

Neutral Citation Number: [2013] EWHC 8 (Fam)

Case No: FB12C00092

**IN THE HIGH COURT OF JUSTICE**  
**FAMILY DIVISION**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 11/01/2013

**Before :**

**MRS. JUSTICE ELEANOR KING**

**Between :**

**A City Council**

**- and -**

**D C**

**J W**

**- and -**

**J W W**

**(A child acting by his guardian)**

**Applicant**

**1<sup>st</sup> Respondent**

**2<sup>nd</sup> Respondent**

**3<sup>rd</sup> Respondent**

**Jonathan Cowen** (instructed by **A City Council**) for the **Applicant**

**The 1<sup>st</sup> Respondent was not present and not represented**

**Stefano Nuvoloni** (instructed by **Osbourne & Company**) for the **2<sup>nd</sup> Respondent**

**Richard Hadley** (instructed by **Lovesey Marsh Solicitors**) for the **3<sup>rd</sup> Respondent**

Hearing dates: 13th and 14th November 2012

**Judgment**

**MRS JUSTICE ELEANOR KING**

This judgment is being handed down in private on 11 January 2013. It consists of 13 pages and has been signed and dated by the judge. The judge hereby gives leave for it to be reported.

The judgment is being distributed on the strict understanding that in any report no person other than the advocates or the solicitors instructing them (and other persons identified by name in the judgment itself) may be identified by name or location and that in particular the anonymity of the children and the adult members of their family must be strictly preserved.

**Mrs. Justice Eleanor King :**

1. This is an application made by A City Council for the revocation of an order made on 2 March 2006 freeing a child, J born 28/11/99 (now 13), for adoption. DC and JWW, who are J's former parents, are the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and J himself, acting through his Children's Guardian, is the 3<sup>rd</sup> Respondent.

### Introduction

2. J has the unhappy distinction of being one of a small, but significant, number of children in relation to whom a care order was made (s31 (1) Children Act 1989), followed by the making of an order (s18 (1) Adoption Act 1976), declaring him free for adoption, but in respect of whom, some years later he has neither been adopted nor had that order been revoked. Such children were styled Statutory Orphans by Wall J (as he then was in *Re C (A Minor) (Adoption: Freeing Order)* [1999] Fam 240 in order to reflect the fact that no identifiable person, other than the local authority as adoption agency, has parental responsibility for such a child.
3. The matter has come before the court today to consider how best to regularise the position of J (and of other children in a similar position for whom this and other local authorities are responsible), and to clarify the position of all parties involved in J's life once his legal status reflects his true position.

### Background

4. In October 2003 J and his sister became the subject of care proceedings instigated by A City Council as a consequence of their parents' drug misuse. Following a failed attempt at the rehabilitation of both children to their mother, the County Court made care orders and freeing orders in respect of both children on the 2<sup>nd</sup> March 2006. Neither the mother nor the father made declarations pursuant to s18(6) AA 1976 which provides that a parent or guardian may make:

*“if he so wishes, a declaration that he prefers not to be involved in future questions concerning the adoption of the child”*

5. The children moved to their adoptive placement on 20<sup>th</sup> June 2006 at which time J was 7½. Unfortunately, although J's sister settled well, J did not and his placement was formally terminated on 10<sup>th</sup> August 2007. J was moved to foster care where he has remained for the last 5 years.
6. On the 12<sup>th</sup> September 2007 a Looked After Child review (LAC review), meeting took place and J's care plan, hitherto one for adoption, was changed to “permanency by way of long term fostering”. Since 10<sup>th</sup> August 2007 J has been living with long term foster carers with whom he is happy and settled. J has had no contact with either of his parents since 2006, although he continues to have direct contact with his sister.
7. The effect of the making of the freeing order is as follows:
  - i) by virtue of s18 (5) parental responsibility for J was vested in the local authority in their capacity as the adoption agency.

- ii) The care order made immediately before the freeing order lapsed
  - iii) Pursuant to s12 (3)(a) the parental responsibility held by the parents immediately before the making of the freeing order was extinguished.
  - iv) The parents become ‘former parents’ and in the event that they had opted to make a declaration under s18(6) (see paragraph 4 above) they would have received no more information concerning the adoption of their child.
8. It follows that J has been a so-called Statutory Orphan since 2006, nearly half his life. In his case he has had the good fortune to be in a loving, permanent and secure home with long term foster carers since almost immediately after his adoption placement broke down.
9. As a fostered child J continues to be the subject of LAC reviews. In February 2008 the independent reviewing officer suggested that an application should be made to revoke the freeing order. I am told that this was a proposal which was put forward at subsequent LAC reviews. It was only on the 6<sup>th</sup> March 2012 nearly four years later, that the City Council sought to revoke the freeing order in relation to J and applied for a care order.
10. On 13<sup>th</sup> March 2012 His Honour Judge Plunkett sitting as a Judge of the High Court revoked the freeing order and made an interim care order. At that hearing counsel for the father indicated that the father wished to have some contact with J. Since that time the father has failed to respond to approaches from J’s social worker. J himself has indicated that he does not wish to have contact with either parent.
11. Further directions were made by His Honour Judge Plunkett on the 1<sup>st</sup> May 2012 and on the 17<sup>th</sup> July 2012 when the case was adjourned for this hearing in order to determine the issue of the form of order which should be made after the revocation of a freeing order.

### The Law

12. Under s19(1) and s20(1) Adoption Act 1976, (AA 1976) a former parent who had chosen not to make a declaration under s18(6) was entitled to apply for revocation of a freeing order where, more than 12 months had passed after the making of the original order. The application could be made only where no adoption order had been made and the child did not have his home with the person with whom he has been placed for adoption [s20(1)(a)(b)]. The basis of an application by a former parent under 20(1) AA 1976 for the revocation of the freeing order is “*on the ground that he wishes to resume parental responsibility*”.
13. The Adoption Act 1976, in its unamended form did not revive the pre-existing care order upon revocation of the freeing order. As a consequence the former parent and not the local authority (qua local authority as opposed to qua adoption agency), recovered parental responsibility [s20(3)(b)(i)(ii)].
14. The difficulties created by a statute which made no provision for a local authority to seek the revocation of a freeing order in any circumstances and parents only where they had declined to make a s18(6) declaration, were first tackled by the courts in *Re*

*C (a minor) (adoption :freeing order)* [1999] 1 FLR 348 when Wall J (as he then was), exercised his inherent jurisdiction to revoke a freeing order in circumstances where the former parents were unable to make an application under s20 AA 1976, having made a s18(6) AA 1976 declaration when the freeing order was made. Wall J said (p257 F):

*“Accordingly, in my judgment, it is open to me to exercise the inherent jurisdiction to “fill the gap” and to protect SC by acting in what is plainly his best interests by discharging the freeing order.”*

15. In *Re J (adoption: revocation of freeing order)* 2000 2 FCR 133, Black J (as she then was), considered whether the court could exercise its inherent jurisdiction to revoke an order freeing a child for adoption absent an application by a former parent making such an application.
16. The circumstances in *Re J* were somewhat different from those in *Re C* in that the local authority concerned had abandoned their plan for adoption prior to the 12 month period provided for in s20(1) AA1976 lapsing. The parents had not made a s18(6) AA 1976 declaration Black J exercised her inherent jurisdiction to revoke the freeing order. She said:

*“In view of the existence of section 20 of the 1976 Act, I have approached the exercise of the court’s inherent jurisdiction cautiously. However, in my judgment, in the particular circumstances of this case, J’s interests would be likely to be harmed if there were no power to revoke the freeing order made in relation to him. This cannot realistically be done without reliance on the inherent jurisdiction. There is presently no applicant entitled to apply under section 20 (just as was the case in re SC) and the reality is that no application is ever likely to be made, even once the mother becomes so entitled. The freeing provisions are designed to facilitate the placing and adoption of children so that their welfare can be secured parliament cannot, in my view have intended that the statutory provision should work so as to cause harm to children when plans have changed and in my judgment it is open to me to exercise the inherent jurisdiction to supplement the statutory powers and therefore protect J.”*

17. In J’s case his former parents would have been entitled to apply for the revocation of the freeing order 5 years ago. Neither has done so: the mother has relocated to Wales and has chosen to play no part in these, proceedings, the father (who has the benefit of public funding and legal representation) has to date, despite his professed desire to re-establish contact with J, not responded to attempts by the local authority to contact him.
18. It is agreed by all parties including the father that in the light of *Re C* and *Re J*, this court has power to exercise its inherent jurisdiction in order to revoke the freeing order. It follows that HHJ Plunkett (sitting as a High Court judge), by virtue of his order of 13<sup>th</sup> March 2012, quite properly exercised that inherent jurisdiction to revoke

the freeing order in J's case. The question therefore arises as to what are the legal consequences for J upon the freeing order having been revoked, and what is the position of the former parents.

19. Again to a certain extent there is consensus between the parties. *The Adoption and Children Act 2002, Schedule 4: Transitional and Transitory Provisions and Savings: Freeing Orders paragraph 7(2) amended section 20 AA 1976 by inserting a section - s20(3)(c)(ia) so that s20(3) AA 1976 now reads as follows:*

***S20 Revocation of s18 order***

*(1).....*

*(2).....*

*(3) the revocation of an order under section 18 (a section 18 order) operates --*

*(a) To extinguish the parental responsibility given to the adoption agency under the section 18 order;*

*(b) To give parental responsibility for the child to-*

*(i) The child's mother; and*

*(ii) Where the child's father and mother were married to each other at the time of his birth, the father; and*

*(c) to revive –*

*(i) Any parental responsibility agreement,*

*(ii) Any order under section 4(1) The Children Act 1989,*

*(ia) Any care order, within the meaning of that act, and*

*(iv) Any appointment of a guardian in respect of the child (whether made by a court or otherwise),*

*extinguished by the making of this section 18 order.*

20. J's mother and father (having been married), will therefore resume parental responsibility under s20(3)(b) of the AA1976
21. In the unlikely event that there has been a pre-existing appointment of a guardian (as opposed to a children's guardian appointed in family proceedings) such an appointment will be revived.
22. That therefore leaves consideration of s20(3)(c)(ia). The statute says that "*the revocation of an order under section 18 (a section 18 order) operates.....to revive .....any care order within the meaning of that act and.....*".

23. The local authority and the children's guardian submit that that clear and unequivocal statutory provision determines the order to be made following the revocation of a freeing order; in other words, once HH Judge Plunkett had revoked the freeing order, the care order made immediately before the freeing order on the 2<sup>nd</sup> March 2006 automatically revived. That being so, it follows that the interim care order made on 13 March 2012 was otiose as J is subject to a full care order pursuant to s20(3)(c)(ia). For reasons set out below Counsel for the father no longer seeks to argue against that submission and accepts that the care order made in respect of J on 2 March 2006 did indeed revive automatically upon the revocation of the freeing order
24. The effect of the revival of such a care order will be:
  - i) to give the local authority parental responsibility for the child (*section 33(3) Children Act 1989*); and
  - ii) as in any care order, the City Council as the designated local authority have, pursuant to s33(b) *Children Act 1989*, the power to determine the extent to which the parents may meet their reinstated parental responsibility for J.
25. The local authority and the guardian submit that the parents, with the benefit of their restored parental responsibility following the revocation of the freeing order, thereafter have two statutory routes available to them:
  - i) If, (as it appears may be the case in relation to the father), one of the parents wishes to re-establish contact with J such an application can be made under s34(3) *CA 1989*; or
  - ii) to apply to discharge the revived care order by making an application under s39 *CA 1989*.
26. Mr. Nuvoloni on behalf of the father was in his written material understandably preoccupied with his lay client's human rights. He 'floated' in his written submission an argument that the new s20(3)(ia) could, and should, be interpreted as permitting the court to make an interim rather than a full care order upon revocation of the freeing order. He submitted that to deny the parents the opportunity to challenge or scrutinise an up-to-date care plan, through the medium of an interim care order, would be accepting an interpretation that offends against the requirement of the Human Rights Act 1998 and in particular section 3 of the Human Rights Act 1998 which requires that primary legislation, in so far as is possible, is to be read and given effect in a way compatible with Convention rights.
27. Mr Nuvoloni submitted that the revival of a full care order would amount to a breach of Article 6 and 8 of the Human Rights Act of both the parent and child.
28. In oral argument Mr Nuvoloni revised his position and accepted that the interpretation he proposed which would allow the court to make an interim care order with a view to scrutinising a new care plan, stretched the wording of the statute beyond breaking point. Further he accepted that if a procedure was adopted by the courts whereby the parents were given sufficient information to enable them to obtain legal advice and, if advised, thereafter to make an application for contact or the discharge of the care

order, then their Article 6 and Article 8 rights as reinstated parents would be adequately protected.

29. Mr Nuvoloni, in my judgment was wise to make the concessions he did and to concentrate, (as he has done most effectively), on how best the court should now proceed. From a statutory interpretation point of view, the section is, in my judgment capable of only one interpretation; the wording is *to revive...any care order within the meaning of that act*. The use of the word *revive* in the statute shows that what is intended is that the full care order (made immediately prior to the freeing order), is to be restored and accordingly a care order will be the order determining J's legal status following the exercise of the court's inherent jurisdiction to revoke the freeing order.
30. Prior to a freeing order being made, it was necessary for the court to have made a full care order, there is therefore no other order that could be revived pursuant to s20(3)(b)(ia) other than the care order made immediately prior to the freeing order. The wording of the statute is unambiguous. It does not provide the court with any residual discretion; for example to replace the freeing order with such order as the court thinks fit having scrutinised a care plan or alternatively with an interim care order made earlier in the original care proceedings.
31. I note that both Black J in *Re J* and Peter Jackson J in *A and S children v Lancashire CC* [2012] EWHC 1689 (Fam) (para 95) not only made full care orders upon the revocation of the freeing orders but that all parties in both cases accepted the interpretation of the Act which is now accepted on behalf of the father.
32. The revival of a full care order is not in my judgment incompatible with either Article 6 or Article 8. The effect of section 20 AA 1976 as amended, not only revives the care order, but also reinstates parental responsibility to the former parents. Those parents, in the exercise of that parental responsibility, are thereafter entitled to make an application for contact or to seek the discharge of the care order (subject to the exceptions in the guidance referred to below). In the meantime the care order regularises the child's legal position whilst recognising that the child is, and often has been for many years, 'in the care' of the local authority.
33. A local authority seeking to regularise the legal position of statutory orders will, as a matter of course, have to file a statement in support of their application for the revocation of a freeing order. Such a statement will, of necessity, set out not only the history of the child since he or she was freed for adoption but also that child's present circumstances; the statement will be served on the former parents who will be parties to the proceedings. It follows therefore that at an early stage in the proceedings (subject to the exceptions in paragraphs 42(ii) and 42(iii) of the guidance set out below) the parents will have an opportunity to make an application for either contact and or the discharge of the care order.

#### *Effect of s18(6) declarations*

34. Consideration was given in oral argument as to the position of those parents who made a s18(6) AA 1976 declaration at the time of the freeing order. All parties submitted, that on a question of strict statutory interpretation those parents who made a declaration had declared *that he prefers not to be involved in future questions concerning the adoption of the child*", and that the question before the court now is

rather different as it is not in relation to the *adoption of the child* but in relation to of the revocation of an order which freed the child for adoption and which, thereafter would have permitted the adoption agency to arrange an adoption.

35. One of the consequences of a s18(6) declaration is that almost inevitably the parents will not have been kept informed as to the fate of their child. They will not have been told that an adoptive placement or placements have broken down or, if such is the case, that no adoptive placement was ever found notwithstanding the optimism that underpinned a successful freeing application. (The agreement of the parents will not be dispensed with unless *the court is satisfied that it is likely that the child will be placed for adoption* s18(3) AA 1976)
36. The local authority, quite properly, took the view that it would be wrong to seek to rely on the antique s18(6) declaration as a reason to exclude former parents from being involved in the revocation proceedings.
37. It follows that, regardless of the fact that they may have signed a s18(6) declaration at the time of the freeing order, all former parents (save in exceptional circumstances when the leave of the court should be sought) should be served with the application to revoke the freeing order.

#### *Legal Aid*

38. Those instructing Mr Nuvoloni have made enquiries as to the funding position for any reinstated parents. His understanding of the position is as follows:
  - i) From April 2013 onwards parents will not be eligible for public funding in relation to their own application to revoke a freeing or placement order as they are not civil legal aid services described in Part 1 of Schedule 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012.
  - ii) Subject to a means and merits assessment, public funding will be available to a parent in relation to an application to discharge the care order (s39 Children Act 1989) or to apply for contact to a child in care (s34(3) Children Act 1989), as they are civil legal aid services described in Part 1 of Schedule 1(1)(b) of the Legal Aid, Sentencing and Punishment of Offenders Act 2012.
  - iii) Applications made by a local authority to the High Court for it to exercise its inherent jurisdiction for the revocation of a freeing order are not civil legal aid services described in Part 1 of Schedule 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 and on the face of it public funding would not be available. S10 of the Act however provides for certain cases to be treated as ‘exceptional cases’ in certain circumstances. It is for the LSC to determine whether a case is exceptional and such a decision will be heavily influenced by an individual’s Convention rights.

It seems likely that issues of breaches of Convention rights may well arise in these relatively rare cases, each of which is marked by the fact that parents have been deprived of their parental responsibility and become ‘former parents’ on the basis of a plan for adoption which has not materialised. That being so, it seems likely that such cases would be regarded as “exceptional”



necessitating legal representation for the parents within the inherent jurisdiction proceedings which have to take place prior to any application for contact/discharge of the care order, applications that do fall within Schedule 1 of the Act.

*Future management of Applications by Local Authorities to revoke Freeing Orders*

39. The local authority and the children's guardian have each expressed their concerns about the potentially unsettling and upsetting effect of applications to revoke freeing orders upon the children concerned. The fact that the application has been made means that the child(ren) who are the subject of the application are likely to be vulnerable children and the very ones who, despite all the early optimism evidenced by the making of the freeing order, have either never been placed for adoption or have suffered the devastating emotional and psychological consequences of a failed adoption.
40. The local authority and children's guardian have made submissions (endorsed by counsel for the father), as to how J's case should be managed in such a way as to limit the disruption caused to him, whilst at the same time ensuring that the Art 6 and Art 8 rights of his parents are respected. This balance, they submit, can only be achieved by the early identification of any applications which the parents may intend to make with a view to once again becoming involved in the life of their child, (often after a total absence for many years), and thereafter by rigorous case management. The aim must be, they submit, to protect the child in so far as that is achievable. Where the child's day to day living arrangements will be unaffected, it will often be the case that the child need know little or nothing about the regularisation of their legal status until such time as it has been resolved and that it is only if the parents decide to take an active part in the proceedings, that they need actively to be engaged in the process.
41. I have been asked by the parties in this case to give some guidance as to the future management of applications made by local authorities to revoke freeing orders. The court has been told that there are a not insignificant number of children around the country in the same or a similar position to J and that, whilst details of practice may well vary from area to area, local authorities around the country would welcome some guidance which would assist both them and parents to regularise the children's position in a speedy, cost effective manner and in a way which causes the least possible disturbance to the child who is the subject of the redundant freeing order.
42. I am grateful for the assistance given by Counsel and to the local authority solicitor in this case in putting together this procedural guidance which has been approved by the Acting President Mr Justice Holman.

**A: ISSUE & APPLICATION**

- i) The general rule is that any application by a local authority asking the court to exercise its inherent jurisdiction in order to revoke a freeing order should be made in the High Court on notice to the former parents including those former parents who have made a declaration under s18(6) of the Adoption Act 1976.
- ii) Exceptionally an application may be made without notice (and in such circumstances the remainder of this guidance shall be departed from as

appropriate). When making such an application the local authority must file a statement in support giving reasons for seeking a without notice order by reference inter alia to the principles in *KY v DD* [2011] EWHC 1277 (Fam) (a wardship case) where Theis J, (giving guidance endorsed by the President of the Family Division), re-emphasised the established principles in relation to without notice applications as set out in *Re W (ex parte orders)* [2000] 2 FLR 927; *Re S (ex parte orders)* [2001] 1 FLR 308; *B Borough Council v S and anor* [2006] EWHC 2584 (Fam),

- iii) Similarly any application to withhold any of the information, which would otherwise be included within the application as set out below, must be made subject to the principles set out by the Supreme Court in *Re A (A Child)* [2012] UKSC 60 and be accompanied by a statement in support of the application.
- iv) Good practice would require that, if they can be traced, the former parents should be told of the forthcoming application face to face by a social worker and be given some sort of explanatory note to help them to understand the nature of the application, which note will thereafter be of assistance to them in obtaining legal advice and public funding.
- v) The application should be made using Form C66 and the requirements for a copy of the child's birth certificate and or a copy of the entry into the Adopted Children Register should be dispensed with, (if necessary by order made at the first hearing).
- vi) The following documents should be filed in support of the application and served, together with the application on the former parents: [Permission for the disclosure of those documents which were generated in the earlier care proceedings should be sought from the trial judge (or local Designated Family Judge if the trial judge is unavailable), prior to issuing the application in order to ensure that service of all documents takes place at one time]
  - a) Copies of the care order and freeing order
  - b) A transcription or note of judgment from the previous care proceedings
  - c) The final care plan from the care proceedings
  - d) A short neutral chronology covering significant events prior to the child's admission to care and significant events following the making of the freeing order
  - e) The children's guardian's final report from the care proceedings
  - f) The Looked After Child (LAC) review minutes, usually for the last two years preceding the making of the application, but in any event to include the LAC review where the local authority made its decision to change its care plan from one of adoption.
  - g) An updated care plan

h) A statement by the allocated social worker or other appropriate person which should include the following information:

- i) The child's social history including details of any placement breakdown, all placement moves and of any ongoing contact whether with the former parents or either of them or with siblings;
- ii) Any evidence of the child's wishes and feelings of which the social worker/carers are aware; [there should ordinarily be no direct discussion with the child(ren) about the consequences of revocation, including any attempts made to seek to ascertain their wishes in relation to contact prior to the first directions hearing].
- iii) Any evidence of the wishes and feelings of the former parents if known.
- iv) Details of the involvement of external agencies including therapy providers, police and other local authorities

**B: FIRST HEARING/ DIRECTIONS:**

- (1) The application shall be listed for Directions before a High Court Judge or before a Circuit Judge sitting as a High Court Judge pursuant to section 9 of the Supreme Court Act 1981. It may be that the Family Division Liaison Judge for each circuit may wish to create a list of Circuit judges approved to deal with such applications in order to avoid delay in the allocation and hearing of the cases.
- (2) At the first directions hearing:
  - (a) The court will decide the preliminary issue as to whether it is in the child's best interests to revoke the freeing order based on the information contained in the statement and supporting documents. It is envisaged that by the very nature of the application in most, if not all cases, it will be appropriate formally to revoke the freeing order at this hearing. If for any reason the freeing order is not revoked at this stage it should be relisted for determination as soon as practicable.
  - (b) The making of the order revoking the freeing order will:
    - i) Revoke the original care order
    - ii) Revoke the appointment of any testamentary guardian
    - iii) Give parental responsibility to the mother
    - iv) where appropriate, in accordance with the relevant statutory provisions, give parental responsibility to the father.

(c) Upon the revocation of the freeing order, the care order having been revived and parental responsibility having been reinstated, the court should give directions for the future management of the case:

- i) Consideration should be made as to whether the court should make an order authorising the local authority to refuse contact between the child and the parents
- ii) The court should make directions requiring the parents to make any application to discharge the care order/apply for a contact order within 56 days (or such other period as may be specified by the court)
- iii) The court should include a request that in the event that the parents, or either of them, issue an application that the original children's guardian should, if possible, be appointed to represent the child(ren) and all the documentation filed should forthwith be served upon the original or newly appointed children's guardian.
- iv) The court should consider whether any other party to the previous proceedings should be served with notice of the proceedings and, if so, what if any documents should be served.
- v) The court should list a further directions hearing at which directions will be given consequent upon any application for discharge of the care order/application for a contact order made pursuant to the direction made at para 2(c)(ii) above
- vi) In the event that no application has been made by either parent or any party served under the direction at para 2(c)(iii) (and the court is satisfied that it is appropriate to do so), the court will ordinarily conclude the proceedings by continuing the s34(4) CA 1989 order where appropriate and making any appropriate order for costs.

43. In relation to J, the freeing order having been already revoked, the interim care order will be discharged as J was already the subject of a care order, which remains in effect. Directions have been agreed between the parties in accordance with the above guidance and the matter will be listed for further directions in January.