

ENGLAND AND WALES / JUDGMENT

W (Children)

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Neutral Citation Number: [2014] EWCA Civ 1492 IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM NORWICH COUNTY COURT HIS HONOUR JUDGE CURL OR13C30292 Case No:
B4/2014/0572 Royal Courts of Justice Strand, London, WC2A 2LL Date: 20/11/2014 Before : LORD
JUSTICE BRIGGS LORD JUSTICE FLOYD and LADY JUSTICE MACUR DBE

- ----- Between : W (Children)
- -----
- ----- Ms S Morgan QC & Mr A Smith (instructed by Edward Hayes LLP)
for the Applicant Miss T Cook QC & Mr C Fletcher (instructed by A County Council) for the
1st Respondent Miss E (in person) 2nd Respondent Mr P Conrath (instructed by SJ Solicitors)
for the 3rd Respondent Hearing dates : 9 September 2014
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Judgment

Judgment Approved by the court for handing down. W (Children) Lady Justice Macur DBE : 1. This appeal concerns two young boys Al, aged 2 years 9 months and Ar aged 1 year 9 months. Both are subject to care and placement orders in favour of N County Council made on 27 January 2014 by HHJ Curl. Care proceedings were issued in April 2013. Applications for placement orders were made in July 2013. 2. The boys' emotional and developmental needs were neglected. They had poor attachments to their mother and father. Ar may have Waardenburg Syndrome which may result in hearing loss. The boy's parents have conceded that they are unable to care for their sons, whether separately or together. Both have their own health problems. 3. The mother and father are, in fact, estranged. They do however have common cause in supporting the paternal grandmother, Ms B's application to be granted increased contact to the boys with a view to their gradual rehabilitation to her care, ultimately under the auspices of a residence or special guardianship order. Judgment Approved by the court for handing down. W (Children) 4. The local authority and children's Guardian do not agree with this proposal despite the largely positive and extensive involvement of Ms B in caring for Al hitherto. They are guided by the independent social work assessment of Mr Mann, which echoes and amplifies the concerns of the first 'in house' viability assessment of the paternal grandmother. These concerns relate primarily to "historical issues in respect of the parenting of her own children and her minimisation of the same" and the continuing close relationship she has with her son M the father of Al and Ar, who is unpredictable in behaviour and who is heavily dependent upon her for his own health needs. 5.

Ms B was made party to the proceedings on 31 July 2013. The applications were listed for final hearing in August 2013. The parents conceded that the threshold criterion for statutory intervention was crossed. No evidence was heard. Ms B made clear that she did not accept the accuracy of the report of historical information in the social worker's negative assessment of her as carer for the boys. At that time the Guardian supported the paternal grandmother's application for a further assessment on the basis of her express indication that she would distance herself from the boys' father. The local authority agreed to alter their interim care plan accordingly. Judgment Approved by the court for handing down. W (Children) 6. There are sealed orders arising from that hearing which suggests that final care orders were made in respect of each child. However, since all parties were aware that the paternal grandmother opposed the making of care or placement orders this is likely to have been a clerical mistake and should have referred to interim orders. HHJ Curl so found and proceeded in January 2014 to hear the case as a fully contested hearing. 7. The issue at that hearing was whether the boys could be cared for within their biological family by Ms B or must be placed for adoption. "No one suggest[ed], in reality that there [were] any other options." 8. Ms B was represented by Counsel at the hearing. She filed statements and gave oral evidence. The only other witnesses to give oral evidence were the independent social worker, Mr Mann and the children's Guardian, Ms McCarthy. The judge makes clear that he had had regard to all documentary evidence and the written materials submitted by and on behalf of the parties in reaching his decision. Judgment Approved by the court for handing down. W (Children) 9. The judge's findings were obviously adverse to Ms B's case. So it was that she as a litigant in person sought permission to appeal and attended before McFarlane LJ on 7 July 2014. Her self drafted grounds of appeal he summarised to be the lack of expert assessment of any therapeutic needs or mental health difficulties, the lack of evidence of any support which may aid Ms B in her care of the children and an "over reliance placed upon the period between 1990 and 1995 when she had difficulties in being the parent of her own three children...now adults." Ms B also challenged the general proportionality of the outcome. 10. It is apparent that, as a result of hearing from Ms B, McFarlane LJ was troubled by the prospect that the factual basis of the independent social worker's report, the Guardian's report and consequently the judge's decision were incorrectly grounded. Therefore he gave permission to appeal so that the full court "can look at just what the factual background was; how, if at all, that was canvassed and challenged before the judge; and whether the judge made findings about it, which he plainly did not do in the judgment that I have before me." He went on to make directions that the local authority should disclose into the appeal proceedings "the raw Judgment Approved by the court for handing down. W (Children) material in terms of local authority records and other matters upon which they rely to establish the more significant factual matters..." 11. Ms B is represented today by Ms Morgan QC and Mr Smith, who were not instructed in the court below. The respondent local authority is represented by Ms Cook QC and Mr Fletcher, the latter of whom appeared at first instance. The mother has attended with a Mackenzie friend, whom we permitted to speak for M, at M's request, as an exceptional course. The father was represented by Mr Conrath. The Guardian did not appear and was not represented but indicated in writing her support for the local authority's stance in the appeal in seeking to uphold the judgement and orders of HHJ Curl. 12. Application was made to file and

argue amended grounds of appeal. In summary these contend that the court: 1. did not embark on a proper or fair investigation / evaluation of the factual basis of the issues related to the paternal grandmother's parenting of her own children, so as to amount to a fundamental procedural irregularity; attached disproportionate weight to the historical issues and failed to consider whether any risk arising could be managed; 2. Was not furnished with sufficient material namely a psychological Judgment Approved by the court for handing down. W (Children) and/ or psychiatric assessment or expertise to conclude that she was vulnerable to future mental health problems which would not be addressed by Ms B in therapy; 3. wrongly assessed that nothing other than adoption would do; 4. did not apply the "welfare check list" pursuant to section 1(3) of the Children Act 1989, and therefore failed to make an holistic evaluation or proportional assessment of the circumstances; 5. placed too much weight on her ongoing commitments to her adult children; 6. wrongly concluded that the children required "enhanced parenting" which Ms B was unable to provide. 13. The court gave leave for the amended grounds to be argued. Ms Morgan realistically acknowledged that the first two grounds contain the main thrust of the appeal. 14. Having the opportunity to consider the detailed skeleton arguments submitted on behalf of the appellant and local authority, the "position statements" of the mother and father and the oral submissions made in amplification of the same the court was able to announce its decision on 9 September with reasons to follow. This Judgment Approved by the court for handing down. W (Children) course was taken with a view to avoiding unnecessary delay in the further planning for the children. The appeal was dismissed. 15. The inherent problems encountered by the court in determining the written or oral applications for permission to appeal by litigants in person were writ large in this case. I would attribute no mala fides to Ms B since she could have little appreciation of the concept of an advocate's duty to the court but the reality is that the single Lord Justice was misled, by deficiency of relevant court documents and omission of explanation by Ms M or response of the prospective respondent, as to the case management directions and true state of affairs during the relevant hearings leading to the orders appealed. If he had been so informed I very much doubt that he would have granted permission. The reality is that Ms B was effectively putting a different case before the single judge at the permission hearing to that which had been run at trial. 16. That is, on 31 July 2013, HHJ Curl granted party status to Ms B and noted her position to be that "she does not agree with the local authority's assessment of her and states that there are inaccuracies contained within the assessment." On 5 August she was represented Judgment Approved by the court for handing down. W (Children) at the "issues resolution" hearing when it was directed that "the local authority is to serve a chronology of its previous involvement with Ms [B] and any other documents it seeks to rely on by 6 August... [Ms B] has permission to respond in writing to the document(s) referred to ...above by 8 August... if so advised." She was represented at the hearing on 13 August, by which time she would have been in possession of the chronology and had filed a statement dated 8 August 2013 in which she "put the Local Authority to proof in respect of the historical information the Social Worker has relied on in her viability assessment ... [which was] second or third hand information at best and without corroborative evidence supporting the facts relied upon...is unsafe and raises more questions than it answers." In fact in a previous statement, unsigned in my bundle but dated 2 August 2013, Ms B had made some concessions as

to her past difficulties. At that hearing the judge made what Miss Cook accurately describes as “a raft of directions” in relation to the disclosure of documents, namely social service files in relation to Ms B’s children and one of her grandchildren, to an independent social worker subsequently jointly instructed to prepare an assessment upon Ms B. Judgment Approved by the court for handing down. W (Children) 17. Miss Morgan relies upon the rejoinder to be found in the August 2013 statements of Ms B and the recorded challenge to the Local Authority’s basis of assessment to found her argument that the judge should have identified the relevant historical events from the source materials relied upon as adverse to Ms B and made findings about them. She submits that Ms B’s own parenting had “moved to centre stage” in the hearing but was not adequately investigated. She queries whether those parts of the judgment in which the judge dealt with some of the historical concerns and recorded his surprise at Ms B’s denial or professed lack of memory amount to findings at all. 18. However, the mother’s position statement for the final hearing, drafted by her Counsel “accepted and acknowledged that legitimate concerns have been raised in respect of the outcomes for her older children and the involvement of social services during their minority and her history of depression.... Ms [B] ..has already taken a number of practical steps to address concerns that have previously been raised by the local authority.” That is he did not challenge the factual basis of all those concerns but obviously sought to argue that they should not dictate outcome by reason of temporal distance and Ms B’s subsequent and positive change of circumstances. Judgment Approved by the court for handing down. W (Children) 19. This appears to have been an entirely reasonable stance to take since reading the judgment of the court below it becomes clear that the “very low standard of parenting over a protracted period of time” was significant not by reason of the details of the incidents but Ms B’s inability to “come to terms with these past events” so as to “have any insight into the effect it has had upon her own children’s lives”. I would not categorise this as meaning that it was Ms B’s parenting that had moved to centre stage, rather her response to it and ability to move on. I accept Miss Cook’s submissions in this regard. 20. In these circumstances I do not accept that it was necessary for the judge to identify the particular historical events beyond that which he did by reference to certain of the reported incidents and Ms B’s response to them of denial, lack of recall, mitigation or minimisation. Implicitly there was some forensic examination of certain of the entries. Further, I am satisfied that the judge’s statement that he had “no reason to believe that the [chronology ordered to be produced on 5 August] is other than fundamentally correct and accurate” was open to him on the basis of the records- a notable number of the entries demonstrably self reported, and Ms B’s response in writing, Judgment Approved by the court for handing down. W (Children) orally and the position taken on her behalf as indicated in paragraph 18 above. 21. The judge had obviously read relevant parts of the records. He was not totally reliant upon the independent social worker and Children’s Guardian in this regard. It is clear that he warned himself that sometimes Children Services Records contained unreliable hearsay and malicious allegations. I do not accept Ms Morgan’s submission, at least implicit, that a judge at first instance is obliged to ignore the way in which a local authority’s case is presented or a party’s case is run by their counsel and conduct his own investigation of the facts line by line. 22. In the alternative, Ms Morgan argues that the first instance judge paid insufficient regard to the context of Ms B’s past problems, that is, her poor

mental health and the behavioural difficulties of one of her children, these events now some 20 years ago and the fact that she sought help in respect of them. 23. However, Miss Cook draws our attention to those paragraphs in the judgment in which the judge deals with “the positives in respect of Judgment Approved by the court for handing down. W (Children) Ms B”, including the fact that the historical concerns were a significant time ago, the improved and changed circumstances in terms of her maturity, living accommodation, absence from abusive relationships, improved mental health and ability to deal with stress. Ms Morgan’s submission on this point therefore has no foundation. 24. The judge’s evaluation of the circumstances relating to past parenting performance led him to conclude in paragraph 86 of his judgment “but if she were to parent these two very young boys, she will not be able to do that adequately without considerable and painful therapeutic work first. I do not consider it likely that she is anywhere near ready to face that as yet”. In this respect he made his findings adopting the opinions of the independent social worker and Children’s Guardian but also “having seen and heard [Ms B] give evidence” which indicated to him that she was not “committed to” and unable to see the point of therapy and that he did not consider it “likely that she could undergo such therapy at the present time.” Quite clearly he did consider risk and management. He cannot be categorised as wrong in his assessment of the evidence before him. The first ground of appeal cannot be sustained. Judgment Approved by the court for handing down. W (Children) 25. The question of Ms B’s mental health, past and future was obviously a consideration in the case. Ms B relied upon the fact of her own previous mental health illness as a reason to explain her past parenting difficulties. The judge records that “she has not suffered any mental ill health for some years.” The last GP’s records which referred to this being in 2009 at which time she was prescribed anti depressants. It was also accepted that Ms B had coped with the stress of the proceedings and the events of the previous year “extremely well”. However, he found that Ms B would likely be “susceptible to mental health problems and/or anxiety and stress”. 26. Ms Morgan argues that this evaluation was a leap too far in the absence of expert psychiatric or psychological evidence. Only with such evidence, she argues, could the judge adequately appraise the likelihood of recurrence, identify the triggers and make findings as to Ms B’s engagement with therapy. She draws attention to the fact that in paragraph 9 of the judgment, the judge records that Ms B had suggested that the court should order such a report upon her which “could be completed fairly promptly”. Judgment Approved by the court for handing down. W (Children) 27. As to the latter, Ms Cook informs the court that an application for an expert report was not made until during the course of final submissions. This is of course regrettable, but not necessarily fatal to the outcome of such an application if the necessity for such a report has crystallised during the course of the proceedings. Miss Cook also points to the fact that the joint letter of instruction to the independent social worker requires him to provide an opinion upon “Ms [B’s] mental health status.” He patently did do so since the judge refers to his evidence on this point at some length. 28. I for myself am surprised to see such a request included in a letter of instruction to an independent social worker who claims no relevant expertise. Also I wonder at the propriety of an independent social worker or Children’s Guardian postulating on “unresolved” mental health issues in the absence of an expert report. I agree with Ms Morgan that neither were competent to give an expert opinion on the issue of existence of mental illness or disorder and, but for

evidence of past episodes of mental illness, they should not have been permitted to give an opinion as to likely recurrence. However, there was cogent evidence before the court of Ms B's past mental ill health and her reaction to stressful situations, and the judge and the Judgment Approved by the court for handing down. W (Children) child welfare experts were entitled to have regard to the potential stress likely to be created by the future challenges of raising the boys from their own expert perspectives and what appeared to be unresolved "emotional issues" in the widest sense. 29. I am therefore satisfied that the judge was entitled on the available evidence, without up to date expert opinion, to conclude that Ms B "is likely to be susceptible to mental health problems and/or anxiety and stress" in relation to prospective "painful" therapy (necessary in his view before she could parent the boys) and what he found to be "other substantial strains and responsibilities that will fall upon her shoulders." Whilst the specific nature of the therapy is not identified, nor could it be in the absence of expert advice, the judge was entitled to have judicial notice of the nature of any therapeutic process upon a resistant participant by reason of a wish to bury the past. There was more than sufficient evidence from which he could form the view as to the future difficulties in store. The second ground therefore fails. 30. Miss Morgan has not sought to expand upon her written submissions in relation to Grounds 3 to 6. I find no substance in any Judgment Approved by the court for handing down. W (Children) of them. There was evidence concerning Ms B's adult children and the possible difficulties, physical and emotional which may beset Al and Ar. The judge's evaluation of these factors cannot be deemed wrong, nor can the fact that he weighed them in the balance be anything other than right. The judge stated explicitly that he had had regard to the welfare check lists in the Children Act 1989 and Children and Adoption Act 2002, and highlighted those features of particular relevance in his consideration of outcome. His judgment read as a whole makes plain that all aspects of the lists were considered in the round and weighed in the balance, as were the boys' rights to respect for their family life. In these circumstances there is no need to refer to every aspect of the lists individually and repetitively. 31. His ultimate conclusion that adoption was in the best interests of both Al and Ar was no doubt reached with a heavy heart bearing in mind Ms B's obvious love for her grandchildren and previous involvement in their care but he did so having formed the view that Ms B "has been exhaustively and fairly assessed". His decision cannot be categorised as wrong or a disproportionate response. Judgment Approved by the court for handing down. W (Children) 32. For these reasons I would dismiss the appeal. Lord Justice Floyd : 33. I agree. Lord Justice Briggs : 34. I also agree

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