Grandparents and Grandchildren:
Relatedness, Relationships and Responsibility

Introduction

Whilst many grandparents play a vitally important part in the lives of their grandchildren, the law takes an ambivalent approach to their role. Grandparents have no legal rights to a relationship with their grandchildren, yet are often treated as the lynchpin in providing security for children unable to live with their parents. Given the extent to which grandparents are relied on as a resource and the positive role that grandparenting can play in the lives of children, there are often claims that grandparents ought to have access to greater legal rights to safeguard those relationships. These claims will be considered in two key areas in which grandparents' relationship are particularly vulnerable: seeking to maintain relationships with grandchildren against the opposition of the parents; and seeking to oppose adoption to maintain legal and social ties with grandchildren.

Despite the strong claims that some grandparents have in these cases, it will be argued that giving greater legal rights to grandparents would be undesirable. The current law is sufficiently flexible to recognize and support those grandparents in situations in which the intervention will be of benefit to the child. The creation of additional procedural rights is likely to lead to unnecessary and harmful litigation or protraction of that litigation. Greater substantive rights risk detracting from the essential question of the welfare of the child. This risk is particularly evident in the perennial question as to the proper weight that ought to be placed on biological relatedness in determining the children's welfare. Litigation in both areas has been distorted by claims of presumptions in favour of the biological parents or the birth family. Grandparents may stand to benefit from these presumptions in relation to non-family members but are disadvantaged in litigation with the child's parents. Whilst the higher courts have clearly rejected such presumptions, there are ongoing tensions, particularly in relation to adoption. Any attempt to grant greater relationship rights to grandparents is likely to exacerbate these problems and distort children's welfare through focus on biological relatedness rather than practical relationships.

It will be argued here that the law in these areas is best understood as prioritizing relationships of primary responsibility rather than biological relatedness itself. Legislation is structured around the prima facie assumption that those who take primary responsibility have particular protection in the law and it is those relationships of responsibility that will usually be of importance to the child's welfare. Where grandparents have taken this role the law will often protect their relationships. It is in adoption cases, where that relationship of responsibility has been repudiated or failed, that the importance of biological relationships has taken on particular significance.

Preserving Relationships: Conflict with Parents

The Campaign for Recognition

As grandparents, particularly grandmothers, play an increasing role in providing practical care for their grandchildren,[1] it might be thought necessary to revisit the relative absence of grandparents in legislation. Certainly there has been significant political pressure for greater legal recognition for grandparent relationships and greater financial support for those providing care. Many of these claims are concerned with the need to protect grandparents from the employment and financial strains imposed by caring. As Kaganas and Piper detail in this volume, grandparents who act as primary carers under a private arrangement are particularly neglected in the current law and often find themselves suffering significant financial detriment with little state support for their role. The extension of employment rights and financial support to those caring under private arrangements would be beneficial in alleviating some of the pressure experienced by grandparents acting as primary carers.

Alongside these campaigns for increased financial and employment support for grandparents in providing care, there has also been pressure for greater legal rights for grandparents in preserving their relationship with their grandchildren.[2] Grandparents as a distinct category are currently largely absent from the legislation surrounding children's contact and residence arrangements. Unlike parents, grandparents must first obtain the leave of the court before applying for a child arrangements order.[3] Further, in deciding whether to make an order there is no statutory presumption, as there is for parents, that the involvement of the grandparent in the child's life will further her welfare.[4] Grandparents are particularly vulnerable to loss of relationship with their grandchildren in the event of divorce or relationship breakdown of the child's parents. The Grandparents' Association has estimated that one million children have lost contact with their grandparents in this way.[5] Given the increased involvement of grandparents in the practical care of their grandchildren, it might be argued that there is a greater need for enhanced legal rights to enable

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[1] [See Kaganas and Piper in this volume].
[2] F. Kaganas, 'Grandparents' rights and grandparents' campaigns' [2007] CFLQ 17
[3] Unless, as discussed further below, the grandparent falls under one of the other categories of applicants able to apply as of right Section 10 Children Act 1989.
[4] Section 1(2A) Children Act 1989, the presumption only applies to those parents who 'can be involved in the child's life in a way that does not put the child at risk of suffering harm'.
[5] http://www.grandparentsplus.org.uk/wp-content/uploads/2011/03/Policy-Briefing-01-paper-statistics-Feb-2011.pdf The basis on which this figure has been calculated is not clear.

grandparents to seek the assistance of the court in preserving these relationships. Grandparents campaigning groups have long argued for, at a minimum, the removal of the leave requirement before an application for a child arrangements order can be brought, with others arguing for a presumption in favour of contact between grandparents and grandchildren.[6] For a time these campaigns looked likely to succeed. In the period before the 2010 general election, both the Conservative and Labour parties pledged their support for grandparents' rights. In January 2010, the outgoing Labour government published a green paper announcing plans to remove the leave requirement and to improve information for grandparents seeking contact after parental separation.[7] A few months later, the incoming coalition government appeared to preserve this policy with the then Deputy Prime Minister, Nick Clegg, describing the fact that that many grandparents did not feel 'empowered' to step in to support grandchildren after parental break up as 'crazy'.[8] Despite the apparent political consensus on the need for greater legal rights for grandparents, the status quo has remained. The turning point in the fortunes of the campaign was the recommendation of the Family Justice Review that no change be made to the leave requirement on the basis that it 'prevents hopeless or vexatious applications that are not in the interests of the child'.[9] The report further agreed with those consultation responses that eschewed the language of grandparents' rights to contact, instead emphasizing that any right was that of the child. In accepting this recommendation, the Government linked the retention of the leave requirement with the overall aim of encouraging the resolution of disputes outside of the court.[10] Given the overall policy of increasing barriers to access to the court in private family cases it would surprising to find barriers being lowered for grandparents. More fundamentally the retention of leave is consistent with priority being given to non-interference with those responsible for primary parenting.

The Leave Requirement

The legislative scheme for applying for child arrangements orders reflects a policy of prioritizing those who are, or ought to be, responsible for the primary parenting of the child. A 'fundamental principle' for the Law Commission in the report preceding the Children Act 1989 was that 'primary responsibility for the upbringing of children rests with their parents'. The list of those who may apply for a child arrangements order without leave extends beyond parents alone but

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[6] F. Kaganas, 'Grandparents' rights and grandparents' campaigns' [2007] CFLQ 17

[7] HM Government, 'Support for All: The Families and Relationships Green Paper' (January 2010).

[8] N. Clegg, 'Why it is time for families to come first' *Daily Mail*, 17 June 2010. http://www.dailymail.co.uk/news/article-1287250/Grandparents-win-legal-right-role-absent-children-s-lives.html

[9] 'Family Justice Review: Final Report' (Nov 2011) [4.41]-[4.48].

[10] Ministry of Justice, 'The Government Response to the Family Justice Review' at p23.

includes only those who have, or might be expected to have, taken primary responsibility for the practical care of the child. Those so entitled include: guardians; special guardians, step-parents with parental responsibility; any person with whom the child has lived for at least three of the five previous years; and a foster parent or relative with whom the child has been living for at least a year.[11] Further, where a special guardianship order is in force, the primary responsibility of the special guardian[12] is recognized by the reintroduction of leave for any other party seeking to obtain an order on the child's living arrangements.[13] Under these provisions, a grandparent who has acted as a primary carer will be able to apply without leave, whether that care was established through a formal court order or through *de facto* caring for the child for the required period of time. Any person who does not fall into these categories of primary carers, including grandparents and other relatives, must obtain the leave of the court.

The aim of the requirement of leave was clearly stated by the Law Commission as being to act 'as a filter to protect the child and his family from unwarranted interference in their comfort and security, whilst ensuring that the child's interests are properly respected.'[14] In this way the requirement of leave recognizes the prima facie responsibility of those with primary responsibility for the child. This is particularly important if the same leave requirement is to apply, as it does at present, whether the applicant is merely seeking contact or wishes to obtain primary care of the child. The latter form of child arrangements order represents a draconian interference with the parents' responsibility and the enjoyment of family life. Such application also have considerable potential to disrupt public proceedings, including adoption, and delay alternative permanent placement for the child. By requiring that the applicant has either acted as a primary carer or obtained the leave of the court, the current law offers some protection from such interference. In relation to contact the arguments are much more balanced, particularly given that no order will be made unless it is in the child's welfare.

In deciding an application for leave, the court must consider: the nature of the application; the applicant's connection with the child; and any risk that there might be of that proposed application disrupting the child's life to such an extent that he would be harmed by it.[15] These factors do not form an exhaustive list, in particular the child's welfare may be relevant, although it is not paramount. Further, leave may be refused where the merits of the application are such that it

[11] For a full list see s10(4)-10(10). Parents, guardians special guardians and step-parents with parental responsibility may apply for any order under s8 Children Act 1989 without leave, other entitled persons are limited to applications for child arrangements orders.
[12] S14C(1) Children Act 1989.
[13] S10(7A) Children Act 1989.
[14] Law Com No 172 [4.41].
[15] Children Act s10(9), there are additional requirements if the child is in local authority care.

is not arguable.[16] In *Re J (Leave to Issue Application for a Residence Order),* Thorpe LJ stressed that consideration of the merits should not impose too high a burden on grandparents, particularly where those grandparents enjoy rights protected by Articles 6 and 8 ECHR.[17] Together these requirements offer a flexible discretion to the court to deal with the diversity of potential applications. The primary caring relationships are protected from vexatious and harmful applications, whilst the grandparent with a relationship with the child and a prospect of success is likely to succeed. This approach reflects that elsewhere in the law of granting prima facie protection to primary caring relationships but granting a broad discretion to the court to protect other relationships that are in the child's welfare.

Making Child Arrangements Orders:

The campaigns concerning the leave requirement have tended to focus on grandparents estranged from their grandchildren and seeking contact following the breakdown of a parental relationship. In reality many of the cases that reach court concern far more complex situations in which there are welfare concerns akin to public law proceedings and significant questions over the future living arrangements of the children. For this reason it is not possible to treat grandparents' child arrangements cases as a monolithic group. Particularly difficult areas concern disputes over residence between parents and grandparents; and the use of orders in favour of grandparents in order to enforce contact with the paternal family. In these categories the tensions between the triangle of primary parenting responsibility, relatedness and relationships interact very differently. A particular tension is evident as to whether parents have any additional status as compared to grandparents within private proceedings and particularly whether there is a presumption that children are best brought up by their natural parents. The argument here is that rather than protecting parents as such, the courts will usually protect functioning relationships of primary responsibility and their importance to the child's welfare.

The leading case on residence disputes between grandparents and parents is the Supreme Court decision in *Re B* [2009].[18] In that case, the Supreme Court upheld the decision of the Family Proceedings Court, rejecting the father's application for a residence order in respect of his three year-old son and maintaining the maternal grandmother's role as primary carer, a responsibility that she had undertaken since his birth. In so doing, Lord Kerr, giving the judgment of the court, stressed the pivotal importance of welfare which 'must be the dominant and overriding factor that ultimately determines disputes' over residence and contact.[19] The High Court in this case had been wrong to distort the application of welfare by focusing on the supposed right of the child to be brought up by his

[16] *Re B (A Child*) [2012] EWCA Civ 737 esp at [48].
[17] [2002] EWCA Civ 1364 esp at [21].
[18] *Re B* [2009] UKSC 5.
[19] *Re B* [2009] UKSC 5. esp. at [34].

natural parents.[20] Similarly, whilst it might in the ordinary case be best for a child to be brought up by his biological parents, this assumption had no role to play in litigated cases, which rarely involved such ordinary situations.[21] In this way a unanimous Supreme Court delivered what appeared to be a terminal blow to any attempt to assert a presumption in favour of natural parents in residence disputes or any automatic preference for parental care. Whilst the case is firmly against the application of any assumptions that might distort the individualised assessment of welfare, nonetheless, the case is likely to favour those with primary caring responsibility over biological relatedness alone.

A good illustration of this consequence can be seen in the Court of Appeal decision in *Re T* [2010] in which there was no biological relationship between the 'grandparents' and one of the children.[22] The case concerned two children, aged 10 and 7, who had been living with the paternal grandparents of the elder child since they were 4 and 9 months. At that time, the grandparents had assumed responsibility for the children under a residence order made with the consent of the mother, who was suffering from significant problems with alcohol and was unable to care for the children. Six years later, having recovered from her drink problem and established a stable marriage with a new child, the mother sought to have residence restored to her. In confirming the trial judge's decision to maintain the children's primary residence with the grandparents, the Court of Appeal approved his view that the mother's biological link was not a 'stand-alone feature' but was only relevant in so far as it impacted on the welfare of the children. As there was no evidence that the grandparents treated the younger child differently or had failed to meet her emotional needs, the absence of a biological connection played virtually no role in the decision. The case is a good illustration of the importance given to maintaining the primary caring relationship, despite the absence of a biological link between the grandparents and one of the children and despite the fact that the biological mother had, it seems, maintained substantial contact with the children.

Despite the clear rejection of a natural parent presumption by the Supreme Court, the Court of Appeal in *Re B* [2012][23] considered that 'manifestly grandparents are not on equal footing with parents' in child arrangements applications. At first sight this statement appears to be tension with the Supreme Court decision but the case illustrates that, whilst there is no presumption in favour of parents, grandparents without caring responsibility are not in an equivalent position to a non-resident parent. In that case the nearly 5 year-old child had been brought up by her mother throughout her life. The relationship with the father was 'turbulent' and the paternal family were regarded by the mother as 'abusive and dangerous'. The mother, who had borderline capacity to litigate, had refused to abide by contact orders in favour of the grandmother that had initially been made when she was neither present nor represented. The trial

[20] *Re B* [2009] UKSC 5 at [19].
[21] Especially at [35].
[22] [2010] EWCA Civ 1644.
[23] [2012] EWCA Civ 858

judge had ordered transfer of residence from the mother to the grandmother, primarily on the basis that the grandmother would be better able to ensure that the child had contact with both sides of her family. It was in overturning this decision that the Court of Appeal stated that 'manifestly grandparents are not on equal footing with parents'. Whilst transfer of residence might be appropriate as a 'weapon of last resort' in contact disputes between parents, the court knew of 'no case in which such a dire sanction has been exercised against an obdurate parent to transfer the primary care to a grandmother'. The difference between parents and grandparents was underlined by the requirement of leave, to which we might now add the absence of a statutory presumption that the child will benefit from grandparental involvement. The apparent conflict between the statements of the Supreme Court and Court of Appeal on the relative position of parents and grandparents is again best seen as reflecting the protection of relationships of responsibility. Whilst grandparents will not be at a disadvantage to parents in retaining their primary caring position, grandparents without primary responsibility will find it difficult to use private law to disrupt the child's primary care.

Both *Re B* [2009] and *Re T* are examples of grandparents stepping in to a situation that might otherwise have required local authority intervention. Research by Maebh Harding and Annika Newnham suggests that such cases are typical of child arrangements cases involving grandparents.[24] In their analysis of all applications for section 8 orders decided in specified county courts in 2011, non-parents, primarily grandparents, were the applicants in 12% of cases, and were overwhelmingly concerned with residence rather than contact.[25] In almost all of these cases, the child was already living with the non-parent prior to the application. Non-parents seeking residence orders in these circumstances were almost always successful in obtaining sole residence, with the two cases in which they were not resulting in shared residence. Strikingly, the cases considered contain features that might be more traditionally associated with public, rather than private, proceedings. In almost all of the cases there were serious welfare concerns and doubts as to the mother's ability to provide secure full-time parenting.[26] Further, in more than half of the cases, the local authority was actively involved with the family before the residence application was made, often having encouraged, or even insisted on, that application. In those cases where the mother was successful in applying for the child to be returned to her care, the local authority was heavily involved in supporting and monitoring that transfer. Whilst the research does not purport to be a representative sample, the

[24] M Harding and A Newnham, 'How do County Courts Share the Care of Children Between Parents? Full Report' (Nuffield Foundation, May 2015)
[25] *Ibid* Chapter 6. The research was carried out before the Children and Families Act 2014 and the change of nomenclature to child arrangements orders. It is not suggested that this had any impact on the outcome of the cases.
[26] The fathers in these cases were all absent or unsuitable as primary carers.

findings fit well with Bainham's observation that the binary division between public and private proceedings is becoming blurred in practice.[27]

As Kaganas and Piper observe in their chapter in this volume, there are significant incentives for local authorities to encourage arrangements in private law rather than using care proceedings. Harding and Newnham's research also seems to confirm that applications for residence by grandparents and other non-relatives often function as an alternative to public law applications. Kaganas and Piper demonstrate the disadvantages that this can have for grandparents caring for children without the obligations that would attach to looked after children. There are also potential disadvantages to the child in that grandparents obtaining a child arrangements order will not be subject to assessment as foster carers in the way that they would under public proceedings.[28] There are further important disadvantages for all the participants within private law litigation, most notably the severe restriction on legal aid in private family disputes means that both parents and non-parents are likely to find themselves without legal representation. For grandparents this can mean that the financial consequences of proceeding through private law orders are not fully understood, whilst parents find themselves at risk of losing care of their children without legal representation. Similarly, the child is unlikely to be separately represented in private proceedings.[29] The consequences for parents in losing the primary care of their child in these cases can be materially identical to those under a care order. The Children Act 1989 was premised on the clear demarcation between public and private law, with the threshold criteria standing as the barrier to removal of a child against the parent's will. It is with good reason that local authorities are prohibited from using private law orders to avoid public law proceedings.[30] It is true that the successful cases have tended to involve parents who had relinquished their child to the care of the grandparent and that cases may be less likely to be successful if the child is not already within the practical responsibility of that grandparent. Nonetheless, the current approach risks removing children from parental care without the substantive and procedural protections that are available in public law proceedings. If local authorities are encouraging such private applications as a means of avoiding public proceedings, there is clearly a risk that the Article 8 rights of parents and children will not be sufficiently protected, particularly in the absence of legal advice. In such cases, the flexible leave requirement, together with the application of welfare that gives no 'stand-alone' consideration to the parental relationship may be insufficient to justify intervention with those Article 8 rights.[31] The privatiasation of what are effectively public law cases has significant risks for all participants.

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[27] A. Bainham, 'Private and Public Children Law: An Underexplored Relationship' [2013] CFLQ 138.

[28] Department of Education, 'Family and Friends Care: Statutory Guidance for Local Authorities' (2010).

[29] See *B (A Child)* [2012] EWCA Civ 858 for concerns expressed on the lack of representation of the child in such a case.

[30] Children Act 1989 s9(2). *Nottinghamshire CC v P* [1994] Fam 18.

[31] A. Bainham, 'Private and Public Children Law: An Underexplored Relationship' [2013] CFLQ 138.

Preserving Relationships: Adoption[32]

It is the prospect of adoption that perhaps raises the greatest threat to the relationship between grandparents and grandchildren. An adoption order not only risks the social and psychological relationships that may already exist but breaks the legal ties and kinship networks that form the heart of the law's construction of the family. The role of adoption in providing care for children has been a point of considerable political and legal contention in recent years. The Government has consistently promoted adoption as a means of providing a stable home for children who would otherwise remain the care system.[33] At the same time, the UK has come under sustained international scrutiny over the notion that it is out of line with prevailing European practice on non-consensual adoption[34] and assertions that the law in this jurisdiction is too ready to break existing legal and biological ties.

The European Court of Human Rights has confirmed that the English law on adoption is not incompatible with the European Convention on Human Rights.[35] Nonetheless, the tension in the Court's judgment between the principle 'that family ties may only be severed in very exceptional circumstances and that everything must be done to preserve personal relations' and the fact that 'it is in the child's best interests to ensure his development in a safe and secure environment'[36] is often difficult to apply in practice. The domestic courts' attempts to clarify the law have exacerbated much of the complexity in this area, most notably the Supreme Court's summary of the law in *Re B* [2013][37] and particularly Baroness Hale's observation that:

> '... it is quite clear that the test for severing the relationship between parent and child is very strict: only in exceptional circumstances and where motivated by *overriding requirements* pertaining to the child's welfare, in short, where nothing else will do.'[38]

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[32] Nicholas Stonor QC's presentation "Re W and Nothing Else Will Do'" to the Children and Family Law Discussion Group, Oxford (18 November 2016) was of great assistance in considering the issues raised in this section.
[33] Most recently, Department of Education, *Adoption a Vision for Change* (March 2016).
[34] For analysis and rejection of this claim see C. Fenton-Glynn, *Adoption Without Consent, Update 2016*, EU PE 556.940 at pp34-36.
[35] *YC v UK* (2012) 55 EHRR 967
[36] *YC v UK* (2012) 55 EHRR 967 at [134].
[37] *Re B (Care Proceedings: Appeal)* [2013] UKSC 33.
[38] *Re B (Care Proceedings: Appeal)* [2013] UKSC 33 at [198].

This statement and the application of the decision to leave to oppose adoption by the Court of Appeal in *Re B-S*[39] appear to have generated an understanding that the cases were intended to change the law and elevate the importance of biological ties. If this were the case it would have considerable implications for grandparents seeking to offer alternatives to adoption outside the family. Whilst the senior judiciary have repeatedly stated, both judicially[40] and extra-judicially,[41] that the cases were not intended to change the law, nonetheless the 'nothing else will do' mantra appears to have had a significant impact on many areas of practice.

Adoption: Grandparents and the Statutory Framework

In adoption, as in private cases, the grandparent without care receives no specific rights or recognition within the statutory framework. The gateway to adoption is governed by the consent of those with primary legal responsibility for the child's upbringing. Before an adoption can take place, the consent of the parents with parental responsibility or the guardian or special guardian, must be obtained or dispensed with.[42] It follows that it is only the people within these categories who can formally oppose the making of an order by seeking to withdraw that consent.[43] In this way the statutory scheme is based on the protection of the primary relationship of responsibility, although in adoption it is a relationship that is more tightly focused on primary legal responsibility and does not extend to the de facto responsible carers who are able to apply for child arrangements orders without leave. Collectively these provisions mean that grandparents have no direct means of challenging the adoption or placement order unless they have an existing position of primary legal responsibility for the child through guardianship. Nonetheless, the absence of specific legislative rights for grandparents does not erase them from the adoption process: indeed relationships with grandparents can be determinative in decision-making in practice. Relationships with grandparents can be relevant at three stages of the process: in offering alternative proposals for care; as a part of the welfare assessment;[44] and through contact at the placement stage, when the adoption order is made and after the adoption has taken place.[45] The possibility of grandparents as alternative carers is of particular importance in adoption cases. The sections below consider first grandparental care under special guardianship as an alternative to a plan for placement for adoption outside the family and second the possibility of grandparental care as a means of resisting an adoption order. Whilst both of these scenarios raise similar issues around the importance to be attributed to care within the birth family, in the latter situation the child

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[39] *Re B-S (Adoption: Application of s 47(5))* [2013] EWCA Civ 1146.
[40] For example, *Re R (Adoption)* [2014] EWCA Civ 1625.
[41] For example, Sir Andrew McFarlane, *Nothing Else Will Do*, *Keynote Address to the Family Law Bar Association National Conference, October 2016.*
[42] Adoption and Children Act 2002, sections 20 and 47.
[43] Adoption and Children Act 2002, sections 47 and 52.
[44] Adoption and Children Act 2002, section 1(4)(f)
[45] Adoption and Children Act 2002, section 26, 46(6) and 51(A)

will already have been placed with potential adopters. In these cases the primary responsibility of the original parents has been relinquished or forfeited, so the tension between the importance of relationships and relatedness becomes particularly difficult to resolve.

Special Guardianship and Adoption

As Kaganas and Piper detail in their chapter in this volume, local authorities have both both legislative obligation and financial incentive to place children with kinship carers. The role of special guardianship is particularly important in considering kinship care as an alternative to adoption. Special guardianship was introduced in 2005 as a means of offering permanent placements for children without terminating their existing legal ties to their parents and other family members. The special guardian obtains parental responsibility for the child and is able to exclude the exercise of the parental responsibility of others,[46] but, unlike adoption, the existing parents retain their legal status and parental responsibility for the child. Although, special guardianship is not limited to kinship carers, it seems that the majority of special guardians are related to the child, with the largest single group being grandparents. For example, in Wade et al's 2014 review of 230 cases, 90% of special guardians were related to the child, with just over half of those relatives being grandparents.[47] Special guardianship was originally intended to be 'be used only to provide permanence for those children for whom adoption is not appropriate',[48] for example for older children who did not want to break their existing link to their parents. There is, however, concern that special guardianship is now being used in preference to adoption, even in cases where that is not likely to secure a stable outcome for the child. There is anecdotal evidence that some local authorities have reacted to the 'nothing else will do' judgments of *Re B* and *Re B-S* by viewing special guardianship as the 'default option' in planning for the child's long-term future.[49] This is supported by the recent rapid increase in the number of special guardianship orders being made, particularly for children leaving care. In 2015/16, 3,830 children left care through a special guardianship order, an increase of 78% since 2012,[50] at the same time there has been a significant drop in placement orders for adoption.[51] Further, it seem that there has been a

[46] Children Act 1989, section 14C(1).

[47] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/377448/DFE-RR372_Investigating_special_guardianship.pdf at p109.

[48] Department of Health, *Adoption a New Approach* (TSO, 2000) at [5.10].

[49] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/487243/SGR_Final_Combined_Report.pdf at p21.

[50] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/556331/SFR41_2016_Text.pdf

[51] Department of Education, *Adoption a Vision for Change* (March 2016) at [2.4].

marked change in the use of special guardianship for younger children since 2013, with increasing proportions of children under 1 being subject to a special guardianship order, rather than being placed for adoption.[52] Together these findings suggest that special guardianship is increasingly being used as an alternative to adoption in finding permanent placements for children, even if those children are very young.

There is insufficient research at present to confirm the reasons for this shift and whether they are likely to be long term. In particular, it is not yet clear whether this change is linked to an increased emphasis on the importance of birth families, particularly following the *Re B/Re B-S* line of cases, although there is some evidence that this is the perception within children's services.[53] Whether special guardianship provides a preferable alternative to adoption will, of course, depend on the individual circumstances of the child concerned. There are, however, good reasons for concern that special guardianship may be being used in circumstances in which it may not provide a safe permanent home for the child. Certainly there has been a notable increased in the use of supervision orders in conjunction with special guardianship, suggesting that these may be placements in which there is on-going concern as to the guardian's ability to provide a safe home. Around a third of special guardianship orders were accompanied by a supervision order in Harwin et al's study of special guardianship in public law proceedings.[54] Further, Bowyer et al's research on local authority use of special guardianship noted that interviewees considered that the orders were being made in more 'fragile' placements than was originally the case.[55] Wade et al's in depth review of special guardianship also found that in a significant minority of cases the assessment of special guardianships was rushed and inadequate.[56] The Government has taken these concerns seriously and issued new regulations for special guardianship assessment,[57] but it remains

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[52] J. Harwin et al, *A National Study of the use of Supervision Orders and Special Guardianship over time (2007*-2016), Briefing Paper Number 1: Special Guardianship Orders (Nuffield, 2015) http://www.nuffieldfoundation.org/supervision-orders-and-special-guardianship

[53] Bowyer S., Wilkinson J. and Gadsby Waters J. (2015). Impact of the family justice reforms on front-line practice phase two: special guardianship orders (Research Report DFE-RR478B

[54] J. Harwin et al, *A National Study of the use of Supervision Orders and Special Guardianship over time (2007*-2016), Briefing Paper Number 1: Special Guardianship Orders (Nuffield, 2015) http://www.nuffieldfoundation.org/supervision-orders-and-special-guardianship

[55] Bowyer S., Wilkinson J. and Gadsby Waters J. (2015). Impact of the family justice reforms on front-line practice phase two: special guardianship orders (Research Report DFE-RR478B) at p9.

[56] Wade, J., Sinclair, I., Stuttard, L. and Simmonds, J. (2014) *Investigating Special Guardianship: experiences, challenges and outcomes.* London: Department for Education.

[57] The Special Guardianship (Amendment) Regulations 2016

to be seen whether this will have a significant impact on the quality of assessment, particularly given the time pressure placed on decision-making by the public law outline.

Although special guardianship is not unique to grandparents, the high representation of grandparents amongst kinship carers means that these trends are of particular importance to them. Special guardianship can provide a secure and stable means of providing children with a permanent home. Nonetheless, the recent experience suggests that they are being used in situation where they might be inappropriate. Although there is not yet robust research on the reasons for the increased use of special guardianship, there is certainly a perception that it is related to the pressure to place even greater emphasis on finding kinship placements that 'will do' before finding placement outside of the family, particularly through adoption. There is a risk that the emphasis on the importance of relatedness will undermine the chances of some of those children finding secure, permanent homes.

Grandparents Challenging Adoption Orders: Re W

The tension between recognising the importance of relatedness and finding its limits has been particularly acute in cases where the child has already been placed for adoption and developed relationships with her potential adoptive parents. The tangled question of how the law values parenting relationships as against the preservation of links with the biological family was raised particularly sharply in the case of Re W. The case concerned the future of the young child and whether that lay with the grandparents whom she had never met or with the prospective adopters who had provided a stable home since her infancy. Whilst the outcome of any single case will depend closely on the specific facts, the case is worthy of careful consideration particularly for the guidance of the Court of Appeal on the misunderstandings that had flowed from the 'nothing else will do' case law and in the contrasting decisions of the judges who heard the case before and after that Court of Appeal decision.

The case concerned a little girl, A, born on 1st May 2014 and placed with foster parents the following day. Her natural parents, both of whom had significant learning disabilities, had never cared for A and had no wish to do so. At the age of 7 months she moved to live with the prospective adopters, Mr and Mrs X, under a placement order. At every stage in the case that placement was described as a great success and a close and loving attachment had clearly been built between A and Mr and Mrs X, who were regarded by A as her parents. The paternal grandparents, Mr and Mrs G, only discovered A's existence when they took on the care of the birth parents' subsequent child, E, shortly after his birth. Mr and Mrs G also offered the prospect of a close and loving home, albeit one not yet tested, and additionally could provide an upbringing with A's biological sibling and wider family. Mr and Mrs G quickly sought the care of A under a child arrangements or special guardianship order. In the meantime the X family had lodged their adoption application. By the time the case came before Mr Justice

Bodey,[58] A was 2 years old and had lived with Mr and Mrs X for 17 months. He was then faced with the 'judgment of Solomon' to decide between two prospective secure homes: one offering an upbringing within the biological family and the other providing the only parenting relationship that A had ever known. In this way, as Judith Masson observes, the case raised a sharp conflict between caring relationships and biological relatedness.[59] In deciding for the grandparents, Bodey J was clearly influenced by the reports of the children's guardian and the independent social worker, both of whom worked from the assumption that if the grandparents were willing and able to provide a secure home for A, she ought to be placed with them, indeed that she had a right to be placed with them.

In setting aside this decision, the Court of Appeal[60] was deeply critical of the determinative weight placed by the guardian and independent social worker on placing A within her biological family. Lord Justice McFarlane, giving the leading judgment, was determined to dispel any notion that there was a right or presumption that A should be brought up within her 'natural' family. The view that such a right or presumption did exist could be traced back to an misunderstanding of the *Re B/Re B-S* 'nothing else will do' approach. McFarlane LJ was clear that this was a dangerous misunderstanding of the case law:

> 'The phrase is meaningless, and potentially dangerous, if it is applied as some freestanding, shortcut test divorced from, or even in place of, an overall evaluation of the child's welfare. Used properly, as Baroness Hale explained, the phrase "nothing else will do" is no more, nor no less, than a useful distillation of the proportionality and necessity test as embodied in the ECHR and reflected in the need to afford paramount consideration to the welfare of the child throughout her lifetime... The phrase "nothing else will do" is not some sort of hyperlink providing a direct route to the outcome of a case so as to bypass the need to undertake a full, comprehensive welfare evaluation of all of the relevant pros and cons'[61]

When considering the welfare evaluation at the placement stage, that assessment would naturally tilt to good quality care within the family, as no relationship with the potential adopters would yet have been established. Where this relationship had been established and the child had formed secure attachment to the potential adopters that balance would naturally change and the child's welfare could not be determined simply by looking at the existence of the viable family placement. Instead, the status quo and the child's existing attachment to their primary carers would play a significant part in the welfare assessment.

The case was reheard in December 2016 by Mr Justice Cobb[62], with the benefit of new and extensive expert reports. In the light of these reports, Cobb J considered

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[58] *Re W* [2016] EWHC 2437 (Fam)
[59] See J Masson, *'Relationships and Relatedness in Family Law'* (2016) JSWFL 456
[60] *Re W (A Child)* [2016] EWCA Civ 793
[61] *Re W (A Child)* [2016] EWCA Civ 793 at [68].
[62] *Re W (Adoption: Contact)* [2016] EWHC 3118 (Fam)

that the case was not finely balanced. It was clear that short-term damage would be inevitable if A were to be moved to her grandparents. There was also 'serious possibility of medium-term and long-term emotional and psychological damage to A by the traumatic severing of the secure attachments which she has formed with the Xs' and no recommended route to transferring her care in a way that could realistically mitigate against those harms. Given the significant risks of severing those secure attachments, it was clear that her welfare was best served through adoption with the X family. In reaching this decision, Cobb J did not consider the convention rights of the parties in detail but noted that it was unlikely that the paternal grandparents had Article 8 rights through their blood relationship with A alone. It was recognized by all parties to the case, including Mr and Mrs X, that contact with the paternal grandparents and the creation of a relationship would be of benefit to A in the future. In this way there was a continuing recognition of the importance of biological relatedness, nonetheless the value given to this link was far outweighed by preserving the primary parenting of the X family. Cobb J considered that it would not be better for A if a contact order were made, instead the Xs should be in control of that contact without the need for court intervention. In this way the case again reflects the importance given to the primary parenting relationship.

The case of *Re W* is important for its firm re-statement of the importance of a full welfare analysis, unimpeded by presumptions as to the value to be placed on biological relationships alone. Protection for the rights of the birth family is not found in this final welfare assessment but in the statutory structures and guidance around parental consent and the priority given to kinship care. The tragedy for Mr and Mrs G was not found in an absence of legal rights but in the delay, entirely unattributable to them in informing them of A's birth.

Conclusions

From the perspective of grandparents, the law on protecting grandparental relationship may appear to be inconsistent and place unfair burdens upon them. Whilst grandparents play a significant role in practical care for their grandchildren, there is no automatic right to apply to the court to protect that relationship if the parents seek to prevent contact. From the position of grandparents this may put them in a vulnerable position: often asked to make considerable sacrifices for their grandchildren's care but with little legal protection for that relationship if things go wrong. Whilst grandparents without care have little standing in private cases, in public law the position seems very different. If the child is to be removed from parental care, it is often the grandparents who play a pivotal part in providing an alternative home. In contrast to the position in private law, the law's approach in public cases is to prioritise kinship care to avoid placement outside of the family. Again there is often inadequate practical and financial support for grandparents who have undertaken the considerable burden of caring for a grandchild in these circumstances.

Nonetheless, the law makes far more sense when seen as a means of prioritizing the relationship of primary care and responsibility for the child. By giving prima facie priority to this relationship and protecting the primary carer from interference, the law protects the relationship that is likely to be of primary importance to the child herself and recognizes the primacy given to parental responsibility rather than state responsibility for children. Where the grandparent has undertaken this primary responsibility they will be in a strong position, both in applying for private orders and resisting interference from others seeking to disrupt that caring relationship, even the child's biological parents. The grandparent without care is placed under additional burdens to show that it is in the child's best interests for that primary care to be disrupted. The difference between the position of grandparents without care in private and public cases is best explained by this importance given to the responsible carer. In private cases there will usually be a parent, or other primary carer who has prima facie protection from interference; in public cases that primary carer is either unwilling or unable to continue to provide safe primary care and so the question becomes replacing rather than protecting that primary relationship.

In seeking new primary carers, the experience of the fallout from the misunderstanding of *Re B/Re B-S* demonstrates the risks inherent in using presumptions in finding the best care for children. The reassertion of the welfare principle, unimpeded by such shortcuts, brings advantages and disadvantages to grandparents depending on whether the case concerns the child's parents or care outside of the family. The real problem in these cases is not in the absence of enforceable relationship rights for grandparents but in the resourcing of family justice. In particular, Grandparents are placed under considerable burdens by the privatizing of what would be public family cases. The use of private orders can release local authorities from the need to provide financial and practical support. The cuts to legal aid and resources within the private family courts leave complex cases without access to sufficient legal advice, assessment support and representation for the child. Cases involving grandparental care often involve children in circumstances of conflict and risk of harm, the solution to these cases is more likely to be found in greater resources than legal rights.