Neutral citation number: [2023] EWCA Civ 1251

Case No: CA-2023-000289

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE FAMILY COURT
HER HONOUR JUDGE JACKLIN KC

The Royal Courts of Justice
Strand, London, WC2A 2LL

Wednesday, 6 September 2023

Before:

LORD JUSTICE BAKER

IN THE MATTER OF W (CARE PROCEEDINGS)

Transcript of Epiq Europe Ltd, Unit 1 Blenheim Court, Beaufort Business Park, Bristol BS32 4NE
Tel No: 020 7404 1400 Email: civil@epiqglobal.co.uk (Official Shorthand Writers to the Court)

Joanne Ecob (instructed by **Maya and Co**) for the **Applicant**
Caitlin Ferris (instructed by **local authority solicitor**) for the **First Respondent**
Gill Honeyman (instructed by **Creighton and Co**) for the **Fifth Respondents**
The Second, Third and Fourth Respondents were not represented at the hearing.

Hearing date: 6 September 2023

Approved Judgment

LORD JUSTICE BAKER:

1. By an appeal notice dated 24 February 2023, the appellant (the "mother") seeks permission to appeal against a special guardianship order made in respect of her son, W. At the conclusion of care proceedings brought by the local authority, a special guardianship order was made in favour of W's maternal uncle, the mother's brother R and his partner C, with whom W had been living for some months prior to the making of the order.

2. On behalf of the mother, Ms Joanne Ecob, who did not appear in the proceedings before the judge, summarises her case as follows. She says that the judge was (1) wrong to find that the threshold criteria for making public law orders under section 31 of the Children Act 1989 were made out; and (2) wrong to decide that a special guardianship order in favour of R and C should be made. As I understand the mother's case, it is said that W should be returned to her care or alternatively placed in the care of her parents, his maternal grandparents.

3. The judge's judgment was delivered and the order made on 20 January 2023. The appeal notice was filed on 24 February 2023, some two weeks out of time. I have already, by an earlier order, extended the time for filing the notice. There was then a very considerable delay in obtaining a transcript of the judgment, for reasons which are unclear although certainly not the fault of the judge.

4. Eventually the application for permission to appeal was referred to me without the transcript but with a note of judgment taken by the mother's then legal representative. I concluded that it was impossible to gauge the merits of the proposed appeal from the papers filed to date, in particular in the absence of a transcript. I concluded that there was sufficient merit to warrant listing the application for an oral hearing of the permission to appeal application. Because of the delays that had already occurred I decided to list the matter for determination of the PTA application with the appeal to follow at the same hearing if permission was granted.

5. I gave further directions for the filing of the transcript of the judgment and skeleton arguments. Unfortunately, the production of the judgment was further delayed but, thanks to the efforts of the designated family judge, it was ultimately provided, whereupon the trial judge read and approved it very promptly.

6. By that time, the hearing before this court was imminent. Although Ms Ecob indicated that she would be able to produce her skeleton arguments imminently, the respondents' representatives indicated that due to the further delays they would be unable to do so. I therefore decided to vary the directions for this hearing, converting the hearing into one for consideration of the PTA application alone, rescinded the direction for the respondents' skeletons but directed that they, that is to say the local authority and guardian, file a response under CPR Practice Direction 52C paragraph 19. Thus, the application before me today is for permission to appeal only.

7. The background to the case is detailed but for the purposes of this relatively short judgment can be summarised as follows. The mother has a history of mental health difficulties. The extent of those difficulties is unknown and contested but it is clear from the limited medical evidence produced before the judge that there is a history of difficulties. The evidence of R is that over the years the mother has demonstrated unpredictable and concerning behaviour consistent with mental health problems. According to the mother herself she has a diagnosis of chronic fatigue syndrome. This is also confirmed by the medical evidence produced in the proceedings but again the precise extent and impact of this diagnosis is unclear.

8. One reason why there is a lack of clarity about the health issues is that the mother has resolutely refused to undergo any assessment in the course of the proceedings, either psychiatric or medical assessments or for that matter a parenting assessment.

9. The mother was in a relationship with W's father for a period prior to W's birth. Again, the extent of that relationship and whether or not it continued after W's birth is unclear.

10. It seems that the mother only sought medical assistance relating to her pregnancy at the very last minute, only a day or so before W was born on New Year's Day 2020. At the hospital, the staff's concern following W's birth led them to report their concerns to the local authority's children's services. Their inquiries were concluded in February 2020 with a decision to take no further action. It was recorded by children's services that the parents had engaged well with the process. It was also noted that they had a good support network, which included W's grandparents on both sides.

11. W then remained in the care of his mother during 2020 and she divided her time between London, where the maternal grandparents lived, and Wiltshire, where the father lived. At Christmas 2020, the mother took W to stay at the father's house for a number of weeks. In February 2021, W started attending nursery. At that point the father was working and the mother not. During a period of six weeks while W was attending the nursery, staff there raised a number of concerns which subsequently featured in the threshold criteria document on which the local authority has relied in these proceedings, including an incident when the father had held W upside down by his ankles, demonstrating how he could calm him down in this fashion; an occasion when W was observed to have some soreness in the anogenital region where he was also soiled with faeces; an occasion when there were bruises observed on his body; and an occasion when the staff noticed unusual writing on W's body.

12. The nursery referred the matter to social services in Wiltshire but, by the time the social workers attended the father's home, the mother and W had returned to London. Social workers and police in London then carried out a section 47 investigation. The mother initially told them that W was with her parents but, when the professionals visited the grandparents' address, W was not there. Eventually he was located at the home of R and C where he was seen to be in good health. R and C reported to professionals that they had been concerned about W's care and treatment when he was with the mother. They gave details suggesting that he had suffered neglect. As a result, the police took W into police protection. A viability assessment was carried out of the maternal grandparents and W was placed in their care on 20 May 2021.

13. During the summer of 2021, professionals tried to engage with the parents hoping to persuade them to sign a working together agreement, but without success. The Public Law Outline process was started and further attempts were made to engage the parents in a parenting assessment, again without success.

14. Eventually, on 1 December 2021, the local authority started these proceedings. At that stage, no order was sought removing W, who remained in the care of the grandparents. Initially the mother indicated that she would agree to assessments but then sent an email via her solicitors indicating that she would not engage with any assessments and stating that she would not allow W to be taken "illegally and into secret custody".

15. Meanwhile, the local authority had started an assessment of R and C to establish whether they could care for the child. In the course of that, R disclosed further concerning information about W's treatment whilst in the mother's care. He also reported that the maternal grandparents did not accept the concerns about the mother and were unable to safeguard W from harm. One example was how, on 14 February 2022, C had taken W out but the maternal grandparents had insisted that the mother accompany them. During the trip the mother had become agitated and threatened suicide causing distress to W.

16. On the basis of these concerns, the local authority decided to apply for an interim care order with a view to removing W from the care of the grandparents and placing him in the interim care of R and C.

17. At the hearing of the interim care order application on 15 June 2022 before HHJ Jacklin QC, a detailed statement from R was filed setting out evidence about W's treatment in the care of his mother, concerns about the mother's problems, the grandparents' failure to accept the extent of those problems, and the impact of all these problems on W and the risks to him. The judge was satisfied that W's safety required his immediate removal and an interim care order was made on the basis of the plan to place the child with R and C. W has lived with his uncle and aunt ever since.

18. The final hearing of the care proceedings took place in December 2022. The threshold document on which the local authority relied had gone through several iterations but the final version (incidentally not produced with the original appeal papers filed in support of this application but only produced by the guardian at the hearing before me) asserted that W was at risk of suffering significant emotional harm, physical harm and neglect in the care of his parents and cited the history around his birth, the concerns of the nursery staff in Wiltshire, the concerns of the police executing the police protection order, issues concerning the mother's health, and her non-engagement with the local authority in assessments. In addition, reliance, in this final version of the threshold document, was placed on the fact that the mother had refused all contact with W since his placement with his uncle and aunt.

19. In her judgment, the judge set out in some detail the history as summarised above. She then summarised the relevant legal principles. Then she set out the evidence put before her, including the evidence of the parents, the evidence of R and C and also that of the grandparents who had been joined to the proceedings and were putting themselves forward to care for the child. A special guardianship assessment of R and C was positive but the assessment of the grandparents was negative. The judge set out the evidence of R, who she described as a straightforward person who was in a very difficult position but totally focused on W's welfare.

20. The judge then summarised the mother's evidence, recording that she denied any mental health issues, spoke about the unfairness of the process, but lacked insight into W's needs and circumstances, in particular the impact on the child of not having any contact with her. The judge also considered the evidence that the mother had given about the incidents relied on by the local authority, including her evidence about the occasion when there had been drawings observed on the child. The judge described the mother's evidence on this issue as disturbing.

21. On the father, the judge concluded from his evidence that his relationship with the mother was continuing and recorded his strong feelings about the social worker and in particular what she described as the "venom" he expressed against R. The judge concluded that he had a very distorted perception of what had happened in this case.

22. On the maternal grandparents, the judge having heard their evidence concluded that it was impossible to see them as a protective force for the child because they had no concerns about the mother's care of the child. The judge described the evidence of the maternal grandfather as combative and condescending.

23. Finally, the judge recorded the evidence of the guardian, whose report she described as thorough and wide-ranging. The mother had refused to engage with the guardian at all, consistent with her policy of not taking part in any assessments in the course of the proceedings. Notwithstanding that, the guardian felt able to observe that the mother had prolonged the situation when W had been out of her care for 18 months and had had no contact for 9 months. The guardian acknowledged that the nursery's concerns in Wiltshire in 2021 had been "low level," but observed that the mother's actions since then had escalated rather than mitigated the concerns. She described the father as protective and defensive of the mother and did not recommend returning W to his care. Although she had seen warm interaction between the mother and the grandparents, she was doubtful about their capacity to maintain robust boundaries around contact with the mother. She endorsed the special guardianship assessment of R and C, who she described as consistently approachable, cooperative and able to support W in every way, understanding of his developmental needs and able to provide appropriate stimulation, boundaries and guidance.

24. Having considered the evidence, the judge turned to the threshold document, noting the categories pleaded, neglect, the police protection incident, the mother's health and her non-engagement. Then at paragraph 177 of her judgment, the judge said:

> "The local authority has not pleaded the evidence of R. I picked this up with them at the hearings in June and in October [2022]. At the last hearing Mr Roscoe appeared for the mother and he made clear that their case is that threshold was not crossed on the basis of the events prior to 19 May 2021 and I observed that events since that time that throw a light on the state of affairs at that date can be relied on. The local authority did not amend to add those matters. The local authority does not have to prove the mother was suffering from poor

> mental health or with chronic fatigue syndrome, it is the behaviour that needs to be assessed and its apparent effect of parenting on the child. There is no doubt that I can go beyond the pleaded case. Being cautious includes being satisfied that no unfairness is caused to the parents in having to address the, as it were, extent of the threshold. The evidence of R has been available to them for some months and he was available for cross-examination."

25. The judge added at paragraph 178 that she needed to look at the totality of the evidence and that it was not helpful to pick out individual aspects of the threshold documents and consider whether they themselves crossed the threshold. Of the incidents picked up by the nursery, she noted that they could not be seen as isolated incidents but part of the totality. On the incident when the father had held W upside down, she acknowledged that there would be a divergence of views about this but noted that he was only 14 months old at the time and that professional observers had been concerned. Of the drawings on W's body, she said that it indicated that he was being "objectified" and accepted the guardian's argument that it was unlikely that this could have been done without some discomfort to W. She concluded that comments made by the mother should be seen as part of the overall picture of being detached from the child, as was the fact that he had been placed in a nursery for 40 hours a week by the mother who was not working. The evidence from the nursery was supported by that of R and the hearsay evidence of C, who had not given evidence before her. The judge described R's evidence as compelling. On top of that, the judge relied on the mother's disengagement and failure to take up contact, which the judge described as almost incomprehensible. The judge accepted that the father had shown himself to be far more able in parenting skills but was most concerned about his inability to acknowledge concerns of the mother's behaviour and its impact on the child. For all these reasons, the judge concluded that the threshold criteria under section 31 were satisfied.

26. Turning to her welfare decision, she noted that it was not possible to ascertain the child's wishes and feelings at his young age, although she was sure that he would want to be with his family, as he would be on any potential outcome. She noted that there was a consensus amongst professionals that W needed consistency and reparative

parenting. The evidence showed a lack of commitment on the part of the parents and so, whilst it would be an advantage to W to be brought up by his parents if possible, that was overwhelmed by the risks they presented in terms of ongoing emotional harm. The judge concluded that the mother had severely damaged whatever attachment she had with W and that the evidence demonstrated that she lacked the skills to correct this. Although the father had greater parenting skills, it was likely the parents would reconcile so that the situation would revert to what it had been before. Although W was clearly attached to the maternal grandparents and they to him, they lacked the necessary insight into his needs and because of their complete alignment with the mother, did not appreciate the risks he would be under if exposed to her.

27. In short, the only placement that could meet the child's needs was with R and C, about whom there were no such concerns. The judge concluded that this was the only placement which would allow him to develop into a secure and stable adult. For those reasons she made a special guardianship order in their favour.

28. When I first read the note of judgment submitted with the appeal papers, I was unable to discern clearly what the judge had concluded and the reasons for her decision. I was unclear whether this was a deficiency in the note or in the judgment itself. Having read the transcript, I am satisfied this was a thorough and well-structured judgment in which the judge summarised the history, identified the legal principles, set out the relevant evidence and analysed the issues before reaching a clear decision.

29. In considering this application for permission to appeal, I apply well-established principles. An appeal against a judge's decision in a family case will only be allowed where the appeal court is satisfied that the decision was (a) wrong or (b) unjust because of a serious procedural or other irregularity. Permission to appeal will only be granted where there is a real prospect that the appeal will succeed or there is some other compelling reason for the appeal to be heard. It is also important to bear in mind the well-established approach of this court to the assessment of evidence. The assessment of evidence and the apportionment of weight to be attached to each piece of evidence are matters for the judge at first instance. An appeal court will not interfere with

findings of fact by the judge or the inferences drawn by the judge from those findings unless there is a very clear justification for doing so.

30. Insofar as this is an appeal against case management decisions, I bear in mind that the circumstances in which the Court of Appeal can interfere with such decisions are limited, namely only if satisfied that the judge erred in principle, took into account irrelevant matters or failed to take into account relevant matters, or came to a decision so plainly wrong that it would be seen as outside the generous ambit of his or her discretion. Thus, a party applying for permission to appeal against a case management decision made within the judge's discretion faces a high hurdle.

31. The original grounds of appeal were presented in narrative form. On taking over the case, Ms Ecob helpfully distilled them into 7 grounds. This morning at the hearing, Ms Ecob has abandoned two of those grounds, namely grounds 3 and 5, leaving 5 grounds outstanding. It is convenient to consider those under 3 headings. First, grounds 1, 2 and 4 which all interrelate, secondly ground 6 and finally ground 7.

32. Under ground 1, it is contended that by insisting that the local authority rely on evidential matters subsequent to the relevant date, 19 May 2021, in order to establish the state of affairs as at the relevant date pursuant to the principles derived from *Re G* [2001] 2 FLR 1111, the judge wrongly overstepped her role.

33. Under ground 2, it is contended that by allowing last minute substantive alterations to the threshold, the judge failed unfairly to afford the mother or her representatives sufficient opportunity to identify what specific allegations in relation to the period after 19 May 2021 the mother is facing.

34. Under ground 4, it is contended that the judge failed to sufficiently evaluate the final threshold as drafted, choosing to rely on the evidence of the former statements from R, in which he made allegations against her which were not particularised in the final threshold and which were mostly reliant on hearsay evidence.

35. In short, the argument advanced on behalf of the mother under these grounds is as follows. The relevant date for assessing whether threshold criteria were satisfied is the date in May 2021. It is accepted that in assessing whether the threshold criteria were satisfied as at that date, the court is entitled to consider evidence about subsequent matters. In such circumstances, the requirement of fairness requires the local authority to identify those matters on which it seeks to rely and for the respondents to have a fair opportunity to respond. This requires the local authority to so draft its threshold criteria document by specific reference to the subsequent matters and for the parents to have a fair opportunity to reply formally to that document.

36. Furthermore, paraphrasing if I may Ms Ecob's argument, although a judge is entitled to exercise her case management powers so as to engage with the parties to ensure a focus on section 31, it is wrong for the judge to be prescriptive as to what should or should not be included in the threshold document. In this instance, the judge overstepped that mark by directing the local authority to amend its document accordingly.

37. Although it was unclear when I initially read the papers whether the judge had overstepped the mark in the way suggested, or whether the mother had been unfairly treated as a result of the way in which this case was conducted, having had the opportunity to consider the transcript and to review the papers in the light of that transcript, I have concluded that there is no real prospect of these arguments being accepted on appeal.

38. The evidence of R, on which the local authority sought to rely, was contained in two statements, one dated February 2022 and the other August 2022. The mother therefore had several months' notice of what R was going to say and it ought to have been crystal clear that this evidence was going to be relied on by the local authority to support its case. It cannot realistically be asserted that the mother did not have sufficient notice of this and in fairness Ms Ecob did not advance her case on that basis. Her focus rather was on the failure to give the parents formal notice or a formal chance to respond to the assertion that the local authority's case was supported by the evidence filed after the relevant date. A reference was made in particular to the judgment of Sir James Munby P in *Re A* [2015] EWFC 11. In his guidance in that case, Sir James stressed the

importance of the local authority through its evidence and submissions establishing why it is asserted that the threshold criteria are crossed following on from the facts as alleged.

39. I accept the importance of the local authority's case on the threshold criteria being properly pleaded. It is clear that in this case the local authority had amended its threshold criteria at a relatively late stage in response to the judge's observations at the case management hearing on 20 November 2022. The final version included matters which had not been in the earlier versions, in particular the section on non-engagement with professionals. I am wholly unpersuaded that this late amendment put the mother at any disadvantage, since she plainly had notice of the substance of the allegations much earlier. In some respects, of course, the most striking matter on which the local authority now sought to rely was the fact that the mother had refused to take up contact with her son ever since he was placed with R and C. That was obviously a matter which had occurred since the relevant date and was obviously relevant to the decision before the court.

40. Similarly, there is no prospect, in my view, of the Court of Appeal accepting that the judge overstepped the mark or acted improperly in any way in steering the local authority towards these amendments. Judges are entitled, indeed obliged, to scrutinise the local authority's pleaded case to ensure that it addresses the gravamen of the issues. Care proceedings are not conventional adversarial proceedings in which the identification of issues is left solely to the parties and the judge acts only as a disinterested observer and arbiter. The paramountcy of the child's welfare in care proceedings requires the court to be vigilant to ensure that the issues relating to the child's future welfare – and only those issues – are fully and fairly addressed. The judge, with her great expertise in these cases, was doing no more than complying with those obligations.

41. Accordingly, in my view, there is no prospect of a successful appeal under grounds 1, 2 or 4.

42. Under ground 6, it is argued that the judge was wrong to find that the threshold criteria were crossed on the basis of specific factors and matters set out in the threshold document and in the judgment, namely:

(i) holding W upside down;

(ii) the presence of nappy rash;

(iii) the writing on W's body;

(iv) bruising;

(v) an occasion when the mother had failed to say goodbye to the child on 17 March 2021;

(vi) non-involvement by the mother in his care in certain respects;

(vii) the fact that W had been placed in a nursery by the mother for prolonged periods when she was not working;

(viii) her alleged failure to provide the nursery with her mobile telephone number;

(xi) the unkempt nature of the mother's house.

43. Specific points are made by Ms Ecob in respect of each of these matters. In some cases, it is said that the judge was wrong to make specific findings on specific issues in respect of those matters. In respect of other matters, it is said that, even if the judge was entitled to make those findings on the evidence, they did not cross the threshold criteria.

44. Ms Ecob submitted that this was a case falling within the category identified by Hedley J in the well-known passage of his judgment in *Re L (Care: Threshold Criteria)* [2007] 1 FLR 2050 [50]:

> "Society must be willing to tolerate very diverse standards of parenting, including the eccentric, the barely adequate and the inconsistent…it is not the provenance of the State to spare children all the consequences of defective parenting."

45. In my view there is again no real prospect of the Court of Appeal allowing an appeal under this ground. The assessment of evidence, the making of factual findings and the drawing of inferences from those findings were matters within the provenance of the trial judge. It is clear from the judgment that she considered the evidence with great care and conducted a thorough inquiry. She concluded on the evidence that, while each of the matters identified in paragraphs (i) to (xi) above would be insufficient by itself to cross the threshold, that did not mean that each incident was therefore irrelevant when it came to assessing the totality of the evidence, as she was required to do in law. She concluded that, taken collectively and assessed in the context of all other matters, those identified matters led to a conclusion that the threshold criteria were satisfied. That conclusion was plainly open to her on the totality of the evidence.

46. I reject the submission that the analysis of the judge on these issues was insufficient. On the contrary, it was plainly sufficient to demonstrate the judge's reasoning and her conclusion. Whilst each individual issue looked at in isolation might have been described as mere eccentricity or an example of diverse parenting and therefore within the category identified by Hedley J, taken together the judge was entitled to conclude that this case fell well outside that category. There is, in my view, no prospect of the Court of Appeal concluding she was wrong.

47. Finally, there is ground 7 under which it is asserted that the judge made a special guardianship order in favour of R and C without fully and fairly evaluating the comparative benefits of W returning to the care of his mother supported by the care of her parents.

48. Ms Ecob accepted that, if she failed to establish ground 6, ground 7 would have less prospect of success. Her argument was the judge's analysis of the welfare options was thin and insufficient and failed to contain a comparison of the advantages and disadvantages of each option before reaching her conclusion. In short, it was her case that the judge adopted a linear approach, dismissing the options of placing the child back with the parents or with the maternal grandparents before concluding that the only option available was a placement with R and C.

49. Both the local authority and the guardian in their responses to this application, acknowledged that this final part of the judgment was shorter and lacking detail in a number of respects. I agree that it was more succinct than the earlier part of the judgment but, although the judge did not set out in any detail the advantages and disadvantages of each option, her explanation was sufficient to demonstrate her reasoning. There is no real prospect, in my view, of the Court of Appeal concluding that her decision to make a special guardianship order in favour of R and C was wrong. On the contrary, on the evidence put before her, it was fully justified.

50. In those circumstances, there is no real prospect of a successful appeal and thus permission to appeal must be refused.