Advice on Schedule 2 Para 19 Children Act 1989

This document is mainly concerned with the process to be followed, under the Care Planning Regs and then obtaining the court’s approval when the plan for a child **who is the subject of a care order** is to be placed in Scotland with connected carers.

Schedule 2 Para 19 is also relevant and the court’s approval will be required when a child is being placed in a childrens home in Scotland on a **permanent basis.** In the case of Re H (Interim Care: Scottish Residential Placement) [2020] EWHC 2780 Para 46 the Judge said: *When is paragraph 19 of Schedule 2 CA 1989 actively engaged? In my judgment, this statutory provision is engaged only when an English local authority is making arrangements, as the statute specifically provides, for the child to 'live' abroad; that is to say, for a proposed long-term or permanent arrangement for a child's future outside of the jurisdiction. It is not engaged in my judgment where the proposal of the English local authority is to place a child temporarily, or in the interim or short term, outside of England and Wales.*

Note in particular para 41 in Re C (A Child) (Schedule 2, Paragraph 19, Children Act 1989) 2019 EWCA Civ 1714 which confirms that child’s consent is required to live in a residential home in Scotland:

*when a child does not consent, and regardless of whether they do or do not have sufficient understanding, the court is not permitted to approve their placement in Scotland other than with a natural person. The consequence is that a local authority cannot "arrange for, or assist in arranging for, any child in their care", who does not consent, to live in a residential home in Scotland (or, indeed, anywhere else outside England and Wales).*

1. **Background:**
2. I am asked to advise Durham County Council in relation to its placement of child in Scotland. Child is subject to care order. Child has connected carers in Scotland who have been assessed and approved as DCC foster carers.
3. DCC have applied for leave to place child out of England & Wales pursuant to Children Act 1989 Schedule II paragraph 19.
4. There are three potential legal paths for child, which can be summarised as follows:
5. She becomes a looked after child within the Scottish legal system, administered by the relevant Scottish local authority;
6. Child remains subject to the current care order made under English law, with the care order continuing to be administered by DCC;
7. She becomes subject to a special guardianship order or equivalent private law structure in favour of her foster carer.
8. **Care planning:**
9. Regulation 12 of the Care Planning, Placements and Case Review (England) Regulations 2010 applies while the care order remains in force, to be borne in mind when making placement decisions pursuant to Regulation 11:

*11(1) Subject to paragraphs (2) to (4), a decision to place C outside the area of the responsible authority (including a placement outside England)—*

*(a) must not be put into effect until it has been approved by a nominated officer, or*

*(b****) in the case of a proposed placement which is also at a distance,*** ***which means outside the area of the responsible authority and not within the area of any adjoining local authority. must not be put into effect until it has been approved by the director of children's services.***

*(2) Before approving a decision under paragraph (1), the nominated officer [or, as the case may be, the director of children's services] must be satisfied that—*

*(a) the requirements of regulation 9(1)(b)(i) have been complied with,*

*(b) the placement is the most appropriate placement available for C and consistent with C's care plan,*

*(c) C's relatives have been consulted, where appropriate,*

*[(d) in the case of a decision falling within—*

*(i) paragraph (1)(a), the area authority have been notified, or*

*(ii) paragraph (1)(b), the area authority have been consulted and have been provided with a copy of C's care plan, and]*

*(e) the IRO has been consulted.*

*(3) In the case of a placement made in an emergency, paragraph (2) does not apply and before ap-proving a decision under paragraph (1) the nominated officer must—*

*(a) be satisfied that regulation 9(1)(b)(i) and the requirements of sub-paragraph (2)(b) have been complied with, and*

*(b) take steps to ensure that regulation 9(1)(b)(ii) and the requirements set out in sub-paragraphs (2)(c) and (d) are complied with by the responsible authority within five working days of approval of the decision under paragraph (1).*

*(4) Paragraphs (1) and (2) do not apply to a decision to place C outside the area of the responsible authority with—*

*(a) F who is a connected person, or*

*(b) F who is approved as a local authority foster parent by the responsible authority.*

*[(5) In this regulation “at a distance” means outside the area of the responsible authority and not within the area of any adjoining local authority.*

*12.— Placements outside England and Wales*

*(1) This regulation applies if—*

*(a) C is in the care of the responsible authority, and*

*(b) the responsible authority make arrangements to place C outside England and Wales in accordance with the provisions of paragraph 19 of Schedule 2 to the 1989 Act (placement of a child in care outside England and Wales).*

*(2) The responsible authority must take steps to ensure that, so far as is reasonably practicable, requirements corresponding with the requirements which would have applied under these Regulations had C been placed in England, are complied with.*

*(3) The responsible authority must include in the care plan details of the arrangements made by the responsible authority to supervise C's placement.*

1. **Permission to live in Scotland:**
2. Children Act 1989 Schedule 2 paragraph 19 prohibits children subject to English care orders being placed outside the jurisdiction of England & Wales without the approval of the Family Court.

*(1) A local authority may only arrange for, or assist in arranging for, any child in their care to live outside England and Wales with the approval of the court.*

1. The placement with connected carers is a permanent arrangement for child to live in Scotland, and so the exception now confirmed in the case of Re H (Interim Care: Scottish Residential Placement) [2020] EWHC 2780 does not apply. Approval of the move is required while child remains subject to the care order.
2. The consent of child and those who have parental responsibility is required.

*(3) The court shall not give its approval under sub-paragraph (1) unless it is satisfied that—*

*(a) living outside England and Wales would be in the child's best interests;*

*(b) suitable arrangements have been, or will be, made for his reception and welfare in the country in which he will live;*

*(c) the child has consented to living in that country; and*

*(d) every person who has parental responsibility for the child has consented to his living in that country.*

1. However, if child’s age means child is unlikely to be considered to have sufficient understanding, the Court may disregard that aspect on the basis that proposed carers are a ‘suitable person’

*(4) Where the court is satisfied that the child does not have sufficient understanding to give or withhold his consent, it may disregard sub-paragraph (3)(c) and give its approval if the child is to live in the country concerned with a parent, guardian, special guardian, or other suitable person.*

1. Need to know whether parents are likely to consent.
2. **Conversion of a care order to its Scottish equivalent:**
3. By Children's Hearings (Scotland) Act 2011 (Transfer of Children to Scotland – Effect of Orders made in England and Wales or Northern Ireland) Regulations 2013 (SSI 2013 No 99) a care order made in England has effect as if it were a compulsory supervision order made in Scotland if but only once certain criteria are fulfilled, including the agreement of the reporting officer to take over responsibility, and a full recognition that the child is to live – effectively permanently – in Scotland and therefore with the approval pursuant to Children Act 1989 Schedule 2 paragraph 19.

*3.— Effect of care orders made in England and Wales*

*(1) This regulation applies where—*

*(a) a child is subject to a care order made under section 31(1)(a) of the 1989 Act;*

*(b) the court has given approval under paragraph 19(1) of Schedule 2 to the 1989 Act to the local authority (“the home local authority”) to arrange, or assist in arranging, for the child to live in Scotland;*

*(c) the local authority for the area in which the child is to reside, or has moved to, in Scotland (“the receiving local authority”) has, through the Principal Reporter, notified the court in writing that it agrees to take over the care of the child; and*

*(d) the home local authority has notified the court that it agrees to the receiving local authority taking over the care of the child.*

*(2) The care order has effect as if it were a compulsory supervision order.*

*(3) In this regulation*“court”*means the court which has given the approval in terms of paragraph 19(1) of Schedule 2 to the 1989 Act.*

1. A compulsory supervision order is similar to a care order, although additional powers can be attached or bolted on if justified. It is defined in the Children’s Hearings (Scotland) 2011 at section 83:

*83 Meaning of “compulsory supervision order”*

*(1) In this Act,*“compulsory supervision order”*, in relation to a child, means an order—*

*(a) including any of the measures mentioned in subsection (2),*

*(b) specifying a local authority which is to be responsible for giving effect to the measures included in the order (the*“implementation authority”*), and*

*(c) having effect for the relevant period.*

*(2) The measures are—*

*(a) a requirement that the child reside at a specified place,*

*(b) a direction authorising the person who is in charge of a place specified under paragraph (a) to restrict the child's liberty to the extent that the person considers appropriate having regard to the measures included in the order,*

*(c) a prohibition on the disclosure (whether directly or indirectly) of a place specified under paragraph (a),*

*(d) a movement restriction condition,*

*(e) a secure accommodation authorisation,*

*(f) subject to*[*section 186*](https://login.westlaw.co.uk/maf/wluk/app/document?src=doc&linktype=ref&context=26&crumb-action=replace&docguid=I361173201EFC11E0B520FF39C03FE9FA)*, a requirement that the implementation authority arrange—*

*(i) a specified medical or other examination of the child, or*

*(ii) specified medical or other treatment for the child,*

*(g) a direction regulating contact between the child and a specified person or class of person,*

*(h) a requirement that the child comply with any other specified condition,*

*(i) a requirement that the implementation authority carry out specified duties in relation to the child.*

1. By the Children's Hearings (Scotland) Act 2011 (Consequential and Transitional Provisions and Savings) Order 2013 (SI 2013/1465) the English care order is essentially replaced by the Scottish compulsory supervision order, thus avoiding two authorities in two jurisdictions having responsibility for the same child:

*15.— Transfer of child from England, Wales or Northern Ireland to Scotland: effect of orders made in England, Wales and Northern Ireland*

*(1) Where regulation 3(2)  or 4(2) (effect of orders made in England and Wales) of the Children's Hearings (Scotland) Act 2011 (Transfer of Children to Scotland – Effect of Orders made in England, Wales and Northern Ireland) Regulations 2013 applies, the care order, supervision order or education supervision order ceases to have effect for the purposes of the law of England and Wales.*

1. The compulsory supervision order must be reviewed in the Children’s Hearings system at least once per year.
2. The implementation authority, essentially the local authority which would take on the care of child pursuant to the compulsory supervision order, would be the Scottish local authority for the area in which child and carers live. The involvement of DCC in child’s life would fall away.
3. The transfer regulations are designed to avoid English care orders being administered in Scotland by English authorities. It is entirely possible for child to remain subject to her existing care order, but it would make statutory visits and access to local services more difficult. The intention is that she would become subject to a compulsory supervision order, and essentially a Scottish child.
4. Despite their availability, the transfer regulation are rarely called upon. Most Children’s Services prefer to retain responsibility for children in their care when they go to live on the other side of the border with Scotland.
5. **The Children’s Reporter:**
6. The Children’s Reporter is responsible for receiving referrals in relation to children, and considering whether they require compulsory measures of supervision.
7. In practice, the Reporter also acts as a useful sounding board for child protection officers, including those in England. In my experience of English looked after children transferring to Scotland or spending time in Scotland, primary advice of Scottish family lawyers is to talk to the local Reporter for the area. The Reporter will act as a useful liaison between the two local authorities and be able to give some advice to DCC.
8. **Moving foster care registration:**
9. Carers will have been approved pursuant to the Fostering Services (England) Regulations 2011. As the title suggests, these do not apply in Scotland, and if they were to be approved as a foster carers in Scotland, it would have to be pursuant to the Looked After Children (Scotland) Regulations 2009 Part VII and Schedule 3.
10. I cannot see that there is any mechanism for mutual recognition of approvals across the border, although the approval process is likely to be quicker given not only the English approval but also carers proven track record as foster carers. Indeed, the transfer protocols that apply between local authorities do not apply across the two jurisdictions. Similarly, the derivative approval mechanism at section 23(1) of the 2009 Scottish regulations will not apply to English approvals.
11. **Habitual residence:**
12. Child has remained in the legal care of DCC, an English authority, with the principal decisions in relation to her care being taken by English social workers based in England. Additionally, her mother has continued to reside in England, albeit her day to day care has been provided by carers in Scotland for the last 18 months, who have acted as her foster carers on the instructions of DCC.
13. Childs ordinary residence will remain in England, due to the 'disregard' or 'stop the clock' provision in Children Act 1989 section 105(6) which reads:

*'In determining the “ordinary residence” of a child for any purpose of this Act, there shall be disregarded any period in which he lives in any place …*

*(c)     while he is being provided with accommodation by or on behalf of a local authority.'*

1. Although carers provide the day-to-day practical care of child in Scotland, they are her foster carers acting on behalf of DCC in England. On that basis child has been provided with accommodation by DCC since removal from the mother’s care, and therefore by the ‘stop the clock’ provision of section 105(6)(c) she remains ordinarily resident in Durham.
2. In Mark v Mark [2005] UKHL 42 at [33] Lady Hale stated:

*It is common ground that habitual residence and ordinary residence are interchangeable concepts: see Ikimi v Ikimi [2001] EWCA Civ 873, [2001] 2 FCR 385, [2002] Fam 72.*

1. However, this was in the context of establishing ordinary residence within the context of the domicile of spouses within divorce proceedings.
2. More specifically, but of lower judicial authority, Singer J equated ordinary residence with habitual residence in his decision in Re R (Care orders: Jurisdiction) [1995]1 FLR 711 at 714G:

*'I therefore take the view that the jurisdictional basis for an application under Part IV is effectively the same as that in relation to s 8 orders established by the Family Law Act 1986. I hold that for the court to have jurisdiction … the child … should be either habitually resident in England and Wales, which I take to mean the same as “ordinarily resident in England and Wales” or that that child should be present in England and Wales at the relevant time, which it seems to me is the time when the application to the court is made.'*

1. Slightly more recent authority to equate ordinary residence with habitual residence, expressly in the context of public law children orders, lies in Greenwich London Borough Council v S [2007] EWHC 820 (Fam)where Sumner J pointed out in relation to children who had moved to live with a relative in Canada:

*The children had been dependent, not on the great-aunt to determine their residence, but upon the local authority. That was determinative. It followed that the habitual residence in England had never come to an end.*

1. The 2007 decision remains unqualified by any substantial judicial treatment since then, although the series of Supreme Court decisions in relation to habitual residence do not sit well with the conclusion that child remains habitually resident in England after 18 months of living in Scotland and intending to continue to live there for the remainder of her childhood. The issue of habitual residence of children in public law proceedings, and its relationship to ordinary residence, has not been considered for many years.
2. **Special guardianship in Scotland:**
3. Save in one respect, there is no direct equivalent of an English special guardianship order under Scottish law. Private law orders available are set out in the Children (Scotland) Act 1995 section 11.
4. The closest that might be achievable is to categorise a section 11 order as a “kinship care order” pursuant to Children and Young People (Scotland) Act 2014 to enable access to kinship care allowances and support services from local authorities.
5. However, the Family Law Act 1986, which governs the relationship between the three principal jurisdictions of the United Kingdom in relation to private law orders, provides a far simpler solution at section 25:

*(1) Where a Part I order made by a court in any part of the United Kingdom is in force with respect to a child who has not attained the age of sixteen, then, subject to subsection (2) below, the order shall be recognised in any other part of the United Kingdom as having the same effect in that other part as if it had been made by the appropriate court in that other part and as if that court had had jurisdiction to make it.*

1. Therefore if child is made the subject of a special guardianship order by the English Family Court while she is still habitually resident in England, then she effectively obtains a special guardianship order in Scotland if that order is registered with the Court of Session in Edinburgh when she moves to live in Scotland.
2. The procedure for registration of the order is set out in section 27 of the Family Law Act 1986 as follows:

*(1) Any person on whom any rights are conferred by a Part I order may apply to the court which made it for the order to be registered in another part of the United Kingdom under this section.*

*(2) An application under this section shall be made in the prescribed manner and shall contain the prescribed information and be accompanied by such documents as may be prescribed.*

*(3) On receiving an application under this section the court which made the Part I order shall, unless it appears to the court that the order is no longer in force, cause the following documents to be sent to the appropriate court in the part of the United Kingdom specified in the application, namely—*

*(a) a certified copy of the order, and*

*(b) where the order has been varied, prescribed particulars of any variation which is in force, and*

*(c) a copy of the application and of any accompanying documents.*

*(4) Where the prescribed officer of the appropriate court receives a certified copy of a Part I order under subsection (3) above, he shall forthwith cause the order, together with particulars of any variation, to be registered in that court in the prescribed manner.*

*(5) An order shall not be registered under this section in respect of a child who has attained the age of sixteen, and the registration of an order in respect of a child who has not attained the age of sixteen shall cease to have effect on the attainment by the child of that age.'*

1. The procedure for making an application to register the English order in Scotland is set out in Family Procedure Rules 2010, rule 32.3.

*(1)   An application for the registration of a High Court order may be made by sending to a court officer at the court which made the order –*

*(a)     a certified copy of the order; and*

*(b)     a statement which –*

*(i)     contains the address in the United Kingdom, and the occupation, of the person liable to make payments under the order;*

*(ii)     contains the date on which the order was served on the person liable to make payments, or, if the order has not been served, the reason why service has not been effected;*

*(iii)     contains the reason why it is convenient for the order to be enforced in Scotland or Northern Ireland, as the case may be;*

*(iv)     contains the amount of any arrears due to the applicant under the order;*

*(v)     confirms that the order is not already registered; and*

*(vi)     is verified by a statement of truth.*

*(3)   On receipt of a notice of the registration of a High Court order in the Court of Session or the Court of Judicature of Northern Ireland, the court officer (who is the prescribed officer for the purposes of section 17(4) of the 1950 Act) will –*

1. *enter particulars of the notice of registration in the register;*

*(b)     note the fact of registration in the court records; and*

*(c)     send particulars of the notice to the principal registry.*

1. By rule 32.6:

*Rules 32.3 to 32.5A apply to a family court order as if –*

*(a)     references to a High Court order were references to a family court order;*

*(aa)   in rule 32.5A, references to the High Court were to the family court;*

*(b)     where the order is to be registered in Scotland, references to the Court of Session and the clerk of the Court of Session were references to the sheriff court and the sheriff-clerk of the sheriff court respectively*

1. The process was described in Glaser v United Kingdom (2001) 33 EHRR I; [2000] Fam Law 880 at paragraph 55 as follows:

*The procedure requires the court which made the order to send the relevant documents to the appropriate court in the other part of the UK, where the prescribed officer of the receiving court on receiving the certified order must forthwith cause the order to be registered. The new court in which the order is registered has the 'same powers for the purpose of enforcing the order as it would have if it had itself made the order' (s 29). The decision of how to enforce the order must depend on what 'will overall promote the welfare of the child' (Re O (Contact: Imposition of Conditions) [1995] 2 FLR 124). In balancing the competing interests of those involved, the courts retain jurisdiction to refuse an order if satisfied, for example, that enforcement would result in physical or moral injury to the child (Woodcock v Woodcock 1990 SLT 848, 853B).*

1. And at paragraph 69:

*The Family Law Act 1986 provides that primary jurisdiction to grant orders concerning children remains with the court dealing with the matrimonial proceedings but that, on registration of an order of that court in another jurisdiction, the courts of that jurisdiction have power to enforce it as if it was their own order. There is equally provision for the court of primary jurisdiction to cede its role where it becomes more appropriate for substantive matters to be dealt with in another part of the UK.*

1. The appropriate forms can be found at [www.justice.gov.uk/courts/procedure-rules/family/practice\_directions/practice-direction-32a-forms-relating-to-part-32](http://www.justice.gov.uk/courts/procedure-rules/family/practice_directions/practice-direction-32a-forms-relating-to-part-32)
2. The court making the special guardianship order could also make any provision as to contact, and if appropriate a family assistance order to assist the move (per Theis J in Medway Council v MI, CI, IE and E, V, M, A & C [2017] EWFC 59).
3. Note that the Family Law Act 1986 governs the relationship between the jurisdictions in relation to *private* law children arrangements. There is no separate mechanism to govern the relationship concerning *public* law orders, beyond isolated instruments such as the transfer regulations mentioned above.
4. If I am correct that child’s habitual residence remains in England because of the ‘stop the clock’ provision, then the Family Court would retain jurisdiction to make a special guardianship order in relation to her notwithstanding that she is already living in Scotland. The only prohibition as to where child lives once she is subject to a special guardianship order is at Children Act 1989 section 14C(3)(b), which prohibits her being removed from the United Kingdom for more than three months.
5. However, as noted above, the statutory ‘stop the clock’ provision relates to *ordinary* residence, and it is far from clear that *habitual* residence should be equated now, particularly in light of the Supreme Court’s application of EU jurisprudence in the various cases before it on the subject between 2013 and 2016. For an English court to make a long-term welfare order that is not recognised or replicated in Scottish law save by application of the Family Law Act 1986, in relation to a child who after 18 months must be fully integrated into school, friendships and life in Scotland, would require some pause for thought.
6. **Special guardianship support:**
7. Any special guardianship support plan would need careful consideration. Financial support would be provided by DCC, as there will be no mechanism for the Scottish local authority to provide financial support in relation to a legal structure that does not exist in Scottish law, save to the extent that is recognised in Scottish law by virtue of reciprocal arrangement pursuant to the Family Law Act 1986.
8. Whilst Children Act 1989 section 14F(9) provides for special guardianship support services (or any part of them) being secured through another local authority, this may not strictly apply to Scottish local authorities. Special Guardianship Regulations 2005 reg 5(3) suggests there is no reason why an agreement for supply of such services from a Scottish local authority cannot be put in place, although the obligation on local authorities to co-operate in relation to such matters pursuant to Children Act 1989 section 27 falls on DCC, but not any Scottish local authority.
9. Other forms of support might be sourced locally to the placement in Scotland, perhaps following guidance and assistance of the Children’s Reporter. This is provided for in Children Act 1989 section 14F:

*(9)     A local authority may provide special guardianship support services (or any part of them) by securing their provision by –*

*(a)     another local authority; or*

*(b)     a person within a description prescribed in regulations of persons who may provide special guardianship support services,*

1. There is further provision within the Special Guardianship Regulations 2005 for DCC to provide support to the placement if it is outside the area, and this does not preclude support being provided to a placement outside the jurisdiction of England & Wales:

#### Services for persons outside the area

*5.—(1) Section 14F of the Act (special guardianship support services) applies to a local authority in respect of the following persons who are outside the authority’s area—*

*(a) a relevant child who is looked after by the local authority or was looked after by the local authority immediately before the making of a special guardianship order;*

*(b) a special guardian or prospective special guardian of such a child;*

*(c) a child of a special guardian or prospective special guardian mentioned in sub-paragraph (b).*

*(2) But section 14F ceases to apply at the end of the period of three years from the date of the special guardianship order except in a case where the local authority are providing financial support under Chapter 2 and the decision to provide that support was made before the making of the order.*

*(3) Nothing in this regulation prevents a local authority from providing special guardianship support services to persons outside their area where they consider it appropriate to do so.*

1. I anticipate that the focus of non-financial support might be in relation to ongoing contact arrangements, which could potentially be achieved by a DCC social worker, as he/she probably would not have to visit the placement to provide that kind of support.
2. I would not see any need for any special guardianship assessment report to make reference to the matters set out in Re K and Ors (Placement of Children with Kinship Carers Abroad) [2019] EWFC 59 at paragraph 88, as these envisage placements in countries outside the UK. Similarly, I would not expect a Family Court judge to require expert evidence as to the recognition of a special guardianship order in Scotland.
3. **An English care order while child is placed in Scotland:**
4. All Local Authority Children’s Services decision-making in relation to placement of children must be in accordance with Children Act 1989 section 22C and the Care Planning Etc Regulations 2010.
5. Sch II para 19 provides a further hurdle for the Local Authority to mount in relation to placements outside England & Wales.
6. In relation to Scotland and Northern Ireland, Children Act 1989 section 33(7) is less restrictive than for the rest of the world:

*(7) While a care order is in force with respect to a child, no person may—*

*(a) cause the child to be known by a new surname; or*

*(b) remove him from the United Kingdom,*

*without either the written consent of every person who has parental responsibility for the child or the leave of the court.*

1. As Cobb J said in Re H (Interim Care: Scottish Residential Placement) [2020] EWHC 2780 (Fam):

*37. Section 33(7) CA 1989 largely replicates in public law the provisions of section 13(1) CA 1989 in private law, and section 14C(3) CA 1989 in relation to a Special Guardianship arrangement.  In all those sections of the Act, the reference to 'United Kingdom' is both interesting and important.  It should be remembered that the jurisdictional reach of the Children Act 1989 is England and (in most respects) Wales.  It is plainly not an accident of drafting that the primary legislation contemplates that a child may move around within the United Kingdom, the statutory regime presumably contemplating close intra-UK co-operation in relation to such arrangements.*

1. It should be said that, for all that Cobb J presumed that the statutory regime contemplated close intra-UK co-operation, there is limited legislation to support that.
2. The Family Law Act 1986 applies to private law arrangements only.
3. Part IV of the Children Act 1989 does not extend to Scotland, by section 108(11).
4. Children & Social Work Act 2017 Schedule 1 only extended secure accommodation orders to Scotland.
5. The Children's Hearings (Scotland) Act 2011 (Transfer of Children to Scotland – Effect of Orders made in England and Wales or Northern Ireland) Regulations 2013 provides a mechanism to convert a care order to a compulsory supervision order, but only with the agreement of the authorities on both sides of the border.
6. As Cobb J himself concluded in Re H, and as Munby P had concluded before him in Re X and Y (Secure Accommodation: Inherent Jurisdiction) [2016] EWHC 2271 (Fam), there is no provision in Scotland to recognise or enforce interim care orders.
7. Nonetheless, once Sch II para 19 permission is granted following compliance with the decision-making procedure, there is nothing legally to stop a Local Authority administering a care order in relation to a child placed outside its boundaries or in another jurisdiction; only practical inconvenience.
8. In fact, recognition and enforcement of an English care order comes in the form of a recovery order pursuant to section 50, which expressly, by sub-paragraph (13) extends the English Family Court’s powers into Scotland.

*(13) A recovery order shall have effect in Scotland as if it had been made by the Court of Session and as if that court had had jurisdiction to make it.*

1. Cobb J was not referred to section 50(13) during the course of Re H, which has led to one commentator suggesting that Re H was wrongly decided when it came to the matter of recognition and enforceability of English care orders in Scotland.[[1]](#footnote-2)
2. For all that the Transfer Regulations provide a mechanism to convert an English care order to a Scottish compulsory supervision order, there is no obligation to do so. There is in fact very little indication that authorities either side of the border take up the invitation.[[2]](#footnote-3) Such arrangements require the consent of both local authorities, and the approval of the Court. There is no financial incentive for the receiving authority to agree; quite the opposite. The language of Regulation 3 of the Transfer Regulations is clearly permissive, and not mandatory.
3. From the foster carers’ point of view:
4. They would need to be re-assessed as foster carers within the Scottish procedure.
5. They would lose a working relationship with the current allocated social worker.
6. There may be different arrangements as to financial and other support, as with special guardianship.
7. The Scottish Local Authority might have a better understanding and access to local resources for them.
8. From child’s point of view:
9. She would also lose her relationship with her current social worker, and have a new social worker allocated who is less familiar with her case.
10. She would acquire habitual residence in Scotland and lose her English status, which may have the advantage of her benefitting from after-care benefits in Scotland if she chose to remain there after childhood.
11. **Answers to questions raised in my instructions:**
12. If DCC does not request a transfer, or consent to a transfer should it be suggested by the Scottish Local Authority, then a transfer of the care order cannot and will not happen. Accordingly, I do not subscribe to the children’s solicitor’s implied contention that a transfer and conversion to a compulsory supervision order, is somehow obligatory or even automatic.
13. The practical and financial advantages for DCC to seek to transfer responsibility for child to a Scottish Local Authority is unlikely to outweigh the fact that PGA do not wish to change the arrangements in this happy and successful placement.
14. For similar reasons, the Family Court is unlikely to make a special guardianship order, particularly with the knowledge that it would have to operate in Scotland where such an order is only recognised because of the provisions of the Family Law Act 1986.
15. If there was a conversion of the care order to a compulsory supervision order then carers would have to be reassessed as foster carers under the Scottish framework.

JUSTIN GRAY

Trinity Chambers

Newcastle Upon Tyne

18 February 2022

Schedule 2 Para 19 Children Act 1989

(1) A local authority may only arrange for, or assist in arranging for, any child in their care to live outside England and Wales with the approval of the court.

(2) A local authority may, with the approval of every person who has parental responsibility for the child arrange for, or assist in arranging for, any other child looked after by them to live outside England and Wales.

(3) The court shall not give its approval under sub-paragraph (1) unless it is satisfied that—

(a) living outside England and Wales would be in the child's best interests;

(b) suitable arrangements have been, or will be, made for his reception and welfare in the country in which he will live;

(c) the child has consented to living in that country; and

(d) every person who has parental responsibility for the child has consented to his living in that country.

(4) Where the court is satisfied that the child does not have sufficient understanding to give or withhold his consent, it may disregard sub-paragraph (3)(c) and give its approval if the child is to live in the country concerned with a parent, guardian, [special guardian, ] 1 or other suitable person.

(5) Where a person whose consent is required by sub-paragraph (3)(d) fails to give his consent, the court may disregard that provision and give its approval if it is satisfied that that person—

(a) cannot be found;

(b) is incapable of consenting; or

(c) is withholding his consent unreasonably.

1. [2021] Fam Law 694 [↑](#footnote-ref-2)
2. *Ibid.* [↑](#footnote-ref-3)