Case No: B4/2014/0322

Neutral Citation Number: [2014] EWCA Civ 1065
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM MIDDLESBROUGH COUNTY COURT
MRS RECORDER KNAPTON

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25 July 2014

Before :

SIR JAMES MUNBY PRESIDENT OF THE FAMILY DIVISION
LADY JUSTICE BLACK
and
LORD JUSTICE TOMLINSON

- -

Re W (Children)

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- -

Mr Ben Boucher-Giles (instructed by Paul J Watson) for the appellant
The respondents were neither present nor represented

Hearing date : 15 July 2014

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Judgment

Sir James Munby, President of the Family Division :

1. This is an appeal, pursuant to permission granted by Ryder LJ on 19 March 2014, from a judgment and order of Mrs Recorder Knapton in the Middlesbrough County Court on 10 January 2014. The Recorder was dealing with what, in form at least, were private law proceedings relating to two children: a girl born in December 2005 and a boy born in September 2010.

2. By July 2012 both children were living with their paternal grandmother, having been "placed" there by their mother in response to concerns that had led the local authority, which had been involved with the family since January 2011, to warn that it might otherwise issue care proceedings.

3. In August 2012 a social worker, Ms Nesbitt, was appointed to the case and in October 2012 began work on a core assessment. On 12 November 2012 the mother and Ms Nesbitt signed a document which described itself as an "Agreement" made between the local authority, the mother and the paternal grandmother. So far as material for present

purposes it read as follows:

> "This is not a legal agreement however; [sic] it may be used in court as evidence if needed.
>
> This agreement has been complied [sic] to ensure that [the mother] agrees for [the children] to remain in the care of paternal grandmother whilst further assessments are completed.
>
> - [the mother] agrees to [the children] remaining in the care of paternal grandmother whilst further assessments are completed.
> - … "

In December 2012, for reasons which are wholly obscure, the assessment was cancelled. At about the same time the local authority decided that the mother's contact with her children could be unsupervised.

4. The mother sought the return of the children. Eventually, after mediation had failed and following difficulties in obtaining legal funding, the mother issued proceedings on 28 May 2013 seeking a residence order and the return of the children to her care. The local authority was ordered to provide a section 7 report. Written by Ms Nesbitt, it was dated 4 October 2013. An addendum section 7 report was written by her successor, Ms Fitzgerald, dated 13 December 2013.

5. Ms Nesbitt expressed the view that the children should remain with the paternal grandmother under the auspices of a residence order. For present purposes it is Ms Fitzgerald's report which is more significant. In paragraph 4.1.2 she said:

> "Further assessment of [the mother's] current ability to meet the needs of the children is required in order to provide evidence that she has made positive changes and more importantly is able to sustain such changes in the longer term."

In paragraph 4.3.1 (paragraph 4.6.1 was to much the same effect) she said:

> "… there is little evidence to support the children returning to their mother's care … It is therefore the view of the Local Authority that Family Resource Team intervention is required in order to support [the mother] and her relationship with the children to include work around routines, boundaries and the appropriateness of comments made to the children by [the mother] … This intervention will enable the Local Authority to assess [the mother's] current ability to meet the needs of the

> children. [The mother] reports that she has made positive changes by accessing counselling and evidence of those positive changes is required by the Local Authority in order to establish [her] current ability to meet the needs of the children in the immediate and longer-term future."

In paragraph 4.8.1 she said:

> "As previously indicated, the Local Authority are of the view that intervention is required from the Family Resource Team who will work with [the mother] and the children in relation to routines, boundaries and inappropriate comments made to the children. This will enable the Local Authority to further assess [the mother's] current and longer-term ability to meet the needs of the children"

In paragraph 4.9.1 Ms Fitzgerald recorded a counsellor describing the mother as "engaging well with the service" which, as she commented, "demonstrates [her] willingness to engage with services to address concerns." In paragraph 4.10.2 she observed that "mother's current ability to meet the needs of the children remains un-assessed" and continued:

> "it is the view of the Local Authority that Family Resource Team intervention is required in order to assess her ability to meet the needs of the children."

6. Ms Fitzgerald's overall view was expressed in paragraph 4.10.3:

> "It must be acknowledged that if the children were to grow up in the care of the 2nd Respondent and not the Applicant mother, this has the potential to affect their identity and they may feel a sense of rejection from their mother. That said, at the present time, the un-assessed risk of placing the children in their mother's care, far outweighs the risk of them remaining in paternal grandmother's care and the 'potential' for this to have an impact upon their identity/emotional wellbeing."

7. The hearing before the Recorder commenced on 9 January 2014. We do not have a transcript of the hearing but Mr Ben Boucher-Giles, who appeared on behalf of the mother before the Recorder, as he subsequently appeared before us, has prepared a very helpful case summary for our use which sets out what we need to know. It has been circulated to the other parties and to the local authority, who have raised no objection and identified no errors.

8. The Recorder heard evidence from Ms Fitzgerald and her team manager, Ms Richardson. In cross-examination Ms Fitzgerald accepted that the mother was committed to her children and was prepared to work with professionals. She re-iterated that the local authority had not assessed the mother and could not therefore say that she had made sufficient progress to prove that she could safely care for them. In answer to the specific question whether there was any event since July 2012 which gave her any specific cause for concern in relation to the mother or her ability to care for the children, Ms Fitzgerald accepted that she could not think of anything in particular. She indicated that a delay in the proceedings – the assessment and associated work might take between 12 and 16 weeks – would have a "high potential of emotional impact" on the older child, though this was no more than the usual consequence of delay.

9. Ms Richardson expressed concern about the lack of assessment and accepted that the local authority had failed in its duty to provide the court with the information it required. She indicated that rehabilitation of the children to the mother "would not be beneficial until perhaps after CAMHS had reported – something may arise."

10. Unsurprisingly in these circumstances, Mr Boucher-Giles applied at the conclusion of this evidence for an adjournment for the preparation of a full assessment of the mother's parenting abilities. His argument, as recorded by the Recorder in the judgment she gave refusing his application, was that the court could not make a decision because it did not have any information about the mother and her ability to care for the children. The application was resisted by the paternal grandmother on the basis that the best interests of the children were served by the matter being brought to a conclusion, in circumstances where the local authority had indicated that it would not 'walk away' even if the case came to a final conclusion.

11. The Recorder dismissed the application. She explained why:

> "In seeking that adjournment and in considering whether or not I should allow it, I must take account of various factors, one of those of course being that delay is inimical to these sort of proceedings. They need to be brought to a conclusion as soon as possible. I have to weigh against that, the fact that [the mother] has not been subject to any detailed assessment, the fact of the matter is that the court is in the position today where it has sufficient information to consider what is in the best interests of the children and if I were to adjourn where would we be then? We would be at a position where the local authority might be saying by virtue of their role in these proceedings that the matter should move to overnight staying contact. It does not mean that they would be in a position to make a final recommendation, not that anything is ever final in the lives of children because things move and things change, but I take the view that to delay these

> proceedings any further, these proceedings having been ongoing for some time, to delay them any further for the purpose of an assessment which might not be able to come to a final conclusion and might not be able to be effected due to the involvement of CAMHS with the older of the two children".

12. The hearing proceeded. The Recorder heard oral evidence from the mother and the paternal grandmother. Cross-examined on the point, the paternal grandmother, who said she had spent a great deal of time in the mother's company over the past 18 months, could not think of anything that had happened during that time which gave her cause for concern in respect of the mother or her ability care for her children, apart from some missed contacts.

13. In closing submissions Mr Boucher-Giles again invited the Recorder to adjourn for an assessment of the mother.

14. At the end of the hearing, on 10 January 2014, the Recorder gave judgment. She summarised the history of events, recording that, on the mother's own evidence, she had had problems in the past with ill health, post natal depression and drug misuse and that, as a result, she had not been able to offer adequate care to the children. She described how matters had "almost reached crisis point" in July 2012. She described the mother's position as being that she had only ever envisaged a temporary arrangement and that by April 2013 she was in a fit and proper position to deal with looking after the children herself.

15. The Recorder then said this:

> "It has become apparent as well that there have been failings in social services dealing with this case and that was acknowledged by the team leader Miss Richardson when she gave her evidence that in fact no assessment of the mother has at any time been undertaken since the mother has recovered from all the difficulties that she had.
>
> However I have to look at the welfare checklist and I have to decide this case on the basis of those matters".

She drew attention to the fact that the older child appeared to be saying that she wished to live with her grandmother. She directed herself that the child's welfare is the paramount consideration and that she had to have regard to the general principle that any delay is likely to prejudice the welfare of the child.

16. The Recorder reiterated her reasons for refusing an adjournment, saying:

> "Clearly delay is a matter which I have to take account of if it is likely to prejudice the welfare of the child or the children and I take the view that any delay in this case, any extension of these proceedings with all the necessary conflicting views of all the parties, would mean that it is likely, it is probable that certainly [the older child] would be adversely affected in terms of her emotional wellbeing by knowing that these proceedings were on going.
>
> It is clear as well that such a delay is an open ended delay, because no-one can say at this stage as to how long, as to what the outcome of overnight contact would be, if it was in fact recommended by the social services department.
>
> … I take the view that delay would not be in the interests of these children, it would not be productive in terms of their welfare and it is for this reason that [the proposition that I should] adjourn for a period of time, is not one which lends itself to me."

17. She then said this:

> "Can I say that I accept that there is no assessment of the mother as she is now. I do not make an assessment of her because I have only had the opportunity of seeing her in the witness box and my decision is based not on the fact that I have made an assessment of her, it is based on the fact that I feel that delay in the case would be prejudicial to the children.
>
> One can only speculate as to what the outcome of that assessment will be".

18. The Recorder then considered the welfare checklist, saying in the course of this:

> "The court must also take into account the children's physical, emotional and educational needs, well it is perfectly plain to me and I think it is even accepted on behalf of the mother that those needs are being met by the paternal grandmother at the present time. On the other hand so far as the mother is concerned I have no evidence before the court that she is able to provide them with the same level of support in terms of their physical, emotional and educational needs."

19. Having found that in the past the children had suffered harm as a result of the mother's

inability to cope, the Recorder continued:

> "I cannot say whether they are at risk of suffering in the future, it is probable that matters will move forward in fact it is inevitable that matter that matters will move forward but I am not in a position to make any finding as to whether or not they are at risk of suffering in the future.
>
> What I also have to take into account is how capable the mother and the grandmother are in relation to the question of meeting the children's needs. Well as I have already indicated it appears to be accepted and in fact I make a finding that the grandmother is in fact meeting the needs of these children and has done so at least for the last eighteen months and possibly for longer so far as [the older child] is concerned.
>
> Taking all those matters into account I then have to decide what is the proper order in this case.
>
> This is a case where the mother has, I have no doubt the best of intentions at heart, but I am not satisfied that it would be appropriate at this stage to make an immediate order granting her residence and so in those circumstances I dismiss her application for residence.
>
> I then have to consider what orders I should make. At the present time the paternal grandmother has no legal standing because she has no orders and nothing in place at the present time. I intend therefore to make a residence order in favour of the paternal grandmother."

20. The mother's appellant's notice was filed on 31 January 2014. Considering the application for permission on the papers, Ryder LJ had the benefit of Mr Boucher-Giles' powerful skeleton argument. In giving permission, Ryder LJ observed that the grounds of appeal and skeleton argument at least four potentially significant issues, which he described as follows:

> "(a) whether a court dealing with a private law children application is obliged to deal with the proportionality of the order as an interference with art 8 rights – the horizontality argument;
>
> (b) whether the judge should have attached any greater significance to the position of a mother as against a grandmother – the imperative of being brought up by a parent if that parent is a good enough parent even though the grandmother may be better;
>
> (c) whether the judge's refusal to order an adjournment to

> obtain a section 7 assessment report from the local authority deprived the mother of the evidence that might demonstrate her capability;
>
> (d) how the court should deal with section 20 accommodation cases where the local authority is acting as the decision maker but not taking care proceedings (and has not assessed the parent when arguably it should have done so)."

21. Ryder LJ "invited" the local authority to intervene in the appeal to make submissions in relation to issue (d). It has declined to do so. The paternal grandmother has been unable, we understand through lack of funding, to take part in the appeal. The children's father, who appeared in person before the Recorder but seems to have played little part in the proceedings before her, has played no part in the appeal. In consequence we have had submissions only from Mr Boucher-Giles.

22. At the end of the hearing we announced our decision, saying that we would give our reasons in due course. We allowed the appeal, remitted the case to the Family Court in Middlesbrough for an urgent directions hearing before the designated family judge, and indicated that the case should be reheard by a circuit judge (that is, not a recorder) in the Family Court.

23. In these circumstances I prefer to proceed on a narrow front. We can properly dispose of this appeal by focusing on issue (c), on which ground alone, in my judgment, the mother is plainly entitled to succeed. I propose to say nothing therefore about issues (a) and (b). These are issues which may fall to be considered hereafter when this case, as we have directed, is re-heard before a different judge, so the less said at this stage the better. They may require careful attention to such authorities as the decisions of the House of Lords and Supreme Court in *In re G (Children) (Residence: Same-sex Partner)* [2006] UKHL 43, [2006] 1 WLR 2305, and *In re B (A Child) (Residence: Biological Parent)* [2009] UKSC 5, [2009] 1 WLR 2496.

24. I turn therefore to issue (c).

25. The stark facts here are clear and obvious. There had been no assessment of the mother. Ms Fitzgerald's report was peppered with the recognition that an assessment was "required" in order both to provide evidence that the mother had indeed changed, and was able to sustain that change, and to assess her current and longer-term ability to meet the needs of the children. The Recorder acknowledged that there had at no time been any assessment of the mother, made clear that she herself had not made any assessment of the mother, and, most strikingly of all, found that, to repeat:

> "I cannot say whether [the children] are at risk of suffering in the

> future … I am not in a position to make *any* finding as to whether or not they are at risk of suffering in the future (emphasis added)."

26. It is quite apparent that the Recorder's decision was driven by her concern about delay. She says so explicitly in the passage, already cited, where she said:

> "my decision is based not on the fact that I have made an assessment of her, it is based on the fact that I feel that delay in the case would be prejudicial to the children."

That is elaborated in the passage where she said:

> "any delay in this case, any extension of these proceedings with all the necessary conflicting views of all the parties, would mean that it is likely, it is probable that certainly [the older child] would be adversely affected in terms of her emotional wellbeing by knowing that these proceedings were on going."

27. As to this I merely observe that one needs to bear in mind what Ms Fitzgerald had said in evidence (see paragraph 8 above) and that the Recorder's comment about the delay being "open ended" (paragraph 16) involved little more than an educated guess – what the Recorder herself described (paragraph 17 above) as speculation – as to what might be revealed by the strictly time-limited assessment being proposed by Mr Boucher-Giles. There is also, in my judgment, much force in his submission that the Recorder focused too much on the short-term disadvantages without addressing, as she should, the medium and longer term implications.

28. The simple fact, in my judgment, is that the Recorder fell into a double error. By refusing an adjournment for the assessment which had never taken place, which the local authority acknowledged was required and which Mr Boucher-Giles was understandably pressing for, the Recorder denied herself vital evidence to fill what on her own findings were serious gaps in her knowledge of the mother and of the mother's ability to care for the children. This was, as Mr Boucher-Giles submitted, an essential piece of information if the Recorder was properly to do her duty in accordance with section 1(3)(f) of the Children Act 1989. On top of that she placed far too much weight on a view as to the consequences of delay which was not borne out by the evidence.

29. This all fed into an approach which ended up being unfair to the mother and went far in the direction of effectively reversing the forensic burden. I have in mind in particular the passage in her judgment where the Recorder, having correctly found that the children's needs were being met by the paternal grandmother, went on to note that:

> "On the other hand so far as the mother is concerned I have no

> evidence before the court that she is able to provide them with the same level of support in terms of their physical, emotional and educational needs."

Indeed, but why was that?

30. It follows that, for all these reasons, the mother in my judgment succeeds on issue (c) and accordingly succeeds on her appeal.

31. Before parting from this case I do need to say something about issue (d). I view with considerable concern both the way in which the local authority embarked upon its intervention in July 2012 and the way in which it has subsequently conducted itself.

32. Ryder LJ seems to have assumed, and I can well understand why, that the powers the local authority was exercising in and after July 2012 were those conferred on it by section 20 of the Children Act 1989. But the very curious terms of the "Agreement" dated 12 November 2012 give pause for thought. Why was it stated to be "not a legal agreement"? Why was it said that "it may be used in court as evidence if needed"? Whatever it meant, and whatever its true legal status, it was treated by the local authority as enabling it – I decline to say authorising it – in effect to control this mother and her children. And, moreover, to exercise that control without the need to commence care proceedings and hopefully, from its perspective, without exposing the local authority to the various obligations which arise in relation to a child who is or has been 'looked after' in accordance with section 20.

33. I express no view at all as to whether this was in law the effect of what was being done, a question on which my Lady's judgment in *SA v KCC (Child in Need)* [2010] EWHC 848 (Admin), [2010] 2 FLR 1721, is illuminating (compare the facts in that case as analysed in paras 57-60, 72-74). See also my Lady's judgment in *Re B, Redcar and Cleveland Borough Council v Others* [2013] EWCA Civ 964, [2013] Fam Law 1382, and the earlier judgments of Smith LJ in *Southwark London Borough Council v D* [2007] EWCA Civ 182, [2007] 1 FLR 2181, para 49, and of Baroness Hale of Richmond in *R (M) v Hammersmith and Fulham London Borough Council* [2008] UKHL 14, [2008] 1 WLR 535, para 42, to which Mr Boucher-Giles referred us.

34. That is not all. I suspect that the reference to the "Agreement" being "used in court as evidence if needed" can only have been intended to have the effect of warning the mother that if she did not 'toe the line' the "Agreement" would be used against her in some way in any proceedings that ensued. I remark that, as Hedley J put it in *Coventry City Council v C, B, CA and CH* [2012] EWHC 2190 (Fam), [2013] 2 FLR 987, para 27, the use of section 20 "must not be compulsion in disguise". And any such agreement requires genuine consent, not mere "submission in the face of asserted State authority":

R (G) v Nottingham City Council and Nottingham University Hospital [2008] EWHC 400 (Admin), [2008] 1 FLR 1668, para 61, and *Coventry City Council v C, B, CA and CH* [2012] EWHC 2190 (Fam), [2013] 2 FLR 987, para 44.

35. Moreover, the "Agreement" was expressed, more than once, to be "whilst further assessments are completed", yet it seemingly remained in place even after the assessment had been cancelled. And the children were not returned to the mother even after she had asked. If this was a placement under section 20 then, as my Lord pointed out during the hearing, the mother was entitled under section 20(8) to "remove" the children at any time. Why were they not returned to her? I can only assume it was because the local authority believed that the arrangements were not within section 20, so that it was for the mother, if she wished, to take proceedings, as in the event she had to, against the paternal grandmother. But if this was so, why did the local authority arrogate to itself effective decision-making power as to whether the mother's contact with the children should be supervised or not? And why was the local authority as recently as January 2014 seemingly arrogating to itself decision-making power as to whether or not there should be overnight staying contact?

36. The local authority's decision to decline Ryder LJ's invitation to intervene makes it impossible for us to get to the bottom of these issues. The picture we have, however, is disturbing. I can well understand why Mr Boucher-Giles complains that the local authority has in effect instigated and resolved what ought to have been public law proceedings without legal authority to do so, sidestepping the need to prove 'threshold' and thus avoiding the important protections against State interference which Part IV of the Children Act 1989 provides. The mother, he says, was by virtue of the State's actions placed in a position whereby her children were being cared for, against her wish, by the paternal grandmother and without any legal order in place. I place these submissions on record without expressing any concluded view, though agreeing with Mr Boucher-Giles that it would be a matter of concern if 'back door' care proceedings such as this were to become prevalent.

Lady Justice Black :

37. I agree.

Lord Justice Tomlinson :

38. I also agree.

39. It is only with the utmost diffidence that I offer any observations in this field. In the presence of the President and Black LJ they are probably superfluous. However, coming fresh to the provisions of section 20, I am sure that that section was not intended by

Parliament to be an instrument of social engineering. We can reach no final view here because the local authority has declined to participate in the hearing, but I entertain grave reservations about the manner in which section 20 has here been used, if it has.

40. I appreciate that local authorities are hard-pressed and short of resources. The responsibilities cast upon them in relation to vulnerable children are grave and onerous. It is in the nature of things that their intervention is not always welcomed by parents.

41. It may not have been intended in this way, but the "Agreement" of 12 November 2012 which the President has described at paragraph 3 above, is to my mind almost comical in the manner in which it apparently proclaims that it has been entered into under something approaching duress. The mother's consent was needed – or putting it another way the local authority could not "place" the children with the parental grandmother if the mother objected: section 20(7). The preamble to the Agreement engagingly acknowledges that the Agreement has been "complied" (sc imposed?) for the purpose of ensuring that the mother does not object to the children being accommodated with their parental grandmother. There must be a suspicion that the reason why the mother did not object was because she was made to understand that if her agreement was not forthcoming, public law proceedings would have been instigated. I cannot believe that section 20 was enacted in order to permit a local authority to assume control over the lives of the mother and her children in this way.

42. As to the conduct of the case by the Recorder, unfortunately once she had refused an adjournment she had left herself with only one option. Her decision was thereafter inevitable, unless she was to acknowledge at the end of the hearing that the initial decision had been in error. There was an opportunity to accept the invitation extended by Mr Boucher-Giles in his closing submissions to grant, however belatedly, an adjournment for an assessment of the mother.

43. As it is, the spurious "Agreement" has as it seems to me been allowed to generate the self-fulfilling prophecy that the mother would be found unfit to have care of her children for no better reason than that it had become too late to assess her fitness. That is on the face of it rather alarming, albeit I accept that we have not heard an explanation from the local authority. I hope that local authorities will reflect accordingly on the strictures of the President.