Neutral Citation Number: [2020] EWCA Civ 346

Case No: B4.2020/0242

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE FAMILY COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 5 March 2020

Before :

LORD JUSTICE BAKER
and
LORD JUSTICE POPPLEWELL

- -

IN THE MATTER OF THE CHILDREN ACT 1989
AND IN THE MATTER OF AV (EXPERT REPORT)

Between :

A MOTHER	**Appellant**
- and -	
A LOCAL AUTHORITY (1)	**Respondent**
A FATHER (2)	
AV (BY HIS CHILDREN'S GUARDIAN) (3)	

- -
- -

Nicholas Goodwin QC and Jack Redmond for the **Appellant**
Julie Sparrow and William Horwood for the **First Respondent**
Karl Rowley QC and Christopher Rank for the **Second Respondent**
Joanna Moody for the **Third Respondent**

Hearing date: 5 March 2020

- -

Approved Judgment

This judgment was delivered in public but it is ordered that in any published version of the judgment no person other than the advocates and other persons named in this version of the judgment shall be identified by name or location and that in particular the anonymity of the child and members of his family must be strictly preserved.

LORD JUSTICE BAKER :

1. We are here concerned with an appeal against a judge's decision refusing permission for the instruction of a child psychiatrist as an expert witness in care proceedings.

2. This is as tragic a case as I have been involved in during forty years working in the family justice system. A and his siblings and their parents had been involved with the local authority social services for some time. The children had previously been placed on the Child Protection Register due to concerns about neglect, poor home conditions, inadequate supervision and an incident between the parents in March 2017.

3. One night in 2019, a dreadful fire engulfed the family home. A and his parents escaped but the other children died. An investigation into the cause of the fire is still continuing. The parents were arrested and interviewed by the police, but then released on bail pending completion of the investigation.

4. Following the fire, the local authority started care proceedings in respect of A. An interim care order was made and A was placed in foster care where he remains. Initially, he struggled to settle into the placement and demonstrated a high level of trauma and distress, but with the steady and loving care provided by his foster carers he has now settled down in that placement. We were told, however, that his current carers are unable to offer A a home in the long term.

5. A's mother has been assessed as having a mild to moderate learning disability and the impact of this on her cognitive abilities has been compounded by the post-traumatic stress disorder she has suffered following the fire. She is therefore represented in these proceedings by the Official Solicitor. An assessment of the parents concluded that it was unlikely that they would be able to meet A's needs even after undergoing therapeutic work. They accept that the chance of A being rehabilitated to their care is very remote. The local authority, as it was obliged to do, looked at the options of placing A with members of his extended family. A "viability" assessment of the paternal grandparents was completed with a positive recommendation, but at that stage the grandparents indicated that they did not wish to put themselves forward as potential carers. Having completed its assessments, the local authority concluded that A should be placed for adoption, and filed evidence and a care plan setting out its reasons and proposals for giving effect to that conclusion.

6. The final hearing of the care proceedings was listed to start on 24 February 2020. At the pre-trial review on 31 January 2020, the Official Solicitor on the mother's behalf applied under Part 25 of the Family Procedure Rules 2010 for a child psychiatric assessment to be undertaken by Dr Martin Newman, to report on the impact on A of placement for adoption. This application was supported by A's father but opposed by the local authority and the child's guardian. It was refused by the judge for reasons summarised below. On 7 February, the mother filed a notice of appeal to this court against that decision.

7. At about the same time, the paternal grandparents informed the social worker that they had changed their minds and now wished to put themselves forward as long-term carers for A. As a result, the proceedings were listed for a further case management hearing before the judge on 14 February. Two matters fell to be considered: (1) an application to adjourn all or part of the final hearing, and (2) a renewed application on

behalf of the mother for the instruction of Dr Newman. The judge dealt with the second matter first, and again dismissed the application, for reasons also summarised below. She then considered the future of the proceedings. The local authority proposed that the hearing listed on 24 February be retained to enable the court to determine whether the threshold criteria under s.31 of the Children Act were satisfied and to rule out the parents as carers on the principles articulated in *North Yorkshire v. B* [2008] 1 FLR 1645. In the event, however, the judge decided to adjourn the whole of the final hearing to a date in July 2020. The judge made a series of further case management directions, including an order for the local authority to file its full assessment of the paternal grandparents by 14 April 2020, with a timetable for the filing of further evidence thereafter.

8. Following this decision, the mother's lawyers submitted a supplemental skeleton argument indicating that they wished to extend the application for permission to appeal to include an appeal against the refusal of the renewed application under Part 25. On 20 February, I granted permission to appeal against both orders and listed the appeal for an urgent hearing today, with ancillary directions. We are very grateful to the parties' representatives for the work they have done to ensure that the appeal can be determined today.

9. In her first judgment on 31 January, the judge correctly directed herself as to the law, reminding herself that any application for expert evidence in children's proceedings is governed by s.13 of the Children and Families Act 2014. She cited subsection (6), which precludes the court from giving permission unless it is of the opinion that expert evidence is necessary to assist the court to resolve the proceedings. She also cited subsection (7) which provides

> "(7) When deciding whether to give permission as mentioned in subsection (1), (3) or (5) the court is to have regard in particular to—
>
> (a) any impact which giving permission would be likely to have on the welfare of the children concerned, including in the case of permission as mentioned in subsection (3) any impact which any examination or other assessment would be likely to have on the welfare of the child who would be examined or otherwise assessed,
>
> (b) the issues to which the expert evidence would relate,
>
> (c) the questions which the court would require the expert to answer,
>
> (d) what other expert evidence is available (whether obtained before or after the start of proceedings),
>
> (e) whether evidence could be given by another person on the matters on which the expert would give evidence,

> (f) the impact which giving permission would be likely to have on the timetable for, and duration and conduct of, the proceedings,
>
> (g) the cost of the expert evidence, and
>
> (h) any matters prescribed by Family Procedure Rules."

The judge reminded herself of the guidance given by Sir James Munby P in *Re H-L* [2013] EWCA Civ 655.

10. She then appropriately analysed the application by reference to the factors listed in s.13(7). With regard to the issues to which the expert evidence would relate, she observed (at para 8) that

> "I turn to the issue to which the expert evidence would relate and the questions the court would require the expert to answer … the court will need to determine and how the impact of trauma and loss may impact on those issues, they are questions as to his placement needs moving forward; the role of his birth parents in his care moving forwards and in particular whether A, given his loss and trauma would be able to attach positively to prospective adopters; whether given the trauma he has suffered, which may be triggered at different points in the future, there is an increased risk of adoption breakdown, with the detrimental impact that would have on A, and whether the importance for A of preserving his birth parent relationships is magnified or enhanced in this case given the experience he already has of the significant loss of his siblings."

11. She continued (at para 9):

> "Turning to those questions and issues, they give rise to questions of attachment. There is already before the court detailed assessment by the social worker and Guardian as to the impact of the trauma suffered by A on his current emotional presentation, his current emotional development, his support needs both now and in the longer term and their assessment of his capacity to form and transfer positive attachments to alternative care givers. Of course that assessment and the evidence by the social worker and Guardian is yet to be subject to proper challenge on the part of the parents by way of cross-examination. Nobody however has shied away from the vulnerability of this little boy and the tragic circumstances that bring him to this court. It is covered at length in the social worker's final evidence, informed by the ongoing work of CAMHS with A and his carers and the progress, which the social worker and Guardian give evidence of…. The court is satisfied that issues over attachment, his capacity to build and transfer positive attachments lie squarely within the expertise of the social worker and Guardian. I am not therefore persuaded

> that further expert assessment of A will render any further forensically useful information to the court."

12. At para 11, she observed:

> "In terms of the impact of loss on A and the value of his birth family relationships being preserved to protect him against the further loss and trauma he may suffer from adoption, it is of course a necessary and sad consequence of the vast majority of adoptions that the child will suffer the loss of both sibling and birth parent relationships. Adoption involves traumatic loss, of what are often valuable significant and ongoing relationships for children. Assessing the impact of that and how it feeds into the placement needs of the child is a task required of the court in every case where adoption is involved. Of course the court must be acutely aware of the tragic consequences is which the loss for A has occurred pre-adoption and in such traumatic circumstances. The court is profoundly concerned with how that will continue to impact on A in the short, medium and long term. … Every case requires the child's individual needs to be carefully and forensically examined. But again I am satisfied that those questions lie within the expertise of the social worker and Guardian and that the expert assessment of a child psychiatrist is not necessary for court to carry out its welfare analysis."

The judge concluded that the required evidence on these matters was already available from the local authority social worker and the guardian.

13. The judge went on to consider the impact which giving permission would be likely to have on the timetable for the proceedings. She concluded that, were she to give permission, it would extend the duration of the case by a further six months. She said that, were she satisfied that an expert assessment was necessary for the right welfare decision to be made for A, she would have no hesitation in extending the timetable. The question for her was whether the expert assessment was necessary to fill a gap in the evidence for the court to make its welfare decisions and she concluded that it was not.

14. In her second judgment, the judge considered the renewed application for an expert in the light of the parties' acceptance that the final hearing would have to be adjourned to accommodate the assessment of the paternal grandparents as potential carers. She noted that, as a result, the instruction of an expert would not have any adverse impact on the timetable for the proceedings. She repeated, however, that the test for instructing an expert remained one of necessity. She recognised that there was now a third realistic option for A's future placement, but concluded that these did not alter the essential issues to be considered, which, for the reasons explained in the first judgment, were squarely within the expertise of the social worker and guardian. On this issue, the judge said:

> "The court continues to struggle as to how any assessment of A, now aged three, will provide forensically useful evidence … He currently presents as stable. The

> proposed questions of the expert are in my view highly speculative and academic. They are issues that will need to be assessed as A grows and will require special support and assistance as he develops but this court continues to struggle with how an assessment now will be able to assist in those questions. The crucial question is how his carers will be able to support and ensure his emotional needs are met successfully as and when they develop/emerge. That is a matter for assessment of prospective carers, not of A."

She therefore dismissed the renewed application.

15. In their composite grounds of appeal against the two orders, Mr Nicholas Goodwin QC and Mr Jack Redmond put forward four grounds:

(1) The judge was wrong to rule that the social worker and guardian had sufficient expertise properly to address the impact on A of adoption in the context of his siblings' death.
(2) The judge was wrong to characterise expert opinion on the effect on A of this double loss as "highly speculative" or "academic".
(3) The judge was wrong to conclude in her 14 February 2020 judgment that "the crucial question is how his carers will be able to support…his emotional needs" and that this was a "matter for the assessment of any prospective carers…not of A".
(4) The judge was wrong to rule that CAMHS could effectively address the issue.

16. In their skeleton argument in support of the first ground, Mr Goodwin and Mr Redmond remind the court that the welfare checklist in s.1(4) of the Adoption and Children Act 2002 requires the court, inter alia, to have regard to "the likely effect on the child (throughout his life) of having ceased to be a member of the original family and become an adopted person". In the present case, the court will need to assess the impact of his siblings' death on A, if adopted, in both the short and long-term. It is submitted that, for all their acknowledged professional experience, neither the local authority social worker nor the guardian have sufficient expertise to address that issue. Counsel submit that the social worker's "child impact analysis", whilst acknowledging the likely need for therapy at some point in the future, fails to consider how the trauma experienced by A may affect the choice of placement. A similar criticism is made of the children's guardian's final analysis. Both reports contain an analysis of the advantages and disadvantages of adoption on the one hand and long term fostering on the other, but counsel submit that in each case the analysis is no more than a generic assessment of the pros and cons. It is submitted that exceptional facts require a bespoke approach. Given the lack of analysis by either the social worker or the guardian on this critical area, it is submitted that the judge was wrong to rule that each had sufficient expertise to address it.

17. As to the second ground, it is submitted that the judge's observation that expert evidence would be speculative or academic demonstrated a misunderstanding of the value of specialist opinion in assessing the impact on children of bereavement and trauma. As to the third ground, it is submitted that the judge was wrong to indicate that the focus would be on an assessment of the prospective carers. It is submitted that a comprehensive assessment of A's needs, including an expert analysis of the impact of trauma, is necessary as a preliminary step in deciding the appropriate placement. With regard to the fourth ground, it is contended that, insofar as the judge was

proposing that a report from CAMHS would meet the need for any psychiatric or psychological input into her decision, she was overlooking the fact that CAMHS involvement in the case has been to advise the foster carers rather than carry out any direct work with A. Furthermore, there is no evidence that the CAHMS psychologist has any particular experience of working with children suffering this level of bereavement.

18. These submissions on behalf of the Official Solicitor for the mother are supported by Mr Karl Rowley QC and by Mr Christopher Rank on behalf the father. They accept that the judge was right that social workers and guardians may advise the court on issues relating to attachment but submit that there are cases, of which this is one, where further expert opinion is needed on the issue of attachment from a psychologist or psychiatrist, due to the particular facts, unusual nature or complexity of the case. Furthermore, in this case the issue goes beyond the question of attachment. It relates also to the impact of the successive losses which A has experienced, and will continue to experience, throughout his life. In oral submissions, Mr Rowley identified various strands of trauma and loss which would be likely to impinge on A in the years ahead – the impact and effect of direct trauma from his experiences of the fire, the indirect trauma of witnessing the aftermath, the trauma of separation from his parents, the trauma of coming to understand the loss of his siblings, the possibility of "survivor's guilt" which Mr Rowley described as a recognised phenomenon of post-traumatic stress disorder, and the possible effect later on of holding his parents responsible for the loss of his siblings, with a consequential impact on his sense of identity. All these strands are matters which are plainly relevant to the decision whether A should be placed within his family, with long-term foster carers in circumstances which would facilitate ongoing contact with some family members, or for adoption which would result in an almost complete fracture of his relationships with his birth family.

19. On behalf of the local authority, Ms Julie Sparrow and Mr William Horwood submit that the judge was entitled to conclude that there was no necessity for expert evidence beyond that of the social worker and guardian to determine A's placement needs. They reject the description of the social worker's analysis as generic. They contend that the evidence filed by the local authority has carefully weighed in the balance the impact of loss and trauma in so far as it can be known at this stage. The extent to which A may suffer in the future as a result of his lived experiences is entirely unknown at this stage and would not be resolved by the proposed expert's report. It is submitted that the appellant has failed to identify precisely how an expert in psychiatry could fill any perceived gap in the social worker's evidence. Any report prepared by psychiatrists will be based on one short interview and would be no more than a snapshot of A. The judge was therefore entitled to conclude that Dr Newman's opinion would be no more than speculation. They add that the appellant has misrepresented the court's treatment of the proposed report from CAMHS. It was never intended to be an expert assessment of A, but merely confirming advice given to the social worker.

20. The local authority's arguments are endorsed and amplified by Ms Joanna Moody on behalf of the guardian. It is her case that both the social worker and the guardian have the relevant experience to address the court on issues relating to A's history, his attachment with his parents and carers and the impact of breaking that attachment if he is moved to an adoptive placement. It is submitted that previous traumatic

experiences of children and the impact of future loss of the birth family through adoption are not uncommon features of public law care proceedings. In some cases, those traumatic experiences involve the loss of a parent or sibling. Identifying future placement needs, and weighing up the pros and cons of each option, will inevitably involve consideration of the losses experienced to date and any future losses involved under the various options. Such considerations frequently lie within the remit of experienced social workers and guardians, albeit with advice and guidance from specialist professionals involved with the child, such as has occurred with CAMHS in this case. Ms Moody endorses the submission on behalf the local authority that the judge was right to query how any psychiatric assessment at this stage would provide the court with any additional evidence since it cannot be known with any certainty how or when A's trauma will manifest itself or what impact it will have on his placement. The balancing of losses against benefits from each placement falls within the remit of the social worker and guardian.

21. The judge's decision was made in the course of exercising her case management powers. It is right to emphasise again that this court does not lightly interfere with case management decisions. A party applying for permission to appeal to overturn a case management decision made within the judge's discretion must cross a high threshold. It is also right to acknowledge that the judge's approach to the issue was very much in keeping with current thinking about the use of experts in family cases, now reflected in s.13 of the 2014 Act. Judges are expected to scrutinise carefully all applications for the instruction of an expert, and only allow them when satisfied that the expert's opinion is necessary to assist the court to resolve the proceedings justly.

22. The judge unquestionably asked herself the right question. I am clear, however, that the answer she gave to that question was wrong.

23. There are three, possibly four, options for A's future placement. Rehabilitation to the parents has not been completely ruled out, although it is seemingly unlikely. The realistic options appear to be placement with the paternal grandparents, a move to a long term fostering placement, or placement for adoption. A's tragic experiences are almost certain to have a profound effect on him as he grows up and throughout his adult life. I accept Mr Rowley's analysis that this is likely to include the impact or effect of direct trauma having experienced the fire, the indirect trauma of witnessing the aftermath, the impact of the loss of his siblings, the possible impact of realising that his parents were to a greater or lesser extent responsible for the fire and therefore for the death of his siblings, and very possibly survivor's guilt. All these strands of loss and trauma are likely to have a significant psychological impact on A for the rest of his life. They will influence all the attachments he forms with carers and with others and will impinge on the consequences of every break of those attachments, for example, when he leaves his current carers, or, if adopted, he ceases to have direct contact with members of his birth family.

24. All these matters are plainly relevant to the court's decision about future placement. In this difficult case, the court needs to have the best possible expert evidence of the likely effect of this complex web of trauma on his future placement. The social worker and guardian are plainly well-qualified and highly-trained professionals, but their expertise manifestly does not extend to expressing a professional opinion as to the impact of loss and trauma of this degree and complexity. In my judgement, only

an experienced child psychiatrist can advise on such matters. This plainly falls within the expertise of a psychiatrist such as Dr Newman.

25. In my judgement, it is wrong to describe his proposed assessment as mere speculation or of academic interest. Of course, a psychiatrist is not going to predict with any degree of certainty what is going to happen. But drawing on his experience from other cases, supplemented by his examination of the child, and his conversations with other persons including perhaps the current carers and other professionals, he will be able to provide an opinion as to the likely impact of A's loss and trauma on the proposed placements. In my judgment, that opinion is necessary to assist the court to resolve the proceedings by enabling the judge to make the order which best meets A's welfare needs.

26. For my part, I would therefore have allowed this appeal if it had been merely against the order of 31 January 2020. In addition, at that stage, the instruction of Dr Newman would have inevitably led to a delay in the final hearing. Under s.13(7)(f), the judge was bound to take into account when deciding whether to give permission the impact of doing so on the timetable for and duration of the proceedings. Given my clear view as to the necessity for a psychiatric opinion, I would have allowed the appeal even though it would have led to a delay in the final hearing in the circumstances of this case, but, by 14 February, that factor had fallen away. As the local authority conceded that the final hearing would have to be adjourned to accommodate the assessment of the grandparents, the instruction of Dr Newman would have no impact on the timetable for the proceedings. Indeed, it can be accommodated easily within the revised timetable, so that the parties, including the local authority and guardian, can take his conclusions into consideration when formulating final care plans and recommendations to the court on the crucially important and potentially difficult question of A's future placement.

27. For those reasons, I would allow this appeal and grant permission for the instruction of the expert.

LORD JUSTICE POPPLEWELL

28. I agree.