RE B-A (CHILDREN: CARE PROCEEDINGS: JOINDER OF GRANDMOTHER) [2011] EWCA Civ 1643

Court of Appeal

Thorpe and Kitchin LJJ and Mann J

1 December 2011

Care proceedings – Unfavourable viability assessment of grandmother – Grandmother not served with a copy and out of the country at the time – Whether she should have been granted party status in order to challenge the assessment

The local authority sought care orders in respect of three Ghanaian children. The care plan was for the two older children to be placed outside the family and for the youngest child, who had a different father, to be cared for by his paternal grandmother in Ghana. The mother objected to the care plan but in the event that she was unable to care for the children she wished them to be placed with the maternal grandmother who had cared for the two older children in the past when the mother was unable to. However, the maternal grandmother had had little contact with her grandchildren in the 18 months before the hearing due to a disagreement with the mother. A viability assessment of the maternal grandmother was undertaken and discounted her as a potential carer for the two children. A copy of the assessment was never received by the maternal grandmother and at around the time it should have been served the maternal grandmother's own mother died in Ghana and she was, therefore, absent from the jurisdiction for several weeks. On her return, only a week before the proceedings were due to be heard, the grandmother sought permission to be joined as a party in order to challenge the viability assessment. The judge refused the application for party status. The grandmother appealed on the basis that the case management decision taken by the judge had denied her a fair process.

Held – allowing the appeal –

(1) The grandmother had undoubtedly been denied her entitlement to a fair trial. The judge had been faced with a difficult situation in a case which had already faced lengthy adjournments. However, the issue that fell to be decided was not only the grandmother's suitability as a potential carer but also the level of contact following placement.

(2) The grandmother's case for generous contact had a solid foundation considering the large part she had played in the children's early life and she could not be denied fuller participation in the proceedings (see paras [22]–[28]).

Stephen Cobb QC and *Neil Bullock* for the appellant
Elpha Lecointe for the children's guardian
Marianna Hildyard QC and *Sarah Haworth* for the respondent
Richard Alomo for the mother
Atim Oji for the father of JS

THORPE LJ:

[1] This is an appeal from the judgment of HHJ Wright sitting in the Principal Registry at First Avenue House on 27 September 2011. The appeal is brought with the permission of McFarlane LJ. The proceedings before the judge were public law proceedings concerning a Ghanaian family. She was

concerned to settle the future of three children. The two elder children, EL and JA, were the children of CB. The youngest child, JS, only 15 months of age, was the child of NA.

[2] The local authority at this final hearing was seeking care orders in respect of all three children. They were proposing that the two older children, the children of CB, should find a future outside the family. For JS they were proposing that he should be cared for by his paternal grandmother in Ghana.

[3] These proposals were supported by the children's guardian. The represented family members were the mother and both fathers. The mother's proposal was that she should care for all three but, failing that, that her mother should care for all three. CB supported her case in relation to his two children. NA supported the local authority's proposals for JS.

[4] This appeal focuses on the role played by the maternal grandmother, who I will, for convenience, refer to as EA. She had cared for the two elder children during times of their mother's inadequacies: but bad blood had broken out between mother and daughter and for a period of some 18 months prior to trial EA had had very little contact with the two elder children and had only once seen JS. She was certainly in the local authority's reckoning in April because there was a meeting between the social worker and both the mother and EA, which was, I think, the product of the fact that, when asked to name family members who might have a role, the mother in March had pointed to EA, although that nomination was retracted when the bad blood spilt.

[5] So the first litigation involvement of EA came with a directions order of 27 May which required the local authority to carry out a viability assessment of EA as a carer. The assessment was to be filed and served by 4 pm on 30 June. We know that, following the order, the social worker, Salamatu Mihan met EA on two occasions, 2 June and 30 June. It seems questionable when the chronology reveals that on the very day for filing and service the social worker had her second meeting, wrote up her report and served it. This questionable discharge of the obligation proposed by the order of 27 May may have been due to pressure of work but also may have been due to the fact that within the month of June EA's own mother died in Ghana and she was involved in the mourning process.

[6] The gist of the assessment was that EA should be discounted as a carer. Obviously it was very important that she should have the opportunity to consider that vital evidence and to react to it. The local authority is clear that the viability assessment was sent to her by first class post on 30 June. She is clear that she never received it. She also asserts that Mrs Mahama had reassured her that she would receive a visit to discuss the content of the viability assessment when it was completed. It is common ground that no such visit was paid.

[7] EA was absent from the jurisdiction throughout the month of August when she was in Ghana dealing with the consequences of her mother's death. She, on her return at the beginning of September, became aware of the content of the viability assessment and the imminence of the proceedings which were fixed to commence on 19 September. So she instructed Goodman Ray and took the first available appointment on 13 September. On the following day Goodman Ray wrote to the court a clear letter giving notice of their instruction. They understood that there was an IRH hearing that very day and

they gave notice of their client's intention to seek orders to establish her as the primary carer for all three children. They also gave notice that they had seen the negative viability assessment and that it was their intention to seek an order for an independent assessment.

[8] On 16 September public funding was obtained and that enabled Goodman Ray to instruct Mr Bullock, who appeared at the outset of the hearing on 19 September and made an application for party status. Mr Bullock was in considerable difficulty on 19 September, given that the exploration of EA's potential case was at an embryonic stage. She is illiterate. She does not speak good English. Her first and primary language is a Ghanaian language. So the first opportunity for a thorough investigation in conference could not be obtained until 21 September. Now on 19 September, how did the judge receive Mr Bullock's application? It had been made plain by the order drawn on 14 September that any application advanced on behalf of EA would not delay the fixture and to that management the judge adhered on 19 September. So it was directed that the mother's application would be heard on 23 September and that she should file a statement of her position in the interim.

[9] The position statement that she did file is carefully drafted. It extends to some 10 pages and it clearly indicates the nature of her proposals, not only in relation to D and E as primary carer but also in relation to contact should she fail in that. She also sets out clearly her case in relation to J.

[10] In the interim between 19 and 23 September, as the trial continued, all the oral evidence was presented with the exception of two witnesses and within that oral evidence was the important contribution from the social worker Mrs Mahama and also from Dr Roger Kennedy, the child and adolescent psychiatrist.

[11] The viability assessment of 30 June had focused on the two older children, because in the month of May Mrs Mahama had visited Ghana, having been satisfied with the proposals advanced by the paternal grandmother for JS and, on her report, the local authority had concluded that that was the right move for JS to follow. Accordingly it was hardly an open question for Mrs Mahama when she came to visit in June and to write as she did in June.

[12] However, we can see from a note of her evidence, what is really more a summary than a note, that she did give her views on EA as a potential carer for JS and the judge directed that the summary should be made available to EA's team.

[13] A very brief note of Dr Kennedy's evidence was also made available on the judge's direction. Dr Kennedy's evidence was adverse to EA's intentions insofar as he stressed the importance of swift decision and the avoidance of any delay, particularly of course in relation to the older children.

[14] His evidence was given on the morning of 23 September for his convenience and so Mr Bullock's application for party status was put over to the afternoon. When advanced, the judge decided that a second statement from EA was requisite and adjourned the application again to Monday 26.

[15] On that day the submissions were advanced by Mr Bullock, in vain, for on the following morning, September 27, in a succinct judgment, HHJ Wright refused the application for party status and with it, of course, the opportunity for EA to advance any positive case.

[16] The majority of her judgment focuses on the belated attempt of EA to enter the arena; understandably, because that was the crucial question. If EA failed then there was really not a lot of difficulty in determining the application in favour of the local authority's proposals.

[17] The application for permission to appeal having been refused by the judge, an appellant's notice was issued on 24 October, public funding having been obtained, and it was on the following day that McFarlane LJ granted permission.

[18] The appeal has been advanced by Mr Stephen Cobb QC leading Mr Bullock. He has been supported in that by Mr Alomo for the mother and opposed by Mrs Hildyard QC leading Miss Haworth, Ms LeCointe for the guardian and at a relatively late stage Mrs Oji for Mr NA.

[19] Mr Cobb's complaint is, of course, that the ultimate case management adopted by the judge denied EA a fair process. Mr Cobb understandably highlights the fact that the judge acted on the oral evidence of Mrs Mahama, untested by any cross-examination from EA, containing material adverse to EA in relation to J, and ultimately resulting in findings by the judge founded on the evidence of Mrs Mahama.

[20] To like effect Mr Cobb says that EA has been denied her proper opportunity to cross-examine Dr Kennedy on the issue of delay.

[21] The contrary case is fluently argued by Mrs Hildyard and equally by Ms LeCointe for the guardian. I am in no doubt at all that the judge was faced with an extremely difficult situation.

[22] I am in no doubt at all that she was absolutely right to endeavour to achieve a complete and fair process within the long-standing fixture. This was a case that had been listed for May and adjourned, then listed for August and adjourned and, had there been a further adjournment without any endeavour to try out the issues in September, it would have been to the obvious prejudice of the children. I am in no doubt at all that the judge was faced with a very difficult task in trying to maintain the momentum of trial and at the same time fairly to conclude EA's application for party status. It is self evident that she took a lot of trouble over the determination of the application. She set it aside from the opening to first the Friday and then the Monday.

[23] If the only issue had been the weighing of EA's potential as a carer for EL and JL, I would not be critical of the judge's ultimate conclusion on the application.

[24] Where it seems to me it is impossible to support the process as fair is in relation to EA's case that she should have generous contact to EL and JA if based outside the family. That case had pretty solid foundation considering the large part she had played in their early life. The judge finessed her on the grounds that she had not seen the children for 18 months and hardly knew JS, but that was hardly good enough and it is noticeable that the local authority had not given any consideration, or any profound consideration, to EA as a contact grandmother in their presentation at trial.

[25] In the result the judge, in her final paragraph, required them to give consideration to contact, but when they returned, the order of 27 September 2011 flowing from an amendment of their care plan left EA with entirely superficial contact, the sort of contact at a minimum to maintain knowledge of a relevant relative, rather than contact that maintains or re-establishes a relationship.

[26] So in relation to that, it seems to me that EA could not be denied fuller participation in the proceedings.

[27] Perhaps even more significant is that she was denied the opportunity to present a potentially viable case in relation to J. The local authority's proposal had JS returned to Ghana to a Ghanaian future with little opportunity for contact with his half brother and half sister. By contrast EA's proposal had the advantage of maintaining JS in this jurisdiction and additionally enhancing the opportunity for inter-sibling contact.

[28] Although the judge has done her best to be fair to all, it was perhaps an impossible task. The option for which she elected has, in my judgment, undoubtedly denied EA her entitlement to a fair trial and on that basis I would allow the appeal and remit.

KITCHIN LJ:

[29] I agree.

MANN J:

[30] I agree and add only this out of respect, if not sympathy, for the position in which the judge found herself. It seems to me that when the judge was faced with the decision she was faced with on the opening day on the Monday she took the only course which was sensibly open to her at that point. Mr Bullock was not even ready to formulate his application for joinder and would not be ready to have had any meaningful participation for another couple of days. Since there was no real question of the trial being adjourned at that point and there was no application for an adjournment, the judge was, in my view, entirely justified in proceeding as she did at that stage. Where she went wrong was at the later stage when on the Friday, in circumstances in which, as Thorpe LJ has indicated, the matter came back, she did not devise a method for letting the grandmother back into the trial. That is probably procedurally where matters went wrong. I adopt, with respect, everything that Thorpe LJ has said about the difficult position in which the judge ultimately found herself in this difficult case.

Appeal allowed.

Solicitors: *Goodman Ray* for the appellant
Dunning for the children's guardian
A local authority solicitor
Charles Allotey and Co for the mother
Montas for the father of JS

SAMANTHA BANGHAM
Law Reporter