Neutral Citation Number: [2020] EWCA Civ 77

Case No: B4/2019/1548

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM BIRMINGHAM CIVIL JUSTICE CENTRE
HER HONOUR JUDGE BUSH
BM17C00319

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/02/2020

Before:

LADY JUSTICE KING
LORD JUSTICE HENDERSON
and
LORD JUSTICE MOYLAN

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W (A CHILD)

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Matthew Brookes-Baker (instructed by **Boardman, Hawkins & Osborne Llp**) for the **Appellant**
Vanessa Meachin QC and James Legg (instructed by **the Local Authority's Children's Trust Legal Department**) for the **1st Respondent Local Authority**
Michael Bailey (instructed by **Lillywhite Williams**) for the **2nd Respondent Mother**

Hearing date: 10th October 2019

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Approved Costs Judgment

Lady Justice King:

1. On 18 November 2019, this court allowed an appeal by the appellant (great-aunt) against an order made by Her Honour Judge Bush on 3 May 2019 in respect of a little boy, "J". The care and placement orders made by the judge were set aside and the matter remitted to Mr Justice Keehan who ordered, on 12 November 2019, that J be placed with the appellant forthwith under a transitional plan.

2. The correct approach to applications for costs involving children has been considered on two occasions by the Supreme Court: firstly, in *Re T (children)* [2012] UKSC 36; and subsequently in relation to appeals in *Re S* [2015] UKSC 20. Baroness Hale of Richmond confirmed that "costs orders should only be made in unusual circumstances", for example, as identified by Wilson J (as he then was) in *London Borough of Sutton v Davis (Costs) (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".

3. At paragraph 29 of *Re S,* 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" (para 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."

4. Finally, of relevance to the present application, Lady Hale said:

> "…The object of the exercise is to achieve the best outcome for the child. If the best outcome for the child is to be brought up by her own family, there may be cases where real hardship would be caused if the family had to bear their own costs of achieving that outcome. In other words, the welfare of the child would be put at risk if the family had to bear its own costs. In those circumstances, just as it may be appropriate to order a richer parent who has behaved reasonably in the litigation to pay the costs of the poorer parent with whom the child is to live, it may also be appropriate to order the local authority to pay the costs of the parent with whom the child is to live, if otherwise the child's welfare would be put at risk."

5. The court rejected the submission of the Local Authority that the judge's brief judgment provided "sufficient detail for the parties to understand why the judge had concluded adoption was the only order which would meet his needs". Whilst ultimately this was a so-called "reasons appeal", the court was critical of the Local Authority and the Guardian in respect of a number of important issues which necessarily impacted upon the judge's approach. This court concluded that the Local Authority, notwithstanding their duty to put an even-handed case before the judge, had provided the judge with an "uneven picture". Mr Brookes-Baker on behalf of the appellant, submits that it is a fundamental part of the rule of law that the state discharges its duty fairly and that the requirement to be "even-handed" and transparent when seeking permanently to sever a child's ties with his birth family is a concept, he submits, which could not be more overwhelming or important.

6. It is further submitted that the Local Authority, having read the judge's judgment and seeing that it unhappily contained significant errors of fact (for example, the judge's erroneous belief that the great-aunt had been unable to provide good enough practical parenting), should, once permission to appeal had been granted, led to the Local Authority taking stock with a view to conceding that the appeal should be allowed.

7. Finally, this was a case, as was identified by Baroness Hale, where J will be in a family placement. It was accepted that the great-aunt had spent substantial sums of her own money in renovating her home, in order to satisfy the Local Authority, that it provided a safe and appropriate environment for J. This she did in good faith at a time when no one could have known whether or not ultimately J would be placed with her. Whilst the court has not, and would not, seek financial disclosure from the great-aunt, it is inevitable that the costs of this appeal will have had a significant financial impact upon her in addition to the sums already spent on her property.

8. The Local Authority understandably emphasises the strain on local authority resources and submit that they had had no proper opportunity to take stock. In support of this submission, they gave details of delays in providing bundles, late filing of skeleton arguments and other procedural mishaps on the part of the appellant. Whilst sympathising with the frustration of the Local Authority in such circumstances, in my judgment the basis of the appeal and the deficiencies in the judgment were, at all times, completely apparent.

9. I have had in mind both *Re T* and *Re S* and have reminded myself of *LR v (1) a local authority (2) a mother (3) a father (4) RP (by her children's guardian)* [2019] EWCA Civ 680, in which the Court of Appeal declined to make an order for costs notwithstanding that the "conduct of the Local Authority and Guardian fell short of the standard expected in care proceedings".

10. Each case must, however, turn on its facts. In my judgment, in this case there was a failure to be even-handed on the part of the Local Authority in their presentation of the case to the judge at first instance and thereafter a failure to recognise (save to a very limited extent) that the judgment as drafted could not justify the order that was made. In those circumstances and in the unusual circumstances of this case, I would order the Local Authority to make a contribution towards the costs of the appellant. I note the analysis produced by Ms Meachin on behalf of the Local Authority and having taken her helpful submissions into account in that respect, I order a contribution of £12,000 inclusive of VAT towards the appellant's costs.

Lord Justice Henderson:

11. I agree.

Lord Justice Moylan:

12. I also agree.