Neutral Citation Number: [2024] EWHC 79 (Fam)

Case No: NN21C00086

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/01/2024

Before :

MRS JUSTICE LIEVEN

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Between :

WEST NORTHAMPTONSHIRE COUNCIL
(acting via Northamptonshire Children's Trust)

Applicant

and

KA (MOTHER)

First Respondent

and

NH (FATHER)

Second Respondent

and

X
(through her Children's Guardian)

Third Respondent

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Ms Samantha Dunn (instructed by **Northamptonshire Children's Trust**) for the **Applicant**
Mr Rob Pettitt (instructed by **Duncan Lewis Solicitors**) for the **First Respondent**
Ms Clare Meredith (instructed by **Dodds Solicitors**) for the **Second Respondent**
Mr Ben Harling (instructed by **HLA Family Law**) for the **Third Respondent**

Hearing dates: **14 December 2023**

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Approved Judgment

This judgment was handed down remotely at 10.30am on 19 January 2024 by circulation to the parties or their representatives by e-mail.

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MRS JUSTICE LIEVEN

This judgment is being handed down in private on 19 January 2024. It consists of 50 paragraphs. The judge does not give leave for it to be reported until it has been anonymised by counsel and approved by the judge.

Mrs Justice Lieven DBE :

1. This case concerns a 2.5 year old girl, X. The case has a most unhappy procedural history and is now in week 127. This is particularly unfortunate given that the Local Authority ("LA") application is for a care and placement order, and the applications were made almost immediately after the child's birth. This delay has been highly detrimental to X's best interests, whether or not the orders sought are ultimately made.

2. The matter was listed before me, as the Family Presider for the Midlands, to consider whether a costs order should be made against an intermediary, Ms Z, for the wasted costs of a 5 day final hearing that had to be adjourned; and whether I should vary the order appointing a deaf intermediary for the Mother during the final hearing. For reasons that I set out below I did not make any costs order against Ms Z, and I have decided not to vary the order for the appointment of an intermediary. However, I will set out some guidance on the use of intermediaries in the Family Court, particularly given the apparent paucity of such guidance and the differences that seem to now arise between the practice in the Family Court and that in the criminal courts.

3. Given the issues that arise in this judgment, and the fact that the final hearing is listed to finally go ahead in January 2024, I will keep the recitation of the background of the case short. X was born in early July 2021. The applications for care and placement orders were made on 22 May 2023. The Mother ("M") is the First Respondent, and the Father ("F") is the Second Respondent.

4. The LA were represented by Samantha Dunn, M was represented by Rob Pettitt, F was represented by Clare Meredith and the Children's Guardian was represented by Ben Harling.

5. The threshold pleaded is based on the risk to X from the M's relationships featuring domestic abuse, the M's unstable mental health, and the M's alleged inability to recognise dangerous and risky situations. All of these matters are said to place X at risk of significant harm. The M had an earlier child with a different father, who was subject to public law proceedings and was placed with his paternal grandparents under a Special Guardianship Order ("SGO"). The threshold findings in that case included that the child and M had been living in an abusive household; that the M could not prioritise the child's needs; and the M's poor mental health and self-harm.

6. The M then had a second child who is subject to an SGO to a family friend. The threshold findings were effectively the same as with the first child and very similar to that set out in the current proceedings.

7. The M is profoundly deaf.

8. An Interim Care Order ("ICO") was granted on 9 July 2021 but the Court did not sanction interim separation. An assessment at [the placement] began on 22 July 2021. DNA testing in August 2021 confirmed the Second Respondent as X's F, and he was joined as a party. The time at [the placement] was extended and there is a recital to a court order dated 23 November 2021 that records:

> *"AND UPON [the placement] advising the following:*

> *In a nutshell, [M] can meet a range of [X's] needs really well but she will need support and continued monitoring in the community. Our concerns primarily focus on the potential for [M] to gravitate towards risky relationships and conflict. Therefore, an extension of one month of her placement at [the placement] will allow us to complete additional work around protection, it would allow her time to sort out her property and would encompass a transition towards life in the community. We would recommend during this time too that the local authority considers the nature of the support her family will offer her, as well as the exploration of services available to support [M] specifically with her deafness (devices will be needed to aid her with her care of [X]).*"

9. The LA then recommended that M and X move to a supported living provision at W Placement and it is recorded that she initially settled well. In January 2022 a parenting assessment was completed of the F, which was negative. The LA were ordered to carry out an "in house" parenting assessment of the M by 13 January 2022 with an Issues Resolutions Hearing ("IRH") listed for 13 April 2022.

10. The LA sought an extension of time to file the assessment due to difficulties in completing the sessions with M due to the availability of British Sign Language ("BSL") interpreters, and M expressing concerns about these sessions being supported remotely and wanting them to be in person.

11. On 5 February 2022, M left W Placement with X and travelled to Portsmouth to stay with a friend and his family. Within the records from W Placement, M had raised that she was feeling isolated and missed her friends, particularly the deaf community.

12. M's friend 'T' was part of the deaf community but also someone whom M had alleged, on 14 December 2021, had raped her on a night out on 11 December 2021.

13. M and X were located at 1am on 6 February 2022 by the police after she and X failed to return to W Placement and were refusing to engage with staff checks.

14. As a consequence, X was police protected and was placed in an emergency placement. The next day X moved to foster carers.

15. The matter came back before the Court on 15 March 2022. It was clear that the IRH would not be effective and court time was identified to deal with the issue of interim placement on 13 April 2022.

16. Prior to that hearing, the LA filed its parenting assessment, which is dated 7 April 2022. It was undertaken by the allocated social worker, Vera Koroye and a student social worker. The assessment concluded that M was not able to meet X's needs.

17. At the hearing on 13 April 2022 the Court sanctioned the continued separation of M and X. M's application for residential assessment was dismissed.

18. A Further Case Management Hearing ("FCMH") was listed on 6 May 2022 to consider M's application for an Independent Social Worker ("ISW") assessment and re-timetabling. On 6 May 2022 M sought permission to instruct Dr Andrew Cornes, Deaf Expert, psychologist and trained social worker, or Suzanne Robinson/Andrew

Beckwith, ISW. The LA and the Guardian did not support M's application for a specialist parenting assessment but did not oppose M's application for an intermediary. After hearing submissions, the Court granted the application for an expert intermediary but rejected the application for a specialist parenting assessment.

19. It was ordered, to remedy any perceived deficits in the process, that the LA would 're-do' the 5 sessions, that had previously been completed without a BSL interpreter, with one present. The addendum assessment was due to be filed and served on 10 June 2022.

20. This was the first time, in these proceedings, that M pursued an application for a deaf intermediary assessment. The intermediary assessment was completed and is dated 6 June 2022.

21. M appealed the decision to refuse the instruction of a specialist parenting assessment. Permission to appeal out of time was granted on all Grounds by Macur LJ on 17 August 2022. The parties then requested that the appeal be allowed on paper and that the order be varied, the appeal not being opposed by the LA or Guardian.

22. Following the appeal of the M, the case was re-timetabled with a direction for there to be an assessment of M undertaken by Dr Cornes. Dr Cornes identified the requirement for an updating cognitive assessment to be undertaken by a deaf specialist. Dr O'Rourke was directed to complete an updating cognitive assessment of M. This assessment is dated 31 October 2022.

23. Dr O'Rourke opined, in summary:

    a. M does not have a Learning Disability;

    b. M's functioning is in the low average range;

    c. All information needs to be translated into BSL;

    d. M has the ability to learn and understand;

    e. M's failure to make changes are not as a result of her not understanding, but due to the M's struggles to comply with teaching when her own needs become overwhelming;

    f. Legal jargon/ legal concepts need to be broken down and explained to M;

    g. M would benefit from a Deaf intermediary.

24. Dr Cornes was directed to complete his parenting assessment of M and file by 12 December 2022. However, Dr Cornes did not comply with this direction, providing several reasons for the delay.

25. On 14 February 2023 the Court directed an extension of time for Dr Cornes to file and serve his assessment of M by 10 March 2023. Dr Cornes' assessment was filed on 2 March 2023. The assessment raises clear gaps in M's parenting and that she does not understand the risks raised by the LA. Despite the concerns, Dr Cornes recommends that he could put in a bespoke parenting programme to assist X in returning to M's care.

He also recommended a bespoke Child Sexual Exploitation intervention package, that he could provide.

26. The LA was concerned that Dr Cornes' report did not consider the impact on X of further delay, nor assess the likelihood of the M engaging in such work. Following receipt of Dr Cornes' assessment, the LA circulated proposed questions of clarification; the need for these points of clarification were agreed by the Guardian. These questions did not request further work to be done by Dr Cornes but filling in some of the missing information and analysis from his original report. Dr Cornes provided some partial responses to the questions posed.

27. The matter returned to Court on 22 March 2023, before Recorder Rowbotham, for urgent directions. The Court on that occasion raised its concern at the escalating costs being charged by Dr Cornes and the fee he sought in order to complete the clarification work requested by the parties.

28. Direction was made for Dr Cornes to respond to the additional questions by 29 March 2023. Of its own motion the Court directed for Dr Cornes to attend the next hearing if a suitable response was not received in relation to the additional questions.

29. Dr Cornes produced his answers to the additional questions. Dr Cornes confirmed he was unable to comment on the likelihood of M being able to meet X's needs following completion of the proposed work on the basis that the progress M would make, and whether she would engage in the work, are unknown. In respect of further questions Dr Cornes responded stating that these were areas outside his clinical expertise.

30. Based on the responses received from Dr Cornes, it was agreed between all parties at the Advocates Meeting in advance of the April hearing that it would not assist for further questions to be put to Dr Cornes and he was de-warned from attending the hearing.

31. At the IRH which took place on 4 July 2023 the issue of Dr Cornes' attendance and/or response to any additional questions was raised and a direction was made for the requisite application to be made by 4 August 2023. No application was made and at the IRH it was confirmed that no party sought to call Dr Cornes.

32. The matter was listed for final hearing on 6 November 2023 for 5 days. However, on the first day of the hearing the intermediary, Ms Z, did not attend. The M's solicitors, who had engaged Ms Z, tried to contact her but only received an out of office reply. Efforts were made to engage a different deaf intermediary, but this is an extremely small pool, and neither of the appropriate people were available. In those circumstances the hearing was adjourned and has been relisted for 5 days commencing on 22 January 2024. Given these circumstances, HHJ Carter, the acting Designated Family Judge for Northampton, listed the matter before me to consider whether it was appropriate to make a Wasted Costs Order against Ms Z.

33. At the hearing on 6-7 December 2023 HHJ Wicks gave consideration to whether it was necessary and proportionate for M to be assisted by a deaf intermediary as well as qualified suitable deaf interpreters. Advice was sought from Dr Sue O'Rourke, consultant clinical psychologist, whose reply was as follows:

> *"The need for a deaf, rather than a hearing intermediary is that, given the role of the intermediary is to monitor and assist with communication and understanding, without fluency in BSL this is impossible in proceedings involving a deaf person. Relying on an interpreter in this situation is not at all appropriate and the hearing intermediary only has access to the interpretation and not the original language, which can muddy the waters even further. I have seen a few 'hearing' intermediaries attempting to advise the court regarding a deaf person and they have little to offer and are prone to making the same errors and making the same assumptions, as any other non-specialist professional without a background in deafness, meaning that their reports at best add little, and at worst mislead the court. A Deaf intermediary on the other hand can monitor communication directly, intervene to assist if needed and advise the court in situations where there is a misunderstanding or miscommunication. The use of a Deaf intermediary in court also helps to advise the court on the nature of BSL, the interpretation process and Deaf culture/norms. The 'power imbalance' of a deaf person surrounded by hearing professionals is somewhat addressed by having a deaf professional assisting the court and is a safeguard against accusations of discrimination. …"*

Submissions

34. No party applied for a Wasted Costs Order against Ms Z.

35. Ms Z gave brief evidence to the court and Ms Dunn, very helpfully, spoke to her outside the court in order to ascertain the circumstances by which she had not attended. It transpired that there had been a tragic family incident which wholly justifiably led to her not attending court and turning off all her electronic devices. Ms Z said she contacted her own personal assistant to send messages but that message appears not to have been received by Ms Z's assistant and there appears to have been no message sent to the Court or the Solicitors on the relevant day in question, despite what Ms Z had thought she had arranged. In the very sad circumstances, it did not appear appropriate to try to ascertain why that had happened.

36. In these circumstances there is no basis for making a Wasted Costs Order or considering that part of the case further.

37. I go on to consider whether there needs to be a deaf intermediary for the M for the entirety of the hearing. Mr Pettitt, on behalf of the M, submits that this is a case which requires the M to have a deaf intermediary throughout the 5 day hearing, as well as the two deaf interpreters. He bases this submission on the letter from Dr O'Rourke.

38. Ms Dunn made submissions about the particular difficulties faced by deaf interpreters where the individual has a "hearing" intermediary. It was clear from those submissions that there were particular challenges in this case, given the combination of communication and cognitive issues faced by the M.

39. Ms Dunn also emphasised the importance, in X's best interests, for the final hearing to be effective. The delay that has already occurred in this case has been extreme and highly detrimental to X's welfare.

40. No party submitted that I should vary the order for a deaf intermediary to be appointed for the entirety of the hearing.

The law

41. The position in respect of the appointment, qualification and duties of intermediaries in the family justice system is not clearly set out either in the Family Procedure Rules ("FPR") or in any Practice Direction. FPR r3A.1 defines an intermediary as follows:

> *"… [I]ntermediary means a person whose function is to –*
>
> *(a) communicate questions put to a witness or party;*
>
> *(b) communicate to any person asking such questions the answers given by the witness or party in reply to them; and*
>
> *(c) explain such questions or answers so far as is necessary to enable them to be understood by the witness or party or by the person asking such questions…"*

42. There is no further guidance on their appointment or role. However, in the criminal justice system the Criminal Practice Directions 2015 gave detailed consideration to the appointment of intermediaries, including steps to assist defendants in their effective participation in the proceedings.

43. This background is referred to extensively in ***R v Thomas (Dean)*** [2020] EWCA Crim 117. In that case the Court of Appeal gave detailed consideration to the appointment of intermediaries and how they should be used. Although there are obvious and important differences between Family Court cases and those involving criminal charges, the reasons for the appointment of intermediaries and their function in assisting those with communication difficulties facing important litigation, are essentially the same. Intermediaries are appointed, whether in criminal or family cases, to ensure that the individual in question can participate in the proceedings so that their fair trial rights are protected. Therefore, the guidance of the Court of Appeal in ***R v Thomas (Dean)*** is in my view applicable to the consideration of the same issues in the family justice system, albeit the Court will need to have close regard to the nature of the case and the evidence that the individual needs to engage with.

44. At [36] to [42] the Court of Appeal went through the relevant considerations for the appointment of an intermediary, and the alternative strategies that might be adopted, to ensure that a defendant's ability to properly engage in proceedings and Article 6 rights were protected:

> *"36. As set out above, in the Practice Direction it is observed that the appointment of an intermediary for the defendant's evidence will be a rare occurrence and that it will be exceptionally rare for a whole trial order to be made. That projection as to frequency serves as an important reminder to judges that intermediaries are not to be appointed on a "just-in-case" basis or because the report by the intermediary, the psychologist or the psychiatrist has failed to provide the judge with a proper analysis of a vulnerable defendant's needs in the context of the particular*

circumstances of the trial to come. These are fact-sensitive decisions that call for not only an assessment of the relevant circumstances of the defendant, but also the circumstances of the particular trial. Put otherwise, any difficulty experienced by the defendant must be considered in the context of the actual proceedings which he or she faces.

37. Criminal cases vary infinitely in factual complexity, legal and procedural difficulty, and length. Intermediaries should not be appointed as a matter of routine trial management, but instead because there are compelling reasons for taking this step, it being clear that all other adaptations to the trial process will not sufficiently meet the defendant's needs to ensure he or she can effectively participate in the trial. The assessment in the Practice Direction as to the number of instances when this is likely to occur, albeit an important reminder to the judge to apply the most careful scrutiny to these applications, cannot derogate from the need to appoint an intermediary as identified by the Lord Chief Justice in Grant Murray "when necessary".

38. It follows that these applications need to be addressed carefully, with sensitivity and with caution to ensure the defendant's effective participation by whatever adaptation of the usual arrangements is required. The recommendation by one or more experts that an intermediary should be appointed is not determinative of this issue. This is a question for the judge to resolve, who is best placed to understand what is required in order to ensure the accused is fairly tried. The guidance given in R v Cox [2012] EWCA Crim 549, [2012] 2 Cr.App.R 6 at page 63 is important in this regard:

i. "29. We immediately acknowledge the valuable contribution made to the administration of justice by the use of intermediaries in appropriate cases. We recognise that there are occasions when the use of an intermediary would improve the trial process. That, however, is far from saying that whenever the process would be improved by the availability of an intermediary, it is mandatory for an intermediary to be made available. It can, after all, sometimes be overlooked that as part of their general responsibilities judges are expected to deal with specific communication problems faced by any defendant or any individual witness (whether a witness for the prosecution or the defence) as part and parcel of their ordinary control of the judicial process. When necessary, the processes have to be adapted to ensure that a particular individual is not disadvantaged as a result of personal difficulties, whatever form they may take. In short, the overall responsibility of the trial judge for the fairness of the trial has not been altered because of the increased availability of intermediaries, or indeed the wide band of possible special measures now enshrined in statute.

ii. 30. In the context of a defendant with communication problems, when every sensible step taken to identify an available intermediary has been unsuccessful, the next stage is not for the proceedings to be stayed, which in a case like the present would represent a gross unfairness to the complainant, but for the judge to make an informed assessment of whether

the absence of an intermediary would make the proposed trial an unfair trial. It would, in fact, be a most unusual case for a defendant who is fit to plead to be found to be so disadvantaged by his condition that a properly brought prosecution would have to be stayed. That would be an unjust outcome where, on the face of the evidence, a genuine complaint has properly been brought against the defendant. If the question were to arise, this court would have to re-examine whether the principles relating to fitness to plead may require reconsideration."

39. In this regard it is important to bear in mind the judgment of the Vice President in R v Biddle [2019] EWCA Crim 86, [2019] 2 Cr.App.R 2 :

i. "39. The principles, as set out in Rashid and the Practice Direction, are clear: the intermediary can make a recommendation based on the material they have considered but it is just that — a recommendation. Ultimately it is for the trial judge to decide, having considered all the material, whether and to what extent an intermediary is necessary […]"

40. In Cox the court gave a helpful guide of the extent to which the court proceedings can be modified to ensure effective participation if an intermediary is not appointed or none is available:

i. "21. […] [The judge] underlined …the word 'effectively'. He examined 'a complete raft of procedural modifications to the ordinary trial process' which would be appropriate in the situation which now obtained. These included short periods of evidence, followed by twenty minute breaks to enable the appellant to relax and his counsel to summarise the evidence for him and to take further instructions. The evidence would be adduced by means of very simply phrased questions. Witnesses would be asked to express their answers in short sentences. The tape-recordings of the interview should be played, partly to accustom the jury to the appellant's patterns of speech, and also to give the clearest possible indication of his defence to the charge. For this purpose it was an agreed fact before the jury that 'Anthony Cox has complex learning difficulties. He could understand simple language and pay attention for short periods'. This was a carefully crafted admission to ensure that proper allowances would be made for the difficulties facing the appellant without creating any risk that the jury might reflect on the evidence in the context of the question of whether or not the appellant was potentially dangerous."

41. We would stress that this passage from Cox remains an excellent rehearsal of at least some of the steps that can be taken to accommodate a vulnerable defendant's needs without having to resort to appointing an intermediary.

42. In R v Rashid Yahya [2017] EWCA Crim 2, [2017] 1 Cr.App.R 25 , the court similarly emphasised the need for the advocates to ensure that the case is presented in a readily comprehensible way, particularly as to how the evidence is elicited. The competence expected of the advocates includes:

> *i. "80. […] the ability to ask questions without using tag questions, by using short and simple sentences, by using easy to understand language, by ensuring that questions and sentences were grammatically simple, by using open ended prompts to elicit further information and by avoiding the use of tone of voice to imply an answer […]"”*

45. The following principles can be extracted from this passage:

    a. It will be “exceptionally rare” for an order for an intermediary to be appointed for a whole trial. Intermediaries are not to be appointed on a “just in case” basis. Thomas [36]. This is notable because in the family justice system it appears to be common for intermediaries to be appointed for the whole trial. However, it is clear from this passage that a judge appointing an intermediary should consider very carefully whether a whole trial order is justified, and not make such an order simply because they are asked to do so.

    b. The judge must give careful consideration not merely to the circumstances of the individual but also to the facts and issues in the case, ***Thomas*** [36];

    c. Intermediaries should only be appointed if there are “compelling” reasons to do so, Thomas [37]. An intermediary should not be appointed simply because the process “would be improved”; ***R v Cox*** [2012] EWCA Crim 549 at [29];

    d. In determining whether to appoint an intermediary the Judge must have regard to whether there are other adaptations which will sufficiently meet the need to ensure that the defendant can effectively participate in the trial, ***Thomas*** [37];

    e. The application must be considered carefully and with sensitivity, but the recommendation by an expert for an intermediary is not determinative. The decision is always one for the judge, ***Thomas*** [38];

    f. If every effort has been made to identify an intermediary but none has been found, it would be unusual (indeed it is suggested very unusual) for a case to be adjourned because of the lack of an intermediary, ***Cox*** [30];

    g. At [21] in ***Cox*** the Court of Appeal set out some steps that can be taken to assist the individual to ensure effective participation where no intermediary is appointed. These include having breaks in the evidence, and importantly ensuring that “evidence is adduced in very shortly phrased questions” and witnesses are asked to give their “answers in short sentences”. This was emphasised by the Court of Appeal in ***R v Rashid*** (Yahya) [2017] 1 WLR 2449.

46. All these points are directly applicable to the Family Court. Counsel submitted that there was a need for intermediaries because relevant parties often did not understand

the proceedings and the language that was being used. However, the first and normal approach to this difficulty is for the judge and the lawyers to ensure that simple language is used and breaks taken to ensure that litigants understand what is happening. All advocates in cases involving vulnerable parties or witnesses should be familiar with the Advocates Gateway and the advice on how to help vulnerable parties understand and participate in the proceedings. I am reminded of the words of Hallett LJ in ***R v Lubemba*** [2014] EWCA Crim 2064 at [45] "*Advocates must adapt to the witness, not the other way round"*. A critical aspect of this is for cross-examination to be in short focused questions without long and complicated preambles and the use of complex language. Equally, it is for the lawyers to explain the process to their clients outside court, in language that they are likely to understand.

47. Finally, it is the role of the judge to consider whether the appointment of an intermediary is justified. It may often be the case that all the parties support the appointment, because it will make the hearing easier, but that is not the test the judge needs to apply.

Conclusions

48. Applying this analysis of the law on the appointment of intermediaries to the facts of the case, I accept that the appointment of a deaf intermediary for M in this case is necessary for the entirety of the hearing. The M's communication issues here are profound, both because of her deafness, but also the further issues highlighted by Dr O'Rourke. These issues go well beyond the fact that she is profoundly deaf and encompass wider communication difficulties. It also appears that there is a particular problem with the use of a hearing intermediary for a person who is deaf, given the very specific interpretation issues involved with British Sign Language.

49. Although it might be possible to determine parts of the trial where it was less necessary to have the intermediary present, I accept that there is a significant risk that M would then be unable to fully understand what was happening in the trial. In most cases, I would take the view that it was the job of M's lawyers to ensure that she understood what was happening through explanations at the breaks during the hearing day. However, I accept that that would be a very onerous, and potentially not possible, on the facts of this case because of the particular issues.

50. I further take into consideration that it is of the utmost importance that this case is not further adjourned, and the final hearing is effective. In those circumstances I will continue the order for the deaf intermediary to attend throughout.