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Re R (Children) (2011)

[2011] EWCA Civ 1795

09/06/2011

Barristers
Rex Howling KC

Court
Court of Appeal (Civil Division)

Practice Areas
Public Children Law

Summary
Whilst a judge conducting a fact-finding exercise in care proceedings following allegations of child sexual abuse had earlier expressed concerns and the need for caution before any finding could be made, he had been entitled, having found DVD evidence of a police interview with one of the children to be compelling, to have nevertheless gone on to conclude that a father had sexually abused his two daughters with their mother's knowledge. That the judge had made up his mind only at the end of the hearing was a wholly legitimate aspect of the trial process.

Facts
The appellant father (F) appealed against a finding of fact that he had sexually abused his two daughters (R and G) with the knowledge of the second respondent mother (M). F and M had lived together with R and G, who were aged six and three. Following allegations of domestic violence against M, F left the family home and was arrested. The police exercised their power to remove the children under the Children Act 1989 s.46. They were placed in the care of the first respondent local authority under interim care orders and remained in foster care. Allegations of sexual abuse by F subsequently arose when R spoke to a social worker, and whilst in foster care she exhibited sexualised talk and behaviour. During a further conversation with a social worker, R demonstrated her ability to maintain perspective and not be put off by others, including M, who suggested she had made a mistake. Further allegations of abuse against F arose during R's subsequent achieving best evidence (ABE) interview with the police. In the course of care proceedings, the judge was required to make findings of fact in respect of the sexual abuse allegations. He found that no reliance could be placed on the evidence of either F or M, and he set out the matters which were indicative of the need for caution, including flaws in the ABE interview process. The judge expressed the need to exercise very considerable caution before any finding of fact could be made, but went on to state that, having viewed the DVD of the ABE interview, it had a powerful effect since R had been natural and relaxed, had given no sign of having been coached, had given consistent evidence and had been unafraid to correct her interviewer on points of fact. He concluded, after a 13-day hearing, that F had abused R and G, and that M had known that the abuse was going on. F contended that, having rightly expressed his concerns and the need for caution, the judge had erred in

nevertheless going on to make the factual findings he had based on his impression of the DVD of the ABE interview. He submitted that since the effect of the judge's earlier comments had been to discourage him from cross-examining the officer who had interviewed R or make further submissions in respect of the interview, fairness required that the judge should have limited his conclusions. By a respondent's notice, M argued that the judge had been wrong to have made the findings he had in respect of her role. The local authority, supported by the third respondent guardian, contended that the judge had been entitled to make reach the conclusion that he had.

Held

It was important for a judge to be able to think aloud in the course of a trial, and it would be helpful to counsel to know what a judge was provisionally thinking. In the instant case, the judge had not expressed a concluded view and the parties had urged upon him the importance of the interview evidence, the validity and reliability of which had remained a live issue throughout the trial. Further cross-examination of the police officer would not have resulted in anything causing further impact on the deficiencies of the interview and the parties had made full submissions on that issue, notwithstanding the sceptical view of the judge, and put before the court all that they had wanted to over the 13 days. That the judge had made up his mind only at the end of the hearing was a wholly legitimate aspect of the trial process. He had had in mind all relevant matters when balancing the reasons for caution against the compelling effect of the DVD evidence. In those circumstances, his reasoning was entirely adequate and there was no reason to interfere with his decision. (2) The case management history of the instant case was unfortunate in that, contrary to long-established protocol in care proceedings, no one judge had been allocated to the case, which led to prolonged proceedings vastly exceeding the aim of concluding matters within 40 weeks. R and G had, consequently, already been in foster care for 13 months and the final hearing was still some months away. The protocol set out the need to allocate such cases to one judge, for case management purposes at least, to maintain judicial continuity between the fact-finding hearing, which was to be treated as part-heard, and the disposal hearing. It was disturbing that there were still care cases involving serious allegations where there was a failure to apply the normal processes and protocol of the court.

Appeal dismissed

Permission