Re W (Residential Assessment) [2011] EWCA Civ 661

[2011] 2 FLR 1024

Court of Appeal

Carnwath, Lloyd and Wilson LJJ

31 March 2011

Care proceedings — Residential parenting assessment — Public funding of application — Mother mentally ill — Whether appropriate to order residential assessment before psychiatric report obtained — Whether mother's application for residential assessment to be dismissed or adjourned — Funding considerations

The Ugandan mother became pregnant after being tortured and raped in Uganda. The mother was granted indefinite leave to remain in the UK. Sadly, after the birth the mother's mental health problems put the child at risk: the mother threatened suicide and infanticide and there were incidents of actual self-harm. Ultimately a care order was made in respect of the child, and the child was fostered; the mother had considerable contact with the child, and developed a very good relationship with the foster parents. The mother's mental health remained unstable for a number of years, but then began to improve. Having being introduced to the father by the foster parents, and having begun a relationship with him, the mother became pregnant again. The relationship with the father was short-lived, but the couple remained on good terms. After reviewing the possible risks to the baby, the local authority chose to monitor the mother's situation closely rather than issue proceedings. However, within a month of the birth the mother's mental health problems began to recur; the mother reported to the social worker that she had considered administering a sedative to the baby on more than one occasion, and that she was hearing voices telling her to harm the baby. About 3 weeks later the baby was removed from the mother under an emergency protection order and placed with the father, on the basis that the mother would have contact five times a week; the mother continued to breast-feed the baby. In the care proceedings the mother sought a direction for a residential assessment under s 38(6); the residential centre identified offered a 12-week assessment at a cost of £5,500 pw. The father and guardian supported the mother's application, but the local authority opposed it. The judge refused to make a s 38(6) direction, concluding that the real issue was not the mother's ability to parent at times when she was mentally stable, which seemed likely to be good, but the risk that her mental problems would worsen. He, therefore, ordered the joint instruction of a consultant psychiatrist to report on: (a) what psychological therapy the mother would need to be able to look after the baby, reducing any risk of a relapse to an extent where it was manageable; and (b) whether the mother herself would be able to tell when she was becoming unwell and unable to care for the baby. He made it clear that the mother would be entitled to apply for a residential assessment again in the light of the psychiatric report.

Held – substituting an adjournment rather than a dismissal of the mother's residential assessment application but otherwise dismissing the appeal – it was premature to assess the quality of the mother's parenting when she was well, without professional reassurance that future relapses in the mother's mental health would not represent an unacceptable risk to the baby. However, rather than dismissing the mother's application for a s 38(6) report, the judge should have adjourned the application until the psychiatric report was produced, as it might be difficult for the mother to secure public funding to make a second application under s 38(6), and she should have public funding to re-present her case for a s 38(6) direction after the psychiatrist had reported (see paras [23], [25]).

[2011] 2 FLR 1025

Statutory provisions considered top

Children Act 1989, s 38(6)

Cases referred to in judgment top

C (A Minor) (Interim Care Order: *Residential Assessment), Re* [1997] AC 489, [1996] 3 WLR 1098, [1997] 1 FLR 1, [1996] 4 All ER 871, HL

Claire Wills-Goldingham for the appellant
Christopher Miller for the respondent

WILSON LJ:

[1] A mother appeals against a judge's refusal in care proceedings to make a direction under s 38(6) of the Children Act 1989. The judge was His Honour Judge Harington and his order was made in the Bristol County Court on 3 February 2011. The care proceedings relate to a girl, A, who was born on 10 September 2010 and is therefore now six months old. A is presently subject to a succession of interim care orders, made in favour of Bristol City Council ('the local authority'), and they have placed her in the temporary care of A's non-marital father.

[2] Thus in the proceedings the local authority are the applicants. The mother is the first respondent. The father is the second respondent. And A, by her Children's Guardian, is the third respondent.

[3] It was on 3 December 2010 that, pursuant to an emergency protection order, A was taken from the care of the mother and placed with the father. Since then the mother has been having contact five times a week with A, primarily under the supervision of the local authority; all are agreed that the contact is of excellent quality and that there is a good relationship between the mother and A. Indeed, she is also breast-feeding A.

[4] In the proceedings it is the urgent aspiration of the mother to secure the return of A into her care whether under a residence order or perhaps, if the local authority ultimately consent to a placement with her, under a full care order. A remarkable feature of the present proceedings is that, although their relationship no longer subsists, the mother and the father are on good terms and, although at this early stage of the proceedings the position of the father is not firm, there are grounds for thinking that he might ultimately also argue for a return of A into the care of the mother or, perhaps, for some arrangement for A's care to be shared between them.

[5] The mother's application which came before the judge on 2 and 3 February 2011 was an application by the mother for a direction under s 38(6) with regard to an assessment of A. To be precise, the assessment which the mother proposed was a residential assessment of A with herself at Orchard House Family Assessment Centre in Taunton, Somerset. The evidence was that A and the mother could move to Orchard House for the assessment almost immediately. Orchard House was proposing that the assessment should endure for 12 weeks.

[6] The judge noted that the cost of the assessment, which would fall on the local authority, was a minimum of £5,500 per week but, as I will explain, his refusal to make the direction was not based upon the very substantial cost of an assessment for 12 weeks. Thus it is, happily, unnecessary for us today to wrestle with the relevance of the vast cost of an assessment to the determination of an application for a direction under the subsection. The basic

principle is well established, namely that, if the court considers that an assessment is *necessary* for the proper determination of the application for a care order, it should ordinarily exercise its discretion to direct that it should take place: see *Re C (A Minor) (Interim Care Order*: *Residential Assessment)* [1997] AC 489, [1996] 3 WLR 1098, [1997] 1 FLR 1 at 501G–H, 1104 and 7 respectively per Lord Browne-Wilkinson. Although, at 504C, 1106 and 10 respectively his Lordship proceeded to stress that the cost to the local authority of an assessment was a factor relevant to the exercise of the discretion, I, for my part, find it logically difficult to understand how cost can be relevant to whether an assessment is necessary or how, if it is necessary, the discretion can properly be exercised against directing it. But the particularly difficult financial

situation of local authorities today certainly militates in favour of a rigorous approach by a judge to a contention that an assessment, particularly a residential assessment, is necessary, including no doubt to a contention that the proposed length of it is necessary.

[7] Before the judge the local authority opposed the mother's application under the subsection. The father, by contrast, supported her application. So, importantly, did the Children's Guardian.

[8] Today the mother appears in support of her appeal and the local authority appear in opposition to it. Appropriately, in the light of their public funding, neither the father nor the guardian appears today. What stance do they take in relation to the appeal? By letter the solicitor for the guardian makes clear that the guardian supports the appeal just as strongly as she supported the mother's application to the judge. The father's stance in relation to the appeal is, however, delphic. His solicitor has written to this court to say that he is, ‘content to rely on the reasons given by the lower court for its decision'. The words appear to suggest that, in contradistinction to his stance at the hearing, the father accepts the judge's decision or at any rate adopts a position of neutrality in relation to the appeal.

[9] The mother is aged 26. She is of Ugandan ethnicity. She arrived in the UK in 2001 and, I am happy to say, has recently secured indefinite leave to remain. When in Uganda she had been subjected to horrifying acts of torture and rape as a result of which, on arrival in the UK, she was pregnant. In April 2002 she gave birth to a daughter, namely N. There were immediate concerns about the mother's ability safely to care for N. Unsurprisingly the mother's mental health was far from sound. She was making threats of suicide and of infanticide and there were occasions of actual self-harm. There were various admissions of her, some of them compulsory, to mental hospitals. Care proceedings took place in relation to N and in the end, in March 2004, a full care order was made in respect of her in favour of the local authority. Since then N has lived with long-term foster parents.

[10] It is an unusual and positive feature of the history that N's foster parents and the mother have remained on extremely good terms, such that the foster parents appear to have been acting over the last several years almost as affectionate and concerned relations of the mother; equally, she enjoys weekly contact face to face, and daily contact by telephone, with N; and such will no doubt need carefully to be weighed when, in the present proceedings relating to A, the court comes to consider the strength of the mother's maternal commitment.

[11] Between 2004 and 2009 the mother exhibited signs of continued mental instability. She overdosed on anti-psychotic medication which had been prescribed for her. At one stage she was developing an alcohol dependency. There were occasions of self-harm. And there were at least four further admissions to hospital.

[12] From about November 2009 the mother's mental health seemed to improve. Early in 2010 she became pregnant with A. It was N's foster parents who had introduced the father to the mother. However the relationship between the latter was short-lived. Once the local authority discovered that the mother was pregnant, they began to ask themselves whether it would be likely that she could safely care for the baby. No firm conclusion was reached prior to the birth of A on 10 September 2010, which was by caesarean section and six weeks early. Following their discharge from hospital, the mother and A went initially to stay, with the local authority's approval, with a Ugandan friend of the mother.

[13] Soon, namely in October 2010, the local authority became concerned about the safety of A with the mother. On 8 October the mother's mental health worker reported to the social services department that the mother had told her that she had been hearing voices and, when at night A would not sleep, she had considered giving her Zopiclone, a sedative which had been prescribed for the mother. Eleven days later the mother told a social worker that she had had further thoughts of administering Zopiclone to A. On 16 November 2010 the index of local authority concern was substantially increased because the mother then told her mental health worker that three nights earlier she had administered to A two teaspoons of Guinness and one quarter of a 3.75mg

Zopiclone tablet in order, in both cases, to help A to sleep. According to the worker, the mother also told her that voices were telling her to harm A. Although it seems that at a later stage the mother denied having actually administered either the Guinness or the Zopiclone to A, she has never denied that she had told the worker that she had done so.

[14] The local authority reacted slowly, surely too slowly, to the disclosures by the mother on 16 November. It was only on 3 December 2010 that they obtained the emergency protection order which enabled them to remove A to the care of the father.

[15] At a hearing for directions before a judge other than His Honour Judge Harington on 21 December 2010 permission was granted to the mother by her solicitors to instruct Orchard House to carry out an assessment of the viability of a proposed residential assessment of A with her there. The viability assessment was duly made and the report by Orchard House in relation to it, namely by Dr Tonks who is a consultant clinical psychological and the deputy clinical director at Orchard House, was the foundation of the application made to His Honour Judge Harington at the hearing on 2 and 3 February. Dr Tonks surveyed the papers, including a report dated 1 December 2010 by Dr Thompson, a consultant psychiatrist who had recently begun to treat the mother in Bristol. Dr Tonks also interviewed the mother for one hour. In her report dated 18 January 2011 Dr Tonks wrote:

> '1.37 On the basis of the information provided, Orchard House recommends that a residential assessment of [the mother] and [A] is undertaken. Such an assessment will provide information about the

> functioning of [the mother], including any risks that she may pose through her parenting and care of [A], the parenting skills of [the mother], and the quality of the interactions between [the mother] and [A].
> …
> 2.6.4 It is my opinion that we will be able to provide an opinion regarding [the mother's] ability to manage the stresses of parenting with regards to her mental health and her ability to safely parent [A] as a result of the assessment.'

Dr Tonks, who gave oral evidence to the judge in support of her report, also suggested in it that the mother should move to Orchard House for one week prior to the arrival there of A and that, upon her admission, an initial psychiatric consultation and opinion should be conducted and obtained.

[16] Dr Thompson's report dated 1 December 2010 had been addressed to the mother's GP. For the court Dr Thompson produced another report dated about 2 February 2011, albeit in substantially similar terms. In both reports Dr Thompson offered the view that the mother suffered a borderline personality disorder and also had features consistent with post traumatic stress disorder. Both her reports contain the following important paragraph:

> 'The features of borderline personality include recurrent and impulsive acts of self-harm or harm to others. I think this diagnosis together with her past history predicts future acts of harm to herself and significant risks to her children which are likely to be impulsive in nature and difficult to predict or prevent. I feel these risks are unlikely to be modified greatly by medication if further assessment supports the diagnosis of borderline personality disorder. They may be modified by reducing psychological and social stressors for [the mother], this might include practical support with parenting and supportive work with her care coordinator here. To date [the mother] has been unable to engage with psychological therapy but this remains an option in the future.'

When writing her second report Dr Thompson had before her the viability assessment made by Dr Tonks. Dr Thompson commented:

> 'From my limited knowledge it would appear that a residential assessment at Orchard House might aid child and family social services in determining what the current risks are, how [the

mother] interacts with her daughter on a more longitudinal basis and whether with appropriate social supports and engagement in psychological therapy these risks are modified sufficiently.'

As one would expect, however, Dr Thompson declined further to enter the forensic arena by giving oral evidence: she considered that it might interfere with her therapeutic relationship with the mother.

[17] At the hearing before the judge the guardian gave oral evidence. Although the position statement filed on her behalf stated that her support for an assessment at Orchard House was only given ‘on balance' she indicated in her oral evidence that she strongly supported it.

[18] So on any view, although the forensic inquiry by us today is of a very different shape, the mother had, before the judge, a strongly arguable case for a direction. By the order dated 21 December the court had seen fit to endorse the exploration of an assessment at Orchard House. The viability assessment which followed strongly supported a full residential assessment. Dr Thompson added her voice in favour of it. So, importantly, did the guardian.

[19] What reasons did the judge therefore give for refusing to direct the assessment? They are clearly to be collected from the following passages in his judgment, as transcribed:

> ‘[32] … It does not seem to me that the issue in this case is going to be whether the mother can parent [A] well and effectively, but whether she is in good health. From what I have heard during this hearing, it seems to me that it is likely that any parenting assessment at Orchard House would confirm that, when the mother is well, she can parent [A] perhaps rather better than many parents can parent their children. …
> [33] If the assessment is positive, it seems to me that that does not necessarily assist the court to reach the right conclusion at the final hearing. The question is likely to be whether the mother's mental illness problems are such that there is a risk of relapses in the future, given unforeseen events, and how any risk to [A] can be managed and made acceptable. …
> [34] Whilst conscious of the need to try to avoid delay in a case such as this … I have to make a decision based on what will be the important issue in this case. … It seems to me that the Orchard House assessment would at the moment be premature and that what is lacking is an independent assessment, either by a psychiatrist or a psychologist, to see what, if any, therapy the mother needs to receive before she can effectively and safely parent [A] over long periods of time. …
> [36] … What seems to me to be the important question is what psychological therapy she needs to be able to look after her child, with any risk of a relapse being reduced to an extent where it is manageable, and also a report or assessment which provides some insight to the court as to whether the mother herself can or will be able to tell when she is becoming unwell and unable to care for [A]. Those matters have not been properly investigated and it seems to me that a report from the treating psychiatrist does not fill the gap. So to that extent I disagree with what the guardian said.'

[20] Thus it was that the judge dismissed the application under the subsection and permitted the parties jointly to instruct a consultant psychiatrist. In the event, so counsel tell us, they instructed Dr Sandford and his report is due to be filed next week, namely on 8 April. On 15 May the judge is due to conduct what is presently fixed only as a short hearing, no doubt in particular to consider Dr Sandford's report.

[21] On behalf of the mother Ms Wills-Goldingham found 11 points to include in her grounds of appeal to this court. In my view wisely she referred only to some of them in her skeleton argument and only to one or two of them in the course of her short but effective oral submissions this morning. With

respect, she was quite wrong to contend in the grounds that the judge had in effect made a final order referable to A. He could hardly have made clearer that he was seeking to identify only the next evidence-gathering step, namely a psychiatric report, in the light of which he would hear further argument, including in particular about the residential assessment at Orchard House. In the grounds counsel also complained that the judge rejected the opinion of Dr Tonks and, in particular, of the guardian. He did indeed do so and, in relation to the guardian, he rightly reminded himself of the need always to explain departure from the recommendation of a child's professional representative. Counsel also wrote that the judge had failed to grasp that the evidence before the court was that the current mental state of the mother was stable. On the contrary, with respect to counsel, the reasoning of the judge was that, in that her state was currently stable, a report by Orchard House following residential assessment might well be positive and, in a sense, be falsely positive if the mother's mental condition were to be such that she might in the future be subject to such serious and unmanageable relapses as to jeopardise the safety of A.

[22] In another of the grounds of appeal counsel complains that the local authority have shut their minds to any proper assessment of the mother with A. In the event Mr Miller, on behalf of the local authority, is keen to stress to us that, if the forthcoming psychiatric report offers cogent grounds for sufficient optimism in relation to the mother's health in the medium and long term, they will, notwithstanding the expense, agree to the proposed assessment at Orchard House. Irrespective, however, of the local authority's stance, it is, as we pointed out to Ms Wills-Goldingham this morning, the court, not the local authority, which will determine whether any residential assessment takes place. To that observation Ms Wills-Goldingham responded with what appears today to be the major plank of her appeal, namely that A's future requires urgently to be determined; that the mother and A have been separated now for almost four months; that, notwithstanding the contact and indeed the breastfeeding, it is urgent that any restoration of A to the care of the mother be effected soon; and that, even if a residential assessment at Orchard House were to be directed to take place in May, June and July 2011, such would be a poor substitute for the assessment which, so she contends, should have taken place in February, March and April. It was, so counsel argues, the damage done by delay to which the judge paid such grossly insufficient attention as to have vitiated his discretionary determination.

[23] In one of the passages of the judgment which I have quoted the judge addressed the need to try to avoid delay. He considered, however, that it was premature to assess the quality of the mother's parenting when she was well – being an assessment which one might already expect to be positive – without professional comfort that future relapses in the mother's mental health were likely to be of a size, of a frequency and of a nature which could be tolerated in terms of A's safety. I see nothing wrong with that approach at all. Indeed I happen to agree with it. It is noteworthy that Dr Tonks considered that the first step to be taken upon the mother's arrival at Orchard House would be to obtain a psychiatric opinion there. It is equally noteworthy that Dr Thompson had expressly anticipated a further assessment which might or might not support her diagnosis of borderline personality disorder. The judge rightly respected Dr Thompson's claim to be spared from entry into the forensic

arena in the light of her therapeutic relationship, however recent, with the mother. The judge wanted, and rightly wanted, a psychiatric opinion which could be subjected to the rigorous testing inherent in professional cross-examination.

[24] Highly arguable though the mother's case was before the judge, her case in our court today, when it is our duty to survey whether the judge has exceeded the discretion invested in him by the subsection, seems to me to be exceedingly weak. Subject to one minor point, I would dismiss the appeal.

[25] The minor point reflects the subsidiary complaint of Ms WillsGoldingham to us that the judge saw fit to dismiss her application under the subsection rather than to adjourn it. To our interjection that the text of the judge's judgment clearly entitles the mother to present her case for

a direction again in the light of the psychiatric report, Ms Wills-Goldingham responds that it might well be a long battle to secure public funding to enable the mother to make a second application for a direction under the subsection. She tells us that she raised with the judge whether he was adjourning or dismissing the application and that he made clear that he was dismissing it. Whether the potential difficulties about public funding were placed before him I do not know. It is amply plain, however, that the mother should have public funding in order swiftly to re-present her case for a direction in the light of the psychiatrist's report. In my view we owe it to A as well as to the mother to take a reasonable step towards enabling her re-presentation to occur seamlessly. My proposal that we should dismiss the appeal is therefore subject to a minor rider, namely that in para 1 of the judge's order dated 3 February 2011 we should substitute the words ‘adjourned generally' for the word ‘dismissed'.

LLOYD LJ:

[26] I agree.

CARNWATH LJ:

[27] I also agree.

Appeal dismissed subject to rider identified above.

Solicitors:*Foster and Partners* for the appellant

A local authority solicitor

PHILIPPA JOHNSON

Law Reporter