IN THE LIVERPOOL FAMILY COURT

ON APPEAL FROM THE LAY JUSTICES

Neutral Citation Number [2023] EWFC 154 (B)

Case No. LV23C50192

Courtroom No. 25

35 Vernon Street
Liverpool
L2 2BX

Monday 21st August 2023

Before:
HIS HONOUR JUDGE PARKER

B E T W E E N:

B

and

A local authority (1)
D (2)
E (3)
F/G (4)

MRS HUGES appeared on behalf of the Applicant
MRS BILLINGTON appeared on behalf of the First Respondent
MR JAMIESON appeared on behalf of the Second Respondent
THE FOURTH RESPONDENTS appeared In Person

JUDGMENT

*of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court..*

HHJ PARKER:

1. I will now give an *ex tempore* judgment and reserve the right to add to or clarify this judgment further, if so required.
2. This is an appeal brought by the Children's Guardian, B, on behalf of the child, C, born [redacted], he is represented by Mrs Hughes.
3. The first respondent is the local authority represented by Ms Williamson.
4. The second respondent is the mother, D, represented by Ms Billington. The father is E, and he is the third respondent, represented by Mr Jamieson.
5. Also appearing before the Court were the paternal grandparents, F and G, who were unrepresented.
6. All parties agreed that they should be present.
7. The appeal of the Children's Guardian was against the decision of the lay magistrates, refusing the application of the Children's Guardian for a full Friends, Family, or other Connected Carers assessment of the paternal grandparents to be prepared by an independent social worker. The magistrates dismissed the application by order of 9 August 2023 on the basis that such an assessment was not necessary to enable them to deal with the proceedings justly. The justices set out their reasons in writing at C58.
8. In his analysis, the Children's Guardian said this,

> "F and G, paternal grandparents have submitted an application to the Court seeking to challenge the outcome of their viability assessment, E35-49. I note the Local Authority's evidence and accept that F and G have been given ample opportunity to challenge their assessment before these proceedings were issued and during these proceedings, however, having met with F and G on 18 July 2023, they outlined to me that up until recently, they were under the impression that the plan for C would be for him to be rehabilitated to his parent's care. F and G's application stems from being informed that the local authority seek to pursue a plan of adoption for C. I found F and G to have good understanding of the risks posed to C by his parents and what a kinship placement would mean for C, mostly with regard to this being in place throughout the rest of his minority. I outlined to the grandparents that any placement of C with them, would not be a bridging placement, as there is no guarantee that C's parents will make the necessary changes in the future, should the Court deem it not safe for him to be placed in their care. F and G appeared to understand this and informed me they continue to seek to be assessed as kinship carers for C. Of course, the grandparents are protective of their son and D, they did advocate for them throughout my meeting

with them, which would be something that needs further exploration via a full fostering, special guardianship assessment, in my view. The Local Authority's viability assessment outlines concerns in relation to the paternal grandparents and why the assessment concludes negatively. If the Court is minded to endorse my recommendation of further assessment of them, then the local authority should consider what intervention can be done with F and G to assist them in bridging these gaps during their assessment."

9. The application for ISW assessment of the grandparents was supported by the parents but opposed by the Local Authority. The local authority had carried out an initial viability assessment of the parents during pre-proceedings, and that document appears at C1. The grandparents received a negative assessment on the following bases:

(i) The grandmother is aged 80 and the grandfather is aged 66.

(ii) They both expressed an element of distrust of the social worker which was driven by their disagreement with the plan of the local authority to separate the baby from his parents when he was born. The question is their ability to work in partnership with the Local Authority.

(iii) They had previously withdrawn from the viability assessment process, though upon hearing of the Local Authority's plan to issue care proceedings when the baby was born, they changed their mind and asked to be reconsidered.

(iv) They told the assessor that they feel unable to be considered for full-time, long-term care, due to their age.

(v) They shared that they felt their role was to care for the baby to buy time for the parents to prove that their baby can be returned to their care as soon as possible. The grandmother said that they could do this for six months, 12 months or two years. She commented that they could perhaps care for him for five years until H could care for him.

(vi) All possible care planning options were discussed as part of the assessment, including a possible plan of adoption at the end of court proceedings. The grandfather said that that would only happen if the parents slipped up and if they did, that was their problem, and they would support the baby being adopted. If he felt that the parents had relapsed, then they could come and take the baby there and then.

(vii) They were feeling a high level of concern about care planning options for their grandson and their primary focus at that time was for the baby to remain with his parents.

(viii) They had the support of H, who had previously worked as a child minder and offered support to this placement. She is the grandfather's sister.

(ix) During discussions, it was clear that a high level of input would be needed to increase their understanding of attachment and the impact of parental drug misuse and domestic abuse.

(x) Concerns regarding domestic violence were discussed and the grandparents presented as quick to minimise and defend the concerns in this area, commenting that everyone has an argument, and disputing the information held by the police. When the father's police history was discussed in relation to a previous partner, both presented as shocked at the relevance of this, saying that it was 13 years ago, and the grandmother suggested that the father's ex-partner provoked it. The grandparents presented as being unable to look objectively and were highly emotionally invested in wanting to support the parents. The grandmother acknowledged that it would be difficult to turn the parents away from their door, if they approached outside of family time plans to see the child.

(xi) The grandparents felt that there was no reason for the unborn child to be removed from his parents' care and no reasons for restrictions on family time.

10. The local authority set out its position in position statement at C40, they opposed the part 25 application for ISW assessment of the paternal grandparents. They did so on the basis of the grandparents' ages . In addition, during the viability assessment, they confirmed that they felt unable to be considered for full-time, long-term care due to their ages. That would not provide stability for a baby. In addition, the grandparents were aware of the gravity of the risks identified in respect of the parents to C. Their assessment confirmed that they had sight of relevant paperwork and attended meetings with Children's Social Care and had been willing to engage in the process. They had sought their own independent advice. Nevertheless, they presented as extremely defensive of the parents at times, minimising the concerns of the Local Authority. Throughout the viability assessment, home visits and during previous conversations with the grandparents, their loyalty towards the parents had been evident and there have been concerns that they have been unable to separate and prioritise the needs of the then unborn baby away from the needs of his parents. This resulted in concerns about their insight and capacity to safeguard.

11. The grandparents had said that they felt that their role was to care for the baby to buy time for D and E, the parents, to prove that their baby can be returned to their care as soon as possible, or by the end of court proceedings. The importance of timely assessments being completed so that the baby has a plan of permanence was discussed and reiterated. However, despite this, during later discussions, the grandmother commented that they could perhaps care for him for five years until H could care for him. It was discussed again how each child needs a plan of permanence as soon as possible and this would not be within his timescales.

12. The grandparents also accepted in their statement, dated 7 August 2023, that they admitted that they were emotionally unprepared to take on this enormous responsibility, initially grappling with the sudden tumult of emotions and concern for their grandchild's future, however, time and deep consideration has brought clarity to their minds and hearts, they said. Their primary focus, they now realise, is to provide C with a secure, stable, and nurturing environment that he deserves.

13. The local authority argued that their position now is emotionally driven, rather than a realistic and sustainable long-term position. That was not suggested as a criticism of them, however, they were tasked with considering the merits of any full assessment and the motivation for the grandparents to change their mind completely, despite being repeatedly being made aware of the possibility of adoption. The change in position led by their understandable emotion, did not provide the necessary justification required to delay for future assessment. The local authority argue that a viability assessment is a means by which practitioners for or on behalf of the local authority can determine whether family and friends are potentially a realistic option to care for the child until they reach adulthood. Its purpose is to recommend to the Court which members of the child's family and kinship network should be further assessed as potential carers for the child. However, information gathered during the viability assessment, might contribute to permanency planning for the child and reference made to Initial Family and Friends Care Assessment, A Good Practice Guide, Family Rights Group, 2022.

14. The local authority submits that there is no gap in the evidence before the Court, it has completed a full and thorough viability assessment, which has been made available to the Court and the parties since the initial hearing in March 2023. This was not challenged by any party or the grandparents, despite notice to do so, until late on. The Guardian's assertion that the viability assessment completed is inadequate, is not supported by any clear or cogent reasoning or evidence base and as an assertion that has not previously been raised by the Guardian to the Local Authority, the parties, or the Court.

15. A letter was provided to the Grandparents on 21 March 2023, and they were advised in clear terms of the need to make any application to challenge the negative viability assessment by 3 April 2023. Prior to the first hearing taking place on 22 March 2023, the grandparents indicated a wish to challenge the negative viability assessment. On 21 March, they were provided with details of how to challenge their assessment, they were also provided with a list of solicitors. No application to challenge was received.

16. At the hearing on 22 March 2023, the Court refused interim placement of C with his grandparents and the parents sought a direction for paternal grandparents, if so advised, to send to the Court and other parties, statements by 4pm, 31 March, setting out their position in relation to the care of the child and in addition, their response to the local authority viability assessment. Permission was granted for the grandparents to submit statements. No statements were received from the grandparents.

17. On 27 March 2023, the paternal grandparents informed the local authority that they may not appeal their negative assessment, as they feel the parents need to be able to do this themselves and they are confident they will.

18. On 11 July 2023, the grandparents contacted the local authority, expressing a wish to be further assessed to care for C. They were urged to seek independent legal advice at the earliest opportunity. They were told of the IRH on 3 August.

19. On 20 July 2023;

    a) a copy of the grandparents' application dated 16 July 2023 for review of their assessment was received from the Court;

    b) and for an order directing their application to be listed for consideration at the IRH on 3 August;

    c) for the grandparents to be permitted to attend at the IRH;

    d) for the grandparents to make any part 25 compliant application for independent social work assessment of them by no later than 31 July 2023;

    e) for the parents to file position statements in response by 4pm, 2 August 2023.

    No part 25 compliant application to further assess the grandparents had been received by the local authority as at 1 August. Assessments had been taking place during the 13 weeks within pre-proceedings and the current proceedings, which were at week 19 of the date of the IRH on 3 August.

20. In a position statement at C25, the second respondent father supported further assessment of the grandparents.

21. In their written reasons, the magistrates identified the legal basis for consideration of the application correctly, they identified the need for the Court to have regard to delay which was likely to prejudice the welfare of a child in section 1(2) of the Children Act and the Adoption and Children Act 2002, section 1(3). They correctly identified the statutory requirement for courts to complete public law cases within 26 weeks, pursuant to section 32 of the Children Act. However, they reminded themselves that justice should not be

sacrificed on the alter of delay. They correctly identified that the Court is not required to hold that the child's welfare is the paramount consideration when making case management decisions. In so doing, the solicitor on behalf of the children said this, in the grounds of appeal, paragraph four:

> "The Court wrongly determined that a child's welfare is not a paramount consideration when making case management decisions, showing no understanding of the fundamental premise of the Children Act 1989, and therefore approaching the application on a fundamentally flawed basis. The welfare of C is paramount in all decisions made by the Court in these proceedings."

22. In so asserting, the solicitor for the child was making a submission that was fundamentally flawed. Section 1 of the Children Act states,

> "When a Court determines any question with respect to the upbringing of a child, the child's welfare shall be the court's paramount consideration."

23. Here the Court was not making a decision with regard to the upbringing of a child, it was making a case management decision, and in particular a decision on whether to direct further expert evidence. Therefore, the magistrates were correct in identifying that the appropriate statutory tests under section 13(6) Children and Families Act 2014 and the criteria set out in section 13(7) of that Act. In addition, the Magistrates were right to bear in mind the Overriding Objective, set out in the Family Procedure Rules of 2010 and in particular Rule 1.1, which provides criteria which define dealing with a case justly on an inclusive basis.

24. In dealing with this appeal, I have had regard to the appeal bundle, the analysis of the Children's Guardian, those skeleton arguments that have been filed and served for the appeal, together with the helpful oral submissions made by each advocate.

**The Law: Appeals against Case Management Decisions**

25. The Family Procedure Rules for 2010, Rule 30.12(1) states:

> "Every appeal will be limited to a review of the decision of the lower court …
> (3) The appeal court will allow an appeal where the decision of the lower court was wrong."

26. This is an appeal against a case management decision of the magistrates. I accept the submission made that a case management decision should not be interfered with or reversed by the appellate court, unless it is wrong, in the sense of being outside the generous ambit where reasonable decision makers may disagree.

27. In *Re TG (A Child)* [2013] EWCA Civ 5, Sir James Munby, the then president of the Family Division, said this,

> "Fourth, the Court of Appeal has recently re-emphasised the importance of supporting first-instance judges who make robust but fair case-management decisions: *Deripaska v Cherney* [2012] EWCA Civ 1235, and *Stokors SA v IG Markets Ltd* [2012] EWCA Civ 1706. Of course, the Court of Appeal must and will intervene when it is proper to do so. However, it must be understood that in the case of appeals from case management decisions the circumstances in which it can interfere are limited. The Court of Appeal can interfere only if satisfied that the judge erred in principle, took into account irrelevant matters, failed to take into account relevant matters, or came to a decision so plainly wrong that it must be regarded as outside the generous ambit of the discretion entrusted to the judge: *Royal & Sun Alliance Insurance plc v T & N Limited* [2002] EWCA Civ 1964, *Walbrook Trustee (Jersey) Ltd v Fattal* [2008] EWCA Civ 427, and *Stokors SA v IG Markets Ltd* [2012] EWCA Civ 1706. This is not a question of judicial comity; there are sound pragmatic reasons for this approach. First, as Arden LJ pointed out in *Royal & Sun Alliance Insurance plc v T & N Limited* [2002] EWCA Civ 1964, paragraph 47:
> 'Case management should not be interrupted by interim appeals as this will lead to satellite litigation and delays in the litigation process.'
> Second, as she went on to observe:
> 'the judge dealing with case management is often better equipped to deal with case management issues.'
> Exactly the same applies in family cases. Thus, in *Re C (Children)* [2012] EWCA Civ 1489 Thorpe LJ and I dismissed the appeal notwithstanding what I said was the 'robust view' His Honour Judge Cliffe had formed when deciding to stop the hearing. And in *Re B (A Child)* [2012] EWCA Civ 1545 I refused permission to appeal from an order of Her Honour Judge Miranda Robertshaw involving what I described at paragraph 16 as 'appropriately vigorous and robust case management.' I said at paragraph 17:
> 'The circumstances in which this court can or should interfere at the interlocutory stage with case management decisions are limited. Part of the process of family litigation in the modern era is vigorous case management by allocated judges who have responsibility for the case which they are managing. This court can intervene only if there has been serious error, if the case management judge has gone plainly wrong; otherwise, the entire purpose of case management, which is to move cases forward as quickly as possible, will be

> frustrated, because cases are liable to be derailed by interlocutory appeals.'
> As Black LJ very recently observed in *Re B (A Child)* [2012] EWCA Civ 1742:
> 'a judge making case management decisions has a very wide discretion and anyone seeking to appeal against such a decision has an uphill task.'"

28. In the case of *Re P (Care Proceedings: Balancing Exercise)* [2014] 1 FLR 824, the Court of Appeal refused an appeal against a case management decision from a circuit judge, refusing an application for assessment by a psychologist of the father's parenting capacity following the Local Authority's negative parenting assessment of the father. In giving the lead judgment of the Court of Appeal, Black LJ said this at paragraph 56,

> "In my view, the judge was not wrong to refuse the assessment the father sought. Case management decisions of this sort are particularly hard to appeal, and, in this case, it cannot be said that the judge overlooked any considerations which were material. An assessment such as Local Authority's parenting assessment of the father can be challenged in ways other than obtaining a competing assessment. If the facts upon which the assessment has proceeded are wrong, they can be disputed. If the opinions are flawed, that can be explored in cross examination, the author of the report being taken to the material which undermines or contradicts the conclusions he or she has drawn. Or, as the guardian contemplated here, a party can take steps to address the problems that have been identified and/or that he or she acknowledges."

29. In making case management decisions and starting from first principles, the Court must further the overriding objective to deal with cases justly, having regard to the welfare issues involved. Rule 1.1(2) of the Family Procedure Rules for 2010 provides that:

> "Dealing with a case justly includes, so far as is practicable,
> (a) ensuring that it is dealt with expeditiously and fairly,
> (b) dealing with the case in ways which are proportionate to the nature, importance, and complexity of the issues,
> (c) ensuring that the parties are on an equal footing,
> (d) saving expense,
> (e) allotting to it an appropriate share of the Court's resources, while taking into account the need to allot resources to other cases."

30. Rule 1.4 imposes a duty on the Court to manage cases actively, active case management includes identifying the issues at an early stage, 1.4(2)(b)(i); deciding promptly which issues

need investigation and hearing and which do not, 1.4(2)(c); and considering whether the likely benefits of taking a particular step justify the cost of taking it, 1.4(2)(h).

31. The primary legislation, the Children Act 1989, recognises the general principle that any delay in determining the question is likely to prejudice the welfare of the child (section 1(2)). In Public Law proceedings, this principle is given sharp focus by section 32 of the Children Act, introduced by the Children and Families Act 2014, which requires the Court to:

> "(a) draw up a timetable with a view to disposing of the application-
> (i) without delay and
> (ii) in any event within 26 weeks beginning with the day on which the application was issued; and
> (b) if such directions as it considers appropriate for the purpose of ensuring, so far as is reasonably practicable, that the timetable is adhered to."

32. Subsection (3) requires the Court to have particular regard to the impact which the timetable would have on the welfare of the child to whom the application relates and on the conduct of the proceedings. The 26-week requirement was introduced as a means of driving the length of care cases down. The philosophy behind it was well expressed in 2011 in this extract from the Foreword to the Family Justice Review by Sir David Norgrove,

> "Here, all the dedication to family justice can harm children, not help them. Having read dozens of replies to our consultations, I was struck by the way in which almost every group thought things would be better were they allowed to do more, including judges, magistrates, social workers, and expert witnesses. Hardly anyone thought they themselves should do less. The reality, of course, is that time and money spent on one child means less time and money available to help another. Dedication to achieving the best possible result for one child comes at the hidden expense of another whose case is delayed or whose social worker has come to court again, when they might have been working to help another child to remain safely within the birth family."

33. Sir Andrew McFarlane, President of the Family Division gave guidance in June 2020, entitled the Road Ahead, and in June 2021, the Road Ahead 2021. The key message of the first document advocated a significant change in time management, paragraph 43:

> "If the Family Court is to have any chance of delivering on the needs of children or adults who need protection from abuse or of their families for timely determination of applications, there will need to be a very radical reduction in the amount of time that the Court afford to each hearing. Parties appearing before the Court

should expect the issues to be limited only to those which it is necessary to determine to dispose of the case and for oral evidence or oral submissions to be cut down only to that which is necessary for the Court to hear."

34. At paragraph 47, it quoted elements of the overriding objective, it stated:

> "In these times each of these elements is important, but particular emphasis should be afforded to identifying the welfare issues involved, dealing with the case proportionately in terms of allotting to it an appropriate share of court's resources and ensuring an equal footing between the parties."

35. Family Procedure Rules 2010, part 25.4 states

> "The Court may give permission for expert evidence, only if the Court is of the opinion that the expert evidence is necessary to assist the Court to resolve the proceedings."

36. Section 13 of the Children and Families Act 2014, states:

> "The Court may give permission only if the Court is of the opinion that the expert evidence is necessary to assist the Court to resolve the proceedings justly."

37. Section 13(7) of the Children and Families Act 2014, provides:

> "When deciding whether to give permission, the Court has to have regard in particular to
> (a) any impact which giving permission would likely have on the welfare of the child concerned and the impact on the child of any assessment of them,
> (b) the issues to which the expert evidence would relate,
> (c) the issues with which the examination or other assessment would enable the Court to answer,
> (d) what other expert evidence is available, whether obtained before or after the start of proceedings,
> (e) whether the evidence could be given by another person on matters which the expert will give evidence,
> (f) the impact which giving evidence would be likely to have on the timetable for and duration in the conduct of the proceedings,
> (g) the cost of the expert evidence,
> (h) any matters prescribed by the Family Procedure Rules."

**My Decision**

38. My decision is that this appeal is dismissed.

**My Reasons**

39. On 16 January 2023, the President of the Family Division identified the need for Family Courts and the Family Justice System as a whole, to realign with the tenets of the Public Law Outline. He identified how the understandable consequence of the Covid pandemic had been that section 32 of the Children Act had fallen out of sharp focus. It was necessary, for the Family Justice System to succeed in its objective of providing timeous outcomes for children, to bring Section 32 and the Public Law Outline back into sharp focus. That drive came on the back of the final recommendations made by the Public Law Working Group, fully endorsed by the President. These identified the need to exert control over the number of experts that were being used by Family Courts and in particular identified independent social workers and psychologists as two disciplines where there was an overuse of experts. The Court already had the expert input from social worker and children's guardian and therefore such applications should be scrutinised to ensure that they met the statutory tests.

40. In this case, the Local Authority's position is that it has assessed the paternal grandparents in the initial viability assessment, and that has resulted in a negative assessment on the bases set out above. It is the professional judgment of the social worker that there is no necessity to proceed to a full assessment. The Children's Guardian does not share that opinion and suggests that there is such a need. There is, therefore, an issue between the two experts in the case.

41. The application of the Children's Guardian, with the support of the parents and the grandparents, is essentially to determine that issue summarily, by directing a further assessment by an independent social worker. In other words, the Court should not be satisfied with the viability assessment of the local authority and should start the assessment process again with another expert. The local authority object to that course.

42. In my judgment, the appropriate venue to litigate that difference of opinion is before the trial judge, it is not a matter either for the appellate judge to determine, nor indeed to tribunal at an issues resolution hearing, unless it could be demonstrated that the assessment was flawed.

43. I am not satisfied on the basis of the evidence put before the Court that that is a decision that can be made without all of the evidence being tested holistically by the trial judge.

44. It may be that at final hearing, the trial judge reaches a judgment that the situation has changed sufficiently and that having conducted an analysis, applying section 13(6) and 13(7) of the Children and Families Act 2014, and bearing in mind the overriding objective, and having regard to the provisions of section 1 of the Adoption and Children Act and Children Act, that a full assessment of the grandparents is merited on the basis that there is a gap in

the evidence that needs to be plugged, and the consequential delay is justified, notwithstanding the delay that has already been occasioned in this case.

45. On the other hand, the trial judge may reach the judgment that the grandparents are being unrealistic in putting themselves forward as long-term carers for C, and that their late change of position, for it is accepted by them and the Children's Guardian, that it is late, is driven by pure emotion rather than proper analysis of what is best for the child, and what they realistically can do. Alternatively, is driven by some other extraneous factors such as third-party pressure or guilt, or a combination of factors.

46. However, in my judgment, if the Court at this stage directs a full assessment by the independent social worker, in the absence of demonstration that the initial viability assessment was flawed, (indeed on the basis of those matters set out in the initial viability assessment, if these matters were found by the trial judge, then the conclusion in my judgment would be justified) then the Court is essentially determining the application without considering all the evidence. It would be to pre-determine the issue. It would also drive a coach and horses through the clear direction of travel for the Family Justice System, repeatedly set out by the President of the Family Division and with full statutory justification.

47. I am not satisfied that the magistrates were wrong in finding that they could not be satisfied that it was necessary for the Court to direct a full assessment by an independent social worker of the paternal grandparents. It cannot be said to have been a decision that was outside the generous ambit for their discretion. Having provided a correct analysis of the law, they identified that the grandparents had been subject to an initial viability assessment. It was clear they chose not to challenge the assessment timeously. They had considered the assessment to be fair and comprehensive. Only at week 19 did they seek to challenge this, despite many opportunities for the grandparents and the Guardian to respond earlier. They were made aware that adoption was a realistic option at the time. The application could significantly delay the final outcome. The social worker is an expert in her own right and gave full reasons as to why the viability assessment concluded negatively. This covered the potential conflict with regard to contact, which was accepted by the grandmother. She also acknowledged concerns around the impact of their age. H has been approached on four separate occasions, but was not in a position, or was unwilling to become a full-time carer. They were mindful that the case centres around permanent planning and one which could lead to adoption.

48. Therefore, in my judgment, the grounds for appeal are not made out in this case. It is open to the grandparents to challenge the Local Authority's assessment, indeed it is open to each of the other parties to challenge the Local Authority's assessment of the grandparents, but the correct forum for that is the final hearing and not at an interlocutory hearing.

49. That concludes my judgment on the appeal.

**End of Judgment.**

Transcript of a recording by Ubiqus
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