Procedure Rule Committee for review. One solution would be to amend the FPR by providing that applications for leave to apply to revoke a placement order are specified for the purposes of s.41. As set out above, s.41(6)(i) allows for proceedings to be specified by rules of court. A number of additional proceedings under the 1989 Act have been so specified FPR rule 12.27(1). If applications for leave to apply to revoke a placement order were included as “specified proceedings”, the court would have the power not to appoint a guardian at the leave stage as it does on the substantive application.
51. I recognise that the conclusions I have reached may cause some alarm amongst judges dealing with applications for leave to revoke. In practice, I suspect that many judges have been proceeding on the basis adopted by the judge in the present case that the rules allow them not to join the child or appoint a guardian on an application to for leave to apply to revoke a placement order. For understandable reasons, many birth parents whose children have been made subject to placement orders are devastated by the outcome and want to take any lawful step open to them to stop the adoption going ahead. Sadly, many applications for leave to apply to revoke placement orders are made with no prospect of success whatsoever – where the parent is completely unable to demonstrate a change of circumstances. There is a risk that the limited resources of Cafcass, which are in great demand, may be diverted to deal with applications which have no prospect of success.
52. As set out above, the court’s extensive case management powers under rule 4.1(3) include, under subparagraph (o), taking “any other step or make any other order for the purpose of managing the case and furthering the overriding objective.” In my judgment, whilst a judge is obliged to join the child to an application for leave to revoke a placement order and to appoint a guardian, it is entirely permissible to direct that the guardian take no substantive step in connection with the application and/or, as rule 18.9(1)(a) permits, to deal with the application without a hearing.
53. These are, however, powers that should be exercised with caution. Parliament has legislated to allow the issue of whether it is in the interests of a child’s welfare throughout his or her life to be adopted to be considered by a court as soon as the local authority is satisfied that the child ought to be placed for adoption: s.22(1)(d) of the 2002 Act. It is at the stage of making the placement order that the court has to consider whether the parents consent to the child being placed for adoption or, if they do not, whether their consent should be dispensed with: s.21(3). But the quid pro quo is that a parent is entitled to seek leave to revoke the placement order if there has been a change of circumstances and the court is satisfied in all the circumstances that leave should be granted. That is consistent with the fundamental principle identified by the European Court of Human Rights in *YC v United Kingdom* (2012) 55 EHRR 967 (at paragraph 134) that:
- “family ties may only be severed in very exceptional circumstances and that everything must be done to preserve personal relations and, where appropriate, to ‘rebuild’ the family.”



Protection against meritless applications is provided by the imposition of a leave filter. But the court's power to revoke a placement order at any point prior to the child being placed is an important element of the statutory scheme and it is to my mind unsurprising that the rules therefore require the child to be a party.

54. Furthermore, while many applications for leave to apply to revoke a placement order have no prospect of success, some do. In those circumstances, the guardian will plainly have a role in assisting the court to come to a decision whether to grant leave, particularly when addressing the second stage of the test, if the court finds that there has been a change of circumstances. The local authority is likely to have a position on the application, having obtained the placement order. The children's guardian adds essential balance to the picture presented to the court. In the case of *Re JL*, cited by Ms Henry, a grandmother who was already successfully looking after two grandchildren as a kinship foster carer, initially decided not to put herself forward to care for their younger sibling, in part because her accommodation was too small. After she moved to a larger property, she applied for leave to apply to revoke the placement order which had been made with respect to the third child and to apply for a special guardianship order. The applications were opposed by the local authority but supported by the guardian representing the child who had been joined to the application. The applications were refused at first instance but allowed on appeal.
55. I have considerable sympathy for the judge in the present case. The position under the rules was unclear and it has taken a lot of thought and time (which is simply not available to a judge sitting in the family court) to arrive at the interpretation set out above. Given the legal analysis set out above, however, I conclude that the judge was wrong to give a direction that it was "not necessary for the children to be party to proceedings or to have a Cafcass Guardian until the application for leave (or permission) has been determined". Under the rules, the child was a party and a children's guardian had to be appointed. It might have been open to the judge to restrict the activities of the guardian until the decision had been taken whether leave should be granted. But the judge did not approach the issue in that way.

## **Ground two**

### *Submissions*

56. Under ground two, it was argued that the judge erred in concluding that there had not been a change in circumstances since the making of the placement orders. The change in circumstances here was that a potential family placement for the children had become available. Regardless of whether the grandmother did or did not put herself forward in the care proceedings, it is understood that she was not formally assessed. Having learnt of the outcome of the care proceedings, she acted promptly in writing to the local authority and making her application to the court as quickly as she was able (considering her initial lack of legal aid). When the court considered the final care plans for the children, she did not feature as a realistic option for analysis. That she was now able to put herself forward to be considered as such amounted to a change in circumstances sufficient to open the door to leave being granted. Ms Henry submitted that the judgment was flawed because of a lack of any or any sufficient analysis of this issue.

57. On behalf of the local authority Mr Hazelwood submitted that, on the grandmother's case, she had at all times wanted to be assessed and the judge was therefore right to conclude that there had been no change in circumstances. It was the local authority's case that the grandmother had initially not wanted to be assessed but changed her mind after the placement order was made. Mr Hazelwood submitted that this was insufficient to amount to a change in circumstances. For the guardian, Mr Brown submitted to this court that a simple change of mind alone is never sufficient to amount to a change of circumstances. There always has to be something more – as he put it, a change of mind plus. He cited *Re JL* as an example. There the grandmother had changed her mind about offering a home to the child after moving to a larger property.

### *Discussion*

58. Throughout care proceedings, parents are encouraged to put forward alternative kinship carers. Family members are given every opportunity to come forward. This accords with the general principle that children should wherever possible be brought up within their natural families and with the statutory duty on local authorities under s.17(1) of the Children Act 1989 to safeguard and promote the welfare of children within their area and, so far as is consistent with that duty, to promote their upbringings by their families. The importance of identifying and assessing alternative carers within the family is reflected in case management orders made in care proceedings, and local authorities have developed a system of viability assessments which can then be followed up by a full assessment if appropriate. By the time the application for a placement order is considered everything possible will have been done to identify and assess possible kinship carers and the court makes its final orders on that basis.
59. Placement orders are, in the large majority of cases, made in relation to very young children living in temporary foster placements and delay in placing them after the making of the order is harmful and in relation to some children can significantly reduce the chances of identifying an adoptive placement.
60. Notwithstanding that to be the case, I do not agree with the submission that a simple change of mind without more can never amount to sufficient change in circumstances for the purposes of s.24(3). To insist on something more than a simple change of mind – a change of mind plus – would be an unwarranted gloss on the statute. But the focus of the court's attention must be on the circumstances which led to the placement order being made. It is only where there has been a change in those circumstances that the court has the discretion to grant leave. It will therefore be very unusual for a mere change of mind to be sufficient. Normally, as in *Re JL*, there will have to be something more.
61. Even if the court is persuaded that a change of mind is a change of circumstances of a nature and degree sufficient to open the door to the exercise of its discretion to grant leave, the court will only grant leave if, at the second stage, it is satisfied that in all the circumstances leave should be granted. Here the child's welfare, although not paramount, is relevant.
62. In my judgment, whether the grandmother is right in saying that she was expecting to be assessed throughout the proceedings or the local authority correct in saying that she changed her mind after the placement order is made, the fact that she is now actively putting herself forward as a potential carer for the child is potentially a change in

circumstances sufficient to open the door to the grant of leave, if the second stage of the test is satisfied. Whether it is will depend on an assessment of the circumstances which led to the placement order being made. The judge, however, did not address the issue in this way. Her reason for refusing leave was expressed in these terms:

“there is a point at which it is too late because her circumstances have not changed in any way over these last months and her circumstances would have to have changed in order for the court to consider her application.”

With respect to the judge, this was not the right approach. The question was not whether the grandmother’s circumstances had changed but whether there had been a sufficient change in the circumstances which led to the making of the placement order.

63. In some cases when giving judgment refusing applications for leave to apply to revoke a placement order, the judge having concluded that there has not been a change of circumstances will go on to consider whether the second stage would have been satisfied if a change of circumstances had been found. In this case, however, the judge did not consider the second stage at all.

### **Conclusion**

64. For these reasons, I conclude that the appeal must be allowed on both grounds and the order refusing leave set aside. The grandmother’s application for leave to revoke the placement order must be reheard by another judge, to be allocated by the Family Division Liaison Judge. The child must be joined and a guardian appointed. Although it will be a matter for the judge to whom the case is re-allocated to give directions, I would anticipate that in this case it will be appropriate for a guardian to play an active role in the application. As the guardian has opposed this appeal, consideration should be given whether, in the interests of fairness, a new guardian should be appointed for the rehearing.
65. I stress that nothing I have said in this judgment should be read as indicating whether leave to apply to revoke the placement order should be granted at the re-hearing.

### **LORD JUSTICE LEWIS**

66. I agree that the appeal should be allowed for the reasons given by Baker LJ. I also agree that it is appropriate to invite the Family Procedure Rule Committee to consider whether it wishes to make amendments to rule 16.4(1) of the Family Procedure Rules.

### **LADY JUSTICE KING**

67. I also agree with the judgment of Baker LJ and would add my voice to the invitation for the matter to be referred to the Rule Committee.