



Neutral Citation Number: [2021] EWCA Civ 787

Case No: B4/2021/0892

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE FAMILY COURT AT PRESTON
HHJ Burrows
PR21C00138

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21 May 2021

Before :

LORD JUSTICE PETER JACKSON
LORD JUSTICE MALES
and
LADY JUSTICE SIMLER

D (A Child)

Julia Cheetham QC and Liam Kelly (instructed by **Pond Marsh Solicitors**) for the **Appellant Mother**

Susan Grocott QC and Alex Walker (instructed by **Blackpool Borough Council**) for the **Respondent Local Authority**

Peter Rothery and Sonny Flood (instructed by **John Whittle Robinson Solicitors**) for the **Respondent Child by their Children's Guardian**

Hearing date : 21 May 2021

Approved Judgments

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be at 5:00pm on Friday, 21 May 2021.

Lord Justice Peter Jackson :

1. O was born on Monday of last week. His mother V is aged 21 and has learning difficulties. She has her own support workers. Unfortunately good plans were not made during V's pregnancy for what would happen after O was born. As it turned out, the local authority found somewhere for them to be together, supervised by two or three adults all the time.
2. Meantime court proceedings started and the case came before the court on May 11, 12, 13 and 14. The last three hearings were before Judge Burrows. O's social workers did not feel that V could cope, even with support, but they tried to find somewhere for them to be assessed together. For whatever reason, that was not successful.
3. The next hearing took place on Wednesday 19 May. It was set up to consider the planning of the case, but on the night before the hearing Ms C, the Guardian appointed by the court to advise on O's welfare, filed a document saying that she felt that it wasn't safe for O to stay with V. She had visited them on the Monday. She said that V might hurt O without meaning to because of clumsy handling and that V wasn't following advice about that. She also thought that O wasn't getting enough warmth and close care from his mother and that he badly needed this. She told the court that O needed to be separated from his mother immediately and looked after by a foster carer until better plans could be made. Ms C based her views on the background, her visit, and daily reports written by the carers. She had two of those by that stage.
4. On Wednesday morning three more daily reports arrived. The picture was no better and in some ways maybe worse. However the local authority did not ask for immediate separation and when the remote hearing began at 2 o'clock its proposal was that the court should set up a hearing in two weeks' time to make its decision. That was also what was asked for by Mr Kelly who was representing V. However, at 3.50, when the two hour hearing was nearly over, the local authority position changed to arguing that O should be placed in foster care that evening. The judge agreed, though he wasn't happy about it, and made the order. Luckily for V, her lawyers knew how to try to appeal urgently and a judge in this court made an order at 9 o'clock that O should not be removed that night. Yesterday I ordered that the request for an appeal to be heard should come before the court today.
5. Turning to the judge's reasons, he carefully considered the cases about removing babies from mothers and about the need to support parents with a learning difficulty. He certainly thought carefully about the situation and he was unhappy about the lack of support that V had being offered before the birth. He also thought that the local authority's position was confused. He gave a short judgment on Wednesday afternoon and helpfully wrote a longer one the next day so that we could know his full reasons.
6. This is what he said in the full judgment:

“20 Having considered the evidence before me at the time, I reached the conclusion that O's safety required removal from his mother's care. I was extremely concerned that there was no sign on the records that V was able to absorb or learn from her experience and the advice she was given. She continued to use practices (particularly relating to handling) that were unsafe. She

was unable to prioritise O, consistently distracted by her mobile phone, and suffering from stress which led her to feel unsafe in the environment in which she was living.

21. I was particularly concerned also by the absence of engaged parenting- affection towards O. I considered this to be a combination of V's personality, but also her inability to approach O as her child, her responsibility. This particularly concerned me for the very reason that Peter Jackson, L.J. gave in Re C- namely the need for bonding between very young children and their parents. This seems not to be happening at all. Indeed, the point was inadvertently driven home by Mr Walker for the LA when he told me that in the period between this hearing and the adjourned hearing, even more support would be put in place for O and V- 2:1 and at times 3:1 support. This struck me as exactly the opposite of what O needs at this time. He needs close bonding with a parent or parent figure, not a team of carers from an agency.

22. My conclusion was that for O to remain in his present milieu would leave him at risk of physical harm, albeit partly ameliorated by a team of carers, but also at risk of emotional and developmental harm by missing out on close, one to one parental care.

23. I was also affected by the utter pessimism expressed by the LA as to the future. No suitable placements have been found that would accept O and V. The guardian, in her experience, was of the view that was because they do not exist. The present plan- only ever intended as a stop-gap measure, or a bridge to an assessment facility- is not a viable one in the medium to long term.

24. With this terrible sense that V was being set up (unintentionally) to fail, along with the risks identified in relation to O, I took the view that his immediate removal was necessary for his safety.

25. That being said, I have listed a hearing for next Wednesday 26 May so that the future of these care proceedings can be the subject of proper planning, with a view to seeing whether V and O's reunification is something that can be achieved in the short term, or perhaps the medium term. I have not written V off as a carer for her son. At the present time, however, I am clear that she cannot be his carer."

7. On behalf of V, Ms Cheetham says that the way the decision came to be made was not fair. V was not given an opportunity to put her point of view either in writing or in person. On behalf of the local authority, Ms Grocott points to the difficulties that they have had in trying to support both V and O. She says the judge had good reasons for making his order and that if V and O are separated the local authority will work to try

to find ways to put them together again. On behalf of O, Mr Rothery agrees that the position the judge found himself in was not a good one but he argues that the hearing was as fair as it could be in the circumstances. Ms C's view had been formed on the Tuesday. She was worried about reports of V handling O in an unsafe way and about the fact that most of O's care was being given to him by other people. If O is placed in foster care and it is not possible to return him to V, Ms C agrees that it will be very difficult for there to be a fair assessment of whether V is able to look after him safely in future.

8. The Judge was in a very difficult position, because the planning for O's arrival had not been as good as it should have been. The case was heard again and again because of the practical problems. This, I think, led to important planning being neglected because there were so many practical problems and court hearings. Still, if the Judge had made his decision after a fair hearing there would be no chance of an appeal succeeding.
9. However, I think that the Judge should have thought more about whether the hearing really was fair to V and, if it wasn't, whether O's situation was really so bad that he needed to be taken away immediately even though the hearing had not been fair.
10. I don't think that the hearing was fair to V. It wasn't set up to decide about O's removal – that was only put on the table by the Guardian the night before. No-one wrote down the arguments for and against taking O away or gave V the chance to put her side of the story. The local authority changed its mind at the very end of the hearing and it isn't clear who took that decision or why. All of that would be difficult for any parent to face, and V is not just any parent. She is someone with learning difficulties and it is only last week that her baby was born.
11. Of course there can situations where the risk to a baby is so bad that the baby has to be removed on the spot and even, in extreme cases, without the mother even knowing that the order is being made. So in the end the question for us is whether the risk was so bad for O that V could not even be given a couple of days in which to prepare her case. The decision was taken after the Judge heard *about* V, but he never heard *from* V.
12. I do not think that the situation on Wednesday afternoon was so bad that the Judge needed to take a decision there and then. As I say, I agree that there were risks that could lead a court to make that decision after a fair hearing. I also agree that the arrangements, with so many other people trying to help V look after O cannot continue much longer – they are only a holding position. However, once a baby has been removed from his mother in this sort of situation, it can be very hard to put them back together. So I think that V ought to have been given a chance to put her side of the story, even if that meant making the decision as little as a day or two later. In a nutshell, the risks for O weren't so bad that V should not have been allowed a normal hearing. None of this is a criticism of anybody, including the Judge, but I think that in making his decision he did not give enough thought to whether what was happening was fair all round.
13. What we will do is to grant permission to appeal and allow the appeal against the separation of O from his mother. The local authority has said that in that case its plan will be to try to continue the high level of support with different carers and different accommodation. It will still have its interim care order and it can of course remove O from V in an emergency. The arrangements that the Judge made for another hearing

next Wednesday will remain. The lawyers will agree to draw up short simple documents on Monday so that V knows the case that she has to answer at the hearing. It will be up to the judge at that hearing whether the court needs to hear live evidence. If so, that will have to be carefully chosen because it is only a four hour hearing. After that, the decision about separation will be entirely up to the Judge.

14. (*Later*) The parties unhesitatingly agree that there is no reason why the Judge should not continue with this case and several good reasons why he should. We also agree.

Lord Justice Males

15. I agree.

Lady Justice Simler

16. I also agree.
