Neutral Citation Number: [2024] EWCA Civ 696

Case No: CA-2024-000909

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE FAMILY COURT AT WORTHING
HH Judge Earley
SD2350176

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20 June 2024

Before :

LORD JUSTICE LEWISON
LORD JUSTICE BEAN
and
LORD JUSTICE BAKER

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O (CARE PROCEEDINGS)

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John Hatton (instructed by **Brighton and Hove Law**) for the **Appellant**
Jacqueline Roach (instructed by **Local Authority solicitor**) for the **First Respondent**
Maria Hancock (instructed by **Spearpoint Franks**) for the **Second Respondent**
Shelly Glaister-Young (instructed by **Emily Carter-Birch**) for the **Third Respondent, by his children's guardian.**

Hearing date : 20 June 2024

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Approved Judgment

LORD JUSTICE BAKER :

1. The question arising in this appeal is whether the judge's decision at a case management hearing to exclude a mother as a future carer for the child was unjust because of a procedural irregularity.

2. The subject of the proceedings is O, a boy aged ten months. O has three older siblings aged 10, 9 and 7 years. There have been longstanding concerns about domestic abuse in the parents' relationship and the children's exposure to that abuse. In 2022, the local authority started care proceedings in respect of the three elder children. In the course of those proceedings, parenting assessments were carried out. In early 2023, the mother disclosed that she was pregnant. The local authority carried out a pre-birth assessment. All the assessments concluded that, despite the mother's love for her children, she did not accept that she needed to make changes or that she required support.

3. The proceedings relating to the elder children were listed for a two-day threshold hearing in July 2023 at a point when the mother was 8-months pregnant. In a judgment delivered on 19 July 2023, HH Judge Earley recorded that the mother was a vulnerable person because she said she was a victim of abuse and had difficulties understanding complicated matters and maintaining concentration, and as a result had been supported by an intermediary. In her judgment, the judge made a number of findings, including that (1) the mother had been subjected to coercive, controlling and abusive behaviour perpetrated by the father; (2) the three children had suffered significant emotional harm by growing up in a home where there had been domestic abuse; (3) the mother had failed to protect the children from emotional harm despite attempts by professionals to work with her to keep them safe; (4) in November 2022, the eldest child had been assaulted by the father, and (5) the mother subsequently accused the child of lying about that incident and put pressure on him to change his account, thereby causing him further emotional harm.

4. In her evidence in the proceedings concerning the elder children, the mother stated that she had now separated from the father. The judge observed: "I am clear that they need to maintain that separation, as the findings that I have made evidences that their relationship is unhealthy and volatile. That relationship has caused harm to [the three children] and the unborn baby."

5. Following the judgment, the three children were made subject to full care orders on the basis of care plans for placements in their extended family. The eldest child was placed with his maternal grandparents, the younger two with a cousin and her partner. All three children continue to have supervised contact with their parents.

6. O was born on 6 August 2023. Care proceedings were started immediately and on the following day, he was made subject to an interim care order. On discharge from hospital, O was placed in foster care, with supervised contact with the mother. The mother put forward the names of a number of people to be assessed as potential carers for O. The local authority conducted an initial viability assessment in respect of those people, and concluded in each case that the proposal was not a viable option. The local authority filed a care plan proposing that O be placed for adoption and issued an application for a placement order under s.21 of the Adoption and Children Act 2002.

7. The matter was listed for a final hearing for three days in February 2024 before Judge Earley, who had had conduct of both sets of proceedings. On day 2, however, it became known that members of the father's extended family, Mr and Mrs A, had been identified as potential carers. Initial investigations suggested that this was a viable option, and the parties agreed that the hearing should be adjourned for a full assessment. At the same hearing, the mother applied for a further assessment, either by an independent social worker or in a residential unit. The judge recorded that, although the mother had spent some time in a refuge, she had not engaged with work about domestic abuse and keeping herself and her child safe; that the father had not undertaken any work on domestic abuse; and that the mother had now moved back to live with the father whilst denying that she was in a relationship with him. The judge refused the mother's application for a further assessment on the grounds that the previous assessments had been fair and thorough and there was no reason to think that a further assessment would reach a different conclusion. According to the approved note of judgment dated 7 February, she concluded by saying:

> "There are no gaps in the evidence other than whether O can be cared for by the As. The outstanding information that is necessary is whether there is a realistic plan for family placement for O. The applications for assessment by an ISW or a residential assessment of the mother are dismissed."

There was no appeal against the judge's decision.

8. The order made following the hearing included various case management directions to facilitate the assessment of Mr and Mrs A. It also included, under the heading of "assessment of the proposal for the mother and O to live with and be supported by [another named couple from the extended family]", a direction for the local authority to file an assessment of the named couple's offer of support.

9. This latter proposal came to nothing. The assessment of Mr and Mrs A, however, was positive. On 17 April 2024, the matter returned to court for a further case management hearing to consider the local authority's amended interim care plan to place O with the As for a period of further assessment. All parties approved the proposed move. The local authority, however, also proposed that there should be a 10-week suspension in the mother's contact. The mother objected to this proposal but, after hearing submissions, the judge endorsed it.

10. In a short judgment, she recalled that, at the hearing in February, the mother had said through counsel that she was open to the As taking on the care of O if positively assessed and that she would do anything to avoid him being adopted. The judged continued:

> "Again back in February I was asked to think about whether there should be further assessment of the mother and whether she should care for O. I considered the application and [was] clear further assessment was not necessary …. I was satisfied the assessments had been thorough and fair and [there was] no reason to think that further assessment would bring about a different outcome. There was no gap in the evidence other than

> whether O could be cared for by the As. I am clear the realistic options are placement with the As or adoption."

The judge said that a suspension of contact was necessary to give the planned placement with the As the best chance of success and that, when contact was resumed, it would be on a much more restricted basis.

11. In the order made following the hearing, the part-heard final hearing was listed for one day on 21 August 2024 and various case management directions were made to facilitate that hearing.

12. The order also included a number of recitals, including one which has led to this appeal. It read:

> "5. In listing the resumption of the part-heard final hearing for one day, the Court observed that the realistic options for O are placement with the As or adoption, noting that it had been said on the mother's behalf at the previous hearing that she would support O's placement with the As if the assessment of them was positive."

13. On 24 April, the mother's representatives filed a notice of appeal against the provision in the order ruling out the mother as a realistic option to care for her son. The ground of appeal was that it was procedurally unfair for the judge to rule out the mother as a realistic option to care for her child at a case management hearing in the following circumstances:

(a) The court had heard oral evidence from the local authority witnesses at the final hearing which had been adjourned part-heard but had not heard evidence from the parents or the guardian.

(b) The mother had a reasonable expectation that she continued to be included within the group of realistic options being considered to care for her child in circumstances where at the hearing in February 2024 (i) the court did not expressly rule her out as a realistic option, and (ii) the local authority had been directed to file and serve evidence assessing the proposal for the mother and child to live with and be supported by extended family members.

(c) The issues for the hearing in April 2024 did not expressly include the question whether the mother might be ruled out as a realistic option to care for her child and no party had raised it as an issue for determination at the hearing.

(d) The hearing in April was listed for one hour during which time the court and the parties had to deal with other significant, albeit allied, issues.

(e) Prior to the decision, the parties had not been made aware that the judge was contemplating ruling out the mother as a realistic option to care for her child.

(f) The mother, who is a vulnerable party as defined by FPR 2010 rule 3A, had not been afforded an opportunity to provide instructions to her legal team on this important issue.

(g) The mother was not afforded an opportunity to make any representations about the issue, either in evidence (oral or written) or through submissions before or after the decision.

14. Permission to appeal was granted on 23 May 2024.

15. In submissions to this Court on behalf of the mother, Mr John Hatton rightly accepted that it was open to a court to rule out a parent as a future carer for a child at a hearing prior to the final hearing of care proceedings. The authority for that course is the decision of Black J in *North Yorkshire County Council v B* [2008] 1 FLR 1645 and such a hearing is commonly referred to as a "*North Yorkshire*" hearing. Mr Hatton accepted that it might have been open to the judge to rule out the mother at a hearing properly convened to consider an application to that effect. But the course taken by the judge – ruling out the mother before she had given evidence at the final hearing, with no notice that she was considering taking that course, and without giving any party an opportunity to make representations about it – was a serious procedural irregularity. Furthermore, having not heard oral evidence from the mother, or submissions as to whether or not she was a realistic option, the court was not equipped to make a proper evaluation about it.

16. On behalf of the father, who has played a minimal role in the proceedings and has not in fact had any contact with O, Ms Maria Hancock in written submissions adopted what she described as a neutral position. In her skeleton argument, however, she cited the decision of this Court in *Re S-W (Children) (Care Proceedings: Case Management Hearing)* [2015] EWCA Civ 27 (considered below) which provides some support for the appellant's position.

17. The local authority submitted through Ms Jacqueline Roach that it would have been open to the judge to rule out the mother in a *North Yorkshire* hearing. The reasons for ruling out the mother were sound and supported by the evidence. It was conceded, however, that the judge was at fault in reaching her decision without notice that she was considering taking that course, or hearing any submissions about it, and that this amounted to a procedural irregularity. The local authority is particularly concerned that there should be no further delay in reaching a final decision about O's future. The placement with the As is said to be going well and the adjourned final hearing remains in the list on 21 August.

18. On behalf of the guardian, Ms Shelly Glaister-Young also accepted that there was a procedural irregularity but questioned whether it was sufficiently serious to render the decision unjust. The mother had had an opportunity to challenge the local authority witnesses. Although she had not given oral evidence, her written statements were before the court. The judge had had conduct of both proceedings and was fully aware of her circumstances, her parenting history, and her case for caring for O. It was within the judge's case management powers to dispense with oral evidence and she would have been entitled to take that course in the circumstances of this case. The only options for the mother had been to persuade the court to allow a further assessment or to sanction a placement for her and O with family members to provide support. The first had been ruled out at the hearing in February and by the hearing in April the second had fallen away.

19. Ms Glaister-Young drew attention to the position statement filed by the child's solicitor for the April hearing in which it was asserted that at the hearing on 7 February, the court had ruled out the possibility of either parent caring for O in the future. She submitted that it was therefore wrong to say that there had been no reference to the option of ruling out the mother. The guardian accepted, however, that there was no express discussion of this option at the hearing in April.

20. In *Re J (Care Plan for Adoption)* [2024] EWCA Civ 265, this Court observed that holding a *North Yorkshire* hearing is still permitted although, following the decision of the Supreme Court in *Re B* (*Care Proceedings: Appeal)* [2013] UKSC 33 and the subsequent decisions of this Court, including *Re G (A Child)* [2013] EWCA Civ 965 and *Re B-S (Children)* [2013] EWCA Civ 1146, the circumstances in which it will be appropriate to hold such a hearing are likely to be less common. As Sir James Munby P observed in *Re R (A Child)* [2014] EWCA Civ 1625, at paragraph 67:

> "*Re B-S* requires focus on the realistic options and if, *on the evidence*, the parent(s) are not a realistic option, then the court can at an early hearing, if appropriate having heard oral evidence, come to that conclusion and rule them out. *North Yorkshire County Council v B* [2008] 1 FLR 1645 is still good law. So the possibility exists, though judges should be appropriately cautious, especially if invited to rule out both parents before the final hearing …."

21. It was therefore plainly open to the judge, as part of her case management powers, to seek to narrow the issues by giving due notice to the parties that she was considering excluding the mother as a future carer of the child and inviting them to make submissions on the issue. But Sir James Munby's warning that judges should be "appropriately cautious" when taking this course underlines the seriousness of the step and therefore the importance of ensuring procedural fairness. Although the court in care proceedings is not confined to the case advanced by the parties, it must ensure that any different findings made are securely founded in the evidence and that the fairness of the fact-finding process is not compromised: *Re G and B (Fact-Finding Hearing)* [2009] EWCA Civ 10, *Re A, B and C (Fact-Finding: Gonorrhoea)* [2023] EWCA Civ 437. The obligation to take all steps to ensure a fair procedure is even more acute where the party who would be adversely influenced by the decision has particular vulnerabilities of the sort suffered by the mother in this case, which require her to be supported by an intermediary. Regrettably, the course adopted by the judge in this case fell well short of what was required to ensure a fair procedure.

22. In *Re S-W*, supra, this Court (Sir James Munby P, Lewison and King LJJ) allowed an unopposed appeal by a mother against care orders made at the first case management hearing some three weeks after the start of the proceedings. The members of this Court were highly critical of the course taken by the judge. At paragraphs 28 and 29, King LJ said:

> "28. The expectation is therefore that a CMH will ordinarily be an essential management hearing designed to get the case in proper order to enable it to be ready for disposal, whether by consent or following a contested hearing, within 26 weeks. This is in contrast to the IRH when all the evidence, including expert

> evidence should be filed and where, unlike the CMH, the rules specifically require consideration to be given as to whether the IRH "can be used as a final hearing" (*PD12A Stage 3- Issues Resolution Hearing).*
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> 29. Every care judge will be conscious that, whilst it is in a child's best interests for their future to be determined without delay, it is equally in their best interests that the management of the case which determines their future should be fair and Article 6 compliant. The danger lies when, as unfortunately happened here, vigorous and robust case management tips over into an unfair summary disposal of a case."

Lewison LJ added:

> "45. …. where parties arrive at court expecting to participate in a hearing that is to deal only with procedural aspects of progressing a case towards a final hearing, it is quite wrong for the court, on its own initiative and without prior notice to the parties – let alone any invitation from any of them – to treat the procedural hearing as if it were the final hearing and to make such a drastic order as the judge made in the present case. Had a party invited the judge to make the order that he in fact made without notice to the other parties one would have described it as "an ambush". The fact that it came from the court makes it worse, not better."

The President observed:

> "55. Rule 22.1 gives the case management judge extensive powers to control the evidence in a children case: see *Re TG (Care Proceedings: Case Management: Expert Evidence)* [2013] EWCA 5, paras 27-28. But these powers must always be exercised, especially in care cases where the stakes are so high, in a way which pays due regard to two fundamental principles which apply as much to family cases as to any other type of case.
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> 56. First, a parent facing the removal of their child must be entitled to put their case to the court, however seemingly forlorn ….
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> 57. Secondly, there is the right to confront ones accusers. So, a parent who wishes to cross-examine an important witness whose evidence is being relied upon by the local authority must surely be permitted to do so."

23. The errors made by the judge in *Re S-W* were on a completely different scale to the complaints about the course taken by the judge in the present case. This was not the first case management hearing. The proceedings had been ongoing for eight months, and followed on from the previous proceedings concerning the other children. The judge had detailed knowledge of O's background and the mother's circumstances. She

did not purport to make a comprehensive final order. She did, however, make a decision recorded as a recital on the order on her own initiative and without prior notice to the parties who had arrived at court expecting to participate in a hearing dealing only with procedural aspects of progressing a case towards a final hearing. On any view, this was unfair. This mother is facing the removal of her child. Although she has had an opportunity to cross-examine the local authority witnesses, she has not yet had the chance to give oral evidence nor challenge the guardian. If she chooses, she is entitled to put her case to the court, however seemingly forlorn.

24. The assertion in the guardian's position statement for the hearing in April that at the hearing in February the court had ruled out the option of either parent caring for O in the future is plainly wrong. The February order directed the local authority to file an assessment of the offer by a named couple within the extended family to support the mother in caring for O. By April that option had disappeared. But, however remote, it remained a possibility in February. Furthermore, the final hearing was part heard and the mother had yet to give her oral evidence. In those circumstances, there was no basis on which the judge could fairly have ruled out the mother at that stage. In both judgments, she referred to there being no gap in the evidence. But where a contested hearing is adjourned part-heard before the court has heard the oral evidence of a mother who wants to resume care of her child and wishes to give oral evidence about it, there is a gap, albeit a narrow one.

25. In *Labrouche v Frey* [2012] EWCA Civ 881, [2012] 1 WLR 3169, Lord Neuberger MR said (at paragraph 24):

> "…what a judge cannot properly do, however much he believes that he has fully read and fully understood all the documents and arguments before coming into court, is to dismiss the application without giving the applicant a fair opportunity to make out his case orally. It is vital that justice is seen to be done, but that is by no means the only, or even the main, reason for this. It is also because it is vital that justice is done. Any experienced judge worthy of his office will have had the experience of coming into court with a view, sometimes a strongly held view, as to the likely outcome of the hearing, only to find himself of a very different view once he has heard oral argument."

In the present case, there was still a possibility, however remote, that, at the adjourned final hearing, the mother would be able in oral evidence to demonstrate that she had made the changes needed in her life to justify giving her a chance to care for her son.

26. In my view the judge's decision recorded in the recital to the order made following the case management hearing on 17 April to exclude the mother as a future carer for the child was a procedural irregularity which was sufficiently serious to lead to injustice. I would allow the appeal and amend the order of 17 April by deleting recital 5.

27. Although in every other respect the judge's management of this case has been entirely appropriate, justice requires that the proceedings now be transferred to another judge. If my Lords agree, I would therefore direct that the proceedings be listed before the designated family judge for an urgent case management hearing. I hope very much that

he will be able to arrange for the final hearing on 21 August 2024 to remain in the list and be heard by a different judge or recorder.

LORD JUSTICE BEAN

28. I agree.

LORD JUSTICE LEWISON

29. I also agree.