



Neutral Citation Number: [2019] EWCA Civ 1120

Case No: B4/2018/2702

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE FAMILY COURT AT MEDWAY

HHJ Robinson
ME18C00694

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 3 July 2019

Before :

LORD JUSTICE PATTEN
LORD JUSTICE LEWISON
and
LORD JUSTICE PETER JACKSON

Between :

W-P (Children)

Marie Crawford (instructed by **Stilwell & Singleton LLP**) for the **Appellant Mother**
Elizabeth Nartey (instructed by **Kent County Council**) for the **Respondent Local Authority**
The **Respondent Father** was not present
The **Respondent Grandparents** were present in person
Monica Ford (instructed by **Davis Simmonds & Donaghey**) for the **Respondent Children**
through their **Guardian**

Hearing date: 25 June 2019

Approved Judgment

Lord Justice Peter Jackson:

Introduction

1. On this appeal a mother challenges the making of a special guardianship order (SGO) in relation to her sons, L (10) and A (9). The order, in favour of the boys' paternal grandparents, was made by HHJ Robinson on 5 October 2018 after a four-day hearing in care proceedings.
2. The grounds for the mother's appeal are in summary (1) a challenge to threshold findings made against her; (2) an assertion that a SGO was disproportionate and that a Child Arrangements Order (CAO) in favour of the grandparents would have been more appropriate; and (3) a critique of the judge's analysis as inadequate.
3. The appeal is opposed by the other parties, being the local authority, the father, the grandparents and the Children's Guardian. We heard submissions on behalf of the mother, the local authority and the Guardian.

Background

4. As long ago as 2010, the boys were the subject of a child protection plan because of parental neglect and in 2011 they moved to live with their grandparents. In 2012, a residence order was made by consent in their favour, with substantial maternal contact. However, the mother, who now has two younger children, has for some time wanted the boys to be returned to her care. In April 2018, after a series of allegations against the grandparents and their son, the father, the boys were placed in foster care. The effect of the judge's order was to restore them to the care of their grandparents, but now under a SGO. Underpinning that decision, the judge made findings of fact about the parties' conduct and about the allegations that had caused the placement in foster care.
5. Turning immediately to those allegations, in October 2014, A, who was then aged 4, said that the grandmother had poured soap into his mouth and that a bump on his head was caused by the grandfather hitting him. At the time, the grandmother accepted an incident had occurred and was given advice by the local authority. The allegation against the grandfather was concluded to be unfounded.
6. In March 2017, the mother said that the children had told her that L had been 'strangled' and A pushed by the father, who was living with his parents. She took this up with the grandparents who said that the father would not be left alone with the children; at that point he moved out of their home for some months.
7. In March 2018, the grandparents made a referral to the local authority in relation to L's behaviour and an assessment was carried out.
8. Matters came to a head when, on 4 April 2018, the mother kept the children after their weekly weekend staying contact. She took them to a police station where they made allegations of physical and emotional harm by the father and grandparents. The grandparents obtained recovery orders which were enforced on 6 April and the

children were returned to their care briefly, before being removed by the police on 9 April and being placed in foster care.

9. ABE interviews were conducted on 10 April. The children repeated allegations against the father but made no allegations about the grandparents.
10. On 11 April, the LA issued an application for an emergency protection order and an interim care order. At a hearing the next day, the parties agreed to voluntary accommodation pending the next hearing. That state of affairs continued throughout the proceedings.
11. The mother's younger children are not involved in these proceedings but a formal assessment was carried out by the local authority in June 2018 because of an incident of domestic abuse between the mother and her then partner in March 2018. The assessment concluded that no further action was required.
12. Within care proceedings, the following assessments have taken place:
 - i) A psychological assessment of the family in August 2018, recommending that the children live with the grandparents or a paternal aunt and uncle but that neither parent could care for them.
 - ii) A positive SGO assessment of the grandparents.
 - iii) A negative SGO assessment of the maternal grandparents.
 - iv) Parenting assessments of the mother, not supporting placement of the children with her.
13. At the final hearing in October 2018, evidence was given by two social workers, a family friend, the mother, the maternal grandmother, the father, the paternal grandparents, the psychologist and the Guardian. The parties' positions were as follows:
 - i) The local authority asserted that threshold was made out in respect of the parents but sought no findings against the grandparents. The children should be placed with the grandparents under a SGO with contact to the mother being regulated under a supervision order.
 - ii) The mother argued that findings should be made against the father and grandparents and that the children should live with her and their half-siblings.
 - iii) The father supported the children living with his parents with his contact being supervised. He accepted inappropriate actions on two occasions but said that the boys had not suffered harm thereby.
 - iv) The grandparents denied the allegations against them. The children should live with them under a SGO. Contact with mother should be reduced and regulated.
 - v) The Children's Guardian had reserved his position until the evidence was heard. He asked the court to make findings and then to allow some time for

reflection before he gave a recommendation. When this was refused, he said that if no significant findings were made against the grandparents, the children should be placed with them, on balance under an SGO.

The judgment

14. The judge posed these questions:

- “a) What are my findings in respect of the allegations against:
 - i) the father, and
 - ii) the grandparents
- b) Are the threshold criteria under Section 31 of the Children Act met?
- c) Where should the children live?
- d) Under what order?”

15. In relation to the father, the judge made findings of roughness on a number of occasions but rejected the allegation that he had ‘strangled’ L. Things had happened that caused the boys bad memories and the father had on occasions gone further than he should have done to control the children. It is common ground that the judge was mistaken in referring to one of these incidents as being in 2013 and at ‘a remove of time’, when it was in fact in March 2017.

16. Regarding the grandparents, the judge found that they were not present when the incidents involving the father took place, and he made no finding that any incident took place after early 2017. He found that in October 2014 the grandmother had, as she admitted, wiped soap on A’s mouth as a lesson not to swear. He did not consider this to be significant physical or emotional harm, if indeed any harm at all. He rejected as a gross exaggeration the allegation that the grandmother had poured soap into A’s mouth while holding him down. He also rejected the allegation that the grandfather had hit A, also in October 2014, and, noting that it had been investigated at the time, saw no reason to doubt the account that there had been an accident in a game of chase. Further allegations against the grandfather for having hit A with a stick were also rejected as having been made to the police in the mother’s presence with a great deal of leading, and as not being repeated in the ABE interview. Further, the grandfather’s response to these allegations was accepted as “transparently honest”. The judge concluded:

“29. In summary, I do not think that the grandparents have been guilty of any behaviour which is harmful to the children. I do think something inappropriate happened with their father, although not anything like as serious as was put by the mother to him through Miss Crawford. I reject the suggestion that the grandparents have harmed the children at all.

30. What is more, I thought that the way that the allegations were placed, on instructions, was such as to show a lack of balance and, indeed, a determination to clutch at any opportunity to raise complaints against the grandparents...”

17. The judge then turned to consider the threshold for making a public law order. He found it satisfied in relation to the father due to his inappropriate treatment of the

children and in relation to the mother due to the risk of domestic abuse that caused the boys to feel unsafe in her home. Further, real harm had arisen from the mother's "determination to find every matter critical of the grandparents" which contributed to the boys' "undoubted emotional disturbance". She was legitimately entitled to report the boys' statements but she had overreacted and lost a sense of proportion. Her possibly unconscious campaign for the children's return had been harmful to them. Although they were not living with her, the fact that they were spending significant time in her care allowed the threshold finding to be made.

18. The judge then considered the welfare checklist and the evidence of the psychologist, which he found highly persuasive. He acknowledged L's wish to live with his mother (A being ambivalent), but found the grandparents to be better placed to meet their needs than the mother, whose hands were full with the younger children. He emphasised the psychologist's view that the boys needed to be given a sensitive message by all adults that they would not be returning to their mother in the foreseeable future.

19. The judge concluded that the boys should be placed with the grandparents. He then went on to consider the form of order:

"72. Should there be a Child Arrangements Order or a Special Guardianship Order? [The Guardian] finds this a difficult decision.

73. ... My view is that [a SGO] should only be made in circumstances where it is clear that the boys will be making their principal home with the grandparents for the balance of the minority.

74. For the reasons that I have set out, I am very clear that that is the right result and the grandparents must understand that. But on that basis I think it is right that there should be a Special Guardianship Order. What it means and what it does not mean is important to understand.

75. It does not take away mother's parental responsibility. She remains entitled to school reports. She remains entitled to visit the school. She remains entitled to be informed about what is going on. She is entitled, subject to the advice of the Local Authority, to see the children. I hope that good and frequent contact will take place.

76. But what it does mean is that it is a message to the boys that this is where their home is. It is a message to the world that this is where their home is. It is a matter of financial support for the grandparents, which I'm sure will be helpful to them. It is recognition that they have that responsibility and it is their duty to exercise it."

20. The judge further considered a supervision order was needed to assist the parties and to allow for a plan for the mother's contact to be devised, implemented and monitored.

21. Following the judge's order, the boys have returned to live with their grandparents and have regular, though reduced, contact with their mother, brokered by the local authority.

Submissions

22. Although it was not immediately clear from the documents, Ms Crawford clarified that there is no appeal against the judge's decision that the boys should live with the grandparents, nor to the supervision order. The mother's appeal instead focuses on two matters: the threshold findings against her, and the choice of a SGO over a CAO. The scope of the appeal is accordingly far more narrow than might at first have been thought.
23. Ms Crawford's opening argument concerned the ability of the court to make a threshold finding involving the mother at all in circumstances where the children were not living or spending time with her at the date on which proceedings were issued. That was 9 April 2018, a date on which the children had returned to the grandparents' care and were for a period of a few days having no contact with the mother. I can deal straight away with this argument, which is not sound. A brief temporary interruption in a significant caregiving relationship cannot disable the court from making findings about whether significant harm is being or is likely to be suffered by children.
24. Ms Crawford's next argument on threshold contended that the judge's findings against the mother were not rationally supported by evidence. Yes, the police were called to her home twice, in December 2017 and March 2018, as a result of her then partner's behaviour, but on the first occasion the boys were asleep, and on the second they were not there (although they later found the glass in the back door broken). Bearing in mind the obligation on the local authority to prove significant harm, it is submitted that the evidence did not support the finding that the children felt unsafe or that the domestic situation actually caused harm or risk of harm. The judge should have noted that the two younger children, who live in the home, are not even subject to a child protection plan. By contrast, says Ms Crawford, the judge should have made findings against the grandparents, both for their own behaviour and for failing to protect the children from the father. The outcome was one-sided and unfair.
25. There was much discussion about the threshold at first instance and on this appeal, but in the end it has become somewhat peripheral. It is true that the proceedings began with the local authority applying for a care order, but by the end they were only seeking a supervision order, and there is now no appeal from that order. The reality is therefore that the mother is challenging the findings of fact as such, rather than for their relevance as threshold findings.
26. As to the form of order, Ms Crawford argues that the case was finely balanced with concerns about both placements and with the Guardian only opting for a SGO at the last minute. The grandparents accepted that their intention had always been that the boys should return to their mother one day. The parties' difficulties in sharing parental responsibility and the grandparents' difficulties in managing L's behaviour make a SGO disproportionate. She relies on *Birmingham City Council v LR* [2006] EWCA Civ 1748 at [78]:

“Special guardianship is an issue of very great importance to everyone concerned with it, not least, of course, the child who is its subject. It is plainly not something to be embarked upon lightly or capriciously, not least because the status it gives the special guardian effectively prevents the exercise of parental responsibility on the part of the child’s natural parents, and terminates the parental authority given to a local authority under a care order (whether interim or final). In this respect, it is substantially different from a residence order which, whilst it also brings a previously subsisting care order in relation to the same child to an end, does not confer on any person who holds the order the exclusivity in the exercise of parental responsibility which accompanies a special guardianship order.”

27. Finally, argues Ms Crawford, the judgment is defective in that the test set out in *Re B (Appeal: Lack of Reasons)* [2003] 2 FLR 1035 is not satisfied – the judge went further than the strength of the evidence permitted and did not sufficiently explain his judgment and reasoning. As a matter of process, the decision to make a SGO fell short of the requirements set out by this court in *Re S*, to which I refer below. He failed to assess the credibility of the witnesses. He refused to conduct the hearing in the way suggested by the Guardian by identifying his findings before adjourning for consideration of welfare decisions. The Guardian thus gave evidence on an either/or basis without being able to consider the findings, and only made a recommendation after his evidence had ended.
28. Ms Nartey for the local authority and Ms Ford (who did not appear below) for the Guardian resist the appeal. They accept, as did the judge, that the threshold as regards the mother and domestic abuse was weak, but argue that the evidence for it did exist, as did the evidence about the unsettling effect of the mother’s approach on the stability of the placement. There was likewise support for the judge’s limited conclusions regarding the grandparents and the father. As to the outcome, the previous CAO had failed to offer the children the stability they need and a SGO was appropriate.
29. Concessions are made in regard to some aspects of the judgment: a number of formal self-directions were not given, the credibility analysis was not detailed, the evidence was not fully analysed and there was some inconsistency of approach. It is also conceded that the case may have benefited from a short adjournment after the fact-finding. But none of this, say Ms Nartey and Ms Ford, is fatal to the judge’s conclusions, which were sufficiently reasoned and were open to him.
30. Unusually, the local authority has filed a Respondent’s Notice seeking that the order be upheld on different or additional grounds, but it did not feature in the submissions before us and does not take the matter further.

Analysis and conclusions

31. The central question in this case was where the boys should live. That was a welfare decision, taken against a background where the grandparents were the long-term primary carers. The judge’s decision on placement was in line with all the professional advice and was one that was plainly open to him. It was reached after a

thorough consideration of the welfare checklist and it is not in any event the subject of appeal.

32. The basis for all the judge's orders were of course his findings of fact. In broad terms, he had to make findings about the history and then address the welfare checklist as it applied to the overall situation, with particular attention to the parental ability of the adults. Having surveyed the evidence, and in particular oral evidence that we have not heard, the judge reached conclusions that this court will inevitably be slow to disturb. For the appeal to succeed in this respect, it would need to be shown that the factual findings and evaluations had no foundation in the evidence or that they were irrational. That hurdle is especially hard to overcome where the findings had no direct effect on the resulting orders. The mother's complaint is considerably motivated by a sense of unfairness at the absence of equivalent findings against the grandparents. I understand that, but the judge was entitled to assess the evidence as he did and we have no basis for intervening.
33. Nor would I accept the submission that the judge was bound to adjourn after making his findings of fact before embarking upon the welfare decision. As has been said on other occasions, legal and social work professionals in this field are well used to making recommendations on alternative bases. Sometimes, the court will recognise the advantage of a short adjournment; in most cases, that will not be necessary. The judge's decision in this respect cannot be faulted.
34. However, I do express some concern about the form of the final order, which does not comply with the guidance given by this court in a case cited by the judge, *Re S & H-S (Children)* [2018] EWCA Civ 1282, where McFarlane LJ said this:

“56. In the course of a necessarily long judgment covering a range of issues and a substantial body of evidence, where the threshold criteria are in issue, it is good practice to distil the findings that may have been made in previous paragraphs into one or two short and carefully structured paragraphs which spell out the court's finding on threshold identifying whether the finding is that the child 'is suffering' and/or 'is likely to suffer' significant harm, specifying the category of harm and the basic finding(s) as to causation.

...

60. At the conclusion of the hearing, after judgment has been given, there is a duty on counsel for the local authority and for the child, together with the judge, to ensure that any findings as to the threshold criteria are sufficiently clear.

61. The court order that records the making of a care order should include within it, or have annexed to it, a clear statement of the basis upon which the s 31 threshold criteria have been established.”

Here, the parties were left in some doubt as to what precise findings had been made at the end of a hearing that ended at a late hour at the end of the court week, and the subsequent process of clarification was unsatisfactory, in that the final order does not contain the necessary clear statement of findings made: rather it touches on some findings made, some not made, and references others with the words “see transcript”, meaning the subsequent transcript of judgment. That is not a satisfactory course. It

tends to breed dissent between the parties and uncertainty for those working with the family in future. It also wastes time, including at the outset of this appeal hearing, in attempts to work out what the judge has and has not decided.

35. I turn finally to the type of legal order: CAO or SGO? The appellant raises issues both of substance and process. As to the substance, the judge was in my view clearly entitled to accept the professional advice in favour of a SGO. As a specialist judge he was aware of the significant difference between that order and a CAO in terms of the restriction upon the mother's exercise of her parental responsibility. Having decided that the children should remain long-term with the grandparents and assessed that the placement needed as much stability as possible, it was proper for the judge to fortify it in this way.
36. Nor, in the end, would I accept that the decision was defective as a matter of process. But for a finely-balanced case the judge's analysis is somewhat thin. A SGO is a significant order requiring a careful approach, as explained by Wall LJ in *Re S (A Child)* [2007] EWCA Civ 54 in a passage that deserves full quotation:

"47. Certain other points arise from the statutory scheme:-

(i) The carefully constructed statutory regime (notice to the local authority, leave requirements in certain cases, the role of the court, and the report from the local authority - even where the order is made by the court of its own motion) demonstrates the care which is required before making a special guardianship order, and that it is only appropriate if, in the particular circumstances of the particular case, it is best fitted to meet the needs of the child or children concerned.

(ii) There is nothing in the statutory provisions themselves which limits the making of a special guardianship order or an adoption order to any given set of circumstances. The statute itself is silent on the circumstances in which a special guardianship order is likely to be appropriate, and there is no presumption contained within the statute that a special guardianship order is preferable to an adoption order in any particular category of case. Each case must be decided on its particular facts; and each case will involve the careful application of a judicial discretion to those facts.

(iii) The key question which the court will be obliged to ask itself in every case in which the question of adoption as opposed to special guardianship arises will be: which order will better serve the welfare of this particular child?

48. The special nature of the jurisdiction also has implications for the approach of the courts:-

(i) In view of the importance of such cases to the parties and the children concerned, it is incumbent on judges to give full reasons and to explain their decisions with care. Short cuts are to be avoided. It is not of course necessary to go through the welfare check-list line by line, but

the parties must be able to follow the judge's reasoning and to satisfy themselves that he or she has duly considered it and has taken every aspect of it relevant to the particular case properly into account

(ii) Provided the judge has carefully examined the facts, made appropriate findings in relation to them and applied the welfare checklists contained in section 1(3) of the 1989 Act and section 1 of the 2002 Act, it is unlikely that this court will be able properly to interfere with the exercise of judicial discretion, particularly in a finely balanced case. (We think it no co-incidence that all three of the appeals with which these judgments are concerned fall to be dismissed, although each reaches a different result.)

(iii) In most cases (as in these three appeals) the issue will be, not the actual placement of the child, but the form of order which should govern the future welfare of the child: in other words, the status of the child within the particular household. It is unlikely that the court need be concerned with the alternative of making "no order" under section 1(5) of the 1989 Act and 1(6) of the 2002 Act.

(iv) For the same reason, the risk of prejudice caused by delay (to which section 1(2) of the 1989 Act rightly draws attention) may be of less pivotal importance. Indeed, in many cases, it may be appropriate to pause and give time for reflection, particularly in those cases where the order is being made of the court's own motion. This is a point to which we will return specifically when considering the first appeal.

49. We would add, however, that, although the "no order" principle as such is unlikely to be relevant, it is a material feature of the special guardianship regime that it is "less intrusive" than adoption. In other words, it involves a less fundamental interference with existing legal relationships. The court will need to bear Article 8 of ECHR in mind, and to be satisfied that its order is a proportionate response to the problem, having regard to the interference with family life which is involved. In choosing between adoption and special guardianship, in most cases Article 8 is unlikely to add anything to the considerations contained in the respective welfare checklists. Under both statutes the welfare of the child is the court's paramount consideration, and the balancing exercise required by the statutes will be no different to that required by Article 8. However, in some cases, the fact that the welfare objective can be achieved with less disruption of existing family relationships can properly be regarded as helping to tip the balance."

37. This passage remains valuable guidance for judges considering whether to make SGOs, whether as an alternative to adoption, as there, or to a CAO, as here. It is also a reminder of the well-established principle of preference for the least intrusive effective option. In this case the professional witnesses, whose evidence the judge clearly accepted, had explicitly identified and weighed up the advantages and disadvantages of each form of order. The lack of similar analysis renders any

judgment of this kind vulnerable. That process, which need not be lengthy, is a significant element of the decision. Had it been carried out in this case, it would have demonstrated beyond argument that all relevant matters had been taken into account, and it is quite likely that permission to appeal would have been refused. As it is, the omission does not undermine the making of a SGO in relation to these children. The evidence justified the order and the judgment, read as a whole, sufficiently explained the outcome.

38. For these reasons, I would dismiss the appeal.

Lord Justice Lewison:

39. I agree.

Lord Justice Patten:

40. I also agree.
