Neutral Citation Number: [2020] EWHC 2783 (Fam)

Case No: FD20P00627

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/10/2020

Before :

MR JUSTICE MOSTYN

- -

Between :

PROSPECTIVE ADOPTERS	**Applicants**
- and -	
SHEFFIELD CITY COUNCIL	**Respondent**

- -
- -

Tom Wilson (instructed by **Goodman Ray Solicitors**) for the **Applicants**
Ruth Cabeza (instructed by **Sheffield CC**) for the **Respondent**

Hearing date: 9 October 2020

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Approved Judgment

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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MR JUSTICE MOSTYN

This judgment may be published in this anonymised form. However, it will be a serious contempt of court if either the children or the prospective adopters were identified in any report of the case.

Mr Justice Mostyn:

1. This is an application by the prospective adopters of two sisters, G, aged nine, and M, aged seven, under sections 6 and 7 the Human Rights Act 1998 for a mandatory injunction that the local authority shall return M to the physical care of the applicants.

2. On 6 March 2019 the Family Court granted a placement order in favour of the local authority. The care plan was for adoption. On 2 September 2019 the children were placed with the prospective adopters, a married couple.

3. Very sadly it appears that this placement has been unsettled almost from the beginning. To their credit, the prospective adopters had been aware of the challenges that likely lay ahead and there has not been, nor could there be, any criticism of them or the parenting that they have given the children. The prospective adopters' account of the circumstances makes for very disturbing reading and it was undoubtedly an exceptionally challenging situation for them and the children.

4. When the country went into lockdown in March of this year the problems experienced in the placement intensified. The most serious incidences have included:

   i) G on at least three occasions assaulting M in a sexual manner causing her bruising and her skin to be broken;

   ii) G lashing out at M, causing her physical and emotional harm;

   iii) G deliberately targeting and destroying precious items belonging to M, including presents and personalised books from foster carers and their birth family; and

   iv) G repeatedly self-harming, causing herself to bleed, pulling her own hair and leaving herself with marks on her body and threatening to kill herself.

5. M was also self-harming and was described by the prospective adopters as being preoccupied with ways in which she might die. Evidently the household was reaching, if indeed it had not already reached, a crisis point. Both children were grossly traumatised.

6. The prospective adopters asked for G to be accommodated separately. They were clear that G was repeatedly targeting M and that they could not keep G safe from herself or M safe from G even with a high level of supervision. The local authority would not do this without further assessments and did not agree to separating the children. The prospective adopters say they had previously rejected the proposal of respite care because,

   > "we need[ed] a solution, not a temporary fix. At the time, we thought that we could not consider putting the girls through further instability and trauma and wanted to get the right help now before the situation exacerbated."

7. On 21 July 2020 G's state deteriorated to an unprecedent depth, it having been worsening for a number of days. In an episode that lasted several hours she bit herself, headbutted floors, doors and walls, gouged her eyes and pulled her hair out. It led

eventually to an ambulance having to be called. Not only was this clearly all very distressing for G but also for the prospective adopters and very importantly for M who inevitably witnessed a great deal of G's behaviour. Only two days previously the children had been taken to A&E so that M's injuries inflicted by G could be assessed, and so that G could be admitted for her own safety and that of M.

8. On 21 July 2020 at 1:36 pm the prospective adopters sent an email to multiple professionals involved with the children at the local authority and an associated agency. It stated:

> "Hi all, I thought by this point, after the email I sent last night, somebody may have been in contact to help us. We have had a lovely supportive text from [X], who has been incredible throughout, but I'm afraid this lack of action from everyone else is just reflective of the way we have been treated throughout. [Y] from CAMHS was very thorough and kind this morning but this is the support we should have had in October when we asked for it. We and the girls have been under incredible stress from that point, and it was impossible to think it could get worse, and in the last four weeks it has. If you are unwilling to act to protect M from G, when the most serious of harm is happening, you are leaving M to live with her abuser and face further harm, and G destroying herself and everyone around her. If you cannot protect us all now at the worst of times, **I'm afraid that is it. We are heartbroken**. We are not social workers and the response is not adequate from yourselves. **Please come and get the girls. And wherever you place them I beg you separate M from G. We are no longer able to continue.** … NB **As I have been writing this email I have seen [Z] has tried to phone 5 minutes ago. I am not going to be ringing back**"
>
> (emphasis added).

9. The following day the children were taken into foster care in separate homes. They have continued to have contact with one another and have also continued to have direct contact with the prospective adopters. The prospective adopters have continued to be involved in decision making regarding the children.

10. On 14 August 2020 (and multiple times since) the prospective adopters sent an email to the local authority asking that M be returned to their physical care. The local authority did not agree to do so. It is at this point that they say the local authority's accommodation of M became unlawful. They say that up until this point the children, in particular M, was being voluntarily accommodated by the local authority with their consent. On 14 August 2020 they withdrew their consent and therefore they say the accommodation became unlawful. They have not asked for the return of G and therefore do not argue that her ongoing accommodation is unlawful.

11. On 7 September 2020 the prospective adopters filed an application for an adoption order with respect to M. Whether they had standing to do so or whether they must go

through the process of seeking leave to apply for an adoption order is dependent on the outcome of this application.

12. The local authority resists the current application as well as the application for an adoption order. There has now been a further 'together and apart' assessment. It no longer recommends adoption. The local authority has now firmly formed the view that it is in the best interests of the children to be placed separately in foster care with a long-term view to them being reunited.

13. I now turn to the law. Section 35 of the Adoption and Children Act 2002 ("ACA 2002") sets out how a child who is subject to a placement order can be returned. It provides:

> **Return of child in other cases**
>
> (1) Where a child is placed for adoption by an adoption agency and the prospective adopters give notice to the agency of their wish to return the child, the agency must
>
> (a) receive the child from the prospective adopters before the end of the period of seven days beginning with the giving of the notice, and
>
> (b) give notice to any parent or guardian of the child of the prospective adopters' wish to return the child.
>
> (2) Where a child is placed for adoption by an adoption agency, and the agency
>
> (a) is of the opinion that the child should not remain with the prospective adopters, and
>
> (b) gives notice to them of its opinion,
>
> the prospective adopters must, not later than the end of the period of seven days beginning with the giving of the notice, return the child to the agency.
>
> (3) If the agency gives notice under subsection (2)(b), it must give notice to any parent or guardian of the child of the obligation to return the child to the agency.
>
> (4) A prospective adopter who fails to comply with subsection (2) is guilty of an offence and liable on summary conviction to imprisonment for a term not exceeding three months, or a fine not exceeding level 5 on the standard scale, or both.
>
> (5) Where
>
> (a) an adoption agency gives notice under subsection (2) in respect of a child,

> (b)before the notice was given, an application
>
> (i) for an adoption order (including a Scottish or Northern Irish adoption order),
>
> (ii) for a special guardianship order,
>
> (iii) for a child arrangements order to which subsection (5A) applies, or
>
> (iv) for permission to apply for an order within sub-paragraph (ii) or (iii),
>
> was made in respect of the child, and
>
> (c) the application (and, in a case where permission is given on an application to apply for an order within paragraph (b)(ii) or (iii), the application for the order) has not been disposed of,
>
> prospective adopters are not required by virtue of the notice to return the child to the agency unless the court so orders.
>
> (5A) A child arrangements order is one to which this subsection applies if it is an order regulating arrangements that consist of, or include, arrangements which relate to either or both of the following—
>
> (a) with whom a child is to live, and
>
> (b) when a child is to live with any person.
>
> (6) This section applies whether or not the child in question is in England and Wales.

14. The prospective adopters argue that the email of 21 July 2020 was not a notice for the purposes of section 35(1) ACA 2002. The local authority says that it was. Counsel agree that there are no requirements as to form or substance of a section 35 notice save that it must be in writing (section 144(1) ACA 2002).

15. Counsel for the prospective adopters forcefully argues that the prospective adopters as a matter of fact only gave consent in the email of 21 July 2020 for the children to be temporarily accommodated. They did not have the requisite intention to end the placement and therefore the email could not be a notice under section 35 ACA 2002.

16. I have read that email carefully in the context of the earlier and later correspondence and in the light of the conduct of the parties. I accept the submission that one should approach messages sent in fraught circumstances with caution and should be slow to import a meaning that brings about far reaching and drastic consequences where this was not clearly intended. I also accept that for a notice to be given under section 35 ACA 2002 the intention of the notice giver must be to end the placement permanently and a request for temporary respite care is not sufficient. I accept that it is not necessary for adoptive parents to have a detailed knowledge of the legal niceties of

section 35 ACA 2002. They must intend, no more, no less, to bring about the consequence of section 35(1) ACA 2002 i.e. for the children to be returned permanently to the local authority and no longer placed with them.

17. It can be seen that the test for what constitutes a notice under section 35 is a question of law but that whether a specific communication satisfies that test is a question of fact.

18. I have reached the clear factual conclusion that the email of 21 July 2020 was a notice under section 35 ACA 2020 and as such brought the placement of the children with the prospective adopters to an end. I have come to this conclusion for the following reasons:

    i) The local authority had repeatedly told the prospective adopters that it would not countenance the children being separated at this time. In the words of counsel for the local authority it was either both of the children or neither of the children. In the context of the ever-deteriorating behaviour from G and the crisis between 18 and 21 July 2020 it is clear that the prospective adopters had finally reached the conclusion that it was best for them to care for neither of the children rather than to continue caring for both children together. This explains why they now asked for M, who was far less challenging, to be cared for by the local authority as well as G;

    ii) The email uses the language and tone of permanence. It is not caveated in any way nor does it make any suggestion, even implicitly, as to the prospect of the children returning to the prospective adopters. The prospective adopters had come to the end of the road. "*That is it*," they say; "*We are no longer able to continue*". The postscript to the email evidences the strength of feeling of prospective adopters in wanting finality and wanting to disengage from the local authority;

    iii) The prospective adopters had previously rejected the idea of respite care (I note the local authority's submission that it intended this respite care to be provided by the family of the prospective adopters and not by the local authority) because in their words they wanted a solution and not a temporary fix. The solution had to be permanent and they did not see respite care as such;

    iv) That the social worker later emailed saying he would "want to consider this as a respite type placement initially" does not assist the applicants. Rather it reinforces the view that this was not a respite placement. The social worker would only "want to consider" i.e. treat it as a respite-type placement if indeed it was not a respite-type placement. Evidently at this time the local authority was still hoping that the situation could be salvaged in some fashion. This also explains the local authority's actions in subsequently continuing to involve the prospective adopters in decisions regarding the children and in facilitating contact with them. It does not, however, detract from the undoubted fact that on 21 July 2020 the prospective adopters had given notice to return permanently the children;

    v) I do not attach much weight to the children apparently being returned with only a few days' worth of clothes. The prospective adopters argue that this is

indicative of their intention only ever being that the children be placed in respite care. However, events were fast-moving, and one would not necessarily expect prospective adopters to pack systematically every last possession of the children. Further, G was sent with only a few days' worth of clothes notwithstanding that the prospective adopters accept that her placement with them has come to a permanent end;

vi) It is unreal for the prospective adopters to argue that the email of 22 July 2020 was not good notice under section 35 ACA 2002 not only vis-à-vis M but also vis-à-vis G as well. They argue that, even now, the placement with G with them has not come to an end. Yet under no circumstances do they want G back and accept that she should be placed elsewhere;

vii) The submission that a social worker had represented to the prospective adopters that they continued to share parental responsibility after 21 July 2020, which would only be true whilst the placement subsists, is unpersuasive. It is of minor significance and does not directly affect the clear intention of the email of 21 July 2020. Counsel for the local authority rightly points out that the social worker's misapprehension of the law cannot change the law and that the statement has since been corrected by the local authority.

19. For all these reasons I dismiss the application under the Human Rights Act 1998. A consequence of this is that the prospective adopters did not have standing to bring their application for an adoption order on 7 September 2020 because M had not been living with them for a period of ten weeks preceding the application (section 42 ACA 2002). The adoption application will therefore be struck out.

20. Having reached my decision I do not therefore strictly need to address the interesting arguments as to the legal status of M in the event that the email of 21 July 2020 did not, in fact, amount to a valid notice under section 35(1) ACA 2002. However, I shall shortly do so in the event that a higher court overturns my primary factual finding about the effect of that email.

21. The scheme of Chapter 3 of the ACA 2002 establishes the following propositions of law:

i) When a placement order is made in respect of a child:

a) any subsisting care order does not have effect (section 29(1));

b) the local authority, as adoption agency, is given parental responsibility for the child (section 25(2)); and

c) the local authority is authorised to place the child for adoption with prospective adopters chosen by it (section 21(1)).

ii) Upon the local authority placing the child with prospective adopters:

a) the child is "looked after" by the local authority (section 18(1));

b) the prospective adopters are given parental responsibility while the child is placed with them. However, that parental responsibility may be restricted by a decision of the local authority (section 25(1)); and

c) the child may only be removed from the care and control of the prospective adopters in accordance with the terms of section 35.

22. It can be seen that the scheme bestows certain limited legal rights upon the adoptive parents. They gain parental responsibility, for as long as the child is placed with them, although that parental responsibility can be cut down by a decision of the local authority. The child cannot be removed from them without the local authority giving at least 7 days' notice of its intention to do so. If they had applied for an adoption order the child cannot be removed from then without an order of the family court. However, throughout the period of the placement the child remains "looked after" by the local authority.

23. The terms of section 35 were not new. They replicated, albeit not identically, the terms of section 30 of the Adoption Act 1976. This provided, so far as is material:

> (1) Subject to subsection (2), at any time after a child has been placed with any person in pursuance of arrangements made by an adoption agency for the adoption of the child by that person, and before an adoption order has been made on the application of that person in respect of the child:
>
> (a) that person may give notice to the agency of his intention not to give the child a home, or
>
> (b) the agency may cause notice to be given to that person of their intention not to allow the child to remain in his home.
>
> (2) No notice under paragraph (b) of subsection (1) shall be given in respect of a child in relation to whom an application has been made for an adoption order except with the leave of the court to which the application has been made.
>
> (3) Where a notice is given … by an adoption agency to any person under subsection (1) … that person shall, within 7 days after the date on which the notice was given, cause the child to be returned to the agency …'

24. In 1976 when this legislation was enacted, placement, as a formal concept, had not been created. The reference, therefore, to a child being "placed" in section 30 (1) of the 1976 Act carried with it no legal baggage but was merely a natural use of the verb.

25. In *R v Devon County Council Ex Parte O (Adoption)* [1997] 2 FLR 388 Scott Baker J held at 392D that the power granted to the local authority under section 30 of the 1976 Act could not be exercised indiscriminately. Were it to do so then judicial review would be available. The grounds might include familiar public law complaints such as a failure to consult the adoptive parents; or a flawed decision-making process where matters were left out of account; or classic *Wednesbury* unreasonableness or

irrationality. Since the enactment of the Human Rights Act 1998 the grounds might expand to include an allegation of breach of Convention rights. Normally such a breach would be pleaded within judicial review proceedings so as to maximise the grounds of challenge, although there is no reason why a human rights claim could not be made free-standingly, as happened in this case.

26. In *DL and ML v Newham London Borough Council and Secretary of State for Education* [2011] 2 FLR 1033 Charles J held at [110] that where notice had been given by a local authority under section 35 the adoptive parents could commence judicial review proceedings and seek interim relief in the form of a stay to prevent its implementation. Equally, in my judgment, where a freestanding human rights application has been made, interim relief could be applied for to seek prevention of the implementation of the notice and the removal of the child.

27. If the local authority had formed the view that the child needed to be returned much sooner than 7 days from the giving of notice because of grave concerns about her safety then the local authority would have to apply for an emergency protection order or interim care order enabling a sooner removal: *ibid* at [113].

28. The scheme is completely logical in circumstances where following a placement order (a) a child has been placed with adoptive parents; (b) the child is actually living with them; but (c) the local authority has decided to end the placement. It is clear, however, that the framers of the legislation did not contemplate the scenario (which, for the purposes of this part of the judgment I assume to be the case) where the child is not living with the adoptive parents but has been returned to the local authority for a period of respite care.

29. Assume that during this period of respite care the child made revelations of serious abuse by the adoptive parents. Mr Wilson, counsel for the applicants, argues that in such circumstances the local authority either has to return the child to the adoptive parents and then initiate the section 35 procedure to get the child back a week later; alternatively the local authority has to apply, in reality against itself, for an emergency protection order or interim care order. I cannot accept this submission which has an air of unreality about it.

30. In my judgment, in this scenario it is obvious that the local authority has the power to decide to terminate the placement. As the child is already with the local authority there is no need for notice to be given to the adoptive parents. The local authority therefore just makes the necessary decision. That decision would be challengeable in judicial review proceedings or in freestanding human rights proceedings. That, in effect, is what has happened in this case. The applicants sought the return of M on 14 August 2020. The local authority declined to return her and in making that decision they tacitly made the decision to terminate the placement. That decision is challengeable in the ways I have indicated. The applicants have decided to go down the route of a freestanding human rights application. In this scenario the application would fall to be determined on an interim basis on its merits using the conventional criteria applicable to such applications.

31. I reject the submission that the local authority has retained M "unlawfully" since 14 August 2020. Again, this is a submission which seems to me to be tinged with unreality. The local authority has retained M pursuant to its overarching parental

responsibility. The applicants lost their parental responsibility when the local authority made its tacit decision on 14 August 2020. The fact that they later made an adoption application does not alter the legal position.

32. Were this situation to arise again in the future it would be better that the decision to terminate the placement should be explicitly set out in a fully reasoned letter rather than being made tacitly.

33. That is my judgment.
