

Legal test to discharge a care order (TT (children (discharge of care order)))

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Family analysis: In *Re TT (children) (discharge of care order)*, the mother's appeal against the refusal of her application to discharge care orders was dismissed by the Court of Appeal. Permission had been sought from the Court of Appeal on the basis the mother had a real prospect of success, but was not granted on this basis. Instead permission had been granted because there was a compelling reason to hear the appeal. Lord Justice Peter Jackson undertook a helpful review of the law in relation to the discharge of care orders and set out guidance as to the correct legal test. Tahmina Rahman, barrister, at 1GC Family Law summarises the issues.

Re TT (children) (discharge of care order) [\[2021\] EWCA Civ 742](#), [\[2021\] All ER \(D\) 58 \(May\)](#)

What are the practical implications of this case?

Before this case the correct legal principles relating to the discharge of a care order were set out in a number of different authorities. The Court of Appeal in *TT* undertook a careful review of the authorities and then clarified the legal principles to discharge a care order. The Court of Appeal also disapproved of the approach taken in relation to the legal test by Mr Justice Mostyn in *GM v Carmarthenshire County Council and LLM* [\[2018\] EWFC 36](#), [\[2018\] 2 FLR 1375](#).

What was the background?

The mother appealed against the refusal of her application for the discharge of care orders in respect of her youngest three children. Care orders had been made in 2017 on the basis that mother cared for the three children and signed a safety plan that there was to be no contact between the children and the father. This was because the father had sexually abused the mother's eldest child in the past. The local authority then discovered that the parents were continuing their relationship and gave notice to remove the children, who were later placed in foster care. The mother's subsequent application to discharge the care order was refused by His Honour Judge Whybrow after a contested hearing. The mother then appealed to the Court of Appeal.

What did the court decide?

The Court of Appeal rejected the mother's appeal, and in upholding the original decision provided the following guidance in respect of discharge applications:

- the paramouncy principle under [section 1\(1\)](#) of the Children Act 1989 ([ChA 1989](#)) applies, and the welfare checklist as set out in [ChA 1989, s 1\(3\)](#) must be considered and given appropriate weight
- any interference with rights under the European Convention on Human Rights must be necessary and proportionate
- the applicant must make a case for the discharge of the care order by adducing evidence that discharge would be in the best interests of the child
- the findings of fact that underpinned the original care order will be relevant to the court's assessment, but the weight to be given will vary in each case

- the welfare evaluation is made at the time of the decision and the threshold criteria (per [ChA 1989, s 31\(2\)](#)) is of no relevance to an application for discharge of a care order, and
- questions of harm or risk of harm form part of the overall welfare evaluation and thus the local authority does not have to re-prove threshold and the applicant does not have to demonstrate that it no longer applies

It is notable that the court emphasised that a ‘welfare evaluation’ is to be undertaken, with reference to the paramountcy principle and welfare checklist. The Court of Appeal expressly disapproved of the approach outlined in *GM v Carmarthenshire County Council and LLM* [\[2018\] EWFC 36](#), [\[2018\] 2 FLR 1375](#) that ‘something close’ to threshold applies so that the local authority would need to demonstrate the continued existence of the statutory threshold.

Finally, the Court of Appeal referred to the observations of Mostyn J in *GM v Carmarthenshire County Council* that questioned both the validity of attachment theory as a whole and also their admissibility—Peter Jackson LJ considered that these observations ‘cannot stand’.

Case details:

- Court: Court of Appeal, Civil Division
- Judge: Lady Justice King, Lord Justice Peter Jackson and Lady Justice Nicola Davies
- Date of judgment: 20 May 2021

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