Neutral Citation Number: [2024] EWHC 395 (Fam)

Case No: NN24C50006

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/02/2024

Before :

MRS JUSTICE LIEVEN

- -

Between :

WEST NORTHAMPTONSHIRE COUNCIL

Applicant

and

THE MOTHER

First Respondent

and

Y
(a child, through his Children's Guardian)

Second Respondent

- -
- -

Ms Melanie Benn (instructed by **Pathfinder Legal**) for the **Applicant**
Mr Simon Leach (instructed by **Family Law Group**) for the **First Respondent**
Mr James Walthall (instructed by **Jackson West**) for the **Second Respondent**
Ms Francesca Lambert-Amaning (instructed by **HLA Family Law**) for the **Father**

Hearing dates: **9 February 2024**

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Approved Judgment

This judgment was handed down remotely at 10.30am on 23 February 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MRS JUSTICE LIEVEN

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media and legal bloggers, must ensure that this condition is strictly complied with. Failure to do so may be a contempt of court.

Mrs Justice Lieven DBE :

1. This judgment concerns an application for a psychologist to undertake a cognitive assessment of a mother in care proceedings. The judgment attempts to give some guidance on when such applications should be made, and the approach that the Family Court should take.

2. The Local Authority ("LA") was West Northamptonshire Council acting through Northamptonshire Children's Trust and they were represented by Melanie Benn, the Mother was represented by Simon Leach, the Children's Guardian was represented by James Walthall, and the Father was represented by Francesca Lambert-Amaning.

3. The matter was listed before me for the purposes of considering the Part 25 application, and case management. Very shortly (a few minutes) before the hearing commenced, I received an email from the Mother's solicitor, Mr Leach, stating that he was seeking to withdraw the Part 25 application for a psychological assessment. Given the lateness of this application I decided not to allow the application to be withdrawn, but rather consider the matter and give a reasoned decision. It is not acceptable for court time and public funds to be wasted by decisions to withdraw applications being made so late. I also note that every skeleton argument/position statement was submitted long after the Case Management Order dated 23 January 2024 had ordered. The late production of skeletons arguments/position statements places an undue burden on judges and causes quite unnecessary delays. These comments do not relate to the Father's team, who was not a party at the relevant time.

4. The child, Y, was born in late December 2023, somewhat prematurely and remained in hospital for three weeks after his birth. The LA applied for an Interim Care Order ("ICO") before he was due to leave hospital. The interim Threshold alleges that Mother failed to engage with antenatal services, including mental health services, and that there was a risk of harm from her association with the Father, who had a history of offences.

5. I note that there is nothing in the interim Threshold or the Social Work Evidence Template ("SWET") which suggest that the Mother suffers from cognitive impairment or significant communication difficulties. There is no reference to her having a Special Educational Needs Statement or having attended anything other than a mainstream school.

6. The ICO application was made on 17 January 2023. The LA's initial plan was for interim separation, however on the day of the urgent removal hearing the LA changed its plan to one of the Mother and child being placed in a mother and baby foster placement. There was a slight delay in finding a placement and there was a further hearing on 23 January 2024. At that hearing the placement was agreed and they have remained in that placement since that date. I am very pleased to say that the reports so far have been very positive of the Mother.

7. On 22 January 2024 the Mother's solicitors made an application under Family Procedure Rules ("FPR") Part 25 for:

> *"1. The Court is requested to commission the instruction of a psychologist to undertake a cognitive assessment of the Mother to assist both the Local Authority and the court in ascertaining:*
>
> *a) How any assessments should be conducted of her;*
>
> *b) Her level of intellectual functioning to assist professionals in understanding how she retains information, learns parenting skills and acts on advice;*
>
> *c) What support she is likely to require in any court hearings and meetings with professionals.*
>
> *2. Instructing Solicitors on behalf of [the Mother] is of the understanding that the information identified within a cognitive functioning assessment would identify recommendations which the court and professionals must utilise to ensure that [the Mother] is fairly represented within proceedings.*
>
> *3. A cognitive assessment will provide valuable insight to parties regarding how hearings or cross examination should be conducted in respect of [the Mother] and whether she will require any assistance within proceedings moving forward. If a cognitive assessment was not completed, it is believed that [the Mother's] Article Six Rights to a fair trial will not be upheld.*
>
> *4. Furthermore, the Local Authority is likely to carry out further assessments during the course of proceedings. The cognitive assessment will be informative in respect of [the Mother's] cognitive needs in order for appropriate measures to be put in place. This would allow [the Mother] to engage meaningfully and entirely with all meetings, assessments and court hearings."*

8. There was minimal evidence submitted in support of this application indicating why the solicitor believed that the Mother required such an assessment. This is important, both because, as I explain below, the test is one of "necessity" and there was no evidence or submissions that supported such a test; and because the late withdrawal of the application is an indication that it should never have been made.

9. The statement in support stated at paragraph 11:

> *"The Mother is deemed vulnerable due to her age, her past experiences and mental health issues. The mother has indicated that she struggles with engaging within professional meetings and retaining information."*

10. It hardly needs stating that these three matters are exceedingly common in care proceedings, and do not begin without further detail, to justify a psychological assessment. An application under Part 25 for a psychological/cognitive assessment must be accompanied by proper evidence which explains why the case goes beyond the standard difficulties faced by many parents in care proceedings. The evidence must explain why the parent's needs cannot be properly managed by careful use of

language and the professionals taking the time to explain matters in an appropriate manner. The evidence must address why such an assessment is necessary rather than just something that would be "nice to have".

11. It would often be the case that if one parent does have cognitive issues this will have been identified at school, during previous interactions with the Local Authority and/or in pre-proceedings work. These earlier interventions will frequently identify whether there are cognitive challenges, and how they can best be handled.

12. The application was placed before HHJ Carter, the Acting Designated Family Judge for Northampton, who listed it before me as the Presiding Family Judge for the Midlands.

13. Mr Leach on behalf of the Mother said that the application had been made on 22 January 2024 as a "belt and braces" approach at a point when he (the solicitor for the Mother) had not met the Mother, but counsel at the earlier hearing had. There may have been some discussion at that stage of the LA using the ParentAssess framework when assessing the Mother. Mr Leach said that once he had spoken to the Mother, the evening before the hearing before me, in the light of her excellent progress at the foster placement and his own conversation with her, he had decided to withdraw the application.

14. The LA, in Ms Benn's helpful skeleton argument, resisted the application, pointing out that in the LA's interactions with the Mother they had not noted any issues with her cognitive functioning, nor had this been pointed out by any of the health or other professionals working with the Mother. Ms Benn also referred to the fact that the LA would take care to not use professional jargon in meetings with the Mother and take steps to check that she understood and retained information she was given.

15. The Child's solicitor, instructed by the Cafcass Guardian, also produced a Skeleton Argument. The Guardian first met the Mother on 1 February 2024. In the light of the application for a cognitive assessment the Guardian spent about an hour with the Mother and considered her cognitive functioning. The Guardian's view is neatly summarised in paragraph 9 of her Skeleton Argument:

> *"During her meeting, the Guardian was content that the Mother understood their discussions and was able to explain her understanding of the written agreement which was agreed on 23rd January 2024. The only observation the Guardian made was that she anticipates that people working with the Mother may need to spend more time with her and to explain things in simple language."*

16. The Skeleton Argument referred to Part 25 and to a speech by the President of the Family Division for the need to be alert to the parents in care proceedings with limited intellectual functioning. However, she then said she was "neutral" on whether the Part 25 application should be granted.

17. It is in my view unfortunate that the Guardian and her solicitor stated they were "neutral". It is quite clear from the Skeleton that the Guardian did not consider the test of necessity in Part 25 to have been met, but still remained neutral on the application. Guardians, and the Children's solicitors, play an important role in care proceedings in

ensuring that the interests of the child are met by minimising delay and maximising the efficient use of resources, in particular by assisting the Court to "Make Cases Smaller", see the President of the Family Division's The Road Ahead. If it is clear to the Guardian and the Child's solicitor that an application should be refused, then they should make that clear to the Court.

The Law and Guidance

18. Part 25.43 of the FPR states:

> *"The court may give permission as mentioned in paragraph (2) only if the court is of the opinion that the expert evidence is necessary to assist the court to resolve the proceedings."*

19. It is therefore beyond argument that the test for an expert is whether the report is "necessary" for the resolution of the proceedings.

20. The meaning of "necessary" in this context was considered in *Re HL (A child)* [2013] EWCA Civ 655, where the Court said:

> *"The short answer is that 'necessary' means necessary. It is, after all, an ordinary English word. It is a familiar expression nowadays in family law, not least because of the central role it plays, for example, in Article 8 of the European Convention and the wider Strasbourg jurisprudence. If elaboration is required, what precisely does it mean? That was a question considered, albeit in a rather different context, in Re P (Placement Orders: Parental Consent) [2008] EWCA Civ 535, [2008] 2 FLR 625 , paras [120], [125]. This court said it "has a meaning lying somewhere between 'indispensable' on the one hand and 'useful', 'reasonable' or 'desirable' on the other hand", having "the connotation of the imperative, what is demanded rather than what is merely optional or reasonable or desirable." In my judgment, that is the meaning, the connotation, the word 'necessary' has in rule 25.1 ."*

21. In deciding whether to allow an application for a psychologist to carry out a cognitive assessment, it is also critical to bear in mind the existence of the Advocates Gateway and the requirement for all those working with parents in care proceedings to be sensitive to their needs. I referred to the Advocates Gateway and the need for all those working in this part of the justice system to be familiar with it and apply its principles in *West Northamptonshire Council v KA (Intermediaries)* [2024] EWHC 79 at [46]. It would only be appropriate to order a psychological assessment relevant to the Court process if the approach in the Advocates Gateway was plainly insufficient.

22. It will often be the case that parents may struggle to absorb information, to understand the proceedings and to concentrate through meetings and hearings. However, the solution to this problem is not, in the majority of cases, to have cognitive assessments and appoint intermediaries. It is for all the professionals involved, including lawyers and judges, to bear closely in mind the need to use simple language, avoid jargon, and where appropriate check that a litigant has understood what is being said. That is all set out in the Advocates Gateway.

Conclusions

23. This application does not come close to meeting the test of being "necessary" to resolve the proceedings, and in my view should never have been made. The fact that Mr Leach referred to taking a "belt and braces" approach indicates strongly that the proper test was not being considered either by counsel when she advised or by the solicitors when they made the application. Unfortunately, such misconceived applications are exceedingly common, particularly in respect of applications for psychologists to undertake cognitive assessments.

24. Such applications waste considerable resources, both in the courts, but also in the local authorities and Cafcass when they lead to unnecessary hearings and unnecessary expense. It is important that they are not granted without the Court properly addressing the correct test.

25. Mr Leach referred to a psychological assessment being useful in determining what support the Mother would need to help care for the child in the future. But that is not the purpose of the Part 25 application. Further, and in any event, that type of analysis is one that all social workers should necessarily be very familiar with. There was again nothing in this case which justified going beyond normal good social work practice.

26. A test of necessity does not mean that a report would be "nice to have" or might help in determining what psychological support the parent might need in the future. That is not necessary to resolve the proceedings.

27. For all these reasons I refuse the application for a psychological assessment.