Neutral Citation Number: [2016] EWCA Civ 871

B4/2016/0478

IN THE SUPREME COURT OF JUDICATURE
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM SWANSEA CIVIL AND FAMILY JUSTICE CENTRE
(MR RECORDER FERRIS)

Royal Courts of Justice
Strand
London, WC2

Thursday, 9th June 2016

B E F O R E:

LORD JUSTICE LAWS

LORD JUSTICE McFARLANE

IN THE MATTER OF

L (CHILDREN)

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Mr D Blake (instructed by T Llewelyn Solicitors) appeared on behalf of the Applicant
Mr R Jones (instructed by Neath Portalbot County BC) appeared on behalf of the Respondent

J U D G M E N T
(Approved)

1. LORD JUSTICE McFARLANE: This is an appeal which arises from proceedings that have been conducted in the Family Court sitting at Swansea, in relation to three young children. The proceedings were initially care proceedings but the children became placed a year or more before the final hearing with an uncle and aunt as foster carers and, in the event, the uncle and aunt are putting themselves forward as prospect Special Guardians for the children.

2. As is now the practice of this court in cases which do not raise any issue of law or practice, it is my intention to give only a short judgment on the point.

3. The point arises in this way. The case was set down for final hearing before Mr Recorder Ferris, in the early part of December 2015. Before the court primarily was the need, first of all, to determine the factual basis of the local authority's case, which was that the youngest of the three children had sustained non-accidental injury through receiving some 17 bruises which were detected in November 2014. The causation of those injuries and the identity of any perpetrator of any non-accidental injury fell to be identified. In addition, obviously, if the threshold criteria were established there was a need to look at the long-term care plan for the children. The primary option put forward by the local authority supported by the Guardian and obviously sought by the foster carers was for the children to remain with those carers under a Special Guardianship order. So the applications before the court separately and not linked were the care proceedings and then the prospective Special Guardians' application.

4. On the first day of the final care hearing, the 7th December, the Recorder heard an application on behalf of the Special Guardians for them to be joined in the care proceedings as parties so that they could sit in and observe the fact-finding process. The Recorder refused that application. The hearing continued in the absence of the Special Guardians and in the course of that hearing, in addition to the primary evidence which was about the bruising to the children, the Recorder heard evidence from the social worker, from the children's Guardian and from the children's mother on the issue of contact.

5. Pending that hearing contact had been taking place at twice per week supervised by the local authority. The local authority's plan supported by the Guardian was that the level of contact should be radically reduced if a Special Guardianship order was to made to the rate of some eight visits a year with I think an extra two around the time of the children's birthdays. Two of the children's birthdays are very close to each other.

6. The mother contested that issue. The judge heard evidence about contact. At the conclusion of that hearing he then indicated that he would hand down his judgment in written form. The judgment was circulated to the parties and handed down on 11th December 2015.

7. In the course of his judgment the judge went further than simply dealing with the facts. At paragraph 67, 68 and paragraph 70 he considered the issue of contact and expressed a preliminary conclusion that the reduction from 104 times a year to 8 or 10 times a year was "too radical" and that he was concerned about the adverse impact on the

mother and that would have an indirect adverse impact upon the children. He indicated that, subject to hearing from the Special Guardians with any evidence or submissions they wished to make, he would decide that the level of contact should be 12 times per year, plus two visits around the time of birthdays or Christmas.

8. What then happened was that submissions took place before the judge on 11th December, during which initially the Special Guardians indicated a reluctance to accept contact at that level, it being in conflict with the views that were maintained by the local authority and the Guardian, notwithstanding the judge's indication.

9. That circumstance, namely the Guardian' wishing to be heard on contact, lead the judge to indicate that a further hearing could be set up in the early part of January, some five or six weeks' time and then there was a need to consider the interim arrangements. The judge was reluctant to make a final Special Guardianship order on that date and he indicated that the current interim contact arrangements, namely twice per week should continue. There was a further consequence of either making or not making a Special Guardianship order on that date. If the Special Guardianship order were made on 11th December, that would bring the care proceedings to an end. The mother would lose her automatic entitlement to legal aid. There was a question mark over whether the local authority would fund the Special Guardians in relation to a further hearing on contact and, with the termination of the care proceedings, the Children's Guardian would cease to have a part to play and likewise the legal team instructed on the children's behalf would no longer have legal aid.

10. Faced with that set of circumstances, in the middle of the hearing on the 11th counsel for the Special Guardians indicated a change in their position and indicated that they would acquiesce in the level of contact that the Recorder had indicated, namely 14 times per year, and thus a consent order was drawn up making the final Special Guardianship order on that day and specifying contact at 14 times per year.

11. It is against that outcome that the Special Guardians now come to this court with their appeal. Permission to appeal was given by King LJ on the basis that the contact order arguably was made in a manner which breached the Article 6 rights to the fair trial of the Special Guardians.

12. A second notice of appeal filed on behalf of the Special Guardians sought to challenge their exclusion from the primary hearing. Permission to appeal was refused in relation to that and the application for permission has not been renewed before this court today.

13. This morning we have been grateful for the focused and clear submissions of Mr David Blake, counsel for the Special Guardians, who cuts to the chase and submits that the process adopted by the Recorder, inadvertently as it may well be the case, led to the contact issue being litigated with evidence being given by the social worker, the mother and the children's Guardian, in the absence of the Special Guardians. As a result, he submits, a fair trial did not take place.

14. I can deal with the point shortly. At the hearing on the 7th December, before he gave his short judgment on the question of whether the Special Guardian applicants should

be present, the judge was invited to clarify whether the court was dealing with the Special Guardianship application in the hearing that was about to commence or simply the application for care. The judge in his judgment on the question of whether the Special Guardians should be present expressly states the narrow basis that, at that stage, he considered was the focus of the hearing that was about to take place. He does so in two paragraphs of this judgment. At paragraph 5 he says this:

> "However, of course, the purpose of my judgment will be, having heard that evidence myself, to decide on balance of probability what happened to these children and how these injuries were caused."

At paragraph 7:

> "If necessary, the application to consider them as Special Guardians can be adjourned until after the end of the hearing to decide Threshold."

15. Yet immediately after giving that judgment, counsel invited him to clarify whether the hearing about to take place is concerned with "both threshold and welfare" and the Recorder says this:

> "I am going to give a judgment on both Threshold and welfare."

16. The subsequent words in the transcript indicate to my eyes that the reference to "welfare" there is to the ball-park decision of whether the children should go home to their mother or remain with the foster carers and if so, whether that should be under a Special Guardianship order (if the Special Guardianship applicants were willing to have such an order there being on that day no agreement by them as to the acceptability of the Special Guardianship support package). The hearing then took place and, as I have indicated, the judge in the course of his judgment went on to give a strong steer on the issue of contact.

17. On behalf of the local authority Mr Rhys Jones makes this submission at paragraph 6(i) of his skeleton:

> "From this point onwards it is respectively submitted that the Court should not have heard any evidence relating to contact or indeed welfare before granting their application and allowing to participant or at least prior to hearing them on the issue."

18. In my view, that submission is bang on target. It is well made and established by the further references to the transcript to which we have been taken and which it is not necessary for me to include in my judgment today.

19. By the time the hearing on 11th December arose, the Special Guardians were in a very difficult position. They had a judge who had given a firm indication of his decision and they were, as Mr Blake puts it "between a rock and a hard place". They had indicated to the children that a final decision would be made that day on the issue of Special Guardianship. They did not wish to contemplate a further interim arrangement and the judge was also indicating that the interim contact arrangement of twice a week would

continue, which was also a state of affairs that the Special Guardians did not consider was conducive to the welfare of the children.

20. On that particular point I struggled when reading the papers to see how the court could contemplate continuing the interim contact arrangement at twice a week at that stage, the key decision as to long-term placement of the children by then having been taken by the judge.

21. The mother, before this court, through her counsel Mr Rhys, in my view rightly, concedes that the judge was wrong to contemplate continuing the interim contact at that in those circumstances high level at that stage. Be that as it may, that was the circumstance that the Special Guardians were required to contemplate during that hearing. The fact that they conceded and consented to the order was a pragmatic decision by them taken in the course of the hearing and I do not consider they should be tied by the fact that that resulted in a "consent order" on the issue at that stage.

22. The reality was that, inadvertently as I believe it undoubtedly was, the court had led itself into a position where the evidence about the important issue of contact was considered without Special Guardians being in the courtroom or being represented. It was crucial that they should hear what the social worker, the children's Guardian and the mother had to say about contact and that facility had simply been denied to them by the course that the proceedings had taken.

23. It really was impossible by the time the judge handed down his judgment with his firm indication for the court to row back from that position and somehow give the Special Guardians a fair hearing on the contact issue. The hearing had largely finished by that stage and it was therefore difficult, even had the issue been adjourned to a further hearing in January, for the Recorder to recover a process that could as a whole be regarded as fair.

24. For those reasons I am entirely clear that, so far as the issue of contact is concerned, there was not a fair hearing on that point undertaken in Swansea in December and the appeal should be allowed on the basis that I have described. The effect of that, as I think all parties agree, is that the order for contact should be set aside and that issue should be re-determined by a different Tribunal, a Circuit Judge sitting in the Swansea area.

25. That is an unfortunate outcome in the sense that the matter will have to be re-litigated but this court has been told this morning that there remain issues between the parties as to how the contact has in fact been working for the benefit or otherwise of the children during the past 6 months. Even if the appeal were not allowed it is likely that an application to vary the contact order would be made and so the reality is that one way or the other the issue would come back before the court. It should come back with the judge who now determines contact having a clean sheet, as it were, in front of him or her, without the Recorder's determination, setting it at 14 times per year as the status quo.

26. LORD JUSTICE LAWS: For the reasons given by my Lord I agree that this appeal should be allowed and the order proposed by him should be made.