

Re W (A Child) (2017)

[2017] EWHC 829 (Fam)

06/03/2017

Barristers

Chris Barnes

Court

Family Division

Practice Areas

Public Children Law

Complex and extensive proceedings heard by the President in respect of a contested adoption.

The case concerned W, a girl born in November 2012. Following care proceedings brought by the local authority, W was made the subject of care and placement orders in September 2013, and placed with prospective adopters, Mr and Mrs A in January 2014. W's siblings - X, Y and Z - remained with their father under a 12-month supervision order, and enjoyed extensive contact with their mother.

The proceedings that followed were extensive and complex. On 30 October 2013, the father, acting as a litigant in person, filed a notice of appeal out of time, which was rejected on the papers. Subsequently, when Mr and Mrs A made their application to adopt W in May 2014, the father sought leave to oppose the making of an adoption order. This was also rejected. The father then sought to renew his challenge to the original care and placement orders, and sought to appeal against the order denying him leave to oppose the making of the adoption order. The first application (to renew his challenge) was refused, but the second (the appeal) was successful and the re-hearing of the father's application for leave to oppose the making of an adoption order took place in December 2014.

In the interim, however, the father had filed in the Court of Appeal his application for permission to appeal his application to renew his challenge to the original care and placement orders, which was refused on the papers by King LJ on 28 January 2015 but on renewed oral application was granted by McFarlane LJ on 18 March 2015. On 6 May 2015, the father's appeal was allowed on the basis of the inadequacy of the first instance Judge's analysis and reasoning; the Court of Appeal did not express a view on the underlying merits of the local authority. The matter was therefore returned to "be re-investigated at a full hearing" before a High Court judge. [19].

Ms Justice Russell heard the matter over five days and handed down judgment on 22 July 2015. It should be noted that the local authority's position by the end of that hearing had altered, in that it was no longer seeking any public law orders. As such, the choice for the court was between a child arrangements order in favour of the father or an adoption order in favour of Mr and Mrs A. Ms Justice Russell determined that W should be reunited with her birth family. Mr and Mrs A appealed and their application was granted on

11 December 2015. The Court of Appeal concluded that Ms Justice Russell's had not understood the Court of Appeal's decision in the first appeal. Therefore, the proceedings before her were sufficiently flawed so as to render the outcome unsafe, with the result that her order had to be set aside and the welfare issue determined by a different judge.

The Current Proceedings

The matter ultimately came before the President, who had to consider the two substantive applications before the court: the local authority's application for permission to withdraw its applications for care and placement orders in respect of W; and Mr and Mrs A's application to adopt W, their application including an application pursuant to sections 47(2)(c) and 52(1)(b) of the Adoption and Children Act 2002 (ACA 2002) to dispense with the consent of her father and mother. In respect of the first application, which was unopposed, the President held that it was "plainly appropriate" [56] to give the local authority leave to withdraw its applications, as the continuation of public proceedings had no useful purpose or benefit to W. Therefore, the President was left to determine whether to grant the application for adoption and, relatedly, whether there should be any order in relation to post-adoption contact.

The Law

During the course of the proceedings, a number of disagreements between counsel arose as to the appropriate principles to be applied. As such, the President set out at length the relevant statutory and case law that he relied on in making his decision [58-81].

Additionally, the President specifically clarified four legal issues that had been raised by counsel. First, the President that threshold was not an issue, given that the care and placement orders had been set aside and the application for an adoption order was therefore being properly pursued under s.47(2) of ACA 2002. Secondly, the Article 8 rights of W, her siblings, her biological parents, and Mr and Mrs A were all engaged and there was no hierarchy of rights under this provision. Third, notwithstanding the failings of the local authority [also see below], the President would not go so far as to hold that there had been unfairness and a consequent breach of Article 8. Finally, it was not necessary or helpful to consider whether W's proposed return to her father would be a situation so intolerable as to engage Article 3.

The Evidence

The President heard extensive evidence from the parties and a number of experts, including a consultant psychiatrist in child and adolescent psychiatry; an independent social worker, a clinical psychologist; and a consultant clinical psychologist and systemic psychotherapist. The expert evidence in particular is set out in considerable detail at paragraphs 93-176, the President having established at the outset that it was central to the resolution of the case. Likewise, the judgment quotes at length from the parties' final submissions.

Judgment

The President was faced with a "stark choice" [224] between two outcomes for W: (a) adoption by Mr and Mrs A or (b) rehabilitation to her father and birth family, each of which carried risks that were difficult to predict or quantify. The argument put forward on behalf of Mr and Mrs A – and supported by the Guardian – was that if W was adopted, from her perspective there would be no significant change in her life; if any difficulties emerged, they would not do so for some years (if at all), were unlikely to be severe, and could be mitigated by contact with her birth family. Conversely, if W were to be rehabilitated to her birth family, the trauma of a move from everything she has known would be immediate, severe, and pose a risk to the placement.

In contrast, the father submitted that if she were reunited with her birth family, W would quickly overcome any initial trauma, thereafter facing an unproblematic future. However, were W to remain with

Mr and Mrs A, the placement would be at risk because of the difficulty of creating an honest “narrative” for her to accept, i.e. that she was adopted whilst her siblings remained thriving in the birth family.

After acknowledging that the starting point had to be W’s current reality, the President held that there were “considerably” more risks and uncertainties in moving W from Mr and Mrs A to her birth family than in leaving her where she was [246]. Should W be removed from Mr and Mrs A, there was a high probability of fairly immediate and significant levels of distress and trauma and “a very real likelihood that the placement would be put under such pressure that it might break down, which if it were to happen would carry with it a more than fanciful risk of catastrophe” [237]. Further, the risk of the “narrative” putting the placement under unbearable and unsustainable pressure was small.

In contrast, W did not have a meaningful relationship with her birth family; her primary relationship was with Mr and Mrs A and their son. In those circumstances, notwithstanding the excellent care and commitment that the father offered, the President considered that it would be “almost too much for any parent in his situation” [250] to meet the needs of W. The President held that the risks of moving W from Mr and Mrs A were too great, and potentially so unmanageable, as to demand that they not be run, and that W’s welfare necessitated that she remain with Mr and Mrs A. He further found that it was in W’s best interests to be adopted by Mr and Mrs A and that her welfare required parental consent to be dispensed with; nothing else would do. As such, the President granted Mr and Mrs A’s application for adoption.

The President also considered whether any post-adoption contact orders should be made. He noted the general agreement amongst the experts that direct contact would safeguard W’s long-term psychological and that it should be started sooner rather than later. However, the President held that there should be no order as to contact; rather it must be for Mr and Mrs A, as W’s parents, to decide when, how and in what circumstances contact should begin and develop.

Postscript: the Local Authority’s Failings

Though the President declined to determine whether the behaviour of the local authority constituted a breach of the parties’ Article 8 rights, he was scathing about their failings. In particular, he highlighted the deficiencies of the initial interim threshold document, which he held was “both in form and in substance a most unsatisfactory document” [31], and criticised the local authority for making certain disclosures to the father’s employer in February 2015, causing him to lose his job.

Permission

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