

# LA v X & others [2011]

## [2011] EWHC 3401 (Fam)

09/12/2011

### Court

Family Division

### Practice Areas

Public Children Law

### Summary

Application by maternal grandmother of X prior to a fact-finding hearing for her 17-year son, who suffers from Asperger's Syndrome, to give oral evidence. Application refused. The balancing exercise set out in Re W [2010] UKSC 12 applied.f

### Facts

The court considered the maternal grandmother's preliminary application prior to a fact-finding hearing for her 17-year son [PJ] to give oral evidence. PJ is diagnosed with Asperger's Syndrome. Theis J refused the application applying the balancing exercise set out in Re W [2010] UKSC 12.

X was born in March 2010 and had been placed with the paternal family very shortly after his birth. The LA's threshold criteria related to the future risk of significant sexual and emotional harm as a result of the alleged sexual abuse and behaviour within the maternal family. The LA relied on a number of matters including the ABE interviews of PJ, the maternal uncle aged 17, and SJ, the maternal aunt aged 10. SJ and PJ made allegations of inappropriate sexual behaviour which was alleged to have been instigated by the mother and the father.

The mother made counter allegations against the maternal grandmother, grandfather and her sister SJ and her brother PJ. As a result, the relevant family members were joined as interveners. SJ and PJ were represented by the Official Solicitor due to their age. The mother issued an application for SJ and PJ to give evidence. However, the mother subsequently withdrew this application.

Before the fact-finding hearing took place, a number of concessions were made by the parties and in particular the mother. This left a relatively discrete issue for the court to determine. Notwithstanding the fact that no party required PJ to give evidence, the court was invited to consider the matter and the court gave a short judgment refusing the application.

On the basis that the findings were no longer being sought, the relevant parties were discharged as interveners, save for the OS who remained to deal with any issues that related to disclosure.

On the first day of the fact-finding hearing the mother changed her position, withdrawing the concessions that she had made. The mother's legal team withdrew and a new legal team was put in place.

The maternal grandmother DJ was re-introduced as an intervener. The mother alleged that the allegations made about her by PJ and SJ in their ABE interviews had been made as a result of the 'influence, suggestion and distortion' by DJ. DJ issued an application for PJ to give evidence in support of her position that he has not been subject of influence and suggestion in relation to the allegations.

The relevant law is set out at paragraphs 12 to 15 of the judgment, including the leading case of *Re W* [2010] UKSC 12. The court also considered the 'Guidelines in relation to children giving evidence in family proceedings' published by the Family Justice Council. The court was also directed to two criminal cases [paragraph 13].

The judge found that PJ was competent in accordance with S96(2) Children Act 1989 and then turned to consider the discretionary exercise and the guidance which is set out by Baroness Hale in the decision of *Re W* paragraphs 22-28. The judge said that it was necessary for her to balance the two considerations, the advantage that giving oral evidence by PJ will bring to the determination of the truth and the damage it may also cause to PJ's welfare or any other child [paragraph 15].

The judge was clear that PJ's disability was not a reason why he should not give evidence but was a relevant factor.

The expert evidence was that he could give oral evidence but he would need to do so with support, due his difficulties processing information and the risk of him becoming overwhelmed. Support could be provided by way of an intermediary and an organisation to provide such support was identified. PJ would also need to be prepared in advance for giving evidence by being taken through in some detail the areas that he is likely to be asked about. This evidence could be given by either a pre-recorded interview or by way of video link.

The expert's opinion was that on balance the risk of harm to PJ tipped in favour of her not recommending that he should give any further evidence whether by way of pre-recorded interview or by video link.

The position of the parties was that DJ submitted that it was crucial that the court heard from PJ and that he should be given the opportunity to participate. Having heard the oral evidence of Dr SG, DJ was concerned about the adverse impact on PJ of giving evidence and submitted that the way forward was for PJ to take part by way of pre-recorded interview [paragraph 12 of the FJC guidance].

The LA did not support PJ giving live evidence but by way of a written statement and pre-recorded interview. Further, that the process of PJ giving evidence was unlikely to give clarity.

The mother and father's position was that the support measures required as outlined by Dr SG would be very likely to result in unfairness as the evidence would be 'contaminated'. The proposed measures would seriously undermine the evidential value of any material obtained.

The children's guardian position was that the matter was finely balanced and that there were two important considerations in respect of the child; fair trial and delay. The best way forward would be by way of a pre recorded interview but due to the extensive preparation needed the weight the court could attach to the evidence would be unlikely to assist the court. The risk of an adjournment if PJ were to give evidence would not be in the child's best interest due to the delay. On balance the court should refuse the application.

The OS for PJ urged the court to hear PJ's evidence by video link. The OS said that given PJ's age and his consistent wish to give evidence, he should be afforded the opportunity to do, the court could hear his evidence and decide what weight to attach to it.

At paragraph 32, the judge, undertaking the balancing exercise, reminded herself of paragraph 23 of the Re W and decided to refuse the application for PJ to give evidence. In summary, the judge concluded that (1) there is real doubt that PJ fully understood the consequences of giving evidence (2) the adverse risks to PJ's welfare (3) the decision reached was not as a result of PJ's Asperger's but on the facts and circumstances of the case, the areas that would need to be covered in his evidence, the issues to be determined and the other evidence available (4) due to the PJ support requires to give evidence, the evidence in all likelihood would be of limited, if any, evidential value (5) PJ would have to be asked about matters which covered an extensive period of time, PJ has real difficulty with abstract concepts of time (6) Article 6 and Article 8 rights are engaged but all parties recognise that there is other material available to the court to determine the issues (7) PJ's evidence is not critical to the determination of the issues (8) any delay would be contrary to the welfare of X (9) The distress felt by PJ is not a reason alone to grant the application, PJ can be reassured that the court has had his ABE interview and will pay careful attention to it.

### **Held**

The court went on to consider the funding of the cost of intermediaries at paragraph 36. The OS had made enquiries of the LSC about the costs of an intermediary. The LSC said that the use of an intermediary was analogous to the use of an interpreter and as such should be funded by the court. The judge made enquiries of the court but no clarity was achieved by such enquiries. There is no scheme available for family cases as there is in criminal cases. The judge considered that there are potential Article 6 and Article 8 implications.

### **Permission**

Family Law Week  Family Law Week