

G (A Child) [2015]

[2015] EWCA Civ 119

25/02/2015

Barristers

John Tughan KC

Court

Court of Appeal (Civil Division)

Practice Areas

Public Children Law

Summary

Appeal by the mother against a decision to refuse her leave to apply to revoke a placement order. Appeal allowed and matter remitted to be heard by a different judge

Facts

J, a six year old boy, had been in foster care since August 2012, when care and placement orders were made by a Deputy District Judge (DDJ). The mother later applied for leave to apply to revoke the placement order, which was refused by a Circuit Judge (CJ) in September 2014. The mother was granted leave to appeal the CJ's refusal.

Macur LJ noted that the threshold criteria in the original proceedings were "more than satisfied"; however, it was not clear as to the basis on which the DDJ made care and placement orders as no transcript of the August 2012 judgment was available. Significantly, the transcript was not available to the CJ who considered and refused the mother's application in September 2014, nor did the CJ have the agreed threshold document.

The only note of the August 2012 judgment was a "note of final hearing" prepared by counsel for the local authority for his instructing solicitor. This was not a full note of the judgment, but a summary of the judge's conclusions and a subjective assessment of the hearing and its outcome by counsel and had not been approved by the DDJ. However, the note was before the CJ, who relied upon it.

A transcript of the CJ's judgment was available. The CJ correctly summarised the test for leave to apply to revoke a placement order as being a two stage test – first to consider whether there has been a sufficient change of circumstances and if so, to then consider whether to exercise her discretion to grant leave.

In respect of the first point, there were significant disputes of fact between the mother and the local authority, but no oral evidence was heard and there was no indication if the CJ accepted the factual basis of the mother's submissions. Despite this, the CJ concluded that she was not satisfied that there had

been a change of circumstances as defined in *Re P (Adoption: Leave Provisions)* [2007], so did not go on to consider whether to exercise her discretion.

The mother appealed this decision and appeared before the Court of Appeal in person. When granting permission, three arguable points were identified: (1) the CJ set the bar too high and was wrong to find there had been no relevant change in circumstances, (2) the CJ was wrong to proceed on the basis that the local authority's disputed allegations were true, and (3) in assessing whether there had been a change of circumstances, J's circumstances should have been taken into account in that the adoption panel refused to approve the match between J and his identified adopters.

Apart from the issues in the grounds of appeal, there were procedural concerns about the hearing before the CJ. It was wrong to proceed in the absence of a transcript of the DDJ's judgment or the threshold document and wrong to accept counsel's unapproved note as a sufficient substitute, despite the intention of avoiding delay. This approach led to an attempt to reconstruct the evidence based on the social worker's and guardian's reports. Even if it was possible to satisfactorily reconstruct the evidence, the CJ would have been incapable of forming a valid judgment about the change in the mother's circumstances without making findings on the disputed facts. The CJ's decision indicated she implicitly found against the mother.

Further, no gloss should be added to the words of the statute to set additional requirements for the change in circumstances and thereby set the bar too high. Issues as to the sustainability of the change and the impact it would have on the child should be considered at the discretion stage.

Held

The appeal was allowed on the basis of the first and second grounds of appeal, the CJ's order was set aside and it was directed that the mother's application be heard by a different judge.

Macur J made obiter comments that, depending on the facts of the case, the child's change of circumstances (such as a failure to place for adoption in a timely manner) may be relevant. It is unlikely that there will be many situations where the change in the child's circumstances alone would be sufficient to open the gateway, but the court should not disregard such changes, whether good or bad, if it is also charged with evaluating the sufficiency of the nature and degree of the parent's change of circumstances.

Finally, shortly before going into court, an uninvited statement by J's social worker was sent to update the court on family finding for J. Although this practice is increasingly common, it is entirely inappropriate to send in further evidence without using the normal procedure to apply for permission to admit fresh evidence.

Permission

Family Law Week 