



Neutral Citation Number: [2022] EWCA Civ 896

Case No: CA-2022-000340

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE FAMILY COURT AT LIVERPOOL
His Honour Judge Greensmith
LV19C03209

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30 June 2022

Before :

LADY JUSTICE KING
LORD JUSTICE PETER JACKSON
and
LORD JUSTICE POPPLEWELL

D (A Child: Placement Order)

Aidan Vine QC and Neil Christian (instructed by Canter Levin & Berg Solicitors) for the
Appellant Grandmother
Lorraine Cavanagh QC and Jonathan Taylor (instructed by Legal Services) for the
Respondent Local Authority

Hearing date: 22 June 2022

Approved Judgment

**This judgment will be handed down remotely by circulation to the parties' representatives
by email and released to the National Archives. The date and time for hand-down
is deemed to be 10.30am on 30 June 2022**

Lord Justice Peter Jackson:

Introduction

1. The recent decision of the Supreme Court in *H-W (Children)* [2022] UKSC 17 underlines that a decision leading to adoption, or to an order with similarly profound effects, requires the rigorous evaluation and comparison of all the realistic possibilities for a child's future in the light of the court's factual findings. Adoption can only be approved where it is in the child's lifelong best interests and where the severe interference with the right to respect for family life is necessary and proportionate. The court must therefore evaluate the family placement and assess the nature and likelihood of the harm that the child would be likely to suffer in it, the consequences of the harm arising, and the possibilities for reducing the risk of harm or for mitigating its effects. It must then compare the advantages and disadvantages for the child of that placement with the advantages and disadvantages of adoption and of any other realistic placement outcomes short of adoption. The comparison will inevitably include a consideration of any harm that the child would suffer in the family placement and any harm arising from separation from parents, siblings and other relations. It is only through this process of evaluation and comparison that the court can validly conclude that adoption is the only outcome that can provide for the child's lifelong welfare – in other words, that it is necessary and proportionate.
2. The question on this appeal is whether a decision that a child could not be placed with his grandmother but should instead be placed for adoption was reached after such a rigorous evaluation and comparison, or whether, as the grandmother argues, the process was deficient because the court did not fully evaluate the option of a placement with her, nor properly compare its advantages and disadvantages with the advantages and disadvantages of adoption.
3. The grandmother's argument is convincing. For the reasons given below, I would allow the appeal and remit her claim for a rehearing. In the light of the extreme delay that has already occurred, this is highly unfortunate, but given what is at stake it is unavoidable. This court holds no view about the likely outcome of the rehearing, and I will say only what is strictly necessary to explain why the appeal succeeds.

The history and the proceedings

4. The appellant, aged 51, is the maternal grandmother of B, a boy who will soon be 3. She has two daughters. The elder, who lives some 50 miles away, has three children, two girls and B. She and the children's father are both deaf. In 2019, care orders were made in respect of the two girls, and they were placed with their paternal grandparents. As for B, he was removed at birth and has been in foster care all his life. The grandmother's younger daughter and that daughter's husband and child live with her, though they will move to their own accommodation soon.
5. In early 2020, following the removal of the sisters, the parents were convicted of child cruelty, arising from their grossly inadequate home conditions. Other concerns that led to the care proceedings relating to the sisters and to B's proceedings centred on domestic abuse in the parents' relationship and their dishonesty with professionals.

6. B's proceedings continued for 144 weeks up to the final order, with no less than 29 orders being made in the process. In October 2020 they were allocated to the judge (His Honour Judge Greensmith), whose final order was made on 24 January 2022 after a hearing that had lasted for a total of 21 days in four episodes: November/December 2020, June 2021, September 2021 and December 2021. Difficulties were experienced with intermediaries, signing interpreters, illnesses and computer technology, and adjournments were granted for further assessments to take place.
7. The grandmother had put herself forward to look after B from the outset. She was negatively assessed as a foster carer by the local authority in March 2020 because of concerns about her health, her home conditions, her smoking, and the history of her own parenting. However, in June 2020 an order was made for an assessment by an independent social worker ('ISW1') and in August 2020 she was joined as a party, although she did not obtain legal representation until January 2021.
8. The report of ISW1 in August 2020 identified some strengths in the grandmother's ability to meet B's needs, but it too did not recommend her as a foster carer or a special guardian. The assessor was particularly concerned about the closeness of the relationship between the grandmother and B's mother, which was said to have led to her failing to intervene on behalf of the sisters; now her focus was said to be too much on her daughter and not enough on B.
9. When the first episode of the final hearing took place, the judge was highly critical of the evidence of ISW1, apparently because of concerns about the witness's understanding of special guardianship. In a recording to an order of 4 December 2020, the assessment was described as "woefully inadequate and of limited value to the court". Whether or not that criticism was warranted, the upshot was that another assessment was commissioned. This was carried out by ISW2, who reported in March 2021 and made a recommendation that was generally favourable to the grandmother.
10. The local authority did not accept the opinion of ISW2 and it declined to approve the grandmother as a foster carer. Further time was then taken up in exploring the issue of her physical capacity. She had for some years been claiming benefits for a level of disability that would be inconsistent with childcare. However, an occupational therapy report in November 2021 established that she was physically fit to care for B, whatever she may have said when making her claim.
11. One feature of the evidence was that the grandmother had called the police twice in September and October 2020 after seeing aggressive behaviour by the father towards the mother during an online call she was having with her daughter. However, when asked about this during the proceedings, she elaborately denied that she had made the reports.

The judge's decision

12. The judge delivered a written judgment running to just nine pages. He concluded that the parents were incapable of providing good enough parenting for B. There is no appeal from that decision, and that issue is settled. He next found that the grandmother had the physical ability to provide good enough care and that she had misled the DWP by exaggerating her physical disabilities. Over the course of the remaining three pages he continued:

“39. The assessment of the grandmother’s ability to provide safe care for B is not limited to her ability to care for him physically, however. By far the greater issue regarding the grandmother is her ability to protect B from his parents. There is no suggestion that either of B’s parents would deliberately harm him but as a result of the court assessment of their parenting ability generally any exposure to the parents would put B at risk of emotional harm and maybe physical harm if he were to become caught up in one of their arguments as his half sibling was. I must therefore go on to assess the maternal grandmother’s ability to protect.

40. If B were to be placed with the maternal grandmother on the basis of a special guardianship order the court would have to be satisfied that the maternal grandmother is capable of protecting B from his parent’s toxic relationship. Any doubt established on the balance of probabilities that the grandmother was either unwilling or unable to protect B would lead to a conclusion that a special guardianship placement would be unsustainable and would expose B to a risk of significant harm. Thus, in order to quantify this risk it is appropriate to consider the relationship between the maternal grandmother and each parent in some detail.”

13. The judge then made these findings:

- (1) The grandmother’s account of being unaware of the older children’s living conditions was not accepted. Her explanation (that she did not visit regularly due to distance) was unconvincing.
- (2) The overall difficulty for the grandmother was her loyalty to her daughter, with a telling declaration in her oral evidence: “as a mother I am going to protect my children as well as my grandchildren”.
- (3) The grandmother had given very little thought to the reality of B being in a permanent placement with her and much of her motivation was to secure the opportunity for B to have a relationship with his mother, as ISW1 had concluded.
- (4) She had reported the domestic violence incidents of October and September 2020 to the police despite her denials and lied about that to avoid further difficulties for her daughter.
- (5) She and her daughter had been warned not to communicate during their evidence, but they had spoken during the mother’s evidence, albeit only about how video contact could be arranged.
- (6) The co-dependency between grandmother and daughter is such that the grandmother would be unable to put in place boundaries to protect B from the abusive parental relationship. There could be no confidence that a special guardianship order would offer the security that B so desperately needs for the remainder of his minority

- (7) The grandmother has had very little contact with B and he has never lived with her. The recommendations of the Public Law Working Group on special guardianship were noted in this regard.
- (8) A period of delay to give B an opportunity to spend time with the grandmother under an interim care order would not provide reliable evidence as to the sustainability of the placement. She is a person who will say what is needed to achieve a result, as evidenced by the benefits misinformation. The mother is equally capable of presenting false information, and it is highly likely that both of them would either put their relationship on hold during the relevant period or engage in disguised compliance.

14. The judgment then ends:

“51. ... My conclusion that B cannot be placed with his parents is based upon my finding that satisfactory home conditions are unlikely to be maintained and that the toxicity of the relationship between the parents will be a constant threat to B’s emotional and physical safety. I am satisfied that the maternal grandmother is incapable of protecting B from that dangerous relationship.

52. Regarding the court’s requirement to look at all the aspects of the case holistically and only to make a placement order if nothing else will do, I have considered whether long term fostering will meet B’s need; it will not. B needs the security that a fostering placement will not provide. If B were to be placed in long term foster care, he would be able to develop a relationship with his siblings. This is a significant factor in the balance. He would also maintain contact with his immediate and extended family; again, this is also a significant factor. However, the inherent uncertainty that accompanies foster placements mean that the opportunity for a permanent home in a loving family unit, in my judgment, outweighs the advantages of foster care.

53. There is no other realistic option to consider as there are no other possible family carers.

54. Having regard to the welfare checklist in The Adoption of Children Act 2002 and considering B’s welfare for the whole of his life I am satisfied that the only option which will meet B’s welfare needs is adoption. If B is adopted, not only will he have the opportunity of living within a safe family setting for his minority, he will become blended into an extended family which will provide him with a supportive environment for the whole of his life.

55. In so far as the parents will not consent to such an order I dispense with their consent finding that B’s welfare requires such.

56. Finally I am satisfied that the orders I will make are consistent with the B's and his family's individual human rights."

Reasons for allowing the appeal

15. On analysis, there are three strands to the grandmother's arguments, which have evolved since I gave permission to appeal. The first is that some of the findings listed above were not justified by the evidence. The second is that no balanced evaluation of the grandmother's position was made. The third is that the welfare implications for B of living with his grandmother were not compared with those of adoption. On behalf of the local authority it is accepted that the short judgment did not address a number of relevant matters, but it is argued that the kernel of the decision is soundly based on matters contained in the judgment and the evidence and that any omissions are inessential.
16. On the basis of the professional assessments, there were undoubtedly a number of justified reasons for concern about the grandmother as a carer for B. The appeal does not in my view turn on the validity of the findings that the judge did make. Although a number of them are not fully explained, despite the mass of evidence that was heard, this appeal can be determined on the assumption that his assessment of the relationship between the grandmother and her daughter and the nature of her past involvement with her grandchildren was one that would have been open to him.
17. However, there is real force in the argument that there were other matters that were not taken into account in evaluating the option of a placement with the grandmother. There was evidence of a more positive nature and there was the question of reduction and mitigation of risk. In written closing submissions made to the judge on the grandmother's behalf, attention was drawn to the fact that her home conditions were now satisfactory, that she had stopped smoking, that she had the support of her younger daughter and husband, that their child had grown up in her home without incident, that she had never been offered education about the effects of domestic abuse, that the parents live a long way away, and that there are a number of protective orders that might be made to keep them away from B's home. These matters were not alluded to by the judge.
18. Another issue arises from the treatment of the calls to the police, later untruthfully denied. This was a classic double-edged sword, but no regard was had to the protective aspect of the grandmother's actions or the confirmation they give that she does not approve of the father. Nor was reference made to the fact that she had brought up and advocated for her own children, one deaf and the other with dyslexia, or to the strong commitment she had shown in putting herself forward to care for B. Finally, the judge made no reference at all to the more recent opinion of ISW2, preferring the opinion of ISW1, despite his earlier strictures. These matters clearly needed to be addressed and, if they were not to carry some weight, explained.
19. More centrally, to borrow from *H-W* at [51], the judge telescoped the process. At paragraph 40, he stated that the grandmother could not be a special guardian if she was shown to be unwilling or unable to protect B from the parents' toxic relationship. He then ruled her out because he found that she would be incapable of protecting him from the risk of significant emotional harm and maybe physical harm if he were to become

caught up in one of their arguments. He effectively treated this one undeniably important matter as if it was the ultimate question, and as if any risk of parental involvement, however limited, was to be regarded as fatal.

20. As noted above, the court had to assess the nature and likelihood of the harm that B would face in the grandmother's care, the consequences for him if it arose, and the possible ways of reducing the risk or mitigating its effects. This required an evaluation of whether the parents, and in particular the father, could be kept at arm's length. A number of questions had to be squarely asked. How likely was it that they would try to interfere? What might she do if they did? What would the consequence be of unauthorised contact, however limited? In short, what was the actual risk, and could it be managed with local authority supervision and support, or by orders preventing the parents coming to B's home area except in accordance with approved arrangements? If the risk could be managed, what benefits might come to B from knowing his parents, or at least his mother, and his siblings, aunt and cousin during his childhood? These questions were not addressed and the evaluation of the internal strengths and weaknesses of the grandmother's position was therefore incomplete.
21. Finally, because the judge had ruled out the option of placement with the grandmother, he did not compare it meaningfully with the alternative plan for adoption. He referred only in passing to the statutory checklists and he did not mention the principle of proportionality. Those matters of form would be of no significance if the analysis was carried out in substance, but it was not.
22. It is very concerning that B, who has spent all his young life in foster care, must now wait even longer for a decision. However, there is no alternative to allowing the appeal and I would remit the grandmother's claim for urgent rehearing by a judge nominated by the Family Division Liaison Judge.

Lord Justice Popplewell

23. I agree.

Lady Justice King

24. I also agree.
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