Neutral Citation Number: [2019] EWCA Civ 1777

Case No: B4/2019/1997

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM SHEFFIELD COMBINED COURT CENTRE
Recorder Grundy
SE18C02062

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22 October 2019

Before :

LORD JUSTICE HICKINBOTTOM
and
LORD JUSTICE PETER JACKSON

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C (A Child)

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Karl Rowley QC and Shaun Spencer (instructed by **GWB Hart Hills LLP**) for the **Appellant Mother**
Darren Howe QC & Justine Cole (instructed by **Rotherham Metropolitan Borough Council**) for the **Respondent Local Authority**
Edward Devereux QC (instructed by **Cartwright King Solicitors**) for the **Respondent Child by his Children's Guardian**
Sarah Morgan QC & Stephen Brown (instructed by **Oxley & Coward Solicitors**) for the **Intervenor**

Hearing date: 22 October 2019

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Approved Judgment

Lord Justice Peter Jackson:

1. This appeal arises in care proceedings concerning a boy E, now aged 12 months. It is an appeal by a mother from an order made by Recorder Grundy on 25 June 2019. Her order was unusual, as it reversed her own decision, made on 11 January 2019, to reopen a finding of fact she had made in earlier care proceedings in September 2017. Those concerned the mother's older child, a girl, A, then 3. Since January 2017, A has been living with her grandparents, latterly under a special guardianship order.

2. The background is that in August 2016 A had suffered an arm injury for which the mother blamed her then boyfriend, W. Next, in January 2017, A was found to have a large number of bruises, including one to her shin. In September 2017, at a final hearing, the Recorder made findings of fact that included these:

> "2. The amount of bruises [there were 11] was excessive for a well child. With the exception of [the bruise to the shin] the causation for the number of bruises was lack of adequate supervision.
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> 3. The bruise [to the shin] is an unequivocal bite mark inflicted by a dental adult (a person aged 12 years or over).
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> 4. The bite mark is a non accidental injury and was deliberately inflicted.
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> 5. It will have caused great pain when it was inflicted and the person who inflicted it would have known that great pain had been inflicted.
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> 6. Dental casts from the mother only were examined by Professor Craig as she is the only potential perpetrator.
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> 7. On 20th January 2017, when staff at nursery saw the bruise A informed them that "mummy, mummy bite me".
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> 8. [The mother] was responsible for the bite mark.
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> 9. On occasions, the mother has failed to work openly and honestly with professionals; and on occasions the mother has lied about taking the child to a hospital appointment or about her reasons for keeping the child off nursery.
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> …
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> 12. The child has previously suffered non-accidental injury in August 2016 which was attributable to the mother's partner at that time, W. The mother has had contact with W during the course of these proceedings, which she has lied to social care about."

3. In relation to finding number 7, there was also evidence from the grandparents that A had on later occasions blamed W for biting her.

4. Finding number 8 concerning the bite was made in the context of the mother claiming that her relationship with W had ended by January 2017. Finding 12 was significantly based on the local authority finding that the mother and W had been together in April 2017. Up to that point, it had been prepared to consider rehabilitation even though it regarded the mother as responsible for the bite. As for the mother, she accepted all the threshold findings apart from finding 8, which she has consistently denied.

5. The proceedings concerning E began at his birth and he has been in foster care awaiting a decision ever since. The reason for this wholly unacceptable delay arises from what has been a regrettably inadequate response to an application made by the mother in November 2018, seeking a reopening of finding 8. The basis on which she did so was that she said that she had lied during the 2017 proceedings and that she and W had continued to be in a relationship in January 2017. He had had the opportunity to injure A and had been responsible for biting her. She had not revealed this at the time because she had been severely threatened into silence.

6. The matter first came before another judge who sensibly transferred it to the Recorder. She then held no fewer than ten hearings. At the second of these, on 11 January 2019, she acceded to the mother's application for a reopening, which was then supported by the local authority and the Guardian. In doing so, she took account of the strong public policy reasons in favour of finality but regarded them as overridden because, as she put it, the finding was so significant in terms of the mother's role in causing direct harm to the child that "it completely alters the landscape".

7. The local authority's threshold case in relation to E is based upon the threshold findings in relation to A, alongside allegations that the mother has not taken any steps to show that she can now change and be trustworthy; there are also concerns about her mental health.

8. Bearing in mind the need for a speedy decision to be made about E's future, there was an obvious risk that the issue surrounding finding 8 had the potential to cause delay and loss of focus. Unfortunately that is exactly what has happened, despite the commitment that the Recorder showed to the case. One or more hearings took place in each month between January and June. This was to some extent due to W lacking litigation capacity, so that when he was formally made an intervenor he required representation by the Official Solicitor. Nevertheless, sensible suggestions were made in relation to the obtaining of a response from W to the suggestion that he had the opportunity to have bitten A, and as to the obtaining of a dental cast so that the expert instructed in the previous proceedings (Professor Craig) could offer an opinion as to whether he might be responsible. The professor, who had confirmed that the bruise was a bite mark, had previously only considered a cast from the mother and had advised, with a low degree of forensic confidence, that she might have caused it.

9. It is unnecessary to chart the lengthy sequence of orders leading up to the decision now under appeal. Suffice it to say that for one reason or another no progress whatever was made. On the contrary, what happened was that the local authority and the Guardian changed their minds about whether a rehearing was appropriate. In this, they were supported by the Official Solicitor. It was in this way that a four day hearing listed for

24 June for final decisions to be made about E's future was converted to a two day hearing to reconsider the reopening decision in relation to finding 8.

10. The parties have made clear that no one actively sought to prevent the Recorder from reconsidering her January decision or argued that she did not have jurisdiction to do so. Be that as it may, the Recorder should in my view have been very reluctant to have entertained what was in the nature of an appeal from herself. Now, however, we are concerned with the merits of her order. As to that, the Recorder noted that she was being invited to reconsider the decision "on the basis that the court and the parties did not have full and accurate information when the court made its decision in January 2019". I would accept that it is open to a court to review a decision on the basis that it had inadvertently been misled, but that was not the case here. The participants in the proceedings – the local authority, the mother and the Guardian – were the same in both proceedings. No one was misled about anything.

11. What the Recorder instead did in a careful judgement was to consider the law fully and then to analyse how much of the material now relied upon by the mother could properly be described as "new material". She considered five categories of evidence and found that two of them were in fact new, namely the allegation that W had had the opportunity to injure A, and the threats. Having done this, she reviewed the different accounts given by the mother over time. She found these to be full of significant and unexplained inconsistencies and to lack credibility and reliability. The new matters therefore fell far short of giving solid grounds for challenging the previous finding. She revoked her previous decision.

12. The difficulty with this approach is that the Recorder, having set herself a correct test, did not apply it. If the sole criterion was the mother's reliability as a witness, her application was bound to fail, and it should not have been granted in the first place. But the account that she was now giving of being together with W in January 2017 was not self-evidently improbable, given that she had been together with him in August 2016 and April 2017 (and lied about it in the latter case). The Recorder was therefore in error in carrying out an assessment of the mother's credibility when that was not the only relevant consideration. She should have carried through on steps contemplated during the case management hearings by getting a statement from W and directing an expert assessment of a dental cast, if he was prepared to give it. Whether or not these further steps ought to have preceded an initial decision to reopen, they certainly should have preceded a reversal of that decision. The result is that the Recorder made two conflicting decisions based on the same evidence, the only explanation being that some of the parties had changed their minds and had persuaded her to do the same. I would accept that the incapacity of W to litigate independently was a challenge for the court, but the lengthy and unproductive case management, with its damaging implications for a small baby, was unfortunate, particularly as the resulting decision is one that cannot stand.

13. There is accordingly no alternative but for us to allow the appeal, with the result that the January 2019 reopening decision revives. We have next considered carefully whether we are in a position to make our own decision in relation to that matter. Is it now necessary and in the interests of overall justice for finding 8 to be relitigated? That in my view depends upon its potential significance, most immediately for decisions about E's future. We have admitted recent reports from an independent social worker and a psychologist in order that we can understand the potential materiality of the

finding to the decisions ahead. Unfortunately, neither professional was made aware of this pending appeal. In both cases their reports are negative from the mother's point of view. In the social work report, relatively little weight is placed upon finding 8. However, the psychological report treats the bite and, perhaps more significantly, the mother's denial, as a material factor in assessing future risk. In the circumstances, the local authority is understandably unable to proceed without making reference to this evidence. We must also recall that the Recorder, who has been due to be conducting the final hearing in relation to E in December, considered the bite to "alter the landscape".

14. All parties, while inviting sympathy for the Recorder in the light of the shifting submissions made to her, acknowledge the difficulty in the position that has now been reached. Having heard from them, and try as we might, we cannot see any alternative to remitting the application in relation to finding 8 for a speedy disposal. We are grateful to the Designated Family Judge, HHJ Carr QC, for making herself available to conduct a directions hearing on 25 October at which plans can be put in place for the resolution of the reopening issue and of the underlying proceedings concerning E. At the invitation of the parties we shall make certain case managements orders, stressing that they may be varied by Judge Carr as she thinks it appropriate.

Hickinbottom LJ

15. I entirely agree with the judgment given by Peter Jackson LJ.