



Neutral Citation Number: [2018] EWCA Civ 2761

Case No: B4/2018/2310

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE FAMILY COURT
HHJ Vavrecka
WD17C01375

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11 December 2018

Before:

LORD JUSTICE LONGMORE
LORD JUSTICE PETER JACKSON
and
LADY JUSTICE ASPLIN

Between :

F (A Child)(Placement Order: Proportionality)

Will Tyler QC and Amy Stout (instructed by JKC Lawyers LLP) for the Appellant Mother
Rex Howling QC and Will Bulman (instructed by Hertfordshire County Council) for the
Local Authority
Philippa Jenkins (instructed by Bretherton Law Solicitors) for the Children's Guardian

Hearing date: 4 December 2018

Approved Judgment

Lord Justice Peter Jackson:

1. This is a mother's appeal from care and placement orders made by HHJ Vavrecka on 31 August 2018 in proceedings concerning a child now aged 15 months, who I will call Robbie. At the end of the hearing on 4 December 2018, we informed the parties that the appeal would be allowed. The care and placements orders were set aside and replaced by an interim care order until the local authority's applications can be reheard. This judgment contains my reasons for concurring in that decision.
2. In short summary, there is no complaint about the judge's legal self-direction, his findings of fact or his conclusion that the threshold for intervention was met. Further, he identified

(1) *The type of harm* that might arise.

(2) *The likelihood* of it arising.

But he did not sufficiently address:

(3) *The consequences*: what would be the likely severity of the harm to Robbie if it did come to pass?

(4) *Risk reduction/mitigation*: would the chances of harm happening be reduced or mitigated by the support services that are or could be made available?

(5) *The comparative evaluation*: in light of the above, how do the welfare advantages and disadvantages of Robbie growing up with his mother compare with those of adoption?

(6) *Proportionality*: ultimately, is adoption necessary and proportionate in this case?

Lacking these components, the judge's analysis did not in my view provide an adequate foundation for adoption in a case where the need for such a profound order is not immediately obvious. With the passage of time a rehearing is unfortunately inevitable, and in view of the child's age we have given directions to expedite this.

The facts

3. By the time of the judge's decision, there was no dispute about the facts.
4. The mother is aged 33. She had a difficult early childhood, with her father leaving home when she was aged eight. She has relied on her own mother for support and advice, not all of it helpful when it came to dealings with professionals. She had a career as a beauty therapist, successfully working on cruise ships for 12 years. However, in 2015 she encountered serious difficulties from a violent relationship, as a result of which she entered a refuge. At this point, she began a pattern of binge drinking in reaction to anxiety. She then struck up a relationship with the father, who she met when attending counselling. Their relationship was characterised by violence and drug use on the part of the father, including violence towards the grandmother.

The local authority first became involved following an incident in October 2016 and it worked with the parents during the mother's pregnancy.

5. The parents separated following a violent incident in September 2017, shortly after Robbie's birth. Two further serious incidents took place in Robbie's presence in December 2017 and the father was briefly sectioned after trying to kill himself. Concerned about the mother's drinking and level of cooperation, the local authority issued care proceedings in December 2017 and applied for Robbie's removal to foster care. That application was refused by HHJ Wilding and an interim supervision order was instead made. A written agreement between the mother and the local authority provided for the grandmother to move in, for the mother not to drink and for Robbie to have no contact with his father. The mother then continued to look after Robbie until 29 June 2018, by which time he was 11 months old.
6. During that stage of the proceedings, the following assessments were obtained:
 - (1) In March 2018, the mother was assessed by Dr Wilkins, an experienced consultant forensic psychiatrist. He found that she did not currently have any psychiatric problems, including mental illness, personality disorder or alcohol misuse (she denied current drinking to him). She had background vulnerabilities in relation to intimate relationships, and between 2013 and 2017 had suffered a significant deterioration in her functioning coinciding with abusive relationships. She had made harmful use of alcohol, falling short of alcohol dependence. Provided she abstained from alcohol it was unlikely that any underlying vulnerabilities would affect her mental health to the extent that it would make it difficult for her to parent Robbie during his minority.
 - (2) Hair strand testing/liver function testing of the mother in February 2018 produced results consistent with chronic excessive alcohol use from October 2017 until January 2018.
 - (3) The local authority carried out a parenting assessment dated April 2018. This found that Robbie had a strong attachment to his mother. She was meeting his basic needs to a good level; she understood the risks posed by the father and needed to continue work in this regard; she had found social services' involvement difficult but was able to communicate and was willing and able to work with professionals; she was able to manage her anxiety sufficiently to focus on parenting Robbie.
 - (4) A psychiatric assessment of the father by Dr Wilkins in May 2018 advised that he has a personality disorder, depression and generalised anxiety disorder; his mental health is significantly affected by poor physical health and homelessness; he could be responsive to therapy but has a limited capacity to maintain engagement.
 - (5) A risk assessment of the father by the local authority did not support direct contact.
 - (6) A hair strand test of the father in April 2018 was positive for cocaine and chronic excessive alcohol consumption from November 2017 to April 2018.

- (7) A special guardianship assessment of the grandmother was negative on the basis of lack of insight, lack of motivation and poor health.
7. On the basis of this information, the local authority filed its final evidence on 25 May 2018. It proposed that the proceedings be concluded with Robbie remaining with his mother under a supervision order. It recorded an incident on 13 May when the parents had been seen together with Robbie in a local pub. It also reported that the mother appeared to have been drinking at a meeting on 17 May, when she denied being in the pub on 13 May. It expressed concern about these incidents and noted that its recommendation was not without risk. Nevertheless, it stated that adoption would be a last resort, and that even though concerns had increased very recently there was insufficient evidence to suggest that it should be the final care plan. There would need to be significant deterioration before this option could be recommended.
8. At the IRH hearing on 30 May, the Children’s Guardian obtained an adjournment of the final hearing (then listed for 18 June) in order to obtain further information about the pub incident and also to allow for further alcohol testing. Testing of the mother showed excessive alcohol levels from December 2017 to June 2018. When limited CCTV evidence was obtained, she asserted that she had had a chance encounter with the father and that they had had breakfast together. However, the full CCTV evidence showed that the parents had been in the pub with Robbie until at least 4.45pm and that the mother had drunk up to a litre of wine during this time. The parents’ phone records for the previous six months showed regular contact in April and May 2018, mostly instigated by the mother, but no such contact before or after that.
9. With the mother’s lies exposed, the local authority applied for Robbie’s removal. On 27 June, the social worker made a statement on these lines:
- (1) Robbie had been seen at least once a month by the social worker, once a fortnight by the health visitor, and once a week by a worker from a baby support group. *“On my visits [Robbie] is a happy, lively baby and enjoys being held and I have had no specific concerns about him and his immediate welfare.”* There is *“a strong, positive attachment”* between Robbie and his mother, with the mother showing emotional warmth and natural awareness of Robbie’s care needs. *“She has been a constant presence in [Robbie’s] life and he responds positively to her.”*
- (2) However: *“[The mother] has also been highly dishonest for the past 12 months about her excessive alcohol use which is proven by two hair strand tests covering a period of several months... During my involvement with [the mother] it was felt that she was fully engaging with the Child Protection plan and was being fairly honest. However, it is highly concerning and disappointing that recent events and test results in fact, made it clear that [she] is unable to work honestly and openly with professionals and has been able to manipulate a number of professionals into assessing that she is positively and truthfully engaging... These recent test results and revelations undermine any positives in this assessment as [the mother] has put [Robbie] at significant risk of harm... During that meeting [at the pub, the mother] gave no thought to the safety and well-being of [Robbie], even leaving him alone with [the father] as she left the table.”*

- (3) Referring to risk factors, the social worker referred to cases where children had been seriously harmed or had died due to the “*toxic trio*” of mental illness, substance misuse and domestic abuse, and stated that the parents’ relationship features all three factors. Robbie is at high risk of significant harm, including a risk of physical harm, due to his mother’s dishonesty regarding the violent relationship with the father and her alcohol misuse.
 - (4) Robbie should therefore be placed in foster care, “*whilst permanence is progressed and agreed by the Agency Decision Maker. Such a placement would protect him from experiencing and being at risk of further significant harm.*”
10. An interim care order was made by HHJ Wilding on 29 June. Robbie was removed from his mother and placed in foster care, where he remains. The mother’s contact was limited to 1½ hours, three times a week.
 11. The local authority then issued an application for a placement order. The care plan proposed adoption with annual letterbox contact.

The hearing and judgment

12. The final hearing took place between 28 and 31 August 2018. The threshold as at December 2017 was agreed under the headings:
 - (1) Exposure to domestic violence, posing a risk of physical and emotional harm.
 - (2) Risk of physical and emotional harm and neglect due to the parents’ poor mental health, alcohol misuse and illicit drug use.
13. By the time of the hearing, the mother did not dispute the allegations against her. She said she had been abstinent for a month and had not seen the father since the incident in May. She asked for Robbie’s immediate return to her care, possibly under a care order. As alternatives she sought an adjournment for three months to allow her to receive further help and show evidence of change, or placement with the grandmother. She produced evidence of abstinence during August, of engagement with the specialist alcohol and drug agency CGL and with other support organisations. She described her efforts to move out of the area to avoid contact with the father.
14. The father did not attend the final hearing due to his mental health problems.
15. The Guardian supported the local authority’s plan. She noted the secure attachment between mother and child, and the mother’s commitment to contact. She had no doubt that the mother dearly loves and is extremely proud of Robbie, and that he is a much-wanted baby. She described meticulous care given by the mother during contact sessions and remarked: “*I worry about her emotional well-being if care and placement orders are made, and I do genuinely worry about how she will manage such a significant loss from her life.*” With regard to risk, the Guardian put it this way: “*[The mother’s] lack of ability to make sound decisions as to who she chooses to be involved with and expose [Robbie] to concerns me as she has directly placed [Robbie] at risk of significant harm. Her need to be in contact with [the father] has*

overtaken her ability to keep her son safe from harm. I fear this pattern may continue if [Robbie] was placed back in her care. Furthermore, apparent continued use of alcohol as a coping mechanism that she appears to have largely been able to hide from professionals places [Robbie] at significant risk of harm. [She] has also sought to protect herself from the risk of losing the care of her son by being dishonest. This adds hugely to the risk in my view...”

16. The Guardian crystallised the current risks as:

- (1) Risk of emotional harm from living with the mother who continues to misuse alcohol and has little insight on the effect of her behaviour on her child.
- (2) Risk of physical and emotional harm from getting caught up in the crossfire of a domestic dispute.
- (3) Risk of physical harm as a mobile baby who needs to be continually monitored by a lucid caregiver.

She considered that there was no plan that could be put in place to secure Robbie's safety within his timescale. Placement at home under a care order would not be in his best interests, as it would be subject to continual review and intervention, which would be stressful for the mother. She would have to achieve abstinence over a sustained period of 6-12 months before such a plan could be considered. She needs intensive therapy to address her own needs in regard to drinking and being drawn to perpetrators such as the father. The harm from permanent separation is far less than the potential harm from remaining in the mother's care. The mother is not a realistic option for providing consistent care; adoption is *“the only option”*.

17. The judge heard evidence from two social workers, the alcohol support worker, the mother and the Guardian. He accepted the advice of the allocated social worker and the Guardian. He approved the care plan and made care and placement orders. His extensive judgment, given from notes, includes the following features:

- (1) The evidence regarding the meeting in the pub entirely justified a shift in thinking by the local authority. The incident was not a moment of madness but rather a deliberate and intentional course of conduct by the mother which justifies the local authority and Guardian's concerns as to the risk she poses.
- (2) The mother's recognition of the difficulties surrounding her alcohol use is very recent. In evidence, she sought to minimise its significance and lacked any proper insight into the reason for her drinking and the risk it poses. She still finds it difficult to understand or explain her actions. Her alcohol use is a long-standing concern and her ability to maintain abstinence is very much untested. Her admissions were made very belatedly and only came when she was confronted with irrefutable evidence. There is a history of her admitting to things and apologising but then going on to repeat her behaviour. This history undermines the weight that can be placed on her apparently sincere apology. Her conduct means that the local authority and Guardian are justifiably concerned about her trustworthiness. It is difficult to know if there has yet been a wake-up call.

- (3) *“I am very aware of the realistic options for [Robbie]. The first to consider is his mother. She is absolutely determined to demonstrate that she can care for him. It’s clear that she is willing, and has said that she’s willing to do whatever. The strength of that bond is not challenged. They have a positive relationship and her contact has been good. He is her son. If [he] was returned to his mother’s care he would remain within his family and have the opportunity to be brought up by his mother and have an ongoing relationship with his doting grandmother. I am very aware of the steps that his mother has taken to demonstrate that she recognises the extent of problems and wants to do something about them”.*
- (4) *“I’ve also had to look at the range and degree of support and services that the local authority can, or could be required to offer. I accept the concerns of the social worker and guardian are well made out as to the viability of such monitoring and support being sufficient to safeguard [Robbie] against the harms detailed by the social worker and the guardian.”*
- (5) It is not safe to return Robbie to his mother at this time. There is a real risk of neglect through alcohol misuse, and of physical and emotional harm through the mother’s anxiety and the possibility of contact with the father. Taking into account the professional evidence, a timescale of nine months’ abstinence would be needed before confidence could be felt, but Robbie is in a crucial developmental window and needs placement as soon as possible. The mother cannot make the necessary changes within his timescale.
- (6) An adjournment is not in Robbie’s best interests. *“Certainly [the mother] is contemplating change and her interview on 10 August and her evidence to me, and her recent engagement with CGL, are all factors that I take into account. But in my judgment, [this] is not sufficiently solid evidence of commitment to change when set against the weight of the other evidence available to me.”* It is not possible to know how long such an adjournment would need to be because the work to be undertaken by the mother is of indeterminate length.
- (7) *“I’ve had to consider the fact that adoption is not straightforward. Not every adoption is successful. However, given the information I have about the prospects of adoption and [Robbie’s] age, and balancing those risks, I’ve come to the conclusion however that there is no other realistic plan for [Robbie]. In my judgment, nothing short of adoption will do.”*

The grounds of appeal

18. On 20 September, an application for permission to appeal was made by the mother in person. On 8 October, I granted permission and stayed the placement order, framing the arguable grounds of appeal in this way:
 - (1) Against the background of a good attachment and where the case depended not on proven harm but risk of harm, the judge was wrong to conclude that the outcome (adoption) was justified by the nature and risk of likely harm arising from the mother’s binge drinking and deception of professionals.

- (2) The judge was wrong to exclude Robbie's return to his mother under a care order as a realistic possibility.
- (3) The judge was wrong to refuse to adjourn for a fixed period to allow the mother a final opportunity to demonstrate that she could stay sober and be honest with professionals.

The submissions on appeal

19. For the mother, Mr Tyler QC and Ms Stout (the latter being trial counsel) submitted that:
 - (1) Analysis of the judgment shows that that the judge did not carry out a proportionality analysis, taking account of the nature and likelihood of the risks, and their possible consequences. Nor did he make a genuine comparison between the advantages and disadvantages of adoption and placement at home, whether with reference to the checklist in the 2002 Act or otherwise.
 - (2) The judgment does not give proper weight to the mother's present engagement with a wide range of support services. He did not explain why this would not reduce the risk considerably: CGL engagement; IDVA and domestic abuse work; referral to a local women's centre for support and a 12 week domestic violence programme; engagement with the GP for mental health support; changing her telephone number so that the father could not contact her and registering with home swap to move away from the area.
 - (3) Nor, by readily accepting that placement at home under a care order was not an option, did the judge give effect to the obligation on the court, noted by Lord Neuberger in *Re B (Care Proceedings: Appeal)* [2013] UKSC 33 at [105], to be satisfied that there was no practical way of the authorities or others providing essential assistance and support.
 - (4) The judge was wrong to make a final order rather than to adjourn for a short period. To set a timescale of nine months in order to achieve reliable abstinence was to hold her to too high a standard when what was needed was acceptable risk reduction, not a complete cure. There was nothing to suggest that the 3-month adjournment requested by the mother would not allow Robbie to be safely returned to her care. The delay would not prejudice his ability to re-attach if required.
20. For the local authority, Mr Howling QC and Mr Bulman (the latter again being trial counsel) opposed the appeal.
 - (1) The court should read the judgment as a whole and have regard to substance not form. This judgment was internally consistent, clear, detailed and balanced. The judge had the advantage of assessing the mother's evidence, and proper latitude must be allowed to his assessment in a difficult case.
 - (2) Here, the evidence about the pub meeting changed what had been a very difficult balancing act. The core of the judge's reasoning is the finding that the

mother had very limited insight and could not yet be trusted. The sustained nature of her dishonesty was emphasised.

- (3) The judge clearly had in mind the support that could be provided to keep Robbie safe and was entitled to find it insufficient.
 - (4) As to a care order and return home, this case differs from this situation arising in the *Neath Port Talbot* case ([2013] EWCA Civ 1227) as it is not a case in which the court's assessment of risk differed from that of the local authority.
 - (5) As to adjournment, the judge's conclusions were based on the professional evidence. He properly applied *Re S (A Child)* [2014] EWCC B44 at [38] to the effect that there needs to be a solid basis for adjourning. He was entitled to find that whilst the mother's actions were commendable they were simply too late. *Re P (A Child)* [2018] EWCA (Civ) 1483 can readily be distinguished: in that case there was a clear evidence base for believing that the necessary changes could be made in time.
21. The Guardian, through Ms Jenkins, supported the submissions made by the local authority. We were concerned that, despite the well-known guidance on duplication of representation, two parties with identical cases should have been separately represented at public expense.

Analysis and conclusion

22. I fully endorse the submission that this court should be slow to interfere with the evaluation of a specialist judge whose conclusions emerged from the crucible of a trial. Moreover, as Mr Tyler freely acknowledged, the local authority behaved entirely properly in stepping in to protect Robbie from harm at his parents' hands. The starting point on this appeal is therefore a complete acceptance by this court of the problems with which the judge was faced. The evidence showed the mother to be a vulnerable person who has repeatedly let her own needs get in the way of her responsibilities towards her son, placing him at clear risk of significant harm. Her decisions to flout the written agreement, to continue to drink, to remain in touch with the father, and then to lie about it, were extraordinarily foolish. Her insight into her shortcomings was limited. The professionals who had been working with her in good faith were understandably deeply disappointed. Moreover, they and the judge were absolutely right to be concerned about delay for a child of this age, when the proceedings had already been on foot for eight months.
23. However, this was not the whole picture. The relationship between mother and child is of good quality, with no complaint being made about Robbie's daily care over the 11 months he lived at home and was regularly seen by a range of professionals. The mother herself does not have serious mental health problems or any established addiction. She is not an alcoholic. Her drinking in recent years has been described as behavioural. Until her late 20s, she was functioning normally. She therefore has a different profile to very many parents who come before the Family Court in cases of this kind.
24. In these circumstances, close attention needed to be paid to the nature and extent of the risks. As foreshadowed at the start of this judgment, there must be (to borrow a

phrase from a different context) an intense focus on the *type of risk* that is involved, *how likely* it is to happen, and what the *likely consequences* might then be. Only by carrying out this exercise is it possible to know what weight to give to the risks before setting them alongside other relevant factors. So, for example, the risk of further physical harm to a child who has been severely injured by a denying parent is likely to be a factor of predominant weight. By contrast, to borrow from the evidence in this case, where a mother who untruthfully denies drinking goes to a park at night to drink alone, leaving her baby with its grandmother, the court will view that risk with a sense of proportion.

25. Similarly, close attention must be paid to the true significance of lies and lack of insight in the context of assessing welfare. Lies, however deplorable, are significant only to the extent that they affect the welfare of the child, and in particular to the extent that they undermine systems of protection designed to keep the child safe. However, as noted by Macur LJ in *Re Y (A Child)* [2013] EWCA Civ 1337, they cannot be allowed to hijack the case. See also Sir James Munby P in *Re A (A Child)* [2015] EWFC 11 at [12]:

“The second fundamentally important point is the need to link the facts relied upon by the local authority with its case on threshold, the need to demonstrate why, as the local authority asserts, facts A + B + C justify the conclusion that the child has suffered, or is at risk of suffering, significant harm of types X, Y or Z. Sometimes the linkage will be obvious, as where the facts proved establish physical harm. But the linkage may be very much less obvious where the allegation is only that the child is at risk of suffering emotional harm or, as in the present case, at risk of suffering neglect. In the present case, as we shall see, an important element of the local authority's case was that the father "lacks honesty with professionals", "minimises matters of importance" and "is immature and lacks insight of issues of importance". Maybe. But how does this feed through into a conclusion that A is at risk of neglect? The conclusion does not follow naturally from the premise. The local authority's evidence and submissions must set out the argument and explain explicitly why it is said that, in the particular case, the conclusion indeed follows from the facts.”

Although these observations about lies and lack of insight are directed to proof of the threshold, they can equally be applied to the welfare evaluation.

26. Drawing matters together, I find that there is substance in Mr Tyler's submissions. The judgment leaves a number of key questions unanswered. How likely is it that the child would come to catastrophic physical harm of the kind mentioned by the social worker? If the mother resumed drinking (as she was doing throughout the time she was caring for Robbie), how serious would the consequences for him actually be? Accepting that the range of protective measures could not provide an absolute guarantee, would they not in fact reduce the likelihood of harm to an acceptable level, or at least ensure that the authorities were alerted to a deteriorating situation before enduring harm was suffered? Is this a case where a care order accompanying a return home might provide additional safeguards?

27. I would also accept the submission that, while the judge showed himself to be very much aware of the salient features, he did not gather them together and balance them out so as to justify his welfare conclusion. Nor, although he mentioned necessity and proportionality in passing, did he confront the ultimate question of whether this very extreme order could be justified on the whole of the evidence. Was the risk really bad enough to justify the remedy? It is true that the judge's conclusion was based on the advice of the social worker and the Guardian, both of whom he found to be impressive witnesses, but their assessment is open to the same analysis as his.
28. Making every allowance for the matters that rightly concerned the professional witnesses and the judge, I conclude that it has not been shown that the evidence in this case meets the exacting standard necessary for orders leading to adoption. The first ground of appeal is therefore made out.
29. In the circumstances, it is unnecessary to say very much about the other grounds of appeal. In the case of this complexion, it was certainly open to the judge to look more narrowly at the position of the local authority and the Guardian, neither of whom included Robbie's return home under a care order as a realistic option. As to the issue of adjournment, I would not cast doubt on the judge's assessment that it was not safe for Robbie to return home immediately in the light of the recent events. But the consequence of that was not that there had to be a placement order if a continuation of the interim care order for a limited period would allow for the collection of necessary information, in particular from the alcohol support service. At all events, there were alternative routes that the judge could have taken, while keeping tight control over the timetable. I share his anxiety about the effect of delay on a child of this developmentally sensitive age, but that could not predominate.
30. In the light of our decision, the matter must be remitted for reconsideration by a different judge. There will be an early hearing to consider case management and resolve any issue about Robbie's interim placement. It may even be possible for the parties to reach agreement on the way forward. If not, the future conduct of the matter must be a matter for the allocated judge, but I see no reason why the point of departure should not be the undisputed findings of fact made by HHJ Vavrecka alongside the conclusions of this court about the approach to be taken to a care plan for adoption. The progress or lack of progress made by the mother in the meantime, will clearly be a matter of great significance.
31. I finally refer to the question of contact. By the time permission to appeal was granted, contact had been reduced in accordance with the care plan from three times a week to once a fortnight and was about to reduce to once a month. In response to the mother's request that it take place at least weekly or fortnightly, the local authority allowed contact to continue once a fortnight. I appreciate that it is difficult for local authorities to plan when there is a pending appeal. However, the goal should surely be to have a holding position that best helps the child to adapt to whatever outcome emerges from the appeal. The very sharp reduction in contact in this case cannot be said to have done that, but it is to the local authority's credit that it has now readily agreed to restore contact to its pre-existing level of three times a week.
32. These are my reasons for allowing the appeal.

Lady Justice Asplin:

33. I agree.

Lord Justice Longmore

34. I also agree.
