Neutral Citation Number: [2020] EWFC 26

Case No: ZC280/19

IN THE FAMILY COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 03/04/2020

Before:

MR JUSTICE MOSTYN

- -

Between:

PROSPECTIVE ADOPTERS

Applicants

-and-

THE LONDON BOROUGH OF TOWER HAMLETS

First Respondent

-and-

TM

Second Respondent

-and-

GH

Third Respondent

-and-

PJ

(by her guardian)

Fourth Respondent

- -

- -

The **Applicants** were not present or represented
Mr Chris Barnes and **Mr Harry Langford** (instructed by **London Borough of Tower Hamlets**) for the **First Respondent**
Ms Maureen Obi-Ezekpazu (instructed by **Lillywhite Williams & Co**) for the **Second Respondent**
The Third Respondent acted in person
Mr Rob Littlewood (instructed by **Freemans Solicitors**) for the **Fourth Respondent**

Hearing date: 30 March 2020
The hearing was conducted by and through Zoom

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE MOSTYN

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

Mr Justice Mostyn:

1. In this judgment I shall refer to the first respondent as the local authority; to the second respondent as the mother; to the third respondent as the father; and to the fourth respondent as PJ.

2. By an application deemed to have been made on 6 January 2020, the mother and father apply for leave to oppose the adoption of PJ. Such leave is required by section 47(5) Adoption and Children Act 2002. Section 47(7) states that the court cannot give leave unless it is satisfied that there has been a change in circumstances since the placement order was made.

3. It is the same where an application is made to revoke a placement order under section 24. By virtue of section 24(2)(a) the leave of the court is required where the application is made by the parents, and section 24(3) states that the court cannot give leave unless there has been a change in circumstances since the placement order was made.

4. Therefore, under each provision a two-stage process must be undertaken. First, there is the factual condition precedent of a change of circumstances. Second, there is the familiar judicial evaluation as to whether, in the light of such change of circumstances, and all the other relevant facts, the application should be allowed to proceed.

5. In my own decision of *Prospective Adopters v SA (Father)* [2015] EWHC 327 (Fam) I ventured the opinion that in order to qualify as a relevant change of circumstances the change must have been unexpected. It must mean something outside "the realisation of expectations". I maintain this view. Obviously, the statutory requirement is not meant to be read literally. Otherwise the mere passage of time would qualify as a change of circumstances. Obviously, changes that were clearly either foreseen or which were foreseeable at the time of the original order cannot qualify. Otherwise, the provision would be just another variation power.

6. For the second stage there is in the authorities a curious difference of approach between the two provisions. The authorities on section 24 are clear that under the second stage the welfare of the child is not the paramount consideration. See, for example, *M v Warwickshire County Council* [2007] EWCA Civ 1084, [2008] 1 FLR 1093. To be sure, when assessing the applicants' prospects of success, the welfare of the child is woven into the decision-making process, but the welfare of the child is not the paramount consideration in the exercise. In contrast, under section 47 the authorities state that in the second stage the child's welfare throughout her life is the paramount consideration. See *Re P (Adoption: Leave Provisions)* [2007] EWCA Civ 616, [2007] 2 FLR 1069 at [26] and *Re B-S (Children)* [2013] EWCA Civ 1146 [2014] 1 WLR 563 at [74(iii) and (viii)].

7. Plainly, at the second stage where the court is considering whether to grant leave the essence of the exercise is for the court to assess the applicants' prospects of success. Here again, there is a curious diversion of approach within the authorities under the two sections. For an application under section 24 *M v Warwickshire County Council* states at [26] that the applicants must show that they have a "real prospect of success". However, under section 47 it has been held in *Re W (Adoption: Set Aside and Leave*

to Oppose) [2010] EWCA Civ 1535, [2011] 1 FLR 2153 at [20] that the applicants' prospects of success must have "solidity". That seems to me to set the bar rather higher than a mere "real prospect of success".

8. Therefore, the burden is on the applicants to show, first, that there have been unforeseen and unforeseeable changes in their circumstances since the placement order was made; and, second, that they have solid prospects, having regard to the paramount consideration of promoting the child's welfare throughout her life, of successfully opposing the adoption application.

9. Is this a power which should only be exercised exceptionally? In *Re W* at [17] Thorpe LJ stated that leave to oppose would only be granted in "exceptionally rare circumstances" and at [28] that a "stringent approach" was necessary. It is true that in *Re B-S (Children)* at [68] the Court of Appeal disapproved of these dicta and declined to follow them, stating that their use in relation to section 47(5) should cease. This is quite problematic for a first instance judge given that it is well-established that the Court of Appeal is generally bound by its own decisions: see *Willers v Joyce (No 2)* [2016] UKSC 44 at [8]. However, I shall not apply a criterion of exceptionality and shall apply the last word of the Court of Appeal on the subject.

10. It has been strongly argued by Ms Maureen Obi-Ezekpazu that I should hear oral evidence. It is true that in *Re B-S (Children)* it was stated at [74(v)] that "sometimes, though we suspect not very often, the judge will be assisted by oral evidence". In my opinion oral evidence will be a *rara avis* indeed. It must not be forgotten that this is a leave procedure. This is a not uncommon feature of the law. In the sphere of family law leave is required, for example, in proceedings under Part 3 of the Matrimonial and Family Proceedings Act 1984. Leave is required to appeal virtually every family court judgment. Leave is required for an application under section 50(1) of the Mental Capacity Act 2005. Outside the sphere of family law leave is required to make an application for judicial review. In none of these cases is the decision ever made on oral evidence. The decision is invariably made on written evidence and on written and/or oral submissions. It would be curious if in proceedings under section 47 of the 2002 Act a different approach were adopted save in the most rare and exceptional case.

11. I refused the application to hear oral evidence.

12. As will be seen, the parents in this case have made two previous applications to revoke the placement order. In the first case leave under section 24 was granted, but the substantive application was rejected. In the second, leave under section 24 was refused. Further, very recently Mr Justice Hayden has granted care and placement orders in respect of another child of the parents, OH. In that judgment he meticulously analysed the parents' present position. Ms Maureen Obi-Ezekpazu does not dispute that these judgments are admissible, nor could she. She however strongly maintains that they are not "binding" on me, and that I must make my own independent decision on the parents' application. She is clearly correct about that. The findings made in those previous decisions are not res judicata. However, they are, undoubtedly, highly relevant material to the decision which I must make.

13. PJ was born on 17 July 2016. She is now 3¾. At the time of her birth care proceedings were ongoing in respect of seven of her older half siblings. She was made

the subject of an interim care order on 21 July 2016 and removed from her parents on that day. Her parents have not cared for her since. On 31 August 2016 HHJ Atkinson found the statutory threshold proved in respect of the seven older half siblings. Permission to appeal this decision was refused by the Court of Appeal.

14. On 10 November 2016 care and placement orders were made in respect of PJ. Again, permission to appeal this decision was refused by the Court of Appeal.

15. On 15 February 2017 PJ was placed with the applicants. She has thrived in their care. She has spent virtually all of her sentient life with the applicants.

16. In October 2017 the parents applied under section 24 of the 2002 Act for leave to revoke the placement order. This came before Mr Justice Holman on 29 January 2018. He granted leave. His judgment is reported publicly as *Re P-J (A Girl)* [2018] EWHC 1546 (Fam). He did not hear oral evidence. On the basis of the written material and the submissions of counsel he was satisfied that in the period of a little over a year since the placement order was made there had been qualifying changes of circumstances and that the parents had sufficient prospects of success to allow the application to proceed. At [21] he stated:

> "So, I have hesitated long and hard before reaching the decision which I have this afternoon; but, stressing, as I do, that the test is whether or not there is a real prospect of success and not whether or not the application is actually likely to succeed, I have just decided that I should grant leave. It seems to me that there has been some change here. Whether it is sufficient and sustainable remains to be considered. I cannot consider that today on the basis purely of documents and, indeed, as is now accepted, it will be necessary and appropriate to obtain an expert psychological assessment of each of these parents and of their functioning as a couple, and necessary also to have an investigation and assessment by an independent social worker. But it seems to me that the parents have raised a sufficient case of change that requires to be more fully investigated by a court."

17. The substantive application came before Mr Justice Baker in June 2018. He heard the case over a number of days. Each parent was represented by leading and junior counsel. On 25 June 2018 Mr Justice Baker delivered an exhaustive judgment running to 174 paragraphs. It is reported publicly as *Re P (A Child) (Application to Revoke Placement Order)* [2018] EWHC 3854 (Fam). He refused the application. An application for permission to appeal was refused by the Court of Appeal on 2 August 2018.

18. In his judgment Mr Justice Baker meticulously analysed the position of the parents at that time and the course that they had followed since the making of the original placement order on 10 November 2016. Anyone needing a comprehensive account of the history to that point should read the judgment.

19. Mr Justice Baker concluded that the events which had occurred were not sufficiently positive to justify the revocation of the order. He scrupulously spelt out the

advantages and disadvantages of a revocation of the order but concluded at paragraph 172:

> "Looking at the advantages and disadvantages and having regard to all the factors, in my judgment, the balance plainly comes down in favour of P remaining with her current carers."

20. In my judgment this decision of Mr Justice Baker conclusively answers the question whether there have been qualifying changes of circumstances for my purposes up to 25 June 2018. It cannot be right, surely, that after having had the benefit of such intense forensic analysis it is open to the parents to rerun before me the question whether between 10 November 2016 and 25 June 2018 there were qualifying, material changes of circumstances for the purposes of section 47(7) of the 2002 Act. To allow such an approach would be to foster duplicative litigation and would amount to an abuse of the process of the court.

21. On 12 March 2019 the father made a further application for leave to revoke the placement order. At the same time, he made an application to set aside the factual findings made by HHJ Atkinson. The mother was treated as having joined in those applications. I am slightly surprised that these duplicative applications were not summarily struck out given that they followed so hard on the heels of the exhaustive decision of Mr Justice Baker.

22. These applications were heard over three days in June 2019 by Mr Justice Hayden. He dismissed the set aside application and refused the leave application under section 24 of the 2002 Act. I have read his judgment dated 12 June 2019. The father had rightly only focused on alleged qualifying changes in circumstances since the decision of Mr Justice Baker. He rightly recognised that that decision drew a line in the sand so far as changes in circumstances were concerned. In a tight and pithy judgment Mr Justice Hayden rejected the application and concluded with these words:

> "16. The findings made by Judge Atkinson represent a real and continuing risk to any child in this couple's care. The situation comprehensively analysed by Baker J just over twelve months ago has not changed at all. I recognise much in the descriptions of F in that judgment in his presentation to me today.
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> 17. This was, I suspect in the light of my judgment yesterday, an almost impossible application to pursue. I am satisfied, with very little hesitation, that I cannot, grant leave if I properly apply the applicable criteria.
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> 18. At this point I add into the broader canvas the fact that P-J is now settled, safe, and secure. Her world is established and familiar and what is being contemplated is a significant disruption. Stability and security at this crucial stage in a child's life equips her well for the future. From this perspective it offers promise and opportunity that will enhance the rest of her life. In this sense it engages the wider principles of Sec 1 ACA 2002 set out at para six above. For these reasons I refuse leave under section 24(2)."

23. Again, it is my firm conclusion that it is impossible for the parents to go behind this judicial decision and to argue that prior to 12 June 2019 there existed material qualifying changes of circumstances for the purposes of section 47(7).

24. An application for permission to appeal the decisions made by Mr Justice Hayden was refused by the Court of Appeal on 18 September 2019.

25. Meanwhile, on 30 April 2019, OH was born. He is a full sibling of PJ. Initially, he was not removed from the parents. Instead, the parents were allowed to enter a supported placement with the baby under an interim care order. That placement broke down. On 23 September 2019 OH was removed from the parents.

26. Over a number of days in November 2019 the application for care and placement orders in relation to OH was heard by Mr Justice Hayden. He granted the applications on 23 January 2020. His judgment is reported publicly as *Re T (a child*) [2020] EWFC 4. This is another exhaustive forensic analysis of the parents' position. The judgment runs to 85 paragraphs and meticulously charts the events up to the date of his judgment. At [79] he concluded:

> "I regret to conclude that there is a chasm between T's needs and the capacity of his parents to meet them. Nor is there any prospect of this being bridged within timescales that are even remotely consistent with T's. There is a wide raft of concerns which are, both individually and collectively, incompatible with any further delay in resolving T's future."

27. On 6 March 2020 the Court of Appeal refused an application by the parents for permission to appeal this decision.

28. Again, it is my firm view that this decision draws a further line in the sand in relation to supposed qualifying, material, changes of circumstances. It could not possibly be right for the court to conclude in the light of this judgment that the factual condition precedent within section 47(7) has been satisfied.

29. It is therefore my clear conclusion in relation to the first stage of the exercise that the parents have not discharged the burden of proving, since the placement order was made on 10 November 2016, relevant unexpected changes of circumstance. For this primary reason, the application will be dismissed.

30. I do not accept the argument of Ms Maureen Obi-Ezekpazu that it was incumbent on the local authority to adduce evidence demonstrating that the case of the mother in her witness statement concerning supposed changes of circumstances was untenable. The local authority was entitled in the light of the judicial decisions to which I have referred to ask me to conclude that the mother's case was completely impossible to advance. I note that the father filed no evidence himself notwithstanding that on 13 February 2020 he was ordered to do so within a fortnight.

31. Notwithstanding that the application falls at the first fence I will nonetheless consider the second stage for completeness.

32. The judicial value judgment required by the second stage is straightforward in this case. It is abundantly clear that the parents do not have solid prospects of successfully showing that it is in the best interests of PJ that she should not be adopted. On the contrary all the materials before me, but most particularly the judgments to which I have referred, demonstrate beyond any doubt whatsoever that it is in PJ's best interests that she should be adopted, and the sooner the better. In my judgment the parents have no prospects of success at all of defeating the adoption application.

33. For these reasons the application is refused. I certify it as being totally without merit.

34. This application came on for hearing in the midst of the national lockdown following the outbreak of the COVID-19 national medical crisis. It was heard remotely via Zoom. The arrangements were made by the clerks of counsel for the local authority. Everyone was connected remotely, and the hearing proceeded without a hitch. The parents participated from their home and conducted themselves extremely politely. I am grateful to them for that. I am grateful to all counsel for their written submissions and for their succinct and eloquent submissions made orally.

35. In view of the propensity of the parents to appeal every decision, and in the light of the need to bring the proceedings in relation to PJ to an early conclusion, I direct, in common with Mr Justice Hayden who made an equivalent order on 13 February 2020, that the time for the parents to file a notice of appeal is abridged to seven days from the date that this judgment is handed down.

36. In the event that permission to appeal this judgment is refused I direct that as soon notice is received to that effect a further hearing is to be arranged to make the adoption order.

37. That concludes this judgment.