Neutral Citation Number: [2019] EWCA Civ 609

Case No: B4/2018/2910

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM WATFORD COUNTY COURT
AND FAMILY COURT
HHJ WILDING
WD392018 & ANR

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/03/2019

Before:

LORD JUSTICE UNDERHILL
LADY JUSTICE KING
and
LORD JUSTICE MOYLAN

- -

A (Children)

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Mr R Jones (instructed by **Blacks Legal Solicitors**) for the **Appellant**
Mr N O'Brien (instructed by **Hertfordshire County Council**) for the **Respondent**

Hearing date: 7th March 2019

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Approved Judgment

LORD JUSTICE MOYLAN:

Introduction

1. The father appeals from the order made by HHJ Wilding on 13 November 2018 which dismissed his application for leave to oppose the making of adoption orders in respect of his two children, then aged six and four.

2. At this hearing the father is represented by Mr Jones and the local authority is represented by Mr O'Brien, neither of whom appeared at the hearing below.

3. The judge referred to the relevant statutory provision, namely section 47(5) of the Adoption and Children Act 2002 ("the 2002 Act"). He correctly identified that there needed to have been a change in circumstances since the placement orders had been made. He decided that there had been no sufficient change in circumstances. However, in the course of his judgment, he wrongly stated that if there had been a change in circumstances, the welfare of each child was not his paramount consideration at the second stage of the legal exercise. Regrettably, none of the advocates drew the judge's attention to this error.

4. The issues, therefore, raised by this appeal can be phrased as follows:
(1) Was the judge wrong to decide that there had been no change in circumstances sufficient to justify granting leave?
(2) Whether, despite stating that welfare was not his paramount consideration at the second stage, the judge's determination nevertheless fulfilled the necessary legal requirements.
(3) If it did not, whether by application of the proper legal approach the father's application should nevertheless have been dismissed.

Background

5. Turning to the background, the children were removed from the parents under a police protection order in April 2015. Care proceedings were then commenced. Interim care orders were made under which the children were placed in foster care. At the conclusion of the care proceedings in March 2017, a placement order was made in respect of each child by HHJ Wilding. At the same time, care orders were made in respect of two older siblings. An application by the parents for permission to appeal those orders was dismissed by me in July 2017. The two younger children were placed for adoption in September 2017.

6. On 3 November 2017 the mother applied to revoke the placement orders. That application was dismissed because the children had already, as I have described, been placed for adoption.

7. Adoption applications were made in May 2018. The mother applied for leave to oppose the applications. That application by her was determined by HHJ Wilding on 7 September 2018. The mother was represented at that hearing. The father was not represented and had made no application, but he was present at the hearing and supported the mother's application.

8. In his judgment dismissing the application, HHJ Wilding summarised the "salient findings" he had made in the care proceedings. He had found that "each of the children had suffered significant emotional harm as a result of the care given by the parents and that the children would require therapy to address those harms". There were a number of reasons for this including neglect; aggressive and volatile behaviour by the parents and in particular the father; the manner in which the children had been parented, the parents having "a very poor emotional attunement to the children"; and neither parent having any understanding or awareness of the impact of their behaviours and parenting on the children.

9. For the purposes of the care proceedings, the judge had heard evidence from a child psychologist, which he had accepted, as to the harmful impact on the children of the care they had received. He had also heard evidence from an adult psychologist, which he had accepted, to the effect that the mother's parenting of the children was unlikely to change because of her psychological functioning and that she would need to engage in therapeutic work for perhaps 12 to 18 months to establish whether there was any prospect that she might change. The judge had concluded that the mother saw nothing wrong in her parenting and was, therefore, unlikely to undertake the therapy recommended and would not change her style of parenting.

10. In his judgment of 10 September 2018 HHJ Wilding found that there had been no change in circumstances. In particular, the mother had not undertaken therapies which had been considered necessary by the psychologist, if she was to change her capacity to parent the children, because she believed that there was no need for them at all. The judge found it was "sadly self-evident" that the mother did not understand the reasons for the previous proceedings and the orders that had been made. There was no evidence that she had changed.

11. The judge dealt with other, what he described as, "small changes" relied on by the mother. One included assistance which could be provided by the maternal grandmother. The judge did not consider this to be a change, because this had also been proposed during the care proceedings. The maternal grandmother had given evidence in support of the mother during those proceedings and had said that she would be able to provide significant assistance to the mother by coming to England for periods of up to six months. This was said to have been offered with the knowledge of and agreement of the maternal grandfather. I should add that the maternal grandparents live abroad.

12. The judge concluded that the mother had no "solid grounds" for seeking leave. He set out his analysis of the children's welfare. He found that there had been "a notable

improvement" in the children's behaviour and functioning since they had been placed in foster care. They had become "an integral part" of their prospective adoptive family and were "thriving". In contrast to the dysfunctional attachments to the mother and the father, each of the children had "a healthy attachment" to their prospective adoptive parents.

13. There was, he determined, "a considerable risk of harm to the children" if their placement was disrupted in any way. The judge also noted that the elder two children did not want to see the mother. In his view, each child's welfare throughout their lives required the dismissal of the mother's application because only adoption would meet their need for security and stability, and it enabled them to continue the progress which they had made. Any other order would, in his judgement, create too great a risk of harm because the children's security and stability would be “deeply affected”. Indeed, the judge concluded that any order other than adoption would be likely to cause them "more than significant harm throughout their lives".

Legal Framework

14. Section 47(5) of the 2002 Act provides that, in the circumstances of this case, a parent may not oppose the making of an adoption order without the court's leave. Section 47(7) provides that:

> "The court cannot give leave under subsection (3) or (5) unless satisfied that there has been a change in circumstances since the consent of the parent or guardian was given or, as the case may be, the placement order was made."

15. It is well-established that, when determining an application for leave, the court adopts a two stage approach. First, the court has to determine whether there has been a change of circumstances. Secondly, if there has, the court has to determine whether to give leave, the child's welfare throughout his or her life being the court's paramount consideration.

16. The approach the court should take to the first stage of the exercise remains that set out in *In re P (A Child) (Adoption Proceedings)* [2007] 1 WLR 2556. In the judgment of the court given by Wall LJ (as he then was) the nature of the change of circumstances was addressed:

> "The change in circumstances since the placement order was made must, self-evidently and as a matter of statutory construction, relate to the grant of leave. It must equally be of a nature and degree sufficient, on the facts of the particular case, to open the door to the exercise of the judicial discretion to permit the parents to defend the adoption proceedings."

17. The judgment then addresses, and rejects, the use of the word "significant" as putting the test too high:

> "Self-evidently, a change in circumstances can embrace a wide range of different factual situations. Section 47(7) does not relate the change to the circumstances of the parents. The only limiting factor is that it must be a change in circumstances 'since the placement order was made'. Against this background, we do not think that any further definition of the change in circumstances involved is either possible or sensible.
>
> 32. We do, however, take the view that the test should not be set too high, because, as this case demonstrates, parents in the position of S's parents should not be discouraged either from bettering themselves or from seeking to prevent the adoption of their child by the imposition of a test which is unachievable. We therefore take the view that whether or not there has been a relevant change in circumstances must be a matter of fact to be decided by the good sense and sound judgment of the tribunal hearing the application."

18. The above approach was endorsed in the decision of *In re B-S (Children) (Adoption Order: Leave to Oppose)* [2014] 1 WLR 563. That case set out, at [74], that, at the second stage, the key factors are "the parent's ultimate prospect of success if given leave to oppose" and "the impact on the child if the parent is, or is not, given leave to oppose". The prospect of success relates to the prospect of resisting the making of an adoption order, "*not*, we emphasise, the prospect of ultimately having the child restored to the parent's care". Sir James Munby P encapsulated this as, the parent having "solid grounds for seeking leave". I quote further from the judgment, at [74]:

> "ii) For purposes of exposition and analysis we treat as two separate issues the questions of whether there has been a change in circumstances and whether the parent has solid grounds for seeking leave. Almost invariably, however, they will be intertwined; in many cases the one may very well follow from the other.
>
> iii) Once he or she has got to the point of concluding that there has been a change of circumstances and that the parent has solid grounds for seeking leave, the judge must consider very carefully indeed whether the child's welfare really does necessitate the refusal of leave …
>
> iv) At this, as at all other stages in the adoption process, the judicial evaluation of the child's welfare must take into account all the negatives and the positives, all the pros and cons, of each of the

> two options, that is, either giving or refusing the parent leave to oppose"

19. On the question of what amounts to a change in circumstances, I would also refer to *A and B v Rotherham Metropolitan Borough Council* [2015] 2 FLR 381 and *Re LG (Adoption: Leave to Oppose)* [2016] 1 FLR 607. In the first of these, the change in circumstances was that the identity of the "true genetic father", at [4], was established only after an adoption application had been made. Prior to that someone else had been wrongly identified as the father. In the latter case, the paternal grandparents were unaware of the care proceedings until after the child had been placed for adoption, in part because the father had falsely told a social worker that the paternal grandfather had physically abused him. In both cases leave to oppose the making of an adoption order was granted.

HHJ Wilding's Judgment

20. I now turn to the application which led to HHJ Wilding's order of 13 November 2018 and to his judgment.

21. Following the dismissal of the mother's application for leave to oppose, the adoption applications were listed for determination on 22 October 2018. At that hearing, counsel instructed by the maternal grandfather appeared and informed the judge that the grandfather was offering to care for the children and sought to be assessed as a potential carer. Faced with this unexpected development, the judge adjourned the hearing. He gave permission for the disclosure to the grandfather of some documents from the proceedings and directed that the grandfather should file a statement.

22. The grandfather filed a statement dated 9 November 2018. At the next hearing, on 13 November 2018, the judge addressed the legal framework. Clearly, the grandfather had no status in the proceedings. However, the father, although he had made no formal application, told the judge that he opposed the making of the adoption orders. The judge, therefore, decided to treat the father as having made an application for leave to oppose the adoption applications. The change in circumstances relied on was that the grandfather was now putting himself forward as a proposed carer for the children.

23. In his statement, the grandfather said that he had been aware of the care proceedings and the reasons for the children being removed from the parents, but he had believed that the parents had made some changes. It was only when the care and placement orders had been made that "he became aware of the severity of the situation". I note, in passing, that the orders had been made some one and a half years previously, namely in March 2017.

24. The judge expressed surprise at the assertions being made by the maternal grandfather because the maternal grandmother had been involved in the care proceedings, as

referred to above. Further, the maternal grandmother's ability to assist the mother had formed part of the mother's application under section 47(5). The judge, therefore, distinguished the circumstances of this case from those in *Re LG*, to which he had been referred. The grandfather knew of the care proceedings and nobody had previously proposed or suggested that he might be able to care for the children.

25. The judge decided that the maternal grandfather's proposal to care for the children was not "a sufficient change in circumstances" to justify granting leave. This was because, as I have said, the grandfather knew of the proceedings and had never been put forward as a potential carer of the children at any stage even though, as the judge noted, there is an obligation, particularly on parents but also on other family members, to inform the local authority and the court of any family members who are able and willing to care for children. The judge characterised the change as more of a change in the grandfather's position than a change in circumstances. The judge also inferred that the grandfather would have known that he had the opportunity to offer to care for the children during the course of the care proceedings but had not done so.

26. As referred to above, when dealing with the second stage of the legal approach the judge said, wrongly, that each child's welfare was not his paramount consideration. He also misstated another aspect of the approach. The judge phrased the question he had to answer as follows:

> "The question is whether, in all the circumstances of the case, including the father's prospects of success in securing revocation and the children's interests, leave should be given."

27. Although the judge wrongly referred to the father's prospects of "securing revocation", his conclusion addressed the right issue, when he said: "It is hard to see how there is any possibility of a successful application to oppose the making of the adoption application". The judge also addressed the welfare of the children. He noted that they had been aged two and a half and approximately six months when placed in foster care at the commencement of the proceedings. In his view, the grandfather's proposal was too little too late. He said:

> "I have expressed throughout the course of these proceedings, which have now been ongoing for a number of years, that the children need and deserve finality. They need certainty. They have been in a stable placement now with their prospective adoptive parents for a little over a year. To consider the possibility of changing their placement would be, to say the least, damaging to the children. It would cause them considerable harm.
>
> So, whilst I am not making a welfare consideration, nevertheless, in considering the prospects of success, it is simply far too remote for

> me to consider that the change in circumstances is sufficient to allow me to exercise my powers to grant leave, and the application is dismissed."

28. This last assessment mirrors the conclusions the judge had reached when dismissing the mother's application in September 2018, as set out in paragraph 13 above.

Submissions

29. I am very grateful to both Mr Jones and Mr O'Brien for their respective submissions. Mr Jones adopted the skeleton argument filed by the father's solicitors and made commendably focused but comprehensive submissions.

30. These submissions can be summarised as follows. First, the judge was wrong to determine that there had not been a change in circumstances. The judge's decision was based on his inference that the maternal grandfather would have known that he had the opportunity to offer to care for the children. Mr Jones submits that it was wrong for the judge to make this inference. He should have given the maternal grandfather an opportunity to explain his knowledge of the proceedings and why he had not previously offered to care for the children. Absent this further enquiry, Mr Jones submits, the judge was not in a position to determine whether the grandfather's offer to care for the children was or was not a change in circumstances.

31. Secondly, Mr Jones submits that the judge was wrong, as is accepted, to state that welfare was not his paramount consideration at the second stage of the legal exercise. The judge, also, did not refer to the factors set out in section 1(4) of the 2002 Act, particularly those referred to in paragraph (f). These two features together are, Mr Jones submits, fatal to the judge's decision. Mr Jones rightly acknowledges that the judge determined that the father's application for leave to oppose the adoption application was not based on solid grounds because he expressly determined that, I repeat, it was "hard to see how there is any possibility of a successful application to oppose the making of" adoption orders.

32. Mr Jones also acknowledges that the judge made a welfare determination. However, he submits that given the factors referred to above, it is not clear whether in making that determination the judge was applying the section 1 of the 2002 Act test or the section 1 of the Children Act 1989 test. Mr Jones accepts that we can bring into account the judge's judgment of 10 September 2018 but he submits that this does not remedy the deficiencies in the judgment of 13 November 2018. It is also submitted that it would be wrong for the court to make adoption orders without the grandfather having been assessed as a potential carer for the children.

33. Mr O'Brien on behalf of the local authority accepts that the judge was wrong when he said that welfare was not his paramount consideration and when he said that the court

would need to consider the father's prospects of success in securing revocation. The judge was, he also accepts, clearly referring to the test under section 24 of the 2002 Act. However, despite these errors, Mr O'Brien submits that the appeal should be dismissed.

34. First, he submits that the judge was right to decide that there had been no sufficient change in circumstances. The grandfather's ability to be a carer was not a change of circumstances because he had always been available as a carer. No one had previously proposed that the grandfather should be considered as a carer and, Mr O'Brien submits, the proposal that he should now be considered is not a change in circumstances, to quote from *In re P*, "of a nature and degree sufficient … to open the door to the exercise of the judicial discretion".

35. Secondly Mr O'Brien submits that the judge did in fact make a welfare determination. The judge, he submits, made clear that the welfare of the children meant that leave should not be given. There was no prospect of the father being able successfully to oppose the adoption application, even on the basis of the grandfather's proposal that he might care for the children. The judge had determined that changing these children's stable placements would cause them "considerable harm".

Determination

36. I now turn to my proposed determination of this appeal. I can express my reasons for my decision quite shortly.

37. First, I agree with the judge's conclusion that the maternal grandfather's proposal that he might care for the children was not, and I repeat again the words from *In re P*, "a change of a nature and degree sufficient … to open the door to the exercise of the judicial discretion". I recognise, of course, the consequences of the making of an adoption order and that such an order can only be justified if no other order is possible in a child's interests. However, in this case someone, including in particular either parent and/or the grandfather, could have proposed during the course of the care proceedings that the grandfather be considered, very probably with the grandmother, as a carer of the children. No one did. This makes this case very different from the circumstances present in the decisions both of *Re LG* and of *A and B v Rotherham Metropolitan Borough Council*. As referred to above, in both of those cases relatives of the child, who had been unaware of the care proceedings, sought to care for the child at a very late stage of the process. In the present case, it is clear that the maternal grandfather was aware of the care proceedings, in which his wife was significantly involved, and that he could have been put forward as a carer for the children. I accept that, as set out in *In re P*, the court must not set the test too high. But, it is difficult to see how a very late proposal by a known family member in circumstances such as have occurred in this case could or would be a sufficient change in circumstances to come within the provisions of the Act.

38. More specifically to this case, I do not consider, despite Mr Jones's submissions, that it was necessary for the judge to give the grandfather an opportunity to explain why he had only come forward in October 2018. The inference relied on by Mr Jones was only one element referred to by the judge. Whatever explanation might have been offered by the grandfather would not, in my view, have materially affected the judge's determination. I am satisfied that it was clearly open to the judge to decide that the change was not a sufficient change. I would add that, in my view, it was the right decision in the circumstances of this case.

39. Therefore, on issue (1), as referred to at the outset of this judgment, the appeal must be dismissed because the judge's decision on the question of a change in circumstances was not only not wrong but was not right.

40. Passing over issue (2), I will next consider issue (3). On this issue, I am satisfied that, if the judge had correctly directed himself, he would inevitably have determined that the proposed application should be dismissed. It was not based on solid grounds and, in my view, giving leave would clearly be contrary to the interests of the children, applying their welfare needs throughout their respective lives.

41. First, the judge expressly considered whether the father had solid grounds for seeking leave and concluded that he did not. The judge was, in my view, plainly entitled to decide that it was "hard to see how there is any possibility of a successful application to oppose the making of the adoption orders".

42. On the issue of welfare, I consider that we are entitled to bring into account the judgment of 10 September 2018. In that judgment the judge explained fully why giving leave to oppose the adoption applications would be significantly detrimental to the children's welfare needs throughout their lives. I do not consider that the change in the maternal grandfather's position materially affected that welfare determination. Further, the judge repeated in his judgment of 13 November 2018 that the children needed finality and certainty. As referred to above, it was his assessment that anything other than adoption orders would cause the children considerable harm and would inevitably be contrary to their welfare needs. In those circumstances, as I have said, the application of the right approach would have led inevitably to the dismissal of the father's application.

43. I do not, therefore, need to address issue (2).

44. Accordingly, I propose, if my Lord and my Lady agree, that this appeal should be dismissed.

LADY JUSTICE KING:

45. I agree.

LORD JUSTICE UNDERHILL:

46. I also agree.

Order: Appeal dismissed