

Neutral Citation Number: [2011] EWCA Civ 1441
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM WARRINGTON COUNTY COURT
HIS HONOUR JUDGE CASE

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Monday 17th October 2011

Before:

LORD JUSTICE WARD
and
LORD JUSTICE EHERTON

In the matter of C-L (Children)

(DAR Transcript of
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Mr Steven Cobb QC & Mr Byrton James, Miss Sarah Leigh & Mrs Leisi Louise Dowling
(instructed by Forshaws Davies Ridgway LLP and Widdows Mason Solicitors) appeared on
behalf of the **Appellant**.

Mrs Woodward (instructed by Legal Department, Widdows Mason Solicitors, Forshaws
Davies Ridgway Llp, Bell Lamb & Joynson Solicitors) appeared on behalf of the **Respondent**.

Judgment

Lord Justice Ward:

1. This is an application for permission to appeal the orders made by HHJ Case on 26 August of this year at an issues review appointment she had for an hour or two. She refused permission to a grandmother for leave to apply for a residence order and she refused the applications made by the parents of one of the children that they be jointly assessed and she refuse the grandmother's application for assessment by the same independent social worker.
2. The case concerns two children. C, who will be five in December, is the child of the mother and father who are the respondents to the local authority's application for care orders. Mother gave birth to a second child, L, who was born on [a day in] September 2009, so she is just two years' old.
3. I must set out a bit of the history. The parents met when both were in a homeless hostel. They were both young; they were both going through significant difficulties in their personal lives; they were -- I think they would be the first to agree -- a bit out of control. Mother was pregnant at the age of 19, and not long after C was born they separated. I think, though I am not entirely sure of this fact, that separation was enforced, because father was sentenced to the first of several terms of imprisonment. He was out of prison but went back on a serious charge of robbery, for which he was sentenced to a considerable time and was released on 8 February 2011.
4. Since their separation mother has lived a fairly chaotic lifestyle; she is a fragile personality. She is dependent, it would appear from a psychological report, on her friends to bolster her low self-esteem; she needs them to make herself feel good; that is what friends are for. Unfortunately her choice of friends has not been brilliant, and they have led her into more and more trouble. So she presents as a young woman, now 25, with a present history of drug-taking going back over many years. Whether she has been able to kick the habit is a matter that the court will need to investigate.
5. During this period of separation she established a short relationship with the father of L but he has disappeared out of the scene and pays no part in these proceedings at all. When the father came out of prison he resumed a relationship with an old flame of his; they had a young child; but, although at one stage during the recent history he and his partner presented as a couple, that relationship broke down and the fact is -- whether a good fact or a bad fact we know not -- that mother and father have, after some four years of separation, resumed life together and are still together and come before the court as the couple best suited to care for these two children.
6. The paternal grandmother, Mrs D, appears today to seek permission to apply for a residence order, although, in the light of the resumption of cohabitation between her son and this young mother, she supports their efforts to have the children returned to them and she is there as the back-stop.
7. Procedurally the case has had an unfortunate history. When mother's association with a thoroughly undesirable man, PH, broke down in February

she agreed to the children being placed in the voluntary accommodation with the local authority. For a short while the children went to their paternal grandmother but very soon were placed in foster care, and they have been with foster parents now since about February or March of 2010.

8. The care proceedings were not actually brought until August 2010, some six months later, and the magistrates had the conduct of the case for many months. For reasons that may be open to criticism they did not transfer the matter to the county court until June 2011, and it has therefore been in the hands of the county court judge for a comparatively short space of time. Why there has been that delay I do not know; it is a matter of deep regret that it has taken so long, but the court must deal with the matter now as it comes before the court.
9. The case was apparently assigned to HHJ Case sitting in the Warrington County Court and she had, on 26 August, to deal with resolving the issues that the court would need to grapple with; that was why a short time was allowed for that appointment. She did not have all the papers and certainly had not read all the papers, as she frankly acknowledged and correctly acknowledged, at the very beginning of the hearing before her.
10. Unfortunately criticisms can be levelled at the way she conducted that hearing and the local authority no longer seek to resist the appeal which is brought on the basis that the judge so made her views plain that the impression has been given that the hearing before her was unfairly conducted. It began with the grandmother making her application for residence, and the judge's immediate response on hearing that was "it is rather late in the day". Again, "this is too late for anybody to come forward at this late stage"; "there is no point in doing it at this late stage"; and those remarks were made before grandmother had risen to her feet, and so with the words "too little, too late" ringing in her ears grandmother had the difficult task of making her application, and the fact that the judge said to her as she got to her feet "tell me what you want to say by all means" could not, I regret to say, overcome the impression made plain by the judge before grandmother had said more than six lines in the transcript in which she was asking for more assessment than the original viability report, the judge's comment, "no, really, that is the end of it".
11. I am not surprised therefore that the grandmother feels aggrieved that she did not get a fair hearing; neither did the parents. In some ways the judge expressed herself even more inappropriately, if I may respectfully use that word, in her dealings with them. On page 3 of the transcript in which the judge is complaining, and rightly complaining, of the case dribbling on for ten months, the judge said this:

"But that said, we've now reached the point where we've got all possible reports and the conclusion, I think, in the light of everything is that these children need now to have placement orders."

12. When I turn from page 3 to page 10 I read the judge saying:

"Clearly the conclusion of the experts or the professionals is that these children need to be subject to placement orders. That is the conclusion of the Guardian and the local authority, and having read those reports and all the information it's based on, I happen to say that I am inclined to agree. It would take something pretty amazing to dissuade me from that being the answer."

13. Now we all know that judges are entitled to give some view of their preliminary view on the matter, and I daresay we all do so, but at this very interim stage, when the judge had not read the papers fully and had not heard the parties, with great respect to her, she expressed herself wrongly; it is not simply a case of not expressing herself felicitously (the code word we all use); the judge overstepped the mark, and I agree therefore that this appeal has to be allowed accordingly.
14. I add only this. I am very sympathetic to the judge in this sense. The case having been delayed, the case did need to be taken by the scruff of the neck. The judge did need to engage in some fairly robust case management, but robust case management, whilst a virtue, always has to be subordinate to the greater interests of justice and the sense of a fairness in the hearing before the court. Thus we have to allow the appeal. No one seriously invites us to remit the matter to a further case conference where these issues can be decided; we have to grapple with them ourselves.
15. Both parents have had the advantage of separate assessments. They were separate because their cases were being separately advanced. Mother has been the subject of a psychological report. I have looked at it carefully and it is a report which has good in it from the mother's point of view because it points in many areas to the improvements this young woman has made; it points to aspects of her character upon which one could reasonably build. She is an intelligent young woman who has wasted her life but the potential shines through. She has wasted it through her addiction to drugs; she is not adverse to a drink from time to time, and she cannot help herself but enter into relationships which are always totally unsatisfactory, and that is the biggest concern for her. But she did well in a parenting programme and she has responded well to counselling. She has not been able to get the therapeutic help that would certainly be of great value to her because no one is prepared to pay for it, which is a terrible shame. So there are signs of improvement in her lifestyle. Of particular importance is the change in contact. Her early contact with C was awful: she swore at the little boy; she was totally failing to understand his needs and his feelings, but she has made a dramatic improvement in that respect. So one can form a preliminary view that she is not without hope.
16. Father, also 25 years' old, comes to the court with an appalling criminal record. Some frightful criminal activity: robbery, but racially aggravated assaults. He does not present as a thoroughly likeable young man who one

would take home to meet dear Aunt Agatha, but he has been out of prison since February -- maybe not a long time, but, given the history of his offending, it is an appreciable time and he has kept out of trouble. He too was addicted to drugs. There is no evidence of his having taken drugs since coming out of prison and there are many indications in the independent social working report on him that he may be one of those rare young men who come out of prison a better man than he went into prison, and if so he is to be commended. He does appear to have learnt some lessons and to have grown up significantly over the last couple of years, enjoying Her Majesty's hospitality, and one is pleased for him for that.

17. Quite why he ended his relationship with the mother of his young child is not clear to me. Quite why he and the mother of C, the parties before us, have resumed their relationship is likewise not clear to me; but they both put the case to the court that they have changed, that they have recognised the error of their ways and that they are determined to correct them and they ask therefore for some chance to demonstrate that fact. They seek to demonstrate it by virtue of a further report from the independent social worker. The local authority submit that that report can never establish satisfactorily that change is significant enough or durable enough to stand the test of time; only time will tell whether their current assertions will be carried forward to the benefit of the lives of their two young children, who have already suffered grievous delay in the court process and who, if they are to be placed for adoption, should be placed for adoption sooner rather than later.
18. We have to judge the parents' request against the timetabling for this litigation. When it was before HHJ Case it was thought that the case could be heard in December, that is to say four months after the hearing before her: four months which would have given the independent social worker ample time to prepare his report; but the judge robustly indicated that she could hear the case in a gap in her list in September; that she would deal with it in two days, not four; and that time therefore did not permit these further investigations. Before us we are told that if no reports are to be prepared the case could be heard in November. The earliest date the court could find a date for the matter would be on 11 January before another circuit judge, but the local authority object to that course of action because they feel duty-bound to submit any report from the independent social worker to their adoption panel so that they may review their recommendation for a placement for adoption in the light of that report. If it is favourable they may even change their mind and therefore swing behind the parents, but in order that they have time to consider the report the earliest date on which this matter can get back to court would be in February.
19. The question therefore, or one of the questions for us, bearing in mind that delay is inimicable and that Section 1.5 of the Act enjoins us to have regard to delay, does that further delay so imperil the welfare of the children that the chance for this report should be snuffed out? A judge, it seems a millennium ago sitting as I recall in Birmingham District Registry, made reference to planned and purposeful delay. That judge prefers to remain anonymous for the time being, but planned and purposeful delay has gone into the mantra. Is this planned and purposeful? Well, in my judgment, it is. I think that this

couple have shown sufficient improvement in recent times not to snuff out the chance of showing the court that their changes are durable. The local authority do not satisfy me that there is no benefit to this further review; it can be accommodated within an acceptable timescale; and for my part I would give leave for the independent social worker to engage in a further assessment of them as a couple. But it has to be on the strict understanding that he fulfils his undertaking to the solicitors that he can prepare a report by 16 December at the latest but by the 9 December, as it was put to me, if he was really pressed. Well, the social worker must tell him that he is really pressed because the Court of Appeal are telling him to get a move on and to make every possible effort to get this report before the parties as soon as possible.

20. What, then, for grandmother's appeal? She, as I have indicated, seeks leave to apply and indeed to apply for a residence order. The local authority do not resist that application; they do resist her application for assessment by the same independent social worker. Grandmother's life has changed in the past week or so. Everybody's life in this case is in a state of flux; but grandmother has separated from her husband of long standing. It is not the first separation; there were hints of divorce back, I think, in 2006; but they had another row; the police were called again, and "enough is enough says grandmother, we are now living separate and apart. I ask the court to judge me on that basis". Living apart from her husband has one serious consequence. He is the breadwinner in the family, and no one is going to pay for this independent social worker's report except those taking part in it. The Legal Services Commission will sponsor the report of the parents, but grandmother will have, one way or another, to pay for it herself, if she can. In her case I have very much more doubt that this report will really produce anything of significant value. I say that because she is setting herself up mainly as the long stop. Secondly, she herself put to us in her submissions "I do not really see why I need to be assessed, judge me as I am for what I am, warts and all", and there is force in that point. Judges are experienced enough to form a judgment of a party whom they will see over four days. The reactions, when not in the witness box, frequently being of greater significance than when giving evidence. Grandmother will be a party and will have an opportunity to respond to cross-examination and to create an impression on the judge.
21. So I am extremely hesitant as to whether or not to accede to this request. Given that there has been a sense of unfairness thus far in the proceedings, I am swayed, but only just swayed, to say, in fairness to these children more than to the parties themselves, that this grandmother should not be excluded from putting her best case forward, and with a degree of reluctance I will give leave for her to be assessed also, but it has to be on the very clear condition which she has to understand and which must be conveyed to the independent social worker and reinforced please by those who are here -- it may be that the guardian ad litem who is not present in court for very good reasons -- should help monitor the situation because she comes with a sense of independence. What I want made clear to the independent social worker is that his report is not to be delayed by virtue of any difficulty in furnishing a report on the grandmother, and if the grandmother is not able to make herself available and, as importantly, to write the big fat cheque that makes this possible, then she

will have to abandon that application. On no account is this case to be held up because of difficulties in having grandmother assessed. If she can join in, she has my leave to do so; if she cannot, then this is not an order that she must be assessed, it is an order that she has leave and permission to be assessed; and if it cannot be made to work then the interests of the children demand that she be cast to the wayside and the case proceeds with her giving the evidence she confidently says she can give to impress the judge that she is a good grandmother.

22. So the good granny has my permission subject to those terms being made plain to Mr P.

23. So the appeal is allowed; Mrs D is given leave to apply for a residence order; I would direct that her application for permission stand as an application for a residence order to make that plain, and the parents have permission to have a further assessment made by the independent social worker and so does grandmother, provided that matters are expeditiously conducted.

Lord Justice Etherton:

24. I agree.

Order: Application granted; appeal allowed