Case No: ZW92/19

IN THE FAMILY COURT AT WEST LONDON

West London Family Court,
Gloucester House, 4 Dukes Green Avenue
Feltham, TW14 0LR

Date: 06/04/2020

Before :

HIS HONOUR JUDGE WILLANS

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Between :

PROSPECTIVE ADOPTERS ("PA") **Applicants**

- and –

(1) THE LONDON BOROUGH OF EALING ("Ealing") **Respondents**

(2) AP ("The Mother")

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Phillipa Jenkins for the **Prospective Adopters**
Phillipa Parry-Jones for **First Respondent**
Anne-Marie Glover for the **Second Respondent**

Hearing dates: 1 April 2020
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JUDGMENT

His Honour Judge Willans:

Introduction

1. Should I give leave for the Second Respondent mother to oppose the adoption application made by the Applicant's in respect of two of her children? This is the question resolved within this judgment.

2. In deciding this question I have considered the papers in the digital hearing bundle filed by the First Respondent together with a limited number of additional documents filed with me after the receipt of the bundle. I have also considered with care both the written and oral submissions made on behalf of all parties.

3. This hearing was conducted remotely by telephone because of the ongoing public health emergency (Covid-19). Given the intention was always for the hearing to proceed by way of submissions I consider the hearing was both effective and fair for all parties. At the end of the hearing I reserved judgment.

4. To protect anonymity, save in the heading to this document, I will refer to the Applicant's as PA('s); the First Respondent as 'Ealing' and the Second Respondent as 'the mother'. I intend to refer to the children under consideration in this judgment as A and N (and to their full sibling as E and their half sibling as M). No discourtesy is intended.

Background

5. In 18 May 2018 I handed down judgment making care and placement orders relating to A, N and E. This judgment is publicly available as **E, A & N (Children- Domestic Violence) [2018] EWFC B91**. At the date of the final

hearing the mother was known to be pregnant with her partner's (and the uncle of the children's) child. The central issue in the case was domestic violence and a complex toxic relationship between the mother, her husband and her brother-in-law.

6. Subsequently the mother gave birth to M. On 12 March 2019 I handed down reserved judgment in M's case and made a 12-month supervision order. In doing so I refused the request for a care and placement order as sought by the local authority and supported by the guardian. This judgment is publicly available at **A (A Child) [2019] EWFC B16**[1]. My conclusions were that A could be safely cared for by his parents given the progress made since the date of the previous hearing. I have subsequently been informed the Supervision Order passed without any significant issues and the parents have been seen to provide good care for the child. Domestic violence has not materialised as a concern.

7. In around August 2019 the PA's applied for adoption orders for both children, the children having lived in their care since February 2019. At about the same time a separate prospective adopter issued an application to adopt E.

8. On 25 October 2019 I gave case management directions. The logic of the cases generally proceeding together was strong given the likely issues arising and the inter-relationship between the two applications. At that hearing the mother acted in person with Ealing was represented by counsel. The mother made clear her wish to oppose the making of adoption orders in each set of proceedings. Unfortunately, at that hearing the PA's sought for their

[1] See BAILII

application to be adjourned to enable further work to be undertaken with the children. The prospective adopter for E had no reason to delay his/her application and as a result the cases progressed on different timetables with E's case listed for a leave to oppose hearing on 7 January 2020 and A/N's case adjourned for directions in July 2020.

9. E's case could not proceed on 7 January 2020 but was instead heard on submissions on 28 February 2020. Only shortly prior to this date the PA's informed the Court they were now ready to proceed with their application. However, it was not possible to fairly timetable their application to the same hearing date given a significant gap in the evidence.

10. On 28 February 2020 I gave leave to the mother to oppose the making of an adoption order in respect of E. An approved draft of my judgment relating to 'change in circumstances' has been shared into these proceedings.

11. Given the cases were now potentially moving closer together I suggested some provisional case management at the end of the E hearing to be shared with the PA's to ensure their case was dealt with efficiently and to ensure it could then proceed promptly to a final order or alternatively efficiently to be joined with E's case without incurring unnecessary further delay. I am grateful to all the parties for the common-sense and co-operation they have brought to this issue.

12. The position is now that there will be a directions appointment in E's case on 30 April 2020 which will be joined by the PA's case if permission is given. This will then allow joined up thinking to be applied to all cases.

Legal Principles

13. There is no disagreement as to the legal principles applying to this application:

13.1 I am obliged to carry out a two-stage approach. First, I assess whether there has been a change in circumstances sufficient to justify reopening the issue (of dispensation with consent in this case under section 52 Adoption and Children Act 2020). If so, and only if so, I must then exercise my discretion as to whether leave to apply should be granted. This second part of the test is welfare driven having regard to the welfare of the child throughout its life and having regard to the question as to whether there is a real possibility the Court may be persuaded not to grant an adoption order. Real possibility can be contrasted with the 'mere fanciful' and highlights the need for solidity in the opposition. Within this part of the test the Court is further required to consider the impact on the child if the parent is, or is not, given leave to oppose.

13.2 I am referred to and keep in mind the ten pointers found in the seminal case of **Re B-S *(Children) (Adoption: Leave to Oppose)* [2013] EWCA Civ 1146**. In particular I keep in mind the wise guidance as to avoiding the setting of an artificially high bar when answering the first question; that change in circumstances and solidity are likely to be two sides of the same coin and significantly entwined in many cases; that a keen eye must be kept on the lifelong consequences of such decision making with the consequential reasoning that adoption remains a last resort; that the evaluation must be holistic in both form and substance; that within the welfare assessment attention has to be given to the

impact on a settled placement but that undue weight must not be attached to this feature given in particular the capacity of the Court to enable investigation without undue disruption.

13.3 In assessing prospects of success in this context the Court will reflect on what has happened in the past, the current state of affairs and what will or may happen in the future: **Re W (A Child); Re H (Children) [2013] EWCA Civ 1177 ("Re W/H")**

13.4 Were the Court to find there to have been a substantial change then:

> *…the likelihood of the parents being able to show a solid case for opposing adoption will be the greater. To be solid the case must have substance: see Re B-S at [57-59]. It must be a case that needs to be fully considered before a decision can be taken about adoption. This calls for a broad and practical balancing up of the welfare advantages and disadvantages of granting leave. I would not expect expert evidence or oral evidence to feature: indeed, if the court is seriously thinking that either might be necessary, it may be an indication that leave should be granted. At all events, the decision on the grant of leave under s. 47(5) should not be allowed to develop into a trial of the adoption application on incomplete evidence.* **W (A Child) [2020] EWCA Civ 16**

13.5 Furthermore at §22 **Re W/H** the Court gave guidance as to the nature of the enquiry when solid prospects of success are demonstrated:

> *If the parent is able to demonstrate solid prospects of success, the focus of the second stage of the process narrows very significantly. The court must ask whether the welfare of the child will be so adversely affected by an opposed, in contrast to an unopposed, application that leave to oppose should be refused. This is unlikely to be the situation in most cases given that the court has, ex*

hypothesis, already concluded that the child's welfare might ultimately best be served by refusing to make an order for adoption

But I am asked to contrast this with the further observations in **Re W/ H** (above):

There will be cases, perhaps many cases, where, despite the change in circumstances, the demands of the child's welfare are such as to lead the judge to the conclusion that the parent's prospects of success lack solidity.

13.6 My attention is also drawn the observations of Lady Black (the Black LJ) in **Re L (Leave to Oppose Making of an Adoption Order) [2013] EWCA Civ 1481** on the question of the complex and difficult balancing act this may often create:

I would like to add a final few words of more general application than just this case. I am very conscious of the difficulties inherent in applications under section 47(5). The relationships and hopes of not just one family but two are imperilled and the material upon which the decision has to be taken is, of necessity, often far from complete and not infrequently has not been tested in a hearing with oral evidence…[E]ach case depends upon its own facts and the circumstances of individual cases vary infinitely. Where, for instance, a child has been placed with adopters for a protracted period, is well settled, and remembers nothing else, a court may well take the view that there has to be a degree of confidence about the parent's ability to provide a suitable home for the child before it can even contemplate assessing the parent's prospects as solid. And the cases show that the overall circumstances of the case may be such that the court may decide not to grant leave even where there is some confidence in the parent…[A]t the other end of the spectrum, there will be cases in which the evident deficiencies in the parent's case are such that, notwithstanding the existence of uncertainty or other issues in relation to the

adoptive placement, the parent's case is not solid enough to justify the grant of leave to oppose.

13.7 These observations bring into keen focus the very difficult task faced by a tribunal in this position, but the task cannot be shirked. At least two families are entitled to a reasoned and rational analysis and conclusion. That these families benefit from my consistent involvement in the case is important. There is no way of avoiding the heartache which will be caused to one of the families before me (and even if only on an interim basis this will be significant). However they should gain some confidence from the fact that I am well placed to carry out the exercise given my consistent role in respect of these children. Ultimately, I have been taken to a range of cases with important points of principle. However, it is important to bear in mind the facts of this case in assessing the task before me. In my judgment I am unlikely to gain much assistance from the discrete facts of any of the cases placed before me.

The First Limb: Change in circumstances

14. I am clear there has been a change in circumstances and that the first part of the test has been crossed by the mother.

15. Significant weight attaches to my conclusions reached in relation to E. Substantially this limb amounts to an objective assessment of change undergone by the opposing parent. In my judgment differential judgments in such regard reached only weeks apart would require a significant and persuasive basis. Whilst I left open the possibility that there might be features

which relate exclusively to A and N which impacted upon this stage of the assessment I was not presented with any pressing arguments in such regard. Indeed the PA's did not seek to suggest the first limb was not crossed [§10 position document]. I have reflected on Ealing's arguments but cannot find anything within those arguments materially different to that presented and rejected in respect of E.

16. I should though for the record repeat my conclusions in respect of E which I judge hold equally with respect to A and N. I find the mother has demonstrated material change of a significant nature to consider reopening the question in issue. These changes are primarily with respect to the progress made in her relationship with her partner and the continued absence of domestic violence in that relationship. This feature is interlinked with the ending of the toxic triangular relationship between mother, partner and husband. It is now the best part of two years since the making of the placement order and the absence in that period of a concerning incident is telling. I have previously recorded that this outcome has been achieved without the full range of works that I anticipated would be required. However, my assessment was not in itself a condition for change but rather an attempt to forecast the requirements for change. I am willing to accept my forecast has been disproved by events and I consider there is little weight in the argument that the appearance of change is somewhat illusory in the absence of work being done. The starting point must be to assess the facts on the ground, and these are positive. Further to the above there are issues around the continuing good quality of care offered to A; the reduced isolation of the mother through

engagement in outside education; the continuation of couples counselling, and; importantly some marked improvements in settled housing and employment.

17. I bring into these proceedings my conclusion that these changes were marked and amounted to the mother comfortably crossing rather than limping over the 'line'. In summary therefore I find a change in circumstances which is such as to suggest real prospects of success in opposing the making of an adoption order.

The second limb: Welfare assessment

18. I am urged by the PA's not to rely on the decision in respect of E when determining the decision in relation to A and N. To do so, it is argued, would be contrary to the requirement to consider the individual needs of each child. If this argument amounts to a warning not to simply adopt the conclusions for E, then I agree. However in my assessment it would be wrong to simply ignore those conclusions insofar as they have impact on the decision for A and N. In my judgment it would be foolish for the Court to close its eyes to the previous decision and whilst there are a myriad of potential reasons which may lead the Court to reach a different decision to that in E it would be an error to close my eyes to the overarching conclusion that E's welfare assessment was consistent with granting leave when considering the situation for A and N. Viewed both objectively and subjectively there are features common to both cases. Importantly there is the life long relationship between A, N and E which is part of any welfare consideration. On reflection the very reason for seeking to manage the cases together was to permit the Court to be able to cross apply

common principles and the inability to achieve this goal does not change the relationship between the cases.

19. It is important to remind myself that given the significant level of change I have found, there will need to be a greater degree of welfare counterargument to justify a refusal of leave.

20. It is with these points in mind that I turn to the welfare assessment:

- **Wishes and feelings**: I bear in mind the information as to A being avoidant when the question of her mother is raised. On the facts of this case A will have memories of family life and given my historic findings whilst these may be mixed they will include some painful and troubling memories. The PA's are entitled to ask me to give careful scrutiny to this feature when evaluating whether permission should be granted. The response for the mother is to remind me as to the possibility for analysis to be undertaken without by necessity of unsettling the children. Furthermore the Court may require more expert assistance before reaching settled conclusions as to what A's feelings suggest for the case. It may be as the social worker suggests that A is suppressing information, but it may be that a more complex situation is in play.

- **The children's needs**: The older children in the family were significantly affected by their lived experience as summarised in my first judgment. I am told and accept that significant work has been undertaken to ameliorate their behaviours, indeed as recently as October last year further work was required necessitating the adjournment of the proceedings. I accept at this point the positive and likely challenging steps taken by the

PA's in support of these children to achieve progress. That these behaviours arose out of their parenting is clear from my earlier assessment. In this context I must apply care as to the potential for work to be undermined and for the children to take backward steps in relation to progress. Such deterioration may have lasting impact and may lead to disruption of their current placement. These are significant concerns to bear in mind. But as noted above the Court has the capacity to manage the case to limit the level of disruption experienced by the children. This of course does not avoid the impact on the PA's and the potential for there to be disruption indirectly. Yet again I am bound to have regard to the principle that the PA's will have entered this process with an understanding of this potential and should have around them a supportive network. The case law cautions me in such regard against allowing such arguments to carry over weight.

In this regard I bear in mind the counter arguments around the mother's feelings concerning the number of moves experienced by the children. Viewed from one perspective this appears to be the mother distancing responsibility from herself and her previous care of the children. When she speaks of the children only having a settled period in her care she in my judgment significantly underplays the level of disruption experienced by the children in her care. However, to an extent there is objective merit in her observations as to the potential for the children to have experienced harm arising out of removal followed by an unsettled period in care. The Court can take a nuanced approach to these competing arguments. To an extent they are suggestive of a lack of insight, but the question arises as to

whether this is more properly analysed in a full hearing rather than in a partial manner at this time.

A feature of similar character is as to what the Court can or should make of the recent issues which prompted the delay in the proceedings. I appreciate those acting for the PA's suggest this is a point poorly made but I judge the mother is entitled to pray it in aid as part of the picture. However, it would be unfair to attempt to resolve this issue factually within this hearing. At best I could engage in informed speculation but little more given the resolution of the case on submissions.

Finally in this regard I must balance the genuine concerns with a recognition of the stark issues in play in this application. If leave to oppose is refused, then this will be the end of the road for the mother and biological family life. Whilst this may be the ultimate conclusion of the Court I reflect on the significance of this step when weighing the likely disruption caused to the children. I must have regard to the emotional importance to the children, albeit perhaps not immediately, of ensuring all opportunities for family life have been at least properly considered and assessed before rejection. There lifelong needs include an ability to come to terms with this emotionally if they are to proceed through life in an emotionally secure manner.

- **Effect of ceasing to be a member of birth family:** This is plainly an important consideration and one which must cause the Court to proceed with caution. I touch upon it above. The impact of adoption is a lifelong consequence with profound implications. It is further complicated in this

case by the potential for differential decision making with respect to the full-sibling E and actual differential decision making for the half-sibling A. The case in respect of E proceeds and it would be foolish to attempt to predict outcome. Yet for A and N the decision making for E will impact on the relationship they may be able to share with him. Currently the PA's and E's carer have maintained a positive open relationship between the children. This might end in circumstances in which E returned to his mother whatever the expressed openness at this time. And so I am gauging the impact of the children being separated not only from biological parents but also potentially from a full sibling with whom they have a continuing relationship of value. I place less relevance on the relationship with M given it has not in fact developed due to timing, but it remains a matter of relevance.

- **Child's characteristics:** In this regard I bear in mind the settled period in the care of the PA's. The evidence suggests a warm, positive relationship of value. Steps which unsettle this relationship are likely to be objectively negative in quality. I appreciate these are children who have (particularly A) memory of their birth family – good and bad.

  I am also asked to reflect on cultural factors given their international heritage and the fact that despite best efforts the PA's will not be able to mirror or maintain this heritage at anything close to approaching the way it would be maintained within the birth family. There is of course an important value for each child linked to their heritage. This is wrapped up with a sense of their identity and place in the world. When these children

were removed into care they spoke in their home language and a reality of their mother's isolated existence was that their culture was more strongly associated with their culture than it might otherwise be expected to be.

- **Harm:** My attention is brought back to my assessment of harm found within my original judgment. These are children for whom the threshold test was crossed in clear terms.

  This point is balanced by my reassessment of risk of harm found within my second judgment. I take all of this into account. I bear in mind the submissions as to the reality of caring for 3 or 4 children as opposed to 1 child. Such care is likely to have enhanced stresses and difficulties and the Court would need to be careful as to how far it can simply apply the improvements made since 2018 to two, maybe three additional children. A parent who has shown capacity to meet the needs of a new baby unshaped by the history may not be able to cope with the more complex needs of additional 'damaged children' and particularly so where that damage arose in that parents own care.

  It is also right to bear in mind the complex relationship which continues to exist in circumstances in which M's father is A and N's uncle and in which M's father was part of the problematic history experienced by the children. This is an unpredictable dynamic which requires careful consideration. It has the potential to unsettle the current stability in an unpredictable and damaging manner. I accept this proposition made by Ealing and the PA's.

- **Relationships of value with the potential to provide a secure environment and the views of such individuals:** I am obliged to reflect on the roles of the mother and the PA's although M's father would also fit into this consideration (as a family member who shared a home with the children). In the case of the PA's they have demonstrated both commitment and capacity to provide a secure and enduring home for the children. Their wishes are clear from their application. It seems to me clear they have a relationship of value to the children which is likely to continue. At this point in time this is each of the children's primary relationship of value and anything which undermines it comes with negative implications for the children.

  The mother has a biological relationship with the children and a clear wish to resume care for the children. Her intentions are genuine in my assessment. However, her relationship with the children has substantially ceased following a farewell contact and placement with the PA's. Regard must be had to this reality and of the children at this time having no meaningful continuing relationship with their mother.

Holistic Assessment

21. If I grant leave to oppose, then in doing so I must accept an element of disruption to these children. I must give allowance for the potential for direct negative impact on the PA's with consequential negative indirect impact on the children. The PA's will face a far less certain future, and this may impact on their care of A and N. These children have experienced poor and unsettled care and such an impact would be to be regretted.

22. Against this though I must bear in mind the extent to which the PA's would have been advised as to this potential and, with the developing picture regarding E, I imagine they must already have contemplated this potential for A and N. I must also reflect upon the capacity of the Court to manage the case in such a way as to safeguard the children from direct disruption. Finally, I can rely upon the basic proposition that the PA's will have been carefully assessed and matched with the children. These as damaged children would always have been known to pose challenging characteristics for any carer. It is therefore likely the PA's would have been assessed to be resilient carers and I must bring that into my assessment. Still I must be realistic as to the emotional impact on the PA's.

23. If I refuse leave then I am closing the door to the mother and to the children's prospects of resuming biological family life. If I do that in the light of strong evidence of change then I am doing so without a fully assessed reconsideration of whether adoption remains the only option for the children. This would be a significant concern given the cultural implications for the children and the potential for decisions to be made in any event which impact on their valuable relationship with E. I would be closing the door despite evidence of change and to do so requires a strong counter veiling welfare argument.

24. Viewed holistically there are obvious benefits to the mother's potential for care based around non-severance of family life and around the maintenance of cultural ties. In a context in which I have left M in the care of the mother it might seem counter intuitive not to be open to reconsideration of the issue in point. But there are also downsides. Granting leave brings delay and this is

inimical to the welfare of these children. It has the potential to bring harm without real purpose if the argument ultimately fails. It could unsettle the placement and in the case of these children it might be an alternative placement would not be found. It would be said for Ealing and the PA's that there remain sufficiently clear signposts to signal the likely outcome of such process.

25. Against this one has the positives of the continuing care given by the PA's. As noted above they have shown commitment to the children and the children are settled in their care. This contrasts with the assessment in 2018 when the principles of placement were determined as required but without clarity as to the availability of carers who could meet these children's needs. Now there is evidence of available carers. I have noted the positive that might flow from a maintained relationship with E fostered by the two caring families. A key feature of this placement is a settled existence free of emotional turbulence.

26. Against this is the severance of family life. This is now very clear and is in focus in this application. This severance extends to cultural and heritage and potentially extends to a severance of relationship with E. This is a stark and significant step to take and can only be sanctioned where nothing else will do. The heart of this application is the suggestion that there is room for concluding there are prospects of arguing that something else will do.

Conclusions

27. As in the case of E I judge the mother's case has solidity when one considers the extent of change evidenced. The case law makes clear that in such

circumstances the welfare counter argument must be the stronger to refuse leave.

28. On my assessment of the evidence there are weighty features which sit in the assessment around the historical experiences of the children; the need for a settled placement in which to emotionally progress and the uncertainties and potential risks of seeking to predict this in the care of the mother. There are additionally the concerns as to disruption.

29. However in my assessment these concerns can be managed by the Court appropriately to limit risk whilst at the same time permitting appropriate reconsideration. An important feature is the uncertainty concerning E. I have considered the counter veiling arguments with care and recognise their force, but I am not persuaded they are such as to justify refusing permission notwithstanding the nature of change demonstrated.

30. I will therefore give leave to oppose to the Second Respondent. The application will now be listed with the case of E on 30 April 2020. The guardian appointed in the case of E should be appointed to represent the interests of A and N. I urge the parties to make as much progress co-operatively as possible and to file a draft order in advance of that hearing.

31. This judgment will be handed down on 8 April 2020 at 2pm. I have already indicated that I do not require attendance at the hearing. If a party seeks to challenge my decision, then I am happy to receive this request in advance of the hearing. I will deal with it and circulate my response. Can I ask those acting for the First Respondent to file an appropriate draft order by 12 noon on Wednesday? Of course if the parties do wish to attend the hearing (by

telephone) then they may, and they should inform me of this wish by 4pm on 7 April 2020 giving the necessary contact details.

32. I will accept any typographical corrections and requests for clarification by 10am on 7 April 2020.

His Honour Judge Willans