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Re H (A Child)

[2015] EWCA Civ 1284

11/12/2015

Barristers
Chris Barnes

Court
Court of Appeal

Practice Areas
Public Children Law

Appeal of Russell J's decision (made on rehearing) to order the return of a child who had been placed with prospective adopters to the care of her father.

The case concerned a child (W) who was the youngest of four siblings, three of whom had remained in the care of their father. W had been made subject to care and placement orders and had been placed with prospective adopters.

By the time the case reached the Court of Appeal (on the application of W's prospective adopters) there had already been lengthy and complex proceedings as follows:

Care and placement applications before DJ Gamba. The three older children were placed with father.
Care and placement orders were made in respect of W.
Application for adoption orders issued by the prospective adopters.
Application for leave to oppose the adoption application issued by the father
Applications for permission to appeal the original care and placement orders and the refusal to grant leave to oppose. These were heard by HHJ Farquhar who refused permission in respect of the care and placement orders but granted it in respect of the leave to oppose application.
Contested adoption hearing listed in front of Russell J.
Application to the Court of Appeal in respect of HHJ Farquhar's refusal of permission to appeal care and placement orders: granted by McFarlane LJ before the hearing listed in front of Russell J.

(The effect of the order of the Court of Appeal was that the original care and placement orders were set aside and W remained instead placed with her carers under an interim care order. Thus, by the time the matter came before Russell J its scope had enlarged to that of a full welfare hearing.)- Matter heard by Russell J at which she ordered that W be removed from the prospective adopters and returned to the care of her father. W was made a ward of court.
Application for permission to appeal and for a stay initially refused by Russell J but subsequently granted by McFarlane LJ.

The overall basis of the appeal was that the proceedings before Russell J were sufficiently flawed to render the outcome unsafe. The specific grounds were that:

The judge had stated a clear view at the outset amounting to judicial bias.

She had failed to attach sufficient weight to the lifelong impact of the removal of W from the care of the adopters.
She had misunderstood the effect of the earlier Court of Appeal decision; this had led to the experts' changing their views.
She had failed to attach appropriate weight to the adoptive family's Article 8 rights.
Her "clouded" judgment in respect of the local authority stance prevented her from forming a balanced view.
Consideration of the grounds of appeal required a detailed analysis of the hearing before Russell J, during the course of which the position of the experts had shifted (broadly speaking) from supporting W remaining in placement to supporting a return to her father. The Court of Appeal judgment quoted extensively from the transcripts of the evidence, setting out, in particular, those passages relevant to the shift in expert opinion and those where judicial intervention was said to have been unduly influential. The Court of Appeal also listened to the tapes of passages of possible relevance to bias. McFarlane LJ then dealt with each of the grounds in turn.

The manner in which the judge had conducted the short opening session was unfortunate. The "cutting across" counsel for the appellants sounded like "sharpness and irritation". Quoting Hedley J from the case of Re L at that stage can only have "generated an indication of judicial thinking in the minds of those present"; this was a sensitively balanced case that required that all sides of the argument be fully and fairly considered. The judge's interventions at that stage had been both unnecessary and unhelpful.

As for the judge's interpretation of the previous Court of Appeal decision, whereas key passages from the hearing suggested that her view was that the original decision had been flawed, the appellants asserted that the appeal arose from deficits in the analysis in the judgment of the District Judge but that the appeal court had been wholly neutral as to the actual welfare merits

McFarlane LJ concluded that, as a matter of "strict law" the latter interpretation was correct although (as asserted by counsel for the father seeking to uphold the judgment) this was a legal distinction, likely to go above the head of a young girl, who in the future might simply understand that she had been removed from her family of birth because of an error by a judge.

Russell J's erroneous understanding of the appellate decision and expressed views that W ought not to have been made subject to a placement order or placed for adoption led to the need to consider the potential impact of those views on (a) the experts and (b) her own evaluation and analysis of W's welfare.

In respect of the experts, during the course of the appeal hearing it transpired that prior to the hearing, although informed that the care and placement orders had been set aside, they had not been provided with the judgment of the Court of Appeal. On the first day of the hearing, albeit they were given notes emanating from the father's team which purported to provide a record of the appeal hearing, there were no formal discussions conducted with counsel. Given the prominence that the basis of that decision acquired, it was regrettable that no advocate had sought to ascertain the experts' understanding of it. On a more basic level, adherence to the practice requirements regarding jointly instructed experts, entailing transparency of communication, might have prevented these problems having occurred. Moreover, for these issues to have only been investigated during the course of the present appeal

hearing was “plainly unsatisfactory”.

As to the substance of Dr Willemsen’s evidence, it strongly suggested that, not only had he only just received the relevant information, he had understood that the appeal court had held that the original decision was seriously flawed and that the placement of W away from her father had been a miscarriage of justice. That understanding was significantly different from the true position.

The position of the independent social worker (Mr Hatter) was less clear but, in essence, he deferred to Dr Willemsen, as did the guardian.

This “unfortunate process”, compounded by the judge’s misunderstanding of the appeal court decision, was not the end of the matter; it was also important to see how the judge had factored Dr Willemsen’s erroneous view into her overall analysis of his evidence. She had found his evidence balanced and fair and had taken note of his anxiety about W finding out in later years, not only about the overturning of the orders placing her for adoption, but of the resistance of her adoptive family to her being reunified with her birth family. She had concluded her analysis with an inaccurate direct quote from the evidence in relation to the potential impact on W of learning of the decision of the Court of Appeal.

With regard to the judge’s analysis of the law, she had omitted to place the quotations taken from Hedley J in Re L and Templeman J in Re KD within the context in which they had been made; namely, the establishment of threshold rather than of a welfare decision. In the circumstances, her reference was, as a matter of law, out of place in a case where the evaluation required was purely in respect of welfare. She had, however, also made correct reference to Re B [2013] UKSC 33 and subsequent case law, to the relevant sections of the welfare checklist in the ACA 2002 and to the need for proportionality and to consider adoption as the avenue of last resort.

Russell J had also, on a number of occasions, used the word “presumption” in the context of there being a presumption that a child should be brought up within its natural family. In public law proceedings there was no such presumption. The only principle, at the welfare stage, was that the child’s lifelong welfare was the paramount consideration.

That said, the “presumption” was not a matter upon which this case turned. Its inclusion in the instant judgment was to highlight the need for caution. As case law had made clear, in public law proceedings, once threshold has been crossed, the evaluation of welfare in each case is to be determined on the basis of a proportionate approach to the facts rather than the application of any “presumption” in favour of the natural family.

McFarlane LJ concluded that, subject to his comments about the use of Re L, the judge’s approach to the law had not (as asserted by the appellants) lacked balance.

Turning to the welfare analysis conducted by Russell J, having listed the factors (on both sides) that she had taken into account, McFarlane LJ noted the appellants submission that she had omitted to mention Dr Willemsen’s concern that if W failed to make the transition to her natural family she would be left, in the long term, in an “emotional void”.

Drawing all these matters together, McFarlane LJ commented that this was by no means a straightforward appeal. He was acutely conscious of the need to achieve finality. W had not been well served by the “procedural history” of the case and allowing the appeal would necessitate another hearing. The grounds were, moreover, about the process rather than the outcome of the hearing. No party was suggesting that Russell J’s decision itself was wrong.

Despite his “anxious approach” he was nevertheless driven to the following conclusions:

The judge had been wrong in her analysis of the earlier appellate decision, the outcome of which had done no more than to remove the District Judge’s orders (because of the lack of analysis within his judgment) without holding that his welfare decision had been wrong.
Her erroneous understanding of the first appeal impacted on her conduct of the hearing, the understanding of the experts and her evaluation of W’s welfare.
The impact on the conduct was established from the very outset of the case. The judge’s statement that “the court needs to keep in mind that, had the proper decision been made in the first place, there would have been no placement” was wrong, as was her reliance on her erroneous understanding of the Court of Appeal decision as support for her view that, had matters been correctly analysed in 2013, W would not have been placed for adoption.
The process of communicating the decision in the first appeal to the experts (compounded by the judge falling into the same error) facilitated Dr Willemsen having an understanding of the situation that was “substantially adrift” from the truth; this had such a major impact that it not only caused him to change his recommendations but led, in turn, to the independent social worker and the guardian following suit.
The “fault line” that reliance on these views produced in the judge’s evaluation of W’s welfare needs was enough to render her ultimate determination unreliable.
The judge had also erred significantly in that, in her analysis of the risk of W falling into an “emotional void”, she did not engage with the issue of potential longer term difficulty.
The “concluded view” formed by the judge had been in respect of the Court of Appeal decision, not the outcome of the matter before her. Although fundamental in nature, it was not evidence of judicial bias, which had not been established.
Accordingly, the appeal was to be allowed with the welfare issue to be reheard before a different tribunal.
For the avoidance of doubt, the Court of Appeal did not assert that the outcome selected by the judge was either right or wrong.

To read the judgment, click here.