

# Re W (Fact Finding: Hearsay Evidence) (2013)

**[2013] EWCA Civ 1374**

06/11/2013

## **Barristers**

Alex Verdan KC

## **Court**

Court of Appeal (Civil Division)

## **Practice Areas**

Public Children Law

## **Summary**

A judge had erred in the way she dealt with hearsay evidence on which she had relied to make findings of fact against parents in the course of care proceedings. Her judgment did not show that she had subjected the evidence to sufficiently critical scrutiny, and it did not reveal the decision-making process that had led her to conclude that the local authority had made out its case.

## **Facts**

The appellant parents (F and M) appealed against findings of fact made against them by a judge in the course of care proceedings.

F and M had eight children. In addition, M had a 28-year-old daughter (T) from a previous relationship. The care proceedings concerned five of F and M's children, the eldest of whom (C) was 15. After a fact-finding hearing, the judge found that F had sexually abused T and C over a number of years. She found that M had known that F was abusing T but had done nothing to protect her. The local authority's evidence was principally hearsay, comprising disclosures made by T, both as a child and as an adult. T suffered from depression and had learning difficulties. She neither made a witness statement nor gave oral evidence. In the months leading up to the fact-finding hearing she wrote two letters retracting her disclosures. The local authority reported that she was under pressure from F and M, and that she felt unable to make a statement confirming her disclosures. At the hearing, social workers gave evidence of what she had disclosed to them as an adult, and things she had said and done as a child. However, they gave no up-to-date information about her position. They did not explain what efforts they had made to obtain a statement from her or to secure her attendance at court, nor why any such efforts had been unsuccessful. The judge accepted the hearsay evidence and found that F and M had put pressure on T to withdraw her allegations.

F and M submitted that the judge should have given the hearsay evidence no weight at all.

## Held

The evidence of what T had said and done as a child was in the form of a social worker's note of a telephone call from a health visitor. The note had been taken in 2003, and the call related to an incident reported by T's maternal grandmother and said to have taken place in 1990, when T was about five. There were no supporting details and, at the fact-finding hearing, the grandmother denied that any such incident had taken place. By the time the account reached the court, it had gone through a number of hands: the health visitor was unlikely to have been a first-hand witness to what she reported, and the social worker taking her call was not one of those giving evidence. The judge, however, accepted the evidence as an accurate record of the incident. The problem with her approach was that she failed to undertake any critical scrutiny. She should have addressed the deficiencies of the note. While she may have had the relevant issues in mind, she had not articulated them in her judgment. There was no recognition that the evidence was multiple hearsay, related to events of some considerable age, and was complicated by the absence of detail. Given the limitations of the material, the judge should have done more by way of evaluation (see paras 16-20 of judgment). The disclosures T made as an adult were central to the local authority's case. Where the evidence of an adult was so central, the court would normally expect her to give evidence. Where it was impossible to obtain a witness statement from her, or to secure her attendance at court, the court would need to know why, so that it could consider the reason when estimating the weight to be given to any hearsay evidence. A judge might be less uncomfortable about giving weight to hearsay evidence if she knew that there was a good reason for the witness's non-engagement. The retraction of a complaint normally required careful consideration. While it did not prevent a judge from accepting the original allegation, it raised questions that she had to address. In the instant case, the judge had case-managed the proceedings throughout and was in a good position to piece together the evidence to provide a solid basis for her judgment. However, her judgment dealt fairly briefly with the evidential material and did not show that she had put together the relevant evidential pieces to reveal an overall picture that outweighed the difficulties attending the hearsay evidence. The judgment should have identified the factors the judge considered to be significant in pointing to abuse, the features that undermined that hypothesis, and why, on balance, she found that the local authority had established its case. While the judge might well have gone through that process, her judgment did not clearly show that she had done so. Her findings therefore had to be overturned and the matter remitted for re-hearing (paras 21-32).

Appeal allowed

## Permission

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