



Neutral Citation Number: [2024] EWCA Civ 1000

Case No: CA-2024-001239

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE FAMILY COURT AT CANTERBURY
His Honour Judge Scarratt
ME22C50219

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/08/2024

Before :

LADY JUSTICE MACUR DBE
LORD JUSTICE BEAN
and
LADY JUSTICE ANDREWS DBE

Between :

In the matter of M (A CHILD)

Mr Chris Barnes (instructed by **Invicta Law**) for the **Appellant**
Mr Jeremy Hall (instructed by **Stilwell & Singleton**) for the **First Respondent**
Ms Polly Thompson (instructed by **Kingsfords**) for the **Second Respondent**

Hearing dates : 9 August 2024

Approved Judgment

This judgment was handed down remotely at 10.30am on 29 August 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Macur LJ :

Introduction

1. This is an appeal against the order of HHJ Scarratt (“the judge”) of 3 June 2024 refusing the Local Authority’s (“LA”) application for a placement order in respect of a 4-year-old female child, ‘M’, which followed an ex-tempore judgment given on 15 May 2024.

2. The judge’s decision was initially recorded in a recital to the order of 15 May 2024:

‘AND UPON the Court giving an ex-tempore Judgment in which it refused to endorse the Local Authority’s care plan of adoption and found that it was not in [M’s] best interests to be placed with her mother in the community. Accordingly, the Court adjourned this matter and invited the Local Authority to change its care plan to one of long-term foster care with ongoing contact between [M] and her mother, indicating that it would intend to make a care order at the next hearing on such basis.’

The judge directed the LA to file an updated care plan by 22 May 2024 to be considered at a hearing on 3 June 2024.

3. However, a recital to the order made on 3 June 2024, indicated that:

“the Local Authority having provided an updated care plan but the Court and other parties expressing concern about the contents of this, stating that this is an inchoate care plan, to include misrepresentation of the views of the Children’s Guardian. Accordingly, the Court did not feel in a position to endorse this final care plan at today’s hearing.”

The LA were directed to file a further final care plan by 17 June 2024 to be considered at a hearing on 9 July 2024. The LA’s intended application for permission to appeal was adjourned to 11 October 2024.

4. In the meantime, the LA had begun to make inquiries of M’s present foster carers, V and K, via their ‘new’ fostering agency. In summary, the Team Manager wished to know whether, despite what had been said by V in the court proceedings, V & K “are putting themselves forward to care for [M] long term and what this may look like.” The response was unequivocal: [V] and [K] have been very clear that the maximum amount of time they would keep M is 5 years.... They cannot commit to care for her until she is 18...”

5. This information was provided to the judge at the hearing on 9 July. The judge gave indication of further amendments required to be made to the care plan, but recited on the face of the order (which mistakenly refers to a “part heard final hearing on 3 June 2024)

“to hear that the current foster carer has indicated that she can only keep [M] in her care for about 5 years, stating that this was not the impression she gave in evidence, the Court stating its decision might have been different in this

extremely finely balanced case had it been aware of this. The Court indicated that a postscript will be added to the Judgment in relation to this issue, noting that the Local Authority has lodged an application to appeal the decision of the Court.”

6. The Judge e-mailed the LA solicitor on 10 July 2024 and requested that the following observation be drawn to the attention of the Court of Appeal:

“I would want the C of A to know – following yesterday’s hearing when I heard for the first time (as did the Guardian) – that the foster carer has decided that she can in fact only care for the child for a maximum of 5 years, that my decision might have been different in this “extremely finely balanced” case (as described by the Guardian). In my judgment it is important for the C of A to know of this most recent development.’
7. Peter Jackson LJ gave directions on the papers, inviting the parties to make written submissions to the court about the appropriate course of action in relation to the application for permission to appeal. “Alternatively , if all parties consider that the proper outcome, in principle and as a matter of practicality is [that the order] (which dismisses the local authority’s application for a placement order) to be set aside; and 2) for that application to be remitted to the family court for urgent fresh hearing by a Circuit Judge or section 9 recorder nominated by the Family Presider, they shall ... file a joint formal request under CPR PD52A 6.4 for an order that paragraph 2 of the Order dated 3 June 2024 should be set aside by consent, without prejudice to the future determination of the application.”
8. The parties were unable to agree. Consequently, Peter Jackson LJ granted permission to appeal indicating: “There is a compelling reason for an appeal to be heard. Having dismissed the application for a placement order on 3 June, the judge received further information on 9 July that led him to cast doubt on that decision. Whatever the substantive merits of the appeal, and whatever justification there may have been for the judge’s doubt, the status of the decision settling [M’s] long-term future is unsatisfactory and should be examined on appeal as a matter of urgency. A hearing will also enable the grounds of appeal to be considered on their merits if that is necessary.”
9. At the conclusion of the hearing of the appeal we indicated that we allowed the appeal with reasons to follow and gave directions for the rehearing of the case by a judge to be assigned by the Family Presiding Judge, Mr Justice Williams, in consultation with the Designated Family Judge, Her Honour Judge Davies, for an urgent case management hearing to give directions for a rehearing of the applications for care and placement orders.
10. These are the reasons why I joined with my Lord and my Lady in allowing the appeal.

Background

11. A very brief summary of the background facts will suffice.

12. The LA first issued public law children’s proceedings on 14 August 2020, one day after M’s birth, due to concerns regarding the serious incidents of domestic abuse the father perpetrated against the mother, (which had resulted in a 2-year restraining order), his drug misuse, and refusal to engage. M’s father has played no active part in any of the proceedings.
13. This first set of proceedings concluded at an Issues Resolution Hearing on 20 October 2021 with the making of a 12-month supervision order. However, due to concerns that the mother had resumed contact with the father during the period of the supervision order, the LA made a renewed application for a care order on 12 July 2022. A final hearing was listed for 13 November 2023 but was adjourned by consent since the Agency Decision Maker (‘ADM’) was unable to decide upon a recommendation of adoption. Following an updating parenting assessment of the mother, the final hearing was re-listed for 13 May 2024. The LA’s care plan for a care order and placement order was supported by the ADM, social worker, and Children’s Guardian, and opposed by the mother. Throughout the entirety of proceedings, including at the time of the final hearing, M and the mother were accommodated together in mother and child foster placements.

The ex-tempore judgment given on 15 May 2024.

14. At the outset, the judge stated he was “not giving a full judgment”, and that he would “give short reasons”. He would not make an order for adoption but neither did he consider it to be in M’s best interests to live with her mother outside of a foster placement. He invited the LA to produce a new care plan setting out a transition plan for M to move into long-term foster care, with the provision of substantial contact between her and the mother. He said he was assisted by V “the extremely good witness yesterday who made it quite clear that [M] can stay with them provided that can be agreed with the local authority and whatever agency she is going to work with. That is my sincere hope, that [M] can reside there... by virtue of the care order that I am going to make, [the mother] cannot live there with [M].” He praised the efforts of the mother, who he viewed had been “let down to an extent by the local authority”. Nevertheless, “this case has to come to an end. One of the factors is proportionality; this case has been going on for 94 weeks and the guardian in the witness box said yesterday, as have others in this case, that it would be “a disaster” if the case was to return because a supervision order and living in the community failed and [M] was at risk, and I do take that into account as one of the welfare checklist factors I must consider; the welfare checklist is at the forefront of my mind when making this decision.” [M] was almost four and would be going to school soon. The judge had “no doubt that one of the factors that makes fostering attractive is that there is such a strong bond and tie between [M] and her mother and, with significant contact, the risk of breakdown of a long-term fostering arrangement is lessened.” Turning to the “reasons why adoption has not been my first consideration. I agree, respectfully, with Mr Hall, counsel for mother, when he submits to the court that adoption really is not finely balanced. In my judgment this was never really an adoption case. The Guardian describes it as “extremely finely balanced” having heard the evidence.” The judge noted that the “locomotive of adoption” had continued apace without any re-analysis

after mother and daughter went back into foster care, and “the evidence of the trauma to this child and the attachment difficulties she will encounter are such that adoption is not a realistic option.” M had never been away from her mother. There were risks in placing M with the mother, fostering was in M’s best interests, with “contact unsupervised ... always under the watchful eye of the foster carer, [V].” M required stability in a placement and it was not realistic to expect the level of supervision that the mother acknowledged would be necessary.

15. Significantly, in terms of the decision he reached, he said “I heard evidence from [V], the excellent foster carer, as I found her to be and as all parties found her to be, that she is there, if she is able to, to look after and care for this child. The law is clear, *Re BS*, nothing else will do. Adoption is the most draconian order this court can make.”
16. The judge identified another difficulty with the application for adoption to be that, as “everybody agrees” that it should be an open adoption, but there was no likelihood of such a placement being found locally to enable the level of contact he regarded to be necessary.
17. The judge said he took into account of the fact that M as a child in care may be stigmatised and at increased risk of breakdown of long-term fostering placements. However, the fact that there “is such a close bond between mother and daughter” and M’s age would “help to make the foster placement, whether with V or elsewhere, stronger, and less likely to break down.” Finally, he had “taken account [of] but not repeated here all the well-known law in respect of the making of placement orders, but in refusing the application for adoption, I take into account, of course, that it is the most draconian order that the court can make and only when nothing else will do. I have concluded, on the evidence, that long-term fostering with [V] will best promote the child’s welfare throughout her minority.”

Grounds of Appeal

18. The LA advances three grounds of appeal. There is a significant degree of overlap between them.
19. Ground 1: The Judge erred in peremptorily dismissing adoption as a realistic option for M, a 4-year-old child. Mr Barnes, on behalf of the LA submits that the judge had, in the course of the hearing, expressed scepticism about the adoption care plan advanced by the local authority, and supported by the guardian. He was wrong to state, on two occasions in the course of his judgment, that “this has never been an adoption case” without providing any adequate reasoning to support the statement. He had expressed particular concern regarding the prospect of post-adoption contact, describing open adoption as “woke” and “nonsense”. The Judge adopted a linear process of identifying something that “will do”, namely long-term foster care, and thus failed to undertake any proper analysis of the pros and cons of adoption; see *W (A Child)* [2016] EWCA Civ 793 @ [68] and [69].

20. Ground 2: The Judge failed to sufficiently evaluate the realistic options. The Judge’s evaluation of the critical comparison between adoption on the one hand, and long-term fostering on the other was inadequate. In particular:
- a. The judge failed to consider the mother’s inability to understand, identify, and avoid risk;
 - b. Consequently, the judge erroneously prioritised contact between the mother and M and failed to weigh other factors in an overall assessment of her best interests throughout her life: see Adoption and Children Act 2002 section 1(2);
 - c. The judge failed to consider the impact of M spending 14 years in long term foster care as opposed to the benefits provided by adoption and “the enduring sense of belonging to a family”;
 - d. The judge’s analysis was influenced by a preconceived and pessimistic personal view of the prospect of an open adoptive placement being identified, and thereafter failed to consider the powers available to the Family Court on the making of an adoption order;
 - e. The judge did not have any or any adequate regard to the potential disruption in M’s current foster placement;
 - f. The judge speculated that M, if adopted, would be traumatised if the mother had further children and cared for them in the community.
21. Ground 3: The Judge’s reasons contained within his judgment were inadequate, see in *Re B (A Child) (Adequacy of Reasons)* [2022] EWCA Civ 407. The Judge adopted a linear approach in evaluating the available options for the child’s future care, contrary to the guidance of Sir Andrew McFarlane P as reiterated in *Re B (A Child) (Adequacy of Reasons)* [2022] EWCA Civ 407 at [43] that:
- “The judicial exercise should not be a linear process whereby each option, other than the most draconian, is looked at in isolation and then rejected because of internal deficits that may be identified, with the result that, at the end of the line, the only option left standing is the most draconian and that is therefore chosen without any particular consideration of whether there are internal deficits within that option. The linear approach ... is not apt where the judicial task is to undertake a global, holistic evaluation of each of the options available for the child's future upbringing before deciding which of those options best meets the duty to afford paramount consideration to the child's welfare.”
22. We did not call upon Mr Barnes to amplify upon his written submissions. He realistically conceded that despite the Local Authority’s clear position that M cannot be returned to the care of her mother, as the judge agreed, it would border on the hypocritical to suggest that the judgment was in any way redeemable. In

that case, a rehearing must logically encompass a reconsideration of the mother's case of her resuming M's care, if that remains her position.

23. Ms Thompson, on behalf of the Children's Guardian, indicated in a statement dated 11 June 2024 that the Guardian was "neutral" in relation to the appeal, but subsequently in a skeleton argument dated 29 July 2024 supported the LA's appeal, and for the same reasons. The Children's Guardian maintains her position, as at the hearing, that a time limited search for an open adoptive placement should be made, but regardless of the success, prospective or otherwise, of that endeavour, a placement order should be made.
24. However, Ms Thompson draws attention to various reports in relation to post adoption contact, including that of the 'Public Law Working Group: Adoption Subgroup's Report – Recommendations for Best Practice in respect of Adoption Interim Report September 2023', and the Family Law Bar Association Response, which were not before the judge, and seeks "guidance" to assist practitioners in considering contact when proposing a plan for adoption, and specifically in relation to the practical application of section 46(6) and section 51A of the Adoption and Children Act 2002. I see no good reason to embark upon such a course, and every reason not to do so. The issue of post adoption contact is tangential to the grounds of appeal and has not been argued, fully or at all, as a discrete issue. No doubt the President will take the opportunity to give guidance in an appropriate case. This is not that case. I would firmly decline the invitation.
25. Mr Hall, on behalf of the mother, realistically acknowledges that the judge's e-mail to this Court creates the disquiet sounded in Peter Jackson LJ's directions and subsequent reasons to grant permission to appeal. He seeks to dispel that disquiet by reference to the fact that the judge did not say that the 'new' information concerning the foster carer's position would have changed his decision. However, he describes the contents of the e-mail to be "puzzling" in the light of matters which I refer to below.
26. Mr Hall has taken us to those parts of the judgment where he says the judge recognises the "reality" that the current foster placement would not endure and says that the final decision was not conditional upon it doing so. In the ex-tempore judgment, the judge says that he was assisted by V, "the extremely good witness yesterday who made it quite clear that [M] can stay with them provided that can be agreed with the local authority and whatever agency she is going to work with. That is my sincere hope, that [M] can reside there." Later he acknowledged: "One of the negatives of long-term fostering, of course, is the risk of breakdown and the consequent disruption and possible harm to the child". Towards the end of his reasons he indicated, "The fact that there is such a close bond between mother and daughter in this case and that [M] is rising 4 years will, in my judgment, help to make the foster placement, whether with V or elsewhere, stronger, and less likely to break down." (Emphasis added)
27. This, Mr Hall submits, is in accordance with the evidence that was led before the judge and demonstrably so from the transcripts. The social worker in answer to a question from Ms Thompson as to whether V and C "might be able to continue as long-term foster carers?", said "Not long term". V, the foster

mother, in answer to the judge indicated a willingness to continue to support the mother and M in a foster placement, subject to the consent of the new fostering agency they had contracted to, however subsequently, made very clear that she and C “would be happy for [M] to continue being fostered by us until she found an adoptive family. ... We cannot commit to 18 years of caring for [M] and I think that would be wrong to say we could. We are older and we are parent and child foster carers.” To which the judge did respond “Right. Got it.” However, in the Children’s Guardian’s subsequent evidence the judge intervened after an answer relating to M’s then current living arrangements and said: “Sorry. We had the evidence from [V] if I might call her [V], that [M] could stay with her for the foreseeable future.”

28. In general terms Mr Hall submits that it would be wrong for a decision to be subject to an appeal or re-litigation where a foster carer has changed their mind or a placement breaks down; and that it was open to the Judge to re-open the case if he considered it necessary following the updating information from the foster carer.
29. In response to ground 1, he submits that the fact that the judge expressed reservations about adoption throughout the hearing did not constitute a “peremptory dismissal” of that option, and his remarks must be seen in the context of the wider judgment which sufficiently explains his reasoning. On grounds 2 and 3, he accepts that the judgment is “short, lacks detailed analysis and is somewhat lacking in structure” but argues there is sufficient evaluation and analysis within the judgment to justify dismissing the appeal. This was an “experienced judge” familiar with the “well known factors” which inform the necessary balancing exercise when considering stark options for a child’s future placements and highlighted in *D-S (A Child: Adoption or Fostering)* [2024] EWCA Civ 948 handed down as recently as 7 August 2024. These factors had been highlighted in the Local Authority’s written submissions, to which the judge would have had regard; however, it was right for the judge to focus and emphasise the relevant issues in the circumstances of this case.

Discussion

30. In my view there is no escaping the conclusion that the judge did base his decision primarily upon an erroneous belief that V was going to continue to provide long term foster care for M. The recital to the order made on 9 July and the fact and substance of the e-mail he sent to the Court of Appeal Office makes this clear, as does his intervention in the Children’s Guardian’s evidence.
31. I agree with Mr Hall that this is at odds with the unequivocal evidence given by V and the social worker, and the apparent understanding of the Children’s Guardian as indicated above. What is more, the judgment does not indicate that the judge thought this was an “extremely finely balanced case”, quite the contrary. In the circumstances, the judge’s communication is aptly described as “puzzling” to say the least.
32. I have no doubt that, of itself, a foster carer’s ‘change of mind’ or placement breakdown is not an appropriate basis of an appeal. In such circumstances, the judge may re-hear the case: see *Re CTD (A Child Rehearing)* [2020] EWCA

Civ 1316 or a parent may apply to revoke care and/or placement order. But that is not the situation here.

33. It would appear that the judge had ‘heard’ different evidence to that actually given. It may, of course, have been an entirely different situation if V’s evidence was as the judge thought it to be, and which option may well have garnered the support of social worker and Children’s Guardian, (particularly if a Special Guardianship Order was in prospect). However, it is difficult to comprehend how he so unhesitatingly reached the decision he did in the circumstances which appertained, and, without articulating his reasons to disregard the opinion evidence of all the professional witnesses, which led him to give an immediate and extempore judgment.
34. I would hesitate to discourage a measured and open discourse between judge and counsel, which effectively challenges a proposition or case advanced. Such discussion may assist the advocate to refine his/her argument or assist the judge to analyse the point. However, the judge’s comments in relation to ‘open adoption’ in general and the peremptory indication that “...this was never really an adoption case” suggests that his mind was closed to any resolution but long-term fostering once he had ruled out placing M in the mother’s care.
35. Clearly, once the judge had dismissed the option of M returning to her mother’s care, he was required to evaluate the pros and cons of long-term fostering versus adoption side by side in a balanced, holistic fashion. However, whilst it is certainly possible to discern the primary motivation behind the judge’s decision, namely, to maintain the mother and child relationship, the judgment lacks a rigorous and unsentimental assessment of the viability of that aim in the context of the actual evidence in the case and the contra welfare factors. I agree with Mr Barnes that the judge’s analysis was inadequate, for the reasons illustrated in [19] above. Furthermore, the judge’s approach was demonstrably ‘linear’.
36. In *Re W (A child) (Adoption: Grandparents’ Competing Claim)* [2017] 1 WLR 889 McFarlane LJ (as he then was), cautioned in [68] and [69] against utilising the phrase “nothing else will do” as a “sort of hyperlink providing a direct route to the outcome of a case so as to bypass the need to undertake a full, comprehensive welfare evaluation of all of the relevant pros and cons: see *In re B-S* [2014] 1 WLR 563, *In re R (A Child) (Adoption: Judicial Approach)* [2015] 1 WLR 3273 and other cases”. Yet the judge obviously did fall into this trap, saying: “The law is clear, *Re BS*, nothing else will do. Adoption is the most draconian order this court can make. In my judgment, there is something else in this case that will do having regard to the evidence I have heard, and I have considered very carefully the other options. As I say, one is the return to independent living with the child, and the other is long-term fostering but with very sufficient significant contact as between [M] and her mother, that is what else will do. And I take that on board. “
37. Mr Hall has tenaciously argued that although the judgment calls for some “jigsaw” construction (see *In re S (A Child: Adequacy of Reasoning)* [2020] 1 FCR 396, @ [34]), this Court may be confident that such an experienced judge as here would have borne all necessary factors well in mind. However, whilst I do not doubt the judge’s experience, “even Homer nods”, and I am not

persuaded that, regardless of the mistaken understanding of V's position, there is any sufficient analysis of the various welfare factors that must be considered in determining the nature of M's future placement.

38. In his skeleton argument, Mr Hall had suggested that if this Court were "persuaded that the reasons and analysis are inadequate or otherwise lacking, ... one option short of directing a re-hearing would be to adjourn the appeal with a specific request to the learned judge to provide fuller reasons and analysis". He explicitly abandoned this argument in his oral submissions and, I think, realistically so. As Baker LJ described in *re O (A Child) (Judgment: Adequacy of Reasons)* [2021] 2 FCR 766, para 61:

"there are cases where the deficiencies in the judge's reasoning are on a "scale which cannot fairly be remedied by a request for clarification As King LJ said in *In re I* (at para 41): "It is neither necessary nor appropriate for this court to seek to identify any bright line or to provide guidelines as to the limits of the appropriate nature or extent of clarification which may properly be sought in either children or financial remedy cases." But where the omissions are on a scale that makes it impossible to discern the basis for the judge's decision, or where, in addition to omissions, the analysis in the judgment is perceived as being deficient in other respects, it will not be appropriate to seek clarification but instead to apply for permission to appeal."

39. I regret, for M and the mother's sake, that there is no other realistic option in this case but to remit the same for a rehearing before a different judge.

Bean LJ:

40. I agree.

Andrews LJ:

41. I also agree.