

Re J (A Child) (2014)

[2014] EWCA Civ 875

27/06/2014

Barristers

Kate Branigan KC

Court

Court of Appeal Civil Division

Practice Areas

Public Children Law

Summary

A judge's conclusion, in the context of contact proceedings, that a complainant's allegations that her uncle had sexually abused her over many years were fundamentally true had to be set aside where there were serious detriments in her fact-finding analysis. The judge had wrongly failed to bring the absence of ABE evidence or a narrative statement into her evaluation, she had given disproportionate weight to the complainant's emotional presentation during the hearing, and she had dealt with evidential inconsistencies on an important aspect of the case as a matter of minor significance.

Facts

The appellant (F) appealed against the decision (A (A Child) (Vulnerable Witness: Fact Finding), Re [2013] EWHC 2124 (Fam), [2014] 1 F.L.R. 146) that allegations of sexual abuse against him by his niece, the second intervenor (X), were fundamentally true.

X, when aged 17, had complained to child protection professionals that F had sexually abused her since she was eight. She claimed that the "trigger event" was her having told F's wife (M), her aunt, that he was having an affair. X stated that M had not believed her, and as a result of her "wrong" F had punished her by having sex with her. She later retracted her complaint, saying that she had lied, but then renewed it. When X made her allegations, F and M had divorced and their daughter (D) was seven years old. The truth of the X's allegations fell to be determined in the context of F's future contact with D. X had never provided a narrative statement of her allegations and there had never been an ABE interview. The evidence consisted of contemporaneous records of the complaint, witness statements and oral evidence from the professionals to whom she had spoken, and two days of oral evidence from X, during which she had often become distressed and given her answers to questions through an intermediary after she and X had conferred in private. M confirmed in evidence that X had never told her about any affair, and X accepted that she had not reported it to her. The judge stated that she was impelled to conclude that X's claims were true, based on X's presentation at the hearing, the extraordinary nature of the allegations, including her assertions that she "deserved to be punished", the content and constancy of X's evidence, X's motivation and the emotional cost of her participation. In respect of inconsistent evidence over the

“trigger event”, and M’s denial that X had told her of F’s infidelity, the judge found that it may have been troublesome for X to differentiate between what F had told her about the consequences of telling M and what she had herself said.

F contended that the judge’s balancing exercise was fatally flawed in that an unjustified degree of weight had been given to X’s evidence, the factors either for or against the making of a finding had not been balanced, and there had been no proper analysis of the core allegations.

Held

The Court of Appeal had to exercise the greatest restraint before contemplating overturning a finding of fact made at first instance, Piglowska v Piglowski [1999] 1 W.L.R. 1360 applied. In the instant case, the need for such appellate caution was enhanced by the judge’s great experience in conducting sensitive fact-finding hearings and the manner in which X had given her oral evidence. Whilst those factors supported the judge’s finding, other aspects of the case were troubling. The lack of an ABE-compliant process or narrative account was notable, but the judge had not mentioned it, let alone brought that absence into her evaluation. That was a significant omission. The emotional content of a complainant’s testimony was plainly an essential component in the evaluation of key oral evidence, but a judge had nevertheless to step back and conduct a reality check by having regard both to the factual content of the evidence and to the other evidence in the case. Strong emotional presentation might otherwise have a disproportionately powerful effect on the otherwise dispassionate process of determining whether or not a particular fact was established on the balance of probabilities. A further matter that needed to be met head-on in the judicial evaluation was X’s evidence concerning the “trigger event”, which was a core theme which ran through the entirety of X’s account. M’s evidence and X’s retraction called for very careful analysis by the judge but she had failed to engage with the inconsistency and its importance and had sought to explain it away as if it were a matter of only minor significance. That element of the evidence had been given no, or disproportionately low, weight. Further, there had been no evaluation of the impact that the compromised process of X giving evidence through an intermediary had had upon the court’s ability to rely upon the factual allegations that X made within her evidence as a whole. Those factors amounted to serious detriments in the judge’s fact-finding analysis, and her conclusion had to be set aside. Even allowing the fullest justifiable weight to X’s demeanour, a finding of fact against F was not open to the court on the evidence. No greater clarity was likely to be obtained by a retrial, and the evaluation of X’s claims had to end. Any determination as to D’s welfare and contact would therefore proceed on the basis that F had not engaged in any sexually inappropriate behaviour with X (see paras 69-70, 72, 75, 77, 83, 85, 88, 94, 98-99, 101, 103-104 of judgment).

Appeal allowed

Permission

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