



Neutral Citation Number: [2019] EWCA Civ 680

Case No: B4/2018/2939

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM WEST LONDON FAMILY COURT
HH JUDGE ROWE QC
ZW17C00477

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16 April 2019

Before :

LADY JUSTICE KING
LORD JUSTICE BAKER
and
MR JUSTICE MOOR

Between :

LR
- and -
A LOCAL AUTHORITY (1)
A MOTHER (2)
A FATHER (3)
RP (by her children's guardian) (4)

Appellant

Respondent

Deirdre Fottrell QC and Tom Wilson (instructed by **Goodman Ray**) for the **Appellant**
David Fowler (instructed by **Local Authority Legal Services**) for the **First Respondent**
The Second Respondent appeared in person
Sam King QC and Oliver Jones (instructed by **Freeman Solicitors**) for the **Third**
Respondents
Sandra Fisher (instructed by **Beu Solicitors**) for the **Fourth Respondent**

Hearing date: 30 January 2019

Approved Judgment

LORD JUSTICE BAKER (delivering the judgment of the court):

1. On 31 January 2019 this Court allowed an appeal by a foster carer against a care order made by HH Judge Rowe QC in respect of a girl, R, who had been in her care for 14 months. The judgment is now reported at [2019] EWCA Civ 525. Following our decision, the appellant applied for an order that her costs be paid by the local authority and Cafcass. In accordance with subsequent directions, the appellant, the local authority and Cafcass have filed written submissions on the costs issue.
2. Having considered those submissions, we have decided to make no order as to costs. We summarise our reasons in this short supplemental judgment.
3. The approach to be followed when considering applications for costs in cases involving children has been considered on two occasions by the Supreme Court in *Re T* [2012] UKSC 36, and subsequently in *Re S* [2015] UKSC 20. We have those principles firmly in mind. For many years, the general practice in proceedings relating to children has been to make no order as to costs save in exceptional circumstances. The principal reason for this approach, as recognised by Baroness Hale of Richmond in her judgment in *Re S*, is that, whenever a court has to determine a question relating to the upbringing of a child, the welfare of the child is the court’s paramount consideration, and as a result “in such proceedings there are no adult winners and losers – the only winner should be the child” (paragraph 20) and “it can ... generally be assumed that all parties to the case are motivated by concern for the child’s welfare (paragraph 22). It follows that “costs orders should only be made in unusual circumstances”, for example, as identified by Wilson J (as he then was) in *Sutton London Borough Council v Davis (No 2)* [1994] 2 FLR 569, where “the conduct of a party has been reprehensible or the party’s stance has been beyond the band of what is reasonable” (paragraph 26).
4. At paragraph 29, Baroness Hale added:

“Nor in my view is it a good reason to depart from the general principle that this was an appeal rather than a first instance trial. Once again, the fact that it is an appeal rather than a trial may be relevant to whether or not a party has behaved reasonably in relation to the litigation. As Wall LJ pointed out in *EM v SW, In re M (A Child)* [2009] EWCA Civ 311, there are differences between trials and appeals. At first instance, ‘nobody knows what the judge is going to find’ (paragraph 23), whereas on appeal the factual findings are known. Not only that, the judge’s reasons are known. Both parties have an opportunity to ‘take stock’ and consider whether they should proceed to advance or resist an appeal and to negotiate on the basis of what they now know. So it may well be that conduct which was reasonable at first instance is no longer reasonable on appeal. But in my view that does not alter the principles to be applied: it merely alters the application of those principles to the circumstances of the case.”
5. In our judgments delivered on 31 January, we expressed a number of criticisms of the work of the local authority and the children’s guardian in this case. We were critical of the local authority, in particular, for (1) failing to correct the judge’s misstatement at the hearing on 2 August 2018 that “R must move”, (2) failing to ensure that the assessment of LR as a prospective adopter for R was concluded before the hearing on 20 September 2018 and (3) subsequently abandoning that assessment after the judge

had given her indication at the conclusion of that hearing. With regard to the guardian, we criticised her for (1) making a final recommendation before seeing the final evidence of the local authority, (2) failing to file a supplemental report for the hearing on 20 September 2018 setting out the rationale for her fundamental change of position and a revised analysis of the advantages and disadvantages of the options for the child, and (3) failing to refer in her final position statement filed for that hearing to the possibility that R could be adopted by the appellant.

6. We are clear that, in these respects, the conduct of the local authority and the guardian fell short of the standard expected in care proceedings. After careful consideration, however, we have concluded that the conduct of the local authority and the guardian in the proceedings before Judge Rowe did not fall into the category of behaviour identified in the *Sutton* case. As noted in the submissions on behalf of Cafcass, this was a very complex case involving four children of different ages and different needs. It seems to us that all parties, including the court, focused attention – for understandable reasons – on the lack of information concerning the options for the children in Poland. All parties, including the court, paid insufficient attention to R’s current placement with the appellant. We recognise that this Court has the benefit of hindsight which in not enjoyed by the parties and judge at first instance, where everyone is working under the considerable pressures that arise every day in the family court. Equally, we do not consider that the position adopted by the local authority and guardian with regard to this appeal gives rise to circumstances which warrant the making of a costs order.
7. In reaching this conclusion, we do not resile from our criticisms of the local authority and guardian. In this context, it was reassuring to read, in the submissions filed on behalf of Cafcass, that this case will be reviewed and lessons learnt. We trust that there will be a similar response within the local authority social services department.