

**IN THE FAMILY COURT**

**His Honour Judge Clifford Bellamy**

**Re Z (A Child: Care Proceedings: Separate Representation)**

**(Judgment handed down on 29 June 2018)**

**Jamal Jeffers, counsel for the local authority**

**Muctar Johal, solicitor for the mother**

**Christopher Gabb, solicitor for the father**

**Kerry Boyes, solicitor for the child**

This judgment was delivered in private. The judge has given leave for it to be reported on the strict understanding that (irrespective of what is contained in the judgment) in any report no person other than the advocates or the solicitors instructing them and any other persons identified by name in the judgment itself may be identified by name or location and that in particular the anonymity of the child and the adult members of his family must be strictly preserved.

**Judge Bellamy:**

1. In September 2017 a local authority applied to the court for a care order in respect of Z. Z is now aged 14. His parents are X and Y. Z's Children's Guardian is HR. There is a conflict between Z and his guardian concerning the appropriate welfare outcome to these proceedings. Z wishes to part company with his guardian and instruct his own solicitor. That is the issue to which this judgment relates.

2. I handed judgment down on 29<sup>th</sup> June. Z is aware of my decision and has asked to see the judgment. This is an abbreviated copy of my judgment written for a very intelligent 14 year old.

### Essential background

3. The mother has a long history of mental illness. Her ill health has been more persistent and more severe since December 2014. In 2015 she made two attempts to take her own life. On both occasions Z was present and witnessed his mother's attempts.
4. In 2016 Z began to self-harm. He experienced suicidal ideation. He was referred to CAMHS. He was discharged in January 2017.
5. In February 2017 Z disclosed that he had been emotionally and sexually abused by his mother. A referral was made to the police. Z went to live with his maternal grandparents. He has not lived with his parents since February 2017.
6. In April the police informed the local authority that they did not propose to take any further action against the mother because of the lack of evidence.
7. That same month (April 2017) Z disclosed that he had also been physically abused by his mother over a period of some two years.
8. By September 2017 Z's placement with his maternal grandparents was breaking down. Z alleged that he had been sexually abused by his grandmother. He later accepted that that was a false allegation.
9. The first case management hearing took place on in October. The local authority sought an interim care order. It was agreed that Z should be accommodated by the local authority pursuant to s.20 of the Children Act 1989.
10. Z was placed in local authority foster care. Initially the foster placement appeared to go well. The placement broke down in February 2018. The foster carers gave notice to terminate the placement.
11. Z moved to his second foster placement. That, too, broke down. Z alleged that his foster carers had physically and emotionally abused him. His allegations were investigated. They were not substantiated.
12. In March Z returned to live with his grandparents. He continues to live with them.
13. The care proceedings are timetabled through to an issues resolution hearing in August.

### Assessment

14. In November 2017 the court gave permission for the parties jointly to obtain an assessment of Z by a clinical psychologist and a trauma-based social worker/play therapist. The assessment report is dated 1<sup>st</sup> May 2018.
15. At the time the report was finalised the authors wrote to Z, via the guardian, setting out their recommendations and explaining their reasons. The letter has been written in an age appropriate style. It is an excellent summary of the main report.
16. Under the heading ‘What we recommended’ the letter sets out the following recommendations:
  - That you move to a long-term foster carer until you are at least 18 but keep seeing and having a relationship with your mum and dad at contact and in therapy.
  - That you are offered therapeutic support, particularly to help you with traumatic memories and how they impact on your life and also to understand your own thoughts and feelings and those of others around you.
  - That you should have contact with your mum and dad every month and contact with your grandparents every month. The social services should review this contact regularly to make sure that it is meeting your needs.
  - That every attempt should be made to find you a placement which causes as little as possible disruption to the rest of your life, so that you can still attend the same school and see your friend.
  - That your Mum is offered specialist therapeutic treatment.
17. The letter went on to say:

‘I am acutely aware that you have told me that you want to go back to live with your parents, but I don’t believe this is in your best interests, nor do I believe it will offer you the best opportunity to really develop as an individual, learn the skills you need for relating to other people or achieve a sense of understanding of your own mind.’
18. The remainder of the letter is highly personal, referring in detail to information gleaned by the psychologist as a result of her meetings with Z and the detailed letter he wrote to her. It is unnecessary to refer to any of that detail in this judgment. It is, though, appropriate to set out part of the final paragraph of the letter. The psychologist says,

‘I hope this letter helps you to make sense of the assessment and the recommendations we made to the Judge. It is important that you understand that the Judge may not agree with our opinions and may make different decisions about your future. I have been really impressed with you Z and your honest account of your difficulties...’

19. One of the issues raised in the letter of instructions was this:

‘Please comment upon whether you feel that Z has capacity to instruct a Solicitor within the course of these proceedings, and to litigate throughout the course of these proceedings.’

The final report gave the following response:

‘3.17.1 While this question was not central to the assessment of Z’s functioning, it is our view that Z’s request for access to his own solicitor is part of his bid to regain a sense of control in a system populated by adults he does not feel he can fully trust to represent his needs. Unfortunately, it is our assessment that Z is profoundly confused about his own mind and about his best interests. While we are impressed with Z’s persistence in ensuring his voice is heard, we feel that his detailed and lengthy report, along with his ongoing communication with his Social Worker and Guardian, is sufficient to express his views and ensure that these are heard and taken into account by the Judge, in the context of the assessment of his psychological functioning presented here.’

#### Z’s position

20. To assist the experts, Z prepared a detailed ten-page statement setting out his account of what has happened in the past and his wishes and feelings so far as concerns his future.
21. The first point to make about this letter is that it bears eloquent testimony to this young man’s considerable intellect. The quality of his writing and of his arguments suggest a maturity beyond his years.
22. In his letter Z describes the years of abuse he suffered whilst in the care of his parents and the domestic abuse he observed between his parents. He talks about the impact all of this has had upon him, especially upon his emotional well-being. He says he finds it very difficult to understand his emotions and deal with them. He has self-harmed and

explains why. He describes his mother's mental health problems and the impact they have had on him. He says that he vividly remembers 'trying to stop my mum from killing herself'.

23. In his letter, Z makes it clear that the outcome he seeks is to return to the care of his parents whom he forgives for the past. He does not believe there would be a risk of further abuse if he returns home. Adopting a balance sheet approach, he analyses what he considers to be the risks and benefits of returning home. He adopts the same approach to analyse the risks and benefits of remaining with his grandparents. Finally, again adopting the same balance sheet approach, he analyses the risks and positives of him remaining either in long-term foster care or in a residential placement. So far as this last option is concerned, he argues that there are no positives. On the contrary, such a placement would damage both his mental health and his education. That could make him suicidal. He says he would run away from home.
24. Z has also written a much briefer letter to the guardian and to his solicitor, Kerry Boyes. He makes the same key points made in his letter to the experts. This, though, is a more emotional letter. He says,

'I would like it to be known that I am going to do absolutely everything in my power to make sure that these recommendations do not happen and that I hopefully move back to my parents. If not then I stay with my grandparents...Because of the present situation, I am going to obtain proper legal advice as to what I should do next. I am going to fight to get back to my parents' care, no matter what. Every child deserves the chance to get a proper education, feel safe and secure and feel loved and cared for. Therefore, I would think it is your duty to properly review these recommendations based upon this and really think about what is in my best interests. Is it really a good idea to take me kicking and screaming away from my grandparents' house and into a house full of strangers.'

25. After these letters, on 5<sup>th</sup> June Z wrote a letter to me. In his letter he pleads not to be 'kidnapped' into foster care. If the court approves a placement in foster care or residential care, Z says,

'I would categorically refuse to go. I would not get into the car...I would run away back to my grandparents as many times as would be needed for people to listen to me. Foster care or residential care is not the right environment for me to be in.'

26. Z is particularly concerned about the possibility that a move into long-term foster care or residential care would mean that he would need to change school. He says that,
- ‘By moving my school, you would destroy my only support network. At school...I have the support of teachers, who at times have become like second parents, and what’s more, it is one of the only places that I can be truly happy...if you forced me to move school it would do catastrophic damage to me both emotionally, socially and developmentally.’
27. Through his guardian and solicitor, Z asked to see me. With the agreement of all parties, I saw Z on 8<sup>th</sup> June in the presence of his guardian and solicitor. The meeting, though informal in style, took place in a court room and was recorded. The guardian also took a full note of our conversation. That note has been circulated to all parties. In our meeting, Z repeated many of the points made to the experts and to his solicitor and guardian.
28. In conversation, Z comes across as extremely articulate and highly intelligent. He was neither emotional nor unduly emotive. I found him to be a very engaging young man. So far as concerns the future, he has set the bar high. He wants to go to university. He hopes to go to Cambridge. He wants to study medicine. He has already started some of his GCSE courses. He is very concerned indeed about the possibility that he may have to move to a new school. In his opinion, that would be disastrous for his education and career prospects.

#### The law

29. As these are care proceedings the rules provide that Z is automatically a party to the proceedings. The court is obliged to appoint a guardian for him unless it is satisfied that it is not necessary to do so to safeguard his interests. At the outset of these proceedings the court decided that it was appropriate to appoint a guardian for him.
30. The rules provide that Z’s guardian has a number of duties including,
- (i) the duty to appoint a solicitor for Z;
  - (ii) the duty to instruct the solicitor on all matters relevant to Z’s interests which may arise in the course of proceedings;
  - (iii) the duty to send and receive documents on Z’s behalf;
  - (iv) the duty to advise Z of the contents of any documents received if satisfied that he has sufficient understanding;

- (v) the duty to inform Z of any decision made by the court if satisfied that it is appropriate to do so given his age and understanding;
  - (vi) the duty to explain the decision to Z (if it is appropriate to do so) in a manner appropriate to his age and understanding.
31. The rules provide that Z's solicitor also has a number of duties:
- (i) the solicitor must represent Z in accordance with the guardian's instructions;
  - (ii) if Z wishes to give instructions which conflict with those of his guardian and the solicitor is satisfied, having regard to Z's understanding, that Z is able to instruct him directly, the solicitor must conduct the proceedings in accordance with Z's instructions;
  - (iii) in deciding whether Z has sufficient understanding the solicitor must take account of the guardian's views, though the responsibility for making the final decision rests with the solicitor and not with the guardian;
  - (iv) if the solicitor decides that Z does have sufficient understanding the solicitor must send and receive documents on Z's behalf and advise him of the contents of documents received;
  - (v) although the rules do not say so, I am in no doubt that the solicitor also has a duty to inform Z of any decision made by the court, if satisfied that it is appropriate to do so given Z's age and understanding, and a duty to explain the decision to him in a manner appropriate to his age and understanding.
32. In deciding whether Z has sufficient understanding to instruct his solicitor directly, the solicitor (or the judge if the issue is being decided by the court) will find guidance given by senior judges in previous cases. In particular, the solicitor must have in mind:
- (1) that the child has the right to express his views freely in all matters affecting him and the right to be heard in any judicial proceedings affecting him;
  - (2) that the child has the right to respect for his private and family life;
  - (3) that the decision to be made relates to *this* child;
  - (4) that the fact that the child's views are considered to be misguided in some way does not necessarily mean the child does not have sufficient understanding to instruct a solicitor;
  - (5) that the fact that the child is unwilling to accept findings already made by the court does not mean that he does not have sufficient understanding to instruct his solicitor;

- (6) that the fact that a child disagrees with an independent professional assessment of what is good for him is not sufficient to lead to a conclusion that the child lacks sufficient understanding to instruct his solicitor;
  - (7) that whether the child has the capacity to instruct his solicitor will depend, in part, upon the issues involved and the child's capacity to give reasonable and consistent instructions on those issues;
  - (8) that the child's direct participation may pose a risk of harm to him and, if it does, the solicitor must consider whether the child is capable of understanding that risk;
  - (9) that a child's understanding increases with the passage of time;
  - (10) that a child's age is not the only relevant consideration;
  - (11) that not allowing the child to participate directly in the proceedings by instructing his solicitor may itself cause the child emotional harm;
33. If the solicitor decides that the child does not have sufficient understanding to instruct his solicitor direct, the court can be asked to review that decision. The judge will come to his own independent decision after taking into account the points just made.

#### Submissions

34. There is no disagreement between the parties so far as concerns the relevant law. It is the application of the law to the facts of this case which is problematic.
35. The barrister who represents the local authority, Mr Jeffers, says that allowing Z to instruct his solicitor direct will lead to him having access to the full report of the experts and that that would be likely to cause him emotional harm. He notes that in their report the experts, 'were clear that the adult version of the report should not be shared with Z'. Mr Jeffers invites the court to take 'a cautious approach' noting that despite Z's undoubted intelligence, 'he has been emotionally damaged throughout much of his life'.
36. Mr Johal, the solicitor who represents the mother, says that the mother adopts 'an essentially neutral position'. Mr Johal describes Z as 'a remarkable child' who has 'a fierce analytical intelligence'. He acknowledges that if the test to be applied was one based on intellectual capacity alone then Z would undoubtedly have sufficient 'understanding' to enable him to instruct his own solicitor. However, he suggests that the court may be concerned 'that Z lacks the insight to fully appreciate the risks of full participation'.



37. Mr Gabb, the solicitor who represents the father, agrees with the points made by Mr Johal.
38. Throughout these proceedings Z has been represented by a very experienced specialist family law solicitor, Ms Kerry Boyes. Up to now, Ms Boyes has taken her instructions from the guardian. She has met with Z, most recently on 16<sup>th</sup> May. Throughout these proceedings to date it has been Ms Boyes' considered opinion that although Z clearly has the intellectual ability needed to give him the necessary understanding he lacks the emotional capacity.

### Discussion

39. All three parties accept that if the test to be applied were based solely on intellectual capacity then Z should be given permission to instruct his own solicitor. All three parties express concern about Z's emotional capacity to be able to instruct his own solicitor and about what they perceive to be the risks of allowing him to do so. All three raise a particular concern about the likely harmful impact on Z's emotional well-being of him having access to the court documents.
40. Z clearly has the intellectual capacity necessary to give him the 'understanding' required by the rules, though I accept that intellectual capacity is not the only relevant factor the court must consider when deciding whether a child should be allowed to instruct his own solicitor.
41. Z well understands that the ultimate welfare decision which the court must make is a decision that may have a profound impact on the future direction of his life. However, the reality is that even with the help of the best professional guidance available (and that is the position I am in) neither the professionals who give that advice nor the court can be absolutely certain of the impact decision-making today will have on the future course of Z's life. Making decisions about Z's future involves an element of risk. Z is as aware of the reality of that as I am.
42. In making decisions the court will have in mind the approach required by the law that Z's welfare must be the court's paramount consideration. The court will also have in mind that Z has the right to respect for his private and family life
43. Concern has been expressed in the experts' report that Z's wish to instruct a solicitor direct 'is part of his bid to regain control in a system populated by adults he does not fully trust to represent his needs'. In my judgment the fact that an intelligent, articulate teenager wishes to have some control of decision-making that could have a profound

effect on the future course of his life is hardly surprising. Z is astute enough to realise that as matters stand at the moment, although his Children's Guardian will faithfully represent his views to the court she will also set out her own assessment of what the appropriate welfare outcome should be. She will make it plain that she does not agree that Z's clearly expressed wishes and feelings accord with his best interests. She is likely, therefore, to recommend to the court that Z's wishes and feelings should not be followed. Currently, Z does not have an advocate who will not only inform the court of his wishes and feelings but will seek to persuade the court that an outcome that accords with his wishes and feelings will meet his best welfare interests.

44. One of the reasons why the experts do not agree that Z should be able to instruct his solicitor direct is because 'it is our assessment that Z is profoundly confused about his own mind and about his best interest'. In my experience, that confusion and uncertainty is experienced by many adolescents who are the subject of care proceedings. I am doubtful that that is a factor which should be considered, of itself, to make it inappropriate for that young person to be given permission to instruct his own solicitor. In this case, I accept that Z himself has said that he finds it very difficult to understand his emotions and deal with them. In my judgment, that does not mean that he lacks the emotional 'understanding' to instruct his solicitor. On the contrary, it could be said that the fact that Z recognises his emotional challenges means that he would be able to engage in an open discussion with his solicitor about the case he wishes to put before the court.
45. All three parties express concern about Z having access to court papers in the event that he is allowed to instruct his own solicitor. In my judgment, that concern is misconceived. Z is already a party. The decision I am called upon to make has nothing to do with the issue of party status. As a party, the rules already give him a conditional right to have access to the papers. As I noted earlier, the rules require the guardian to advise the child of the contents of any document received so long as the guardian is satisfied that the child has 'sufficient understanding'. Whether the child should be allowed to see a particular document or simply be given a summary of that document is, for understandable reasons, a matter that is left to the discretion of the guardian. The rules impose a similar duty on the solicitor. In my judgment, that duty arises whether the solicitor receives his instructions through the guardian or direct from the child. In each case the solicitor is not under a duty to allow the child to see documents that have been served upon him but, rather, 'if the child is of sufficient understanding [to] advise

the child of the contents of any documents' received. It is for the solicitor to come to a judgment about whether the child has 'sufficient understanding'. If the solicitor is uncertain whether the child has 'sufficient understanding' and whether the child should be allowed to read a document or simply be given a summary of the contents of that document, the solicitor should seek guidance from the court. The ultimate responsibility for deciding whether a child or young person should have access to the court papers is, always, that of the court.

46. As I noted earlier, in this case the experts have prepared for Z an excellent age-appropriate summary of its report. The authors are of the opinion that it would be detrimental to Z's welfare for him to be allowed to read the full report. For the reasons I have already given, in my judgment, if the court were to allow Z to instruct his solicitor direct it does not follow, as a matter of law, that Z then becomes entitled to unfettered access to all of the documents placed before the court. Deciding precisely what Z should be allowed to see is a matter for the exercise of discretion and is a decision in which some regard must be had to his welfare.
47. Mr Johal expresses concern 'about the risk of full participation' by Z. He submits that Z lacks the insight to fully appreciate the risks of participation. The risks he refers to are the risk arising from access to the court papers (to which I have just referred) and the risk that participation 'has the potential to significantly contribute to Z's documented emotional and psychological difficulties and limit the future success of any therapeutic treatment.' He does not set out in what way there is a risk to the future of any therapeutic treatment. Z has made it very clear that he is willing to engage in therapy. I do not read the experts' report as highlighting such a risk.
48. Set against those risks, the decisions made by senior judges, to which I referred earlier, highlight the risk of emotional harm being caused to a young person by *not* allowing him to participate more fully by means of having his own solicitor. In this case, Z is very concerned indeed to ensure that his voice is heard and, in particular, to ensure that his wishes and feelings about his education are understood and respected. I am in no doubt that if he were not allowed to have his own solicitor there is a real risk that that decision would cause him emotional harm.

### Conclusion

49. I have come to the conclusion that in this case Z does have the 'understanding' required by the rules to enable him to instruct his own solicitor. There are no sufficient welfare

reasons why that should not happen. I shall therefore order that Z has permission to instruct his own solicitor. It is important that the solicitor appointed is appropriately experienced and skilled for the task in hand. That is an issue I will return to when judgment is formally handed down.