

No information that is capable of or may lead to the identification of the children or the parties to this case may be published.

Neutral citation number: [2024] EWFC 98 (B)

**IN THE FAMILY COURT**

**SITTING AT READING**

**On appeal from**

**DJ Harrison**

Before:

**HIS HONOUR JUDGE MORADIFAR**

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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In the matter of:

Re K (Child: Placement options: Concurrent planning)

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Miss Jacqui Gilliatt (instructed by the Joint legal Team) on behalf of the applicant Local authority.

Mr Andrew Alexander (instructed by Campbell Hooper & Co) on behalf of the Respondent mother.

Miss Susan Quinn (instructed by Rowberry Morris Solicitors) on behalf of the child through his Guardian.

Date of the hearing:

7 May 2024

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HHJ Moradifar

This Judgment was delivered in private. The judge has given leave for this version of the judgement to be published. The anonymity of the children and members of their family must

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be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

## **His Honour Judge Moradifar:**

### **Introduction**

1. This appeal raises a single issue, namely whether the learned District Judge (the “Judge”) was plainly wrong to prefer the recommendations of the subject children’s guardian to those of the children’s allocated social work team?

### **The law**

2. The local authority’s applications for permission to appeal the Judge’s decision is governed by r 30 of the Family Procedure Rules [2010] and in common with the Civil Procedure Rules [1998] [r52.3(6)], it provides at r 30.3 (7) that:

*“Permission to appeal may only be given only where –*

*(a) the considers that the appeal would have a real prospect of success; or*

*(b) there is some other compelling reason why the appeal should be heard”*

3. The definition of what constitutes ‘a real prospect of success’ was set out by Moor J in *AV v RM (appeal)* [2012] 2 FLR 709, FD, which provides that the appeal must be realistic, not fanciful and this does not equate to a greater than fifty percent chance of success.
4. More recently Baker LJ in *Re N* [2023] EWCA Civ 364 has described the role of the appellate court as falling in two parts,

*“first, to consider whether the judge’s decision was sufficiently founded on the necessary analysis and comparative weighing of the options and, secondly, if it was, to determine whether the orders were necessary and proportionate.”*

His Lordship further reminded us by reference to a summary of the dicta in *Re B (Care Proceedings: Appeal)* [2013] UKSC 33, that

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*“In a case where the judge has adopted the correct approach to the issue of necessity and proportionality, the appellate court’s function is accordingly ... to review his findings, and to intervene only if it takes the view that he was wrong. In conducting that review, an appellate court will have clearly in mind the advantages that the judge has over any subsequent court - see Lord Wilson in *In re B* at para 41 and the earlier decision of the House of Lords in *Piglowska v Piglowski* [1999] UKHL 27, [1999] 1 WLR 1360.”*

### Background

5. The Judge was concerned with two siblings, K who has just turned seven years old and is the subject of this appeal, and his half sibling L who is four years old. They share the same mother and have different fathers. For several years, the local authority has had significant involvement with the family. The children’s older half sibling was removed from the mother’s care in 2016 and subsequently placed with the paternal grandmother as her Special Guardian.
6. In the ensuing years, the local authority’s concerns continued, at the core of which was the emotional harm of the children and the mother’s inability to address the same. On 11 November 2022, the children were removed pursuant to interim care orders and placed in foster care. Subsequently they were placed with family members who were unable to offer K a long term placement, leading to the separation of the children on 23 March 2023 when K was once again placed in foster care.
7. Sadly, K’s father has not participated in his life in a meaningful way and this was also his stance in the proceedings before the Judge. The mother was the subject of a cognitive assessment, psychiatric assessment and a PAMS parenting assessment, all of which identified deficits in the mother’s parenting and the need for her to undertake some long term work before the children could be returned to her care. L’s father who has maintained contact with L and participated in the proceedings, began to disengage with the proceedings by the time of the final hearing which commenced on 2 February 2024.

### The final hearing

8. Leading to the final hearing, the local authority’s plan for L was the continuation of his placement with the family members pursuant to Special Guardianship Orders. The local authority planned for K to be adopted with annual ‘letterbox’ contact with his mother and L, although the local authority proposed to explore the possibility of annual direct contact with L which was to be the subject of a risk assessment. However, by the first day of the final hearing the local authority had amended its care plan for K, providing an alternative but concurrent plan which

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proposed to look for both an adoptive and foster placements. It further provided for a different contact regime depending on the plan that came to fruition.

9. The mother opposed the plans and sought an adjournment so that she could undertake the work that was identified by the experts and to seek the return of the children to her care. The children's guardian opposed the mother's proposals, she supported the plan for L but opposed the plan for K.
10. The Judge proceeded with final hearing and heard the evidence of the allocated social worker Mr Chatterjee, a member of the family finding team, Ms Verity, the independent social worker, the mother and the children's guardian. After hearing submissions, the judge gave a detailed *ex tempore* judgment, the transcript of which extends to 143 paragraphs. After identifying the available options for each of the children, the learned Judge dismissed the mother's application for an adjournment, granted special guardianship orders in respect of L, made no order on the local authority's application for a placement order and approved a care plan for K placing him in foster care pursuant to a final care order.

**Application for permission to appeal**

11. The local authority issued its application within the prescribed time and the matter was considered on the papers by a Circuit Judge, who directed that the case be listed for an oral hearing to consider the application for permission to appeal and the appeal should permission be granted. Although the transcript of the judgment was available, the transcript of the evidence was delayed leading to the adjournment of the hearing that was listed in April to this hearing before me.
12. The local authority's appeal rests on three grounds that may be summarised as follows;
  - a. The Judge failed to reach a reasoned decision on the comparison between the two placement options that was based on reliable evidence and not the speculative approach of the Judge,
  - b. The Judge was flawed in her application of the checklist as set out in s 1(4) of the Adoption and Children Act 2002 (the "Act"),
  - c. The Judge erred in dismissing the possibility of making a contact order with a placement order by stating the court was unlikely to wish to bind the adopters against their will.

The mother and the guardian each oppose the local authority's application for permission to appeal, characterising it as lacking in merit.

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13. I am grateful to the parties for their comprehensive skeleton arguments and submissions. The local authority's submissions are by reference to a detailed micro analysis of the judgment. It criticises the Judge for not giving appropriate weight to the evidence from Ms Verity about the changing attitudes to post adoption contact, placing undue weight on the concerns that direct post adoption contact was unlikely to be forthcoming which may limit the pool of available adopters if an order for contact is made thus erring in the application and interpretation of s 26 of the Act. Furthermore, the Judge was wrong to infer that the more recent deterioration in K's circumstances and presentation would make adoption a less likely option if the Child Permanence Report were updated to include his current circumstances.
14. The local authority further submits that the Judge's reliance on broad understandings and analytical data about the stability of an adoptive placement compared to long term foster care is flawed and that she was duty bound to make further enquiries about the same. She was wrong to assume that adopters were likely to need additional training to meet K's needs and she was wrong to conclude in the absence of evidence that the local authority was unable to conduct a parallel search for the two types of placements. Furthermore, she failed to attach sufficient weight to the permissive nature of a placement order. She was also wrong to assume that there would be less delay in finding a foster placement than an adoptive placement. Moreover, she erred by placing too much weight on the consequences of an adoptive placement breaking down. Whilst I do not intend to rehearse the entire list of criticisms, I note that the local authority's criticism also include the Judge's failing to address all the criteria under s1(4) of the Act and more generally wrongly preferring the evidence of the guardian over the witnesses on behalf of the local authority.
15. The mother and the guardian each argue that the criticism levied against the Judge are ill-conceived and that not only was she entitled to reach the conclusions that she did, but she was correct to do so on the evidence before her. They each argue that in the circumstances of this case adoption was not a realistic option. It was the local authority's failing to adduce the necessary evidence that it now seeks to use to highlight the evidential difficulties that erode the integrity of the Judge's reasoning. Finally, the local authority's application and proposed appeal is founded on nothing more than a disagreement with the Judge's decision and the appeal has no merit whatsoever.
16. The judgment is detailed and comprehensive. After a few introductory paragraph, the Judge readily identifies the main issue to be the resolution of "*a divergence of a professional opinion between the Local Authority witnesses on the one hand and the Guardian on the other*"[para 13]. Later in the judgment she turns to the law

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and provides a summary that includes reference to the welfare checklist under s1(3) of the Children Act [1989] and s 1(4) of the Act. She bears *“in mind the case law, that placement for adoption is a very extreme thing, a last resort and a high degree of justification is required, after a full and holistic analysis of all realistic alternatives, before adoption can be endorsed as being necessary.”* The Judge then continues by referring to the application of some of the relevant well known authorities to the instant case before identifying four realistic options for her to consider.

17. After dealing with threshold, at paragraph 50 she clearly states that she will address the findings that are relevant to the welfare checklist before weighing those into the analysis of the *“pros and cons”* for each of the options and finally weighing into the balance which of the options will best meet the children’s best interest whilst having in mind the issue of proportionality. In the remainder of her judgment, the Judge stayed true to this structure. Having taken those steps, she dismissed the mother’s application for an adjournment and granted Special Guardianship Orders in respect of L. The thread that binds the plans for the children is their contact during their minority. Following this thread, she recognised the importance of the sibling relationship for both children and continued to consider the plan for K.
18. The plans for K were presented to the Judge as parallel or concurrent plans. However, the evidence of Mr Chatterjee as corroborated by the wording of the care plan, made clear that adoption would be given priority over long term foster placement. Indeed, there were ongoing discussion about the timing and funding of a foster placement being kept open should one be found before a suitable adopter is identified. On the evidence before the Judge, she was bound to separately consider the merits of the two options. Indeed, the structure of the evidence followed this path.
19. Adoption of a child is an interference of the highest order with the child’s rights to a family life and it is only permissible when it is necessary, proportionate and in accordance with the law. Similarly, dispensing with a parent’s consent to place his or her child for adoption fully engages the parent’s rights to a family life and cannot be treated lightly.
20. It is important that the judgment is considered in its totality and not dissected into its smaller constituent parts. When read as a whole, it is clear to me that the Judge was fully engaged with the issues of necessity, proportionality and legality of the proposed plans. In considering these issues she properly addressed the evidence that has informed her findings as well as recognising and considering the important features of each of the options.

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21. Whether the plans are concurrent or in the alternative, the court remains under a positive duty to engage with the issues that I have set out above in order to first identify the realistic options before deciding which of those will best meet the welfare needs of the subject child. The concurrent plans that were before the Judge were each of a vastly different nature with significant differences in their suitability to meet K's long term needs. The essence of the local authority's argument is that the Judge should have left both options open as a suitable outcome for K and to permit the local authority to explore both notwithstanding significant difference in the two options and the properly founded concerns of K's guardian. In my judgment, the premise of local authority's case on appeal is manifestly flawed, presenting a fundamental misunderstanding of the judge's reasoning and the positive duty that is placed upon her to engage with the issues that I have set out above. Furthermore, not only was it properly open to the Judge to reach the conclusion that she did, but it was also the only proper conclusion that she could reach on the evidence that was before her.
22. It is not necessary for me to address all of the issues that have been raised in submissions. However, I take this opportunity to address some of the more pertinent issues that arise in this case. There is some evidence of a welcome sea change in the professional and social attitudes to adoption and the preservation of the appropriate familial links in the post adoptive landscape. These changes are at their infancy and I have no doubt that there is a great deal more that we should learn going forward. In my judgment, when dealing with such cases, judges are entitled to take into account of the broader social and professional barometer. However, each case must be decided on its own unique facts and general assertions about social norms serve no more than to provide some relevant background. Where the more precise statistical data is relevant to the facts of a particular case, it is the duty of the party who seeks to rely on those to bring those to the court's attention. Where a judge identifies the importance of such data, the judge may invite the parties to address the court on those issues. There is nothing in this case that would have placed such an expectation on the Judge. She was entitled to observe the broad well known differences between the two proposed plans. Her refusal of the local authority's application for a placement order was based on a number of factors that she weighed into the balance which included the importance of the links between the siblings and their mother.
23. I commend the social work team for its flexible thinking by seeking to find the best options for K. The challenges for those who work in the family justice system can also be its reward. The expectations of the professionals are high. They are called upon to find solutions to highly complex human and social conundrums. As this case illustrates, when planning the future of a child, it is crucial that the care plans are clear, concise and readily understandable. Care plans must address the

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details of the necessary steps and expected time scale for implementation of each of the options and must be unambiguous about the status of its proposals by identifying if these are parallel plans, alternative plans or plans for contingencies. It is also crucial that care plans and the evidence that informs them are provided to the parties on sufficient notice so that any ambiguities or other issues can be identified and addressed before the court begins to hear evidence. Parents, guardians and the court should not for the first time hear such details of the care plan during oral evidence of the social worker. Where the care plan provides for alternative or parallel plans in the same document, at the conclusion of the hearing the court may consider ordering a fresh draft of the care plan that the court has approved so as to avoid any misunderstandings about the document that will accompany the child for the remainder of his or her minority.

24. In this case there has been an inordinate delay in resolving the issues that have expanded with the passage of time. Sadly, this is the inevitable consequence of delay in many cases. Although, I am grateful to the local authority for confirming that it has implemented the approved care plan and has continued its searches for a long term foster care placement for K, this case highlights the need for appeals in such circumstances to be dealt with swiftly. Ordinarily, applications for permission to appeal are dealt with on the papers with a right by the applicant to seek an oral hearing when permission to appeal is refused. When applying for such permission, the applicant must provide the court with an approved transcript of the judgment that has been obtained expeditiously or a note of the judgment that has been agreed by the parties and approved by the first instance judge. The other parties do not ordinarily respond to the application unless the court has directed them to do so. Finally, where the respondents to the application speak in unison, unless the court directs otherwise, there is no requirement for them all to be present at the hearing. These are important procedural steps that serve to avoid unnecessary delay and costs.

### Conclusion

25. For reasons that I have set out above, the appeal has no prospect of success and I refuse the local authority's application for permission to appeal.