Case No: B4/2010/1122 and (A)

Neutral Citation Number: [2011] EWCA Civ 1362
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE PRINCIPAL REGISTRY OF THE FAMILY DIVISION
(HIS HONOUR JUDGE KARSTEN QC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Friday, 14 October 2011

Before:

LORD JUSTICE THORPE
LORD JUSTICE GROSS
and
MRS JUSTICE BARON

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IN THE MATTER OF W (A CHILD)

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The **Appellant** mother appeared in person.

Ms Deirdre Fottrell (instructed by London Borough of Hillingdon Legal Services) appeared on behalf of the **First Respondent**, the local authority.

Ms J Youll (instructed by Camerons Jones) appeared on behalf of the **Third Respondent**, the Children's Guardian.

The remaining **Respondents** did not appear and were not represented.

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Judgment

Lord Justice Thorpe:

1. This is an appeal from the judgment of HHJ Karsten QC who I think was sitting as a deputy judge of the division when he delivered judgment on 1 April 2011 in a difficult case concerning an eight year old boy who is generally known as B. The appeal is brought by B's mother, permission having been given by Sir Mark Potter. She is supported in her appeal by the guardian ad litem who at a late stage sought to file a respondent's notice. That in my judgment was a superfluous procedural step. She was fully able to advance all the submissions that she wanted to advance without that foundation.

2. At a late stage the appellant sought to introduce evidence about contact difficulties since the 1 April. We formally admitted the evidence. It has in my judgment no bearing on our task, which is to evaluate the judge's conclusions on the evidence that was before him.

3. The very brief necessary background is that the appellant in her relationship with Mr W gave birth to three children, all of whom were removed as a result of the chaos in their family life which in its turn resulted from their dependence on drugs. The two elder children, both girls, were accommodated by the appellant's sister and B was accommodated by the sister's best friend and her husband, that is, Mr and Mrs N. To her very great credit the mother has succeeded in totally reforming her way of life. She has freed herself from the use of hard drugs, she has given birth to another child and she is successfully parenting her last born.

4. The proceedings in the court were consistently listed before HHJ Meyer. For some reason judicial continuity was then lost. HHJ Atkinson had the case and then it went to HHJ Compston. Unfortunately, the case having been adjourned by HHJ Compston, he was obliged to recuse and so when listed before HHJ Karsten in March he had to start from two days, I think, of oral evidence which he had not heard but which he was taken to have heard, transcripts being made available to him. He then concluded the taking of evidence, he heard submissions, that was achieved between 22 and 25 March, and then on 1 April in the afternoon he gave a judgment.

5. In a sense the issue that HHJ Karsten had to decide was a narrow one. Plainly B was going to stay indefinitely with the Ns. The question was under what legal label: was it to be placement and adoption or was it to be special guardianship? In either event, what about contact? Although the issue was narrow it was difficult in that there were very strong feelings both within the lay and professional witnesses and, as can happen, as may legitimately happen, both the expert, Dr Holmes, the child and adolescent psychiatrist, and the guardian swayed from a recommendation that there should be a placement order with a view to adoption to supporting the alternative of special guardianship. In so shifting they came as it were into the appellant's camp and deserted the camp of the local authority.

6. In the end HHJ Karsten came to a firm conclusion. He was quite sure that the considerations contained in the welfare checklist in section 1 of the Adoption of Children Act 2002 required the making of a placement order. He said towards the very end of his judgment:

> "I am quite satisfied that this is a case where to provide absolute stability and security for this placement there must be a placement order. To my mind it has become a clear case."

7. Now to reach that conclusion he obviously had to reject the recommendation of the expert and the guardian and had to give a clear explanation why he did so. Given that it is perhaps statistically unusual for a trial judge to reject the united view of the expert and the guardian, it is perhaps not surprising that an appellant's notice was filed in this court and that Sir Mark Potter granted permission, but in the end the task that we have faced this morning has been a conventional one and an uncomplicated one. We have to evaluate the submission that HHJ Karsten did not sufficiently explain his rejection of the professional opinion; alternatively that he made factual errors in explaining his rejection. That case has been presented by Ms Marks who appeared in the court below and I would pay tribute to the care with which she has prepared her submissions today. She has taken us through the full transcript of the proceedings, at various points indicating passages in the evidence which she says support her submissions that the judge was less than fair to the expert and accordingly improperly rejected his recommendation. She has left to Ms Youll, who represents the guardian, the parallel task of criticising the judge's rejection of the guardian's evidence.

8. The judge in my opinion cogently explained why he rejected the evidence of Dr Holmes. He found that Dr Holmes had been under a misapprehension as to B's understanding of his birth family and he rejected Dr Holmes's opinion, or mistaken belief as the judge put it, that the Ns would not afford contact without an order. It is said by Ms Marks that the judge conflated the two questions of what should be the legal label and what should be the contact order into one and improperly concentrated excessively on the issue of contact, which he should have approached only secondarily after deciding the principal question. I do not think that is a fair criticism. The question of how the two families, the caring family and the biological family, would cope with and adapt to B's need to remain in relationship with, in touch with, fully up to date with, his birth family was a fundamental question and it was not illogical for the judge to consider that in deciding whether special guardianship or placement would better serve those interests. It was a very fundamental question and Dr Holmes explained his shift largely by criticising the performance of Mr and Mrs N in the witness box. He perceived in their evidence an underlying, maybe unconscious, wish to exclude the birth family and he even commented on the emotion which he registered as Mrs N gave her evidence, that she was hostile and angry. By contrast the judge took a high view of the Ns' commitment to contact and maintaining the relationship. It had been put graphically by Mrs N that for B to lose contact with his biological family would be devastating for him. When that was put to the

doctor he as it were avoided the question by saying that it would be a devastation for him to lose his family.

9. So it does seem to me that the judge sufficiently explained his rejection of Dr Holmes's opinion and it was fundamental that they registered the emotional commitment and sincerity of the Ns so differently. The judge was convinced that as long as B was made secure in that family, and the Ns had the solace of that security, they would be generous and that contact between B and his birth family, both his siblings and his parents, would evolve in a spontaneous and natural way that judges can never achieve by writing detailed court orders.

10. Ms Marks also asserts that the judge did not properly and conscientiously apply the analysis of the section 1 welfare checklist. That seems to me, with respect to Ms Marks and indeed to Ms Youll who specifically expressed like criticism, quite unsustainable. The judge deals with this expressly between paragraphs 83 and 88 of his judgment, he makes it plain that he is applying the welfare checklist, he then in the succeeding paragraphs picks up relevant subsection headings and in paragraph 86, contrary to the submission of Ms Youll, he very plainly has regard not to B's minority but his welfare for the rest of his life. So I was quite unpersuaded by that submission.

11. Ms Youll of course principally criticised the judge's treatment of the guardian in his judgment. The judge had heard the guardian for two and a half hours on 25 March and the guardian was asked, inevitably, by Ms Youll, why have you changed your position? And there came from the guardian a passage which the judge clearly found hard to follow and accordingly at some length he tried to really get to the bottom of what had led her to shift her ground and there are passages, lengthy passages, in the transcript (inaudible) all the way through to 431 when the judge courteously and patiently endeavours to get the guardian to explain what precisely it was. She had said, well, it was the evidence, listening to the oral evidence that caused me to change my mind. So the judge was saying, well, what was it? We have got the transcript. What was it? Show me. What was it in their evidence that was so influential?

12. And the judge summarised in paragraph 73 by saying:

> "She was unable, despite my efforts to prompt her, to find any passage in Mrs N's evidence which explained her change of mind."

13. Ms Youll has submitted that that is unfair to the guardian. Having read the transcript I am completely unpersuaded that the judge was in any way misrepresenting the exchanges, the lengthy exchanges, which he had had. Of course it is incumbent upon the judge to explain why he could not accept her recommendation. He did so with some candour in paragraph 75 when he said that he unfortunately found that her evidence had been unclear in a number of respects and indeed was at points rather confused.

14. That is an absolutely clear explanation for the judge arriving at a different discretionary judgment. All these judgments as to the future, what will

promote welfare, what may cause harm, are essentially speculative but must be based on the clear appraisal of the history and then an evaluation of the oral evidence, which in these cases is so influential in helping a judge to reach a conclusion which is going to shape the future of the child's life beyond minority and indefinitely. That process enabled the judge to be quite clear as to what was best. He was quite clear that B's welfare required the security of adoption and he was quite clear that contact with the birth family was better left to the judgment and the commitment of the N's.

15. I would pay tribute to this judgment, which is extremely well constructed, comprehensive and, although naturally distressing to the appellant, is proof against criticism. Although permission was given on the basis that it was arguable that he arrived at the wrong conclusion, the process of the submissions in this court demonstrates to my mind quite the reverse. It was a discretionary choice which was fully justified on the evidence as the judge evaluated it and for all those reasons I would dismiss this appeal.

Lord Justice Gross:

16. I agree.

Mrs Justice Baron:

17. I agree.

Order: Appeal dismissed