Re S (Residential Assessment) [2008] EWCA Civ 1078

[2009] 2 FLR 397

Court of Appeal

Mummery and Wall LJJ

12 August 2008

Care proceedings — Residential assessment — Delay — Mother's behaviour — Risk that child would lose foster placement — Whether assessment required

The child was born when the mother was 16 and herself in the care of the local authority; the child was placed in a long-term foster placement by the local authority. An initial psychiatric psychological assessment recommended a residential placement of mother and child; the authority responded by placing them in a well-known residential unit, but the placement broke down very quickly because the mother refused to co-operate, was verbally abusive to staff, and failed to respond appropriately to the child's needs. A subsequent assessment by a social worker recommended a further residential assessment, but that recommendation was withdrawn when the social worker learnt of the mother's aggression towards other workers. At that stage the mother withdrew her application for another residential assessment, by agreement with the judge. At a relatively late stage the mother sought another residential assessment for herself and the child. Although a different residential unit had concluded that the mother was showing enough capacity and motivation to do the work in order to care for the child and that the child had shown sufficient attachment to the mother to justify a 3-month residential parenting risk assessment, the judge dismissed the mother's application. The judge considered that the failure of the first residential assessment raised serious concerns and that the mother had failed to disclose relevant matters to the new residential unit, including her pregnancy, but he was particularly worried by the delay that would result if the assessment went ahead. The mother appealed arguing that, as in *Re L and H (Residential Assessment)* [2007] EWCA Civ 213, the lack of an assessment left a gap in the evidence relating to the mother's ability to care for the child. Evidence at the appeal hearing made it clear that, if an assessment were ordered, the final hearing would have to be adjourned. The authority had produced a letter stating that it would not be able to keep open the current foster placement, the only home the child had ever known, and that there was therefore a risk that at the end of the assessment the child would have to be placed with an alternative foster carer. The mother had in the week before the appeal hearing been found guilty of a public order offence and criminal damage following an altercation with a key worker.

Held – dismissing the mother's appeal –

(1) A number of distinctions could be drawn between this case and *Re L and H (Residential Assessment)* in particular that in this case the assessment would interfere with the final date fixed for the hearing (see para [16]).

(2) The judge had weighed a number of relevant factors, both positive and negative. Had this been the first application made by the mother for a residential assessment matters might have been different, however, given the facts presented to the judge, reinforced by the facts as at the appeal hearing – the delay, the mother's behaviour and the risk of disruption to the child – the judge had exercised his discretion appropriately (see paras [23], [24], [30]).

Statutory provisions considered top

Children Act 1989, ss 31, 38(6)

European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, Art 6

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Cases referred to in judgment top

G (Interim Care Order: Residential Assessment), Re [2005] UKHL 68, [2006] 1 AC 576, [2005] 3 WLR 1166, [2006] 1 FLR 601, [2006] 1 All ER 706, HL

LandH(ResidentialAssessment), Re [2007] EWCA Civ 213, [2007] 1 FLR 1370, CA

Nicholas Horsley for the appellant
Christopher Miller for the respondent

Cur adv vult

WALL LJ:

[1] This is an application for permission to appeal by a young mother whom I will call 'KS' for the purposes of this judgment, since these are ongoing proceedings. She is the mother of a very small child, P, born on 8 June 2007, and thus only 14 months old now. KS herself is still technically a child because she was born on 24 October 1990 and was 16 when P was born. She will be 18, of course, later this year. She has, as I understand it, been cared for by the local authority.

[2] KS seeks permission to appeal against an order made by His Honour Judge Atkins, sitting in the Croydon County Court on 20 May, whereby he dismissed an application by KS under s 38(6) of the Children Act 1989, the mother seeking a residential assessment for herself and the child at the Cassel Hospital in Roehampton. The judge also refused her application for permission to appeal.

[3] I had the case on paper on 25 July and I directed that it should be listed on notice to the local authority and to the guardian with the appeal to follow if permission were granted. We have been told that the guardian – rightly in my view – in terms of public expenditure does not seek to appear separately as she agrees with the position adopted by the local authority, and we have had the benefit today of submissions by Mr Horsley on behalf of the applicant and Mr Miller on behalf of the local authority.

[4] I would like to say before I go any further that, in my view, Mr Horsley has argued this case immaculately on the mother's behalf. He has been frank with the court; he has taken good points and not taken bad ones, and in my judgment, his client should be grateful to him for the care which he has obviously given to preparing the argument. Not only has he been careful and courteous but he has also, as one would expect, fairly and properly brought us up to date.

[5] One of the factors which concerned me when I had the case on paper was that the appeal involved an attack on the exercise of a judicial discretion, and that the court's power to intervene in such cases was limited in the extreme. However, I raised the possibility that, applying the recent decision of this court of *ReLandH(ResidentialAssessment)* [2007] EWCA Civ 213, [2007] 1 FLR 1370, it might be arguable, having looked at Mr Horsley's grounds of appeal, that the judge had exercised his discretion inappropriately. I will, of course, come back to that in just a moment.

[6] I was, however, concerned, because this was a child case and because the rules relating to evidence in relation to children's cases are different, that this court should be brought up to date and should learn what had happened since the judge made his order. I raised four particular points which were

answered by the local authority and have also been addressed in a letter which Mr Horsley has shown us today from those instructing him.

[7] The first was: was the assessment at the Cassel still open and, if so, when could it be undertaken? Mr Horsley was able to answer that by saying that there is a vacancy but it would not be until the middle of September before it could commence – the beginning to middle of September, so next month.

[8] The second question which I raised, which I thought to be of importance, was what was the local authority's care plan for P? And the answer to that, we are told, is that the maternal grandmother of P is put forward as a special guardian. The local authority's plan is for a kinship placement therefore within the family, although we are also told that the plan was not accepted by the guardian.

[9] The third question was whether or not there was a date fixed for the final hearing, given the delay there has already been in the case, and the answer to that is that the case is now listed for 4 days, commencing 6 October 2008 at Gee Street.

[10] Finally I was concerned about the position of the foster carer in relation to any potential assessment at the Cassel, because it is quite clear from the documentation I have read that P has formed a bond with her foster carer – indeed, probably her principal attachment is to her foster carer, with whom she has been now for most of her life – and in those circumstances, if there were to be a residential assessment which involved separation of the child from her foster carer, that would be a matter which would cause me some concern.

[11] I feel bound to say in this latter respect that my concerns have not been alleviated by the letter from the local authority. Obviously the local authority is in a position to know about the foster carer rather than the mother. The position is that if it were ordered that an assessment be carried out at the Cassel, then the local authority would not be in a position to keep open the current foster placement. If the assessment at the Cassel Hospital were then to break down, the local authority would in first instance approach the foster carer to establish whether she had a place available to resume the care of P, and if such a place were not available the local authority would then look for a placement with an alternative foster carer approved by the local authority.

[12] I emphasise that point because it was clearly a point which concerned the psychotherapist, Mrs B, who give evidence on behalf of the Cassel at the hearing before the judge. She says (and I quote from her evidence at 87 of our bundle) it being put to her that the prospects of success were remote as the outcome of any assessment they did:

> 'Well, if I thought it was that remote we would not have recommended a viability assessment. Obviously if she had had the opportunity to come earlier in [P's] life it would have been better. I think it is important that [P] has had a stable, as far as I am aware, placement, and should there be a viability assessment it would be very important if it remained in place. In my experience children who have come to the Cassel for an assessment, you know, usually flourish, and if they don't flourish then the assessment, you know, is ended. It is very important that, you know,

> the current attachments are maintained, which will help them engage either with their own parent[s] or with future carers.'

She went on to say:

> 'It would be [of] enormous concern [if P] were to lose her foster carer suddenly. It wouldn't, you know, it wouldn't be able to help her very easily unless she and her mother were more engaged. So we would be very concerned about that.'

So, from the additional material which has come before us, two immediate points of concern arise out of what I asked – namely that if an assessment is ordered the final hearing will have to be adjourned; there is no way it could be maintained; and, secondly, there must be a risk if P were to go to the Cassel that she would lose her current foster placement.

[13] The final piece of recent information is one which very properly Mr Horsley has shared with us: namely, that last week the mother appeared before the justices charged with a public order offence and criminal damage. She had an altercation with her key worker. It appears that she damaged some chairs at the property and put one of the workers in fear. She has been remanded by the justices for a pre-sentence report, and the likelihood is that she will receive a community

penalty. Mr Miller adds some details to that on which I do not think I need elaborate. It is a matter of very grave concern indeed.

[14] So where does one go in relation to the assessment itself? The principal argument it seems to me that Mr Horsley was advancing, and perfectly properly advancing, was that there is a gap in the evidence in relation to this mother's capacity to care for P. It is a gap with which, if not filled by a residential assessment, will mean, almost inevitably, that the local authority will obtain their care order and there will be no prospect of this young mother resuming the care of her child. Therefore, says Mr Horsley, the judge did not address that point. In those circumstances it follows that that is such a gaping hole in the exercise of his discretion that nothing can fill it and certainly he didn't fill it himself.

[15] Mr Horsley advances three grounds of appeal only, and I have in a sense summarised them. Basing himself on *Re L and H(ResidentialAssessment)*, which he says the judge did not follow, he advances the following grounds, which I will read out:

> '1 The judge held that the evidence in the case as to the mother's ability to parent the child was "fairly full" and "quite substantial". He thereby failed to be astute to ensure that the case had been fully investigated and that all the relevant evidence necessary for the decision was in place.
> 2 The judge failed to give any adequate reasons for rejecting the strong recommendation of the Cassel Hospital brought in to advise the Court that an assessment in a psychodynamic residential setting was justified in the case.
> 3 In the absence of positive evidence from the assessment recommended by the expert, it was a foregone conclusion that the child

> would not be reunited with the mother. The rights of the mother under Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 were therefore infringed.'

[16] Before going any further and discussing what the judge to say, I think it right to point out that in my view there are, in any event, a number of distinctions which can properly be drawn between this case and *Re L and H(ResidentialAssessment)*. The first point is that in *Re L andH* the assessment was not going to interfere with the final date fixed for the hearing. The second point was that there had been a clear and unequivocal and indeed uncontradicted recommendation from an expert as to a residential assessment. Thirdly, the care plan had been for adoption. There are other distinctions which Mr Miller sought to point out this morning.

[17] In any event, as I indicated in my response to the documentation in the case, the court is looking at a discretionary judgment. It is a discretionary decision by the judge weighing, as he has to, all the factors in the case and reaching a conclusion; and it is I think significant that throughout the judgment the judge refers to the balance and the balancing exercise he has to undertake. He plainly undertook that exercise with great care. So I turn to the judgment.

[18] The threshold criteria under s 31 of the Children Act 1989 were conceded as common ground. The judge refers to them and we have them in a written form in our bundle. They demonstrate the very unhappy history that KS has had, and her inability to control her behaviour, as indeed was illustrated by the events of last week. At the same time the judge recognised that she is very young. The judge goes through the history of the proceedings. He points out that there had been an initial psychiatric psychological assessment which had specifically recommended a residential placement, and the local authority had followed that advice and placed the mother and the child at a well-known resource called Jamma Umoja.

[19] Speaking for myself, in the context of an overall exercise of discretion, I am not impressed with the argument that Jamma Umoja did not provide the necessary therapeutic teaching element to the mother. The simple fact of the matter was, as the judge recognised, that the mother was incapable of living in those circumstances in that environment and the assessment came to an end very rapidly.

[20] There was a second assessment, this time from a social worker, which also recommended a residential assessment, but that recommendation was withdrawn at one of the earlier hearings when the social worker, we are told, learnt of the mother's aggression to other workers. And indeed, on that occasion, the mother, who had issued an application for a residential assessment, withdrew it by agreement with the judge. Thus the application to the Cassel was the third attempt by the mother to obtain a residential assessment.

[21] The judge begins the critical part of his judgment by commenting on the positives. He quotes directly from the decision of *Re Land H(ResidentialAssessment)*:

> 'Before removing children from their natural families and placing them for adoption with strangers, the court should be astute to ensure that the case has been fully investigated and all relevant evidence necessary for the decision was in place.'

[22] The judge also then quotes from *Re G (A Minor)* [2005] UKHL 68, [2006] 1 AC 576, [2005] 3 WLR 1166, [2006] 1 FLR 601, a well-known decision of the House of Lords, which again had been discussed in *Re Land H(ResidentialAssessment* to the effect that the principal focus of the assessment had to be on the child.

[23] And so the judge looked first at the positives. In favour of holding the assessment first of all was the recommendation the social worker, even though she had withdrawn it. He also had, of course, not only a written report from the Cassel, but he had heard the evidence of one of the psychotherapists and she had been cross-examined in front of him, and so he faithfully reported the conclusion of the Cassel, which was that the mother had shown enough capacity and motivation to do the work in order to care for her daughter, and P had shown sufficient attachment to her mother for the Cassel to recommend a 3month residential parenting risk assessment. So the judge was well aware of the positives. He also bore in mind, at para [15], that the mother was very young and P's natural mother. There were positives in the report. There were concerns, but there were positives, and the judge expressly said he bore all those in mind.

[24] And so having assembled on one side the positive reasons for undertaking the assessment, the judge then looked at the negative side. The first point he put into the scales was the fact that the Jamma Umoja residential assessment had failed, and he had the reasons for that it the report from the Jamma Umoja workers. 'They are summarised', he said:

> '… as being mother's refusal to co-operate with the assessment, not listening to advice being offered, not attending sessions, being verbally abusive to staff, non response to the baby's needs, inconsistent care, lack of motivation to care for the child, and mother's threats of abandonment.'

[25] Those, in my judgment, he rightly calls 'very serious concerns'. He then went on to point out – to repeat, in fact – that there had been one s 38(6) application which had been brought and then abandoned or withdrawn, although he accepted that that might well have been because of advice given to the mother by previous solicitors whom she has now changed. The third point, which he thought particularly important, was the point of delay. He said:

> 'This is something which concerns me greatly because [P] has been the subject of proceedings now for a considerable period of time, they have been delayed already, and the sad fact is that if I order this assessment to go ahead it will result in additional delay to the resolution of this case.'

That is plainly right. These proceedings have gone on for a very long time – longer than they should have done; and to lose the October hearing would, we

were told by Mr Horsley today, be likely to result in a hearing next February, in Croydon, but who knows when it would be heard in Gee Street.

[26] The judge described that as a very important factor, not, of itself, sufficient to say that the assessment should not take place, but an important factor to weigh in the balance against the assessment because delay was contrary to the interests of the child unless it is justified. The judge then also went on to mention the point which troubles me, namely that if the assessment was begun then there was likely to be disruption to the child. He said:

> '[P], I am told, and accept, is currently placed in a secure placement where she is doing well, but if the assessment were to go ahead it may be that there would be not only delay but also disruption.'

He goes on to explain why that was the case, based on the evidence from the Cassel.

[27] The fourth question which he then addressed related again to the Cassel's recommendation. Did the Cassel have sufficient information? The mother had not disclosed to the Cassel that she was pregnant, which is clearly a matter of considerable relevance and importance, and she did not turn up to one of the sessions with the Cassel for the preliminary report. So the judge thought those were matters of concern. He was also concerned by the way the mother had responded to one of the psychotherapists in relation to the Cassel and, as I say, he already said he expressed concern about the failure to attend. So although he thought no one doubted the good faith of the Cassel, and the judge was plainly aware of it as a resource because he refers to it at the very beginning of his judgment as a well-known resource – he must be very familiar with it – there were a number of concerns in relation to the Cassel's investigation. And then fifthly he said: 'Well, it is argued in front of me that there is a lot of information already available to the court – 'already fairly full' information – and really therefore was a further report from the Cassel relevant?' Would it give him any more information than that which he already had? He also had, of course, the report from the independent social worker; he had had a report from the psychologist; he had the report from Jamma Umoja; and altogether he took the view that it could properly be said that the information is already fairly full and there was a serious question whether any relevant or vital further information could be provided by an assessment from the Cassel.

[28] The judge then went on to consider the point as to whether or not this was assessment or therapy. He tended I think to the view that it was more likely to be therapy than assessment, but he covered himself, if I may say so, cautiously, by saying, well, even if I am wrong about that, that is not a factor – I would still have reached the same conclusion ignoring that factor altogether; and he finally reminded himself that the proceedings had to be fair, but at the same time he was looking to what he described as 'the longterm future of this child'. So he concluded by reminding himself that it was necessary to have all the relevant information. So that was the balancing exercise which the judge performed and he concluded:

> '…the factors arguing against allowing this assessment, or ordering this assessment should go ahead, outweigh the facts in favour of the assessment, and I think that they are outweighed by a substantial margin.'

[29] I intended to add, as I have already indicated, that if he were wrong about the point of therapy as opposed to assessment, he would still take the same view. In his final paragraph:

> 'Therefore, I do not consider it is in the best interests of this child to say that the assessment should proceed. I do not think it should proceed, and the reasons that I rely on are the reasons I have outlined as being reasons which weigh against ordering the assessment. For those reasons I am afraid I am not going to order this assessment, and I think it follows that the application on behalf of the mother will be dismissed.'

[30] I have of course considered that analysis carefully and I have read the judgment given extempore by the judge several times. I remind myself that this court cannot interfere with the exercise of a judicial discretion unless the judge has made some error in the balancing exercise

of such seriousness as to be plainly wrong in the conclusion which he has reached, and in my judgment, having considered the matter carefully, I do not think I can begin to say that. The judge weighed a number of relevant factors. Factors in the scale the other way he also weighed. Had this been the first application made by the mother for a residential assessment, matters might, I suppose, or could have been, different. But given the facts which were presented to the judge, reinforced, I have to say, as they are by the facts given to us today – the delay, the mother's behaviour and the risk to the child – I have come to the conclusion that the judge exercised his discretion appropriately and that this court cannot properly interfere.

[31] I would therefore either dismiss the application for permission or, if permission were to be granted, I would dismiss the appeal. It seems to me this is a properly balanced judicial exercise in which a judicial discretion has been exercised appropriately, and this court therefore cannot interfere with it.

MUMMERY LJ:

[32] I agree.

Application refused.

Solicitors:*Hornby & Levy* for the appellant

London Borough of Croydon for the respondent

PHILIPPA JOHNSON

Law Reporter