Neutral Citation Number: [2018] EWCA Civ 3050

Case No: B4/2018/1427

IN THE COURT OF APPEAL (CIVIL) DIVISION
ON APPEAL FROM CENTRAL LONDON FAMILY COURT
HER HONOUR JUDGE PEARL
ZC17C00678

The Royal Courts of Justice
Strand, London WC2A 2LL

Tuesday, 21 August 2018

Before:

LORD JUSTICE MOYLAN
and
LORD JUSTICE HOLROYDE

Between:

IN THE MATTER OF

R(CHILDREN)

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Ms A Brooks (instructed by Myria Pieri & Co Solicitors) appeared on behalf of the **Applicant**

Ms A May (instructed by London Borough of Newham Legal Services Department) on behalf of the **Respondent**

Judgment

LORD JUSTICE MOYLAN:

1. The guardian appeals from care orders made by Her Honour Judge Pearl on 29 May 2018 in respect of two children then aged 12 and 10. The orders, which were stayed by Peter Jackson LJ when he granted permission to appeal, would have resulted in the children moving to foster care. The children are living with a friend of the mother's where the elder child, "C", has been living since about April 2016 and the younger child, "M", since April 2017.

2. At the hearing below the local authority, supported by the guardian, proposed that the children should live with their current carer, who I will call "R", under a special guardianship order and a supervision order. The mother also supported these orders. The father proposed that the children should live with him or his sister.

3. The judge rejected the latter options as proposed by the father and nobody contends that she was wrong to do so. It is, as I have said, her decision to make care orders, which would have the consequence of requiring the children to move from R, which is challenged by the guardian's appeal. The only remaining options for the children's future care were either remaining with R or moving to foster care. If the children were to remain in the care of R, this would not be under a care order because R was considered unlikely to be approved as a foster carer by the fostering panel, for reasons that I do not need to go into.

4. At this hearing the guardian is represented by Ms Brooks and the local authority is represented by Ms May. Neither the mother nor the father is present or represented. I am satisfied that both the mother and the father are aware of this hearing. Neither has sought to appear, nor to instruct anyone to appear on their behalf; nor has either sought to obtain an adjournment of this hearing. We have, therefore, decided to proceed in their absence.

5. The guardian advances a number of grounds of appeal which can be summarised as follows:

(i)the judge failed to carry out the required balancing exercise in that she did not

sufficiently evaluate the positive and negative aspects for C and M of each option. Nor did she sufficiently weigh the advantages and disadvantages of each option against the other. In particular, the judge failed to analyse the consequences for the children of moving to long-term foster care including because they were, to use the judge's words, "desperate to remain in the care of [R]";

(ii) the judge wrongly placed considerable weight on matters which were not addressed during the course of the oral evidence with the result that R was unable to deal with them in her evidence;

(iii) the judgment does not explain why the judge appeared to consider a care order, under which the children would live with R, would be consistent with their welfare needs but a special guardianship order with the same effect would not.

6. The local authority has adopted a neutral stance on this appeal. The skeleton argument, as expanded by Ms May today, acknowledges that there may be grounds for appealing but also acknowledges that its final care plan may have been flawed because too much emphasis was placed on the wishes and feelings of the children.

7. I have formed the clear view that the state of the evidence at the hearing below was sufficiently incomplete and unsatisfactory that, on that basis alone, if my Lord agrees, this appeal must be allowed and the matter sent back for a rehearing. I am also of the view that the judge did fail sufficiently to analyse the benefits and disadvantages of each of the options available to the court or to compare their respective benefits and disadvantages.

8. In those circumstances, it is neither necessary nor appropriate for me to say more than is required to explain my conclusion. In particular, I say nothing which is intended to indicate what the outcome of the consequent rehearing should or might be.

9. Turning to the background. There is a long history of the family's involvement with social services. There were care proceedings in 2013, during which a parenting assessment of the father was negative. The proceedings concluded with a supervision

order with four children, including the two children the subject of this appeal, remaining in the care of their mother.

10. As I have said, in about April 2016 C moved to live with R under a private arrangement between the mother and R. In about April 2017 the three other children, including M, moved to live with R. This arrangement was assessed by the local authority which recommended that long-term arrangements needed to be made. At the end of September 2017, the two children who are not the subject of this appeal were removed from R's care and placed in foster care. Care proceedings were subsequently commenced. C and M remained living with R under interim supervision orders. The other two children have remained in foster care.

11. What was intended to be the final hearing of the care proceedings for all four children took place in March 2018. This led to final orders being made in respect of the other two children, but the evidence was considered insufficient to enable the proceedings in respect of C and M to be concluded.

12. As recorded in her judgment of 29 May 2018, the judge said:

    i. "The court made it clear that the local authority must consider alternative solutions to the case should the court not approve the making of special guardianship orders in favour of [R]".

13. During the course of the March hearing, the judge expressed concerns about the effectiveness of supervision orders with special guardianship orders. She expressed the view that the children could remain with R, "if the local authority wanted it", but that this would involve the local authority having parental responsibility through a care order.

14. When the hearing resumed in May 2018, the evidence was still incomplete. Additional oral evidence was given by the social work team manager and also by the social worker, but no further evidence was provided or given by R. Further, the judge considered that

the special guardianship report "lacked rigour or independent critical analysis" and that the guardian's assessment of R's parenting was "inaccurate and incomplete". She regarded the analysis as also being inadequate in that "it contains no separate advantages and disadvantages analysis of the various options" for the children.

15. The judge did not adjourn the case but proceeded to determine the applications. She accepted that the children were desperate to remain in R's care. She also found that R could meet “their everyday needs” and could offer a “warm emotional environment for the children”. However, she concluded that these factors were outweighed by it being "virtually impossible to predict when the next crisis will come". This assessment was based significantly on information which was either new or which the judge did not consider had been properly raised during the hearing in March. The former related to one of R's own children and the latter to events in 2013 concerning the mother. This led the judge to conclude that there was a significant risk that the children, if in R's care, “might suffer in some way”.

16. The local authority was proposing that they would provide, what they considered to be, “very robust support”. The judge disagreed with this description and set out the steps which she considered would be required if the children were to remain in the care of R. However, she did not consider that even these would, in fact, be sufficient and concluded that R would be unable to meet the children's needs in "an environment which is free of risk".

17. Before leaving the judgment, I would additionally comment that while it contains an extensive assessment of R and her ability to meet the children's needs, there is almost no assessment of long-term foster care, and in particular of the consequences for these children of moving to foster care, beyond a few, with respect to the judge, somewhat generalised observations including a reference to the “significant disadvantages” of foster care. This has to be seen in the context of the guardian’s submission that the judge failed sufficiently to analyse the benefits and disadvantages for C and M of living with R under special guardianship orders and of living in foster care under a care order.

18. Turning to my determination, I start by acknowledging first, the need for this court to recognise the pressures on the family justice system including on judges. Secondly, as has been said in a number of cases such as *Re R* [2015] 1 FLR 715, it is "the substance of the judicial analysis, rather than its structure or form" which has to be considered, McFarlane LJ at [18].

19. In *Re G (Care Proceedings: Welfare Evaluation)* [2014] 1 FLR 670, McFarlane LJ referred to the balancing exercise as requiring each option to be "evaluated to the degree of detail necessary to analyse and weigh its own internal positives and negatives" with each option then being compared against the other to determine the welfare outcome.

20. On 29 May 2018 the judge was undoubtedly faced with a difficult situation. Some of the missing evidence which had led to the proceedings being adjourned in March 2018 remained missing. Other evidence, Police National Computer records, had been obtained. They contained information which featured significantly in the judgment. Some of this was new and some, although known to the local authority and the guardian, had not featured either at all or prominently during the hearing in March 2018 and had not therefore been dealt with during the oral evidence. I, again, do not propose to detail these matters because it is not necessary to do so for the purposes of this appeal. These matters were, as I have said, in addition to the judge's assessment of deficiencies in the special guardianship report and in the guardian's analysis.

21. As a result, it is plain that the judge determined the applications in less than satisfactory circumstances. In my view, the proceedings should have been further adjourned to enable the new information and what the judge regarded as deficiencies to be addressed including by the parties and R giving further evidence. As the guardian has submitted, the judge placed considerable weight on matters which had not been dealt with previously in evidence and which, in particular, R had not had an opportunity to address. As a result, the judgment does not rest on sound foundations because, in summary, more evidence was required to enable the applications to be properly determined. I also

question whether the problems faced by the judge might have been increased because R was not a party to any proceedings, no application for special guardianship orders having been made.

22. In addition, the manner in which the case had developed between March and May clearly had a critical impact on the judge's decision. In my view, it was this which led the judge to focus unduly on R and her care. One of the consequences of the judge determining the applications, without further exploration of the matters which featured significantly in her judgment, is that it undermined her ability properly to assess *both* of the available options.

23. Regrettably, because it requires the family to endure a further substantive hearing and prolongs the uncertainty of the children, I have concluded that the appeal must be allowed. In my view, the judge did not undertake a sufficient assessment of the advantages and disadvantages for these children of each of the potential care options available. Nor, as a result, did she sufficiently weigh the advantages and disadvantages of each option against the other, namely by balancing the positive and negatives of foster care under a care order with the positives and negatives of care with R under a special guardianship order.

24. I consider, therefore, that the guardian has made good the grounds of appeal as summarised in (i) and (ii) above.

25. Because, as a result, this case will have to be reheard I propose to say very little about the third ground of appeal. I confine myself to commenting that careful consideration would need to be given to why the legal framework was sufficiently important to the welfare needs of the children when living with R to mean that one form of order would make this in the children's best interests and the other form of the order would not when compared, in both cases, with the alternative of foster care.

26. In conclusion, I propose that the judge's order is set aside and the matter is sent back for a

rehearing.

LORD JUSTICE HOLROYDE:

27. I agree.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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