Neutral Citation Number: [2022] EWCA Civ 1717

Case No: CA-2022-002115

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE FAMILY COURT AT LINCOLN
Recorder William Evans
LN22C50054

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22 December 2022

Before :

LORD JUSTICE MOYLAN
LORD JUSTICE PETER JACKSON
and
LADY JUSTICE NICOLA DAVIES

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S (Children: Party Status)

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Helen Compton (instructed by **Sills & Betteridge LLP**) for **Mr B**
Kyle Squire (instructed by **Lincolnshire County Council**) for
the **Respondent Local Authority**
Davina Krishnan (instructed by **Watsons Solicitors**) for the **Respondent Mother**
Meryl Hughes (instructed by **Bridge McFarland Solicitors**) for the **Respondent Children by their Children's Guardian**

Hearing date : 20 December 2022

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Approved Judgment

This judgment was handed down remotely at 10.30am on 22 December 2022 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Peter Jackson:

1. The issue in this appeal is whether the refusal of an application by the Appellant, Mr B, to become a party to care proceedings was wrong. After argument on 20 December 2022, we informed the parties that the appeal would be allowed: these are my reasons for joining in that decision.

Joining a party to care proceedings

2. The Family Procedure Rules 2010 12.3 and 12.4 provide that the court may at any time direct that a person be made a party to care proceedings and may give consequential directions about the management of the proceedings. There is no guidance in the rules or in the Children Act 1989 as to how this power should be exercised, beyond the fact that the overriding objective applies, as it does to any case management decision.

3. The most useful judicial guidance on the topic is *Re B (A Child)* [2012] EWCA Civ 737. Black LJ confirmed that the court should consider the factors contained in section 10(9) of the Children Act:

> "(9) Where the person applying for leave to make an application for a section 8 order is not the child concerned, the court shall, in deciding whether or not to grant leave, have particular regard to—
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> (a) the nature of the proposed application for the section 8 order;
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> (b) the applicant's connection with the child;
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> (c) any risk there might be of that proposed application disrupting the child's life to such an extent that he would be harmed by it; and
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> (d) where the child is being looked after by a local authority—
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> (i) the authority's plans for the child's future; and
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> (ii) the wishes and feelings of the child's parents."

Black LJ noted that this provision highlights certain relevant factors but that it is not a test, still less an exhaustive one. The court has a broad discretion to conduct the case in the most appropriate way given the issues involved and the evidence available. It is for the judge to weigh the various factors and decide what the proper order is in the individual case, with this court being slow to interfere with decisions of this kind. One factor that she identified (para. 37) is the purpose that party status would serve:

> "It is logical that a judge determining an application to become a party to proceedings should have an eye to what may follow joinder. To illustrate this with an obvious example, there would be no point in joining someone as a party if they would then inevitably be refused leave to bring an application in relation to the child and would have no other legitimate role in the proceedings."

This might be described as the court having regard to whether the aspiring party has an arguable case to make for some significant remedy. However, the 'arguable case' test is not a substitute for a broad, practical assessment that ensures a fair and efficient determination of the issues in the case.

The background

4. Mr B, who is in his 40s, met the Respondent mother, who is in her 20s, shortly after she arrived in England in 2014. They cohabited briefly and separated. Soon afterward, the mother became pregnant with C, a boy who is now aged 5. Mr B is not C's father. Mr B and the mother then began to live together again. He supported her during the pregnancy and was present at C's birth. They all lived in Mr B's home until 2020, when the mother obtained her own tenancy. Throughout this time Mr B was involved in C's care and a close bond developed between them. More recently, C has been diagnosed with ASD, which places particular demands on his carers.

5. In September 2021, the mother gave birth to D, who is C's half-brother. In early April 2022 her mental health deteriorated and she and the children moved in with Mr B. On 8 April 2022, she was detained under section 3 of the Mental Health Act 1983. Before being taken to hospital with D she asked for C to be cared for by Mr B. On 22 April 2022, D was placed in foster care. The mother remained in hospital until August.

6. Mr B was then formally assessed by the local authority as a "connected person" under regulation 24 of the Care Planning Regulations 2010, which led to a positive assessment on 20 April 2022.

7. The local authority issued care proceedings in respect of the children and on 22 April 2022 an interim care order was made on the basis of an interim care plan that C remained with Mr B. A direction was made for Mr B to be assessed as a special guardian.

8. The two local authority reports described the strength of the relationship between C and Mr B.

Reg. 24 assessment (22 April 2022):

> "Mr B has known C all his life. They share a close bond and a warm affectionate relationship as reported by different professionals."
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> "Mr B understands C's additional needs and adjusts his parenting of him accordingly."
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> "Mr B has been a significant source of support to C and his family over the years."

Special guardianship assessment (15 August 2022):

> "C presented as content in Mr B's care and a positive relationship was observed. If C was unable to return to his mother's care I expect he would wish to remain in Mr B's care as this was familiar and predictable."

> "Mr B has been observed to communicate well with C, offering lots of warmth and support to engage with workers during home visits. Mr B describes that he has been the only father figure to C for the duration of his life thus far, identifying himself as C's 'psychological' father…"
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> "Mr B also has a sound understanding of C's additional and challenging needs, which he reports can include outbursts of anger, struggling to verbalise and comply with rules and boundaries."

9. Despite these reports, C was taken into foster care on 4 August 2022 after a hearing of which Mr B was given no notice. The local authority considered that it had obtained further information during the special guardianship assessment that justified asking the court to amend C's interim care plan so that he was placed in foster care, separately from D. The information consisted of an account from Mr B's ex-wife, a single allegation of assault made by the mother on 22 June 2022, information about Mr B's criminal history from the PNC relating to 1996 and 2013/14, and information from his GP about his past mental health relating to 1997 and 2015. The social worker also opined that there was possible evidence of coercive and controlling behaviour by Mr B towards the mother. A statement, dated 1 August 2022 and redacted (apparently to protect the ex-wife), was placed before a Circuit Judge, who approved the change in the care plan. No provision was included in the order for Mr B to be heard, or even served. He was told that C would be removed into foster care from school. His contact was set at 90 minutes a month: the reports that we have seen are consistent with the positive accounts contained in the assessments.

10. We are not concerned with an appeal from the order of 4 August 2022, but it forms a significant moment in the sequence of events that led to the order that is under appeal and it is relevant to my assessment. We have seen nothing to show that A's safety and welfare required his immediate removal without Mr B being told that it was proposed, without him being given any explanation, and without the court giving him an opportunity to be heard before or after the event. To this day he has never been served with the statement that led to the removal. I need not consider whether or not he was entitled to the specific protection of advance notice under the protocol contained in *Re DE* [2014] EWFC 6; [2015] 1 FLR 1001, as endorsed by this court in *Re S* [2018] EWCA Civ 2512. It is simply a question of whether the process was fair.

11. At all events, on 15 August 2022, the local authority filed its special guardianship report and gave a heavily redacted version of it to Mr B. On 18 August 2022, he made an application to be joined as a party to the care proceedings.

The decision under appeal

12. Mr B's application was considered at a CVP hearing before Recorder Evans on 30 September 2022 at which Mr B and the parties were represented. The recorder dismissed the application. His order included this recital:

> "Giving judgment, the court refused Mr B's application, identifying evidence that would inevitably cause any application made by him for leave to bring a Section 8 order to fail and

therefore confirming that there was no role for him to play in proceedings."

13. In his clear and compact judgment, the recorder introduced the application and summarised the parties' submissions. His reasoning appears in the following passage:

> "11. In the alternative, it is suggested, on Mr B's behalf, he could be made an intervenor for a specific purpose, that being to challenge the special guardianship assessment. The local authority does not seek any findings to be made against Mr B. The situation here is he was assessed. He was considered on a viability assessment as a potentially appropriate carer. He was assessed as a potential special guardian, and that assessment is negative.
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> 12. In those circumstances, it would be very unusual, it seems to me, for the potential special guardian to be either made a party or an intervenor. The potential special guardian has the right, obviously, to contest what is said about him and file a statement. That can be done without being a party, without being an intervenor, and even without an order.
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> 13. In the circumstances, it seems to me that there is no really good reason put forward for Mr B to be made a party to these proceedings, which does give rise to at least the possibility that there is an ulterior motive in doing so. The decision as to whether a person should be joined as a party to care proceedings, it is acknowledged, is governed by section 10(9) of the Children Act, which deals with when a person applies for leave to make an application for a section 8 order.
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> 14. But it is common ground, there being no such application for leave before me or made in these proceedings, that the matters referred to in section 10(9) apply to my consideration of this matter, and it says I should have particular regard to the nature of the proposed application for the section 8 order, which, as I say, is not made; the connection with the child of the applicant; risk there might be of the proposed application disrupting the child's life to such an extent that they would be harmed; and where the child is being looked after by a local authority, the authority's plans for the child for the future; and the wishes and feelings of the child's parents.
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> 15. As to the last of those, the only parent involved at the moment is the mother who opposes the application. The authority's plans are that Mr B should not, at least presently, be considered as a potential carer, and, as far as there is a connection with the child, his connection with C was put as second best to an actual parent.
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> 16. I am also, on behalf of the local authority, referred to the case of *Re B (paternal grandmother joinder as party)* [2012] EWCA

> Civ 737 and Black LJ's judgment therein, which makes it clear that there is a broad discretion to conduct care proceedings according to the issues and evidence, and I must ensure there is a fair determination of the claims of the parties and issues in the case, including family members' assessments, and although Mr B is not a family member I take that to include someone in Mr B's position.
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> 17. But, in particular, she said that one factor that I should take into account is whether the person seeking party status has an arguable position to advance in the proceedings and the local authority draw my attention to a particular passage in paragraph 37 when she said:
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> > "It is logical that a judge determining an application to become a party to proceedings should have an eye to what may follow during them. To illustrate this with an obvious example, there would be no point in joining someone as a party if they would then inevitably be refused leave to bring an application in relation to the child and would have no other legitimate role in the proceedings."
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> 18. As I have said, it is not necessary for Mr B to be a party or an intervenor for him to file a statement challenging the special guardianship assessment. He can do that so that such information as he wishes to put forward is before the court and with the local authority. There is no other legitimate role in these proceedings put forward by Mr B justifying his application. Considering the special guardianship assessment, and the evidence that is before me, I share the local authority and the guardian's concerns about the concerns it raises, and it does seem to me to be evidence which would inevitably cause any application for leave by Mr B to make a section 8 application to be refused.
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> 19. In those circumstances, there is no role for him to play in these proceedings and his application to be joined as a party must be dismissed. I do acknowledge he has a right, as I have said, to challenge the special guardianship assessment and the appropriate way to do that would be either to apply for an independent assessment or to file a statement or both, but he can take those steps without any order, and it does not seem to me to be appropriate for me to make any such order."

The appeal

14. Mr B sought permission to appeal, which I granted on 2 December 2022.

15. For Mr B, Ms Compton, who did not appear below, made concise and effective submissions. She made clear that Mr B has no intention of competing with the mother but wants to put his case before the Family Court in case she is unable to resume care of C. In that event, he would seek to be C's carer, either as his special guardian or

under a lives-with order; in any case, he would seek more contact. He was happy for his involvement in the proceedings to be limited so that he did not see the personal documents relating to the mother or participate in matters that did not concern him.

16. The first ground of appeal is that the recorder failed to properly consider and assess the factors in s. 10(9) Children Act 1989 and failed to assess whether Mr B had an arguable case. Ms Compton acknowledged that the recorder had correctly directed himself as to the legal assessment he had to make, but she argued that he had not sufficiently attended to the essential feature of Mr B's importance to C. A decision that he had no role to play in the proceedings was perverse, and the supposition that he had an ulterior motive was unsustainable. Mr B's case was not merely arguable but strong. The safeguarding issues were either disputed or of insufficient significance to lead to a different conclusion.

17. The second ground of appeal is that the determination was unfair in that it gave Mr B no opportunity to challenge the reasons behind C's removal or to put his case at any stage. Under this ground, it is also to be noted that in reaching this conclusion, the recorder had the advantage, which we do not share, of seeing the unredacted special guardianship report and, no doubt also the statement of the social worker that was before the court on 4 August. In para. 18, he refers to them as "evidence which would inevitably cause any application for leave by Mr B to make a section 8 application to be refused". He did not engage with the fact that Mr B only had the redacted report, and there is no indication that his decision rested to any significant extent on the redacted material: had it done, he would have had to make that clear. On behalf of the local authority, Mr Squire accepted that what we have seen contains the essential information underpinning the recorder's decision, and we proceed on that basis.

18. The third ground of appeal is that the recorder was wrong to exclude Mr B when there was no basis in evidence for doing so. The only evidence was that filed by the local authority, Mr B not having had the opportunity to file a statement himself. In the circumstances, there was no sound basis for ruling him out, still less to have suggested that he might have an "ulterior motive" for wanting to participate in the proceedings.

19. The last ground of appeal contends that the recorder placed too much weight on alternative options that were available to Mr B to put his case. There was no consideration of how he could file a statement, seek another assessment or challenge the local authority's assessment without being a party. Apart from the problem of a lack of standing, Ms Compton confirmed that Mr B would not be eligible for continued legal aid if the current order stood.

20. The respondents raised a number of arguments in opposition to the appeal:

    (1) They were united in submitting that the recorder had been entitled to find that Mr B had no arguable case and that this was a discretionary decision that should not lightly be interfered with.

    (2) Mr Squire submitted that the starting point was to consider what Mr B wanted from the proceedings. He is seeking to be a special guardian but he had made the wrong application. Instead of asking for party status, he should have applied for a special guardianship order. If he wanted contact he could make an application under

section 34. He would need leave, but if he obtained it he would be able to participate in the proceedings to an appropriate extent.

(3) For the mother, Ms Krishnan stated that her client is a vulnerable individual and that allowing Mr B to become a party would cause disruption to the proceedings and "open up a can of worms". In the same vein Ms Hughes, for the Guardian, urged that joining Mr B would increase the complexity of the proceedings and lengthen the final hearing.

(4) Ms Hughes observed that if the hearing in August 2022 had been approached differently, matters might not have reached the stage where Mr B needed to apply for party status. However, it would be going too far to make him a party now. He should wait until the question of the mother's ability to regain care of C had been decided and at that stage it might be appropriate for his claim to be considered.

(5) Nonetheless, Ms Krishnan and Ms Hughes noted that orders commonly contained a direction permitting anyone dissatisfied with a special guardianship assessment to attend a hearing to seek to challenge it, though none of the three orders so far made in these proceedings contains such a provision. They therefore proposed a "pragmatic approach" whereby Mr B would be (without becoming a party) (a) permitted to file a statement setting out his challenge to the special guardianship assessment and making any contact proposals, (b) invited to attend the final hearing, and (c) allowed to give evidence and cross-examine the assessor.

21. I would add that the issue of delay featured heavily in the respondents' written arguments (though it was not an issue before the recorder). However, that fell away by the time of the appeal hearing. We were told that the IRH, previously fixed for 3 January 2023, was to be deferred as there is agreement that work will be carried out with the mother for eight weeks to support her ability to care for the children. That will be followed by further assessment. Accordingly, and for good reason, the IRH will not take place for a number of months.

Determination

22. In approaching the application made by Mr B, the court needed to consider the broad contours of these care proceedings. The best outcome, by unanimous consent, would be for the mother to be able to recover the care of both children. However, at the time of the recorder's decision, there was no certainty about that. If it could not happen, the local authority would be likely to seek a placement order for D, but that option will not be available to C. The only alternative to foster care for him would be a placement with Mr B. In any event, the issue of contact was likely to arise. Against that backdrop, there are in my view two difficulties with the order under appeal.

23. The first is that the recorder could not legitimately determine on the basis of the available information that any application made by Mr B would inevitably fail and that there was therefore no role for him to play in proceedings. The court's task at that point was (to borrow a turn of phrase from *Re W* [2016] EWCA Civ 793 at para. 70) to decide whether his case was broadly 'a runner', not whether it was 'a winner'.

24. In making that judgment, the salient features that should have led the court to grant the application were these:

(1) The importance for C of his relationship with Mr B, particularly in the light of his special needs.

(2) The lack of any similarly important adult relationship, apart from with his mother.

(3) The relatively moderate gravity of the unproven allegations made against Mr B.

(4) The requirements of natural justice in the peculiar circumstances of C's removal from his approved interim carer.

(5) The benefit to the court in having all realistic options before it for C's sake.

(6) The inability of Mr B to participate effectively without party status in circumstances where all parties had dismissed his case.

(7) The need to avoid delay.

25. Seen with the assistance of s. 10(9), the recorder should have identified (a) that the nature of the proposed intervention was appropriate to the circumstances, whether or not it would ultimately be successful, (b) that the applicant had an unusually strong connection with the child for someone who is not a relative, and (c) that there was no significant risk of intervention harming the child. It is undoubtedly the case that Mr B is "second best to an actual parent" but that did not make his case unworthy of consideration. As to (d), the local authority's plan had abruptly changed and its presentation could in certain respects be considered tendentious, while the mother had, at least ostensibly, also changed her position towards Mr B after years of reliance on him. Had the recorder considered these matters squarely, he would in my view have been bound to conclude that Mr B had an arguable case sufficient to satisfy the test for joinder.

26. The second difficulty is that the options identified by the recorder do not seem consistent with his substantive decision. Having found that Mr B had no legitimate role to play in the proceedings, the recorder stated at paras. 18-19 that he had a right to challenge the assessment and that he could apply to file a statement or to obtain an independent assessment or both. However, he did not explain how that could happen or why his main conclusion would not inevitably be fatal to any such attempt. Further, if this was a meaningful right, the court should have addressed it there and then and given any necessary directions.

27. It follows that I reject the respondents' various arguments. The argument that Mr B might have filed a different application leads nowhere, as he would immediately have come up against the same objections. The fact that an intervention would add complexity to C's proceedings is unconvincing and any added complexity would in any case be no more than a reflection of his life story. The final hearing will only be lengthened by Mr B's participation if the court considers it should. The idea that there should be sequential rather than parallel planning is calculated to build in delay. The "pragmatic approach" is in reality party status in all but name.

28. For these reasons, we made an order in these terms:

1. The appeal is allowed.

2. The Appellant is joined as party to the care proceedings with case number LN22C50054 as the Fifth Respondent.

3. The matter shall be listed for a case management hearing (currently expected to be 3 January 2023) as directed by the Designated Family Judge for Lincoln.

4. Any Part 25 applications shall be made by 10:00 on 3 January 2023.

5. The matters to be considered at the case management hearing directed above shall include:

    i. The extent of disclosure to the Fifth Respondent;

    ii. The necessity for any continuing redactions;

    iii. Case management in relation to any further assessment or assessments that may be necessary;

    iv. The extent to which the Fifth Respondent should attend future hearings.

29. In conclusion, I would add that the outcome of this appeal is particular to its facts. As the recorder observed, it will be unusual for a potential special guardian to become a party to proceedings. The features that justify it here are that the Appellant is a non-relative who has been a constant presence in the child's life and was an approved carer from whom the child was removed without apparent due process. In addition, he does not benefit from the duties placed on a local authority under s. 22C of the Children Act in relation to the placement of children in care. This combination of features makes the case an unusual one and justifies our unusual order.

Lady Justice Nicola Davies:

30. I agree.

Lord Justice Moylan:

31. I also agree.