Case No: B4/2013/2363/CCFMF

Neutral Citation Number: [2014] EWCA Civ 135
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM WILLESDEN COUNTY COURT
HER HONOUR JUDGE KARP
BT12C0001

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/02/2014

Before :

LADY JUSTICE MACUR DBE
LADY JUSTICE SHARP DBE
and
SIR ROBIN JACOB

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Re S (Children)

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Mr Andrew Bainham (instructed by **Ratcliffe Duce & Gammer Llp**) for the **Appellant**

Ms Hannah M Markham (instructed by **L.B. of Barnet**) for the **1st Respondent**
The Respondent Mother appeared in person
The Guardian did not participate in the appeal his attendance having been excused

Hearing dates : **31 January 2014**

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Judgment

Lady Justice Macur DBE :

1. The father appeals against a placement order made in respect of his daughter A-M by HHJ Karp on 31 July 2013.

2. The central issue in this appeal is whether the judgment is based upon proper evidence and reasoned sufficiently to be compliant with the admonitions of the President of the Family Division in Re B-S (Children) [2013] EWCA Civ 1146. That is, in accordance with In the Matter of W (A Child), In the Matter of H (Children) [2013] EWCA Civ 1177 @ paragraph 16 , focusing "on substance rather than form" and whether "the judge's approach as it appears from the judgment engage with the essence."

3. For the reasons given below, the appeal is allowed, an interim care order is substituted in place of the full care order made and the case is remitted

to HHJ Karp for further case management directions and, ultimately re-hearing.

4. Despite the conspicuously skilful advocacy of Ms Markham, Counsel for the Respondent local authority, I am of the clear view that the judge was wrong to make the order without further assessment of the situation of the father and child and in any event did not adequately articulate her reasons to proceed to make a placement order in the circumstances of this case.

5. The facts must be referred to in a limited compass relating to the court proceedings to provide the context of the grounds of appeal argued by Mr Bainham on behalf of the father. It is, however, unnecessary to descend into detail of the circumstances which first triggered the intervention of, and then led to proceedings initiated by, the local authority.

6. A-M is now 5, nearly 6, one of the mother's four children ranging in age from 1 to 12 years old. The eldest and youngest children have the same biological father, DdS. He has had little practical input into his children's lives and is not concerned with the outcome of this appeal.

7. The Appellant is the biological father of D, now aged 10 and A-M. He has parental responsibility in relation to L, now aged 12, by virtue of his marriage to her mother at the time of her birth. The mother is from Portugal. The father is from Nepal. They were married in August 2002 and separated in late 2007, prior to A-M's birth. Post separation, his contact with the children was limited to visiting contact of short duration until the beginning of 2012 when proceedings were issued by the local authority.

8. The father was implicated in the first social services referral in 2005 when a neighbour reported that the children L and D, then aged 2 and 1 had been left alone in the house without appropriate supervision. The father conceded the obvious mischief in doing so in the hearing held before HHJ Karp in November 2012. No follow up action was taken at that time.

9. Regrettably, from May 2009, the children's situation was significantly jeopardised in the mother's care. In her judgment dated 15 November 2012, HHJ Karp found " a serious lack of supervision and neglect of the children; that they have suffered physical injuries from each other as a consequence of not being properly supervised; that the mother is unable to meet their emotional, developmental and educational needs; that the children are at risk of sexual abuse due to the mother's lack of vigilance and her inability to safeguard them from men allowed into the home, about whom she knows little; and that L and D have both exhibited inappropriate sexual behaviour". There is no issue but that the mother was reasonably and realistically excluded by the judge as a future carer for any of the four children. She has attended before this court in support of the father's appeal and ultimate wish to have the care of A-M in

Norway. She has informed the court that she is pregnant with her fifth child.

10. Obviously with the benefit of hindsight, I question the lack of an earlier application for statutory intervention by the local authority and the willingness of the local authority initially to maintain the two girls with their mother under interim supervision orders. Concerns were escalating from May 2009. Referrals from the children's school were frequent and of worrying substance. The adverse home situation was unabated despite social work advice and assistance.

11. There is no doubt that at the time of the local authority initiating proceedings pursuant to section 31 of the Children Act 1989 and his removal from his mother's care, first to the care of his father, the Appellant, and his wife and subsequently to foster care, D was an extremely damaged child with obvious and long standing behavioural problems. By the time of L and A-M's subsequent removal six months later they had been exposed to further physical and emotional harm. The mother was placed in a "mother and baby" foster home with the youngest child.

12. D moved to live with the Appellant and his wife in February 2012 and, at first, settled comparatively well. The father would have been aware of the local authority's concerns at this stage. Nevertheless, and inappropriately he returned D to the mother's care in March 2012 when he travelled to Norway to work. He did not inform the local authority. This was recorded by HHJ Karp but without overt criticism in her judgment of November 2012. The reality is that D was consequently exposed to further harm – however briefly - and this is to the obvious demerit of the Appellant. In May 2012, the Appellant asked for D's removal due to his "challenging behaviour". He was removed to foster care. The two girls joined him there in July, 2012 and they remained placed as a sibling group until July 2013. In July 2013 the elder two children were removed from the foster placement and placed separately when it became apparent that they had been engaged in inappropriate sexual behaviour together.

13. The Appellant had conceded the so called "threshold" statement prepared by the local authority in respect of the November hearing. That is, he accepted that the children had suffered, or were likely to suffer, significant harm as a result of the parenting afforded to them by the mother. He had been assessed, together with his second wife, as carers for the three elder children. Despite his action in returning D to his mother's care, the first assessment had been positive. However, HHJ Karp noted that a further assessment was proposed since "[t]he local authority has highlighted serious concerns in the current positive assessment. Furthermore a detailed exploration ….following on from the notification on 2nd November 2012 by a hospital midwife to the local authority that [the Appellant's wife] is 16 weeks pregnant and reported to the midwife that she feels L, D and A-M have special needs and

behavioural problems and would be a danger to her baby when it is born. She apparently also reported feeling that the …mother is a risk to her and that there was police involvement before because she was attacked by her at her house".

14. HHJ Karp made a full care order in the case of Le, the youngest child, with a view to adoption. She directed a further assessment of the Appellant and his wife and an updated assessment of the children by Dr Yates, a consultant child and adolescent psychiatrist. The local authority's care plans were for long term fostering placements for L and D, and adoption for A-M. HHJ Karp re-listed the case in April 2013.

15. In April 2013 the Appellant, the mother and DdS supported, and the Appellant father did not oppose, children remaining as a sibling group with their then current foster carers Mr and Mrs M. If this was not deemed appropriate the Appellant sought to care for the three children together, and if not all three, then for A-M alone. The local authority did not support the continuing placement with the Ms and maintained the position in its previous care plans. The Children's Guardian supported the Ms continuing to care for the three children. He did not countenance the Appellant's proposals for care. A further assessment was ordered of the Ms by an independent social worker and psychotherapist, Miss Edwards.

16. The further expert report advised against continuing placement with the Ms. The Children's Guardian disagreed and maintained his opposition to the local authority's plans in forthright fashion. Noting the conclusion of Miss Edwards, he reported "[the foster mother] has shown outstanding commitment to these children, a commitment I have no hesitation in saying from my 25 years as a children's guardian I have rarely seen. In my view, other placements would have broken down by now and I remain concerned that any future placement away from the Ms would be highly vulnerable to break down." He suggested that the Ms may wish to seek a Special Guardianship Order in relation to the children.

17. His support was undermined by the events referred to in paragraph 11 above. By the time of the final hearing listed to commence on July 29, he supported the local authority's plans for all three children to be placed separately, the elder two in long term foster homes, A-M with a view to adoption. The Appellant supported long term fostering of L and D, but sought the return of A-M to his care.

18. The father by this time had separated from his wife and was working in Norway. HHJ Karp noted that the Appellant and his wife had apparently become increasingly estranged from the time that she had confided in the midwife her concerns relating to the three children. The preliminary assessment that had been conducted between August and October 2012 "demonstrated many positives" although identifying some concerns. The second assessment, conducted between October and December 2012 was

negative. The author concluded that "[t]here is no evidence that he has recognised or shown insight into the importance of carers being resilient, consistent and able to implement firm boundaries and have a range of parenting strategies".

19. The judge's evaluation of the assessments of the father, and her own evaluation of his case, is contained in paragraphs 29 - 40 of the judgment. She acknowledges his genuine commitment to his children, and the good quality contact which had been maintained despite his employment abroad. She noted his care proposals and accepted that "schools, social services and mental health provision in Norway are every bit as good as provision in the United Kingdom". However she "share[d]" the continued concerns of social worker and children's guardian regarding his conduct in returning D to his mother in February 2012, his ability to work in partnership in the light of his deceit and concealment of facts relating to his marriage. Additionally, she was concerned as to his changing plans. She concluded "with considerable sadness [that whilst she was] satisfied that [the appellant] had the capacity to carry out the basic physical parenting of A-M, [she accepted] the unanimous professional opinion in the three assessments …that he does not have the capacity to meet A-M's identified emotional and psychological needs – in particular, her need for stability, security and the high level of reparative parenting that I am satisfied she needs."

20. There is a stark contrast between the opinion of Dr Yates recorded in the November 2012 judgment that A-M's "development appeared normal to date, within normal range" and that of Miss Edwards that there were indications of "the high level of emotional and behavioural need of A-M requiring very devoted and individualised parenting and probably individual therapeutic intervention in the future." HHJ Karp records the different opinions. Dr Yates was not called to give evidence in July 2013 but had given evidence in November 2012 and participated in a "professional's meeting" in February 2013. Mr Bainham frankly concedes that the solicitor appearing for the father at the case review in June was in error not to have required the attendance of Dr Yates for the hearing in July 2013. In his absence, the judge makes no attempt to reconcile the two divergent opinions or express her adjudication upon them. That said, on the basis of Miss Edwards evidence she was entitled to find that A-M required "… a high level of reparative parenting" and to consider the father's prospect as a single parent accordingly.

21. It is crucial to note that the family court will be faced on many occasions with asserted markedly changed circumstances, often poorly evidenced and very late in the day, necessarily exceeding the child's 'timetable' in terms of welfare considerations. In such cases there can be little prospect of delaying a decision, mostly inevitable in the light of the previous history of the case. However, there are cases where delay is 'purposeful'. Each case must be judged on its own facts. HHJ Karp recognised this in indicating that if she "felt any concern about the deficiencies in those

assessments, notwithstanding the delays for A-M, I would have no hesitation in ordering a further assessment".

22. I acknowledge the need in an appellate review of the trial judge's determination in a child case "to factor the advantages which the judge had over it in appraising the case", bearing in mind the speech of Lord Hoffman in Piglowska v Piglowski [1999] 1 WLR. (See paragraphs 41 – 42 and 58). Nevertheless, and noting the careful and skilful structuring of the judgment in question I am struck by the following features: (i) the considerable weight placed by all professionals and also the judge upon the Appellant's lack of candour regarding his failing marriage which in their view militated against working in partnership , implicitly, whether in the United Kingdom or Norway and which apparently therefore resurrected his past behaviour in failing to isolate D from his mother's abusive or poor parenting; and(ii) that a prime example of the father's "lack of ability to demonstrate that he can prioritise the needs of the children over his own needs" , in that it is given explicit reference in the judgment, is showing the children a picture of his new baby daughter on his lap top during contact.

23. It has become de rigueur for a trial judge expressly to articulate their self direction in accordance with R v Lucas [1981] QB 720 in fact finding hearings. That is, the significance that may or may not attach to the lies told by a party in relation to the injury/ behaviour in question. There is none such in this judgment which deals with outcome. A specific reference to the same is unnecessary but I do consider that it was unrealistic for the judge, and the professionals not to have appraised the same exercise in the context of the non disclosure and/or deceit in question. The fact of a parent's non disclosure or deceit is not necessarily determinative of parenting capacity or, depending on the circumstances, an ability to co-operate with the authorities.

24. I fail to see that the father acted inappropriately in showing the photograph of his new daughter to the children. The relevance of this behaviour is not easily explained as a failure to prioritise the children's needs above his own. It appears contradictory of the judge's criticism that the father had made no attempts to have contact with his new daughter.

25. I am concerned that these issues obviously informed the judge's conclusion to a high and possibly unwarranted degree that the father would not be able to accommodate A-M's needs without professional input and would not co-operate with outside assistance. In all the circumstances of the previously positive assessment of the father indicating capacity to care for three children and therefore implicitly for one child, the changing landscape vis a vis the children as to outcome, the changing stance of the children's guardian , the demonstrably changed domestic circumstances of the father notified well before the hearing and the prospect of the severance of all A-M's established familial ties by the making of a placement order with severely curtailed and then

no parental contact, I am persuaded that HHJ Karp was in error not to seek a further assessment of the Appellant.

26. I stress that this conclusion is fact specific. It is not supportive of the right of every parent to be further assessed in changed circumstances whatever and whenever they may be.

27. Furthermore, even supposing HHJ Karp to have been justified in proceeding in the absence of an up to date assessment of the father, which would inevitably need to incorporate the prospective input of social services in Norway, Ms Markham concedes the obvious scope for appeal in the lack of substantive reasoning by the judge in dealing with the local authority's application for a placement order now required by Re B-S. This decision is very shortly explained at the conclusion of her judgment. That is, on the basis that she has ruled out the mother and father and has "anxiously considered" long term fostering, but without further discussion of the advantages and disadvantages of adoption, she concludes with the almost bald assertion "that [A-M's] welfare demands that she be given the opportunity of a forever family by way of an adoptive family for her stability and security and these are her primary and fundamental needs…"

28. HHJ Karp refers in general terms to "the welfare check list in section 1(4)" and specifically to the authority of Re P [2008] EWCA. Civ 535" quoting Wall LJ (as he then was) in expressing the imperative to ensure "the child's welfare requires adoption as opposed to something short of adoption". She expresses herself satisfied that the interference of the rights guaranteed by Article 8 "are justified in law by the risks … outlined and pursues a legitimate end". However, I regret that this is formulaic phraseology in the absence of a reasoned consideration of the welfare check list whether explicitly referenced or capable of recognition throughout the evaluations stated within the body of the judgment. Ms Markham was unable to identify any passages which engaged the relevant criteria to any or any sufficient degree. Consequently the judgment read as a whole does not and cannot engage the essence of Re B-S.

29. In fact the passage of time has brought about an entirely new scenario that was not envisaged by the judge at the time of her determination. That is, Ms Markham has informed this court that the 'Ms' have made known their intention to apply to adopt A-M. This may have repercussions as regards continuing familial contact and may impact upon the father's intended renewed application to be considered as sole carer for A-M. In itself it is irrelevant to the appeal but highlights the necessity and desirability of the trial judge to have rejected the "linear" or binary approach which leaves adoption by strangers as the 'last man standing'.

30. The father has funded this appeal privately and seeks his costs in the sum of £13,787.70. He does not aver that the local authority have engaged in

reprehensible behaviour or took an unreasonable stance in the hearing at first instance to justify a departure from the normal rule that costs are not awarded in children's cases. However, Mr Bainham argues that the judgment in Re T (Children) [2012] UKSC 36 to this effect is directed at first instance hearings where public policy considerations militate against any possible financial deterrent to an authority taxed with the responsibility of protecting children from pursuing proceedings. Likewise, in the case of an appeal neither should a parent be deterred from challenging decisions which impact upon the most crucial of human relationships. Ms Markham argues the case is not so restricted and resists the application.

31. I consider the question of costs in the appeal to be of a discrete category and the discretion of the Court broad. Re T is distinguishable for the reasons argued by Mr Bainham.

32. In this case, Ms Markham has been forced to recognise the deficiencies of the judgment of the lower court but nevertheless has resisted the appeal. In the circumstances of the father's limited means, already decreased by his travel from Norway to the United Kingdom to exercise contact, I would grant his application and order costs in the sum of £13,787.70.

Lady Justice Sharp DBE:

33. I agree.

Sir Robin Jacob:

34. I also agree.