



Neutral Citation Number: [2020] EWFC 97

Case No: ZC194/19

IN THE FAMILY COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/11/2020

Before:

MRS JUSTICE THEIS

Re R

Mr Wilson (instructed by **Goodman Ray**) for the **LR**
Mr Pearman (instructed by **A Local Authority**) for the **Local Authority**
Ms Peacock (instructed by **Beu Solicitors**) for **R**
JW and NP did not appear and were not legally represented

Hearing date: 11th November 2020 Judgment: 13th November 2020

Approved Judgment

.....
MRS JUSTICE THEIS

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published. 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.

Mrs Justice Theis DBE:

Introduction

1. This matter concerns an adoption application by LR in relation to R, now 3 years old. R has been living with LR since she was placed in her care in November 2017 and is the subject of a care and placement order made on 24 May 2019.
2. R was initially placed with LR as a foster placement. LR was approved as a prospective adopter on 14 May 2019 and the adoption application is dated 6 August 2019.
3. This hearing was listed to determine the application by R's birth mother, JW, for leave to oppose the making of an adoption order. R's birth father, NP, supported JW's application.
4. Having heard oral submissions I announced the court's decision on 11 November 2020 to JW's application, with reasons to be given in a judgment which are set out below.

Relevant Background

5. The adoption application was made following care proceedings that concluded with the making of a care order and placement order on 24 May 2019. The judgment given that day sets out the detailed background and the reasons for the court reaching that conclusion.
6. The original care proceedings, commenced in 2017 when R was six months old, involved R's three older half siblings, referred to in this judgment as her siblings. In relation to those three children the final orders resulted in them being placed in foster care in Poland in December 2018, pursuant to care plans and orders made in October and November 2018. At that time, a care order was made in relation to R, with a plan for her to be placed in foster care in Poland. That order was successfully appealed by LR and the matter remitted for hearing, which following a contested hearing resulted in the orders made on 24 May 2019.
7. There was no appeal against the threshold findings made in August 2018, as set out in the schedule dated 2 August 2018. In summary, the court found that the parents relationship was toxic and the children had been exposed to domestic abuse between the parents. NP had sexually abused one of R's siblings and there were inappropriate boundaries. JW was found not to recognise the risks of such behaviour, was unable to protect the children from future harm and consistently failed to co-operate with the local authority. Additionally, it was found that the parents and the maternal grandmother colluded to abduct two of the older children to Poland, concealed the whereabouts of R and the eldest child was beyond parental control.
8. At the time of the hearing in relation to R in May 2019 JW accepted she was not in a position to care for R, but sought a placement in Poland so R's cultural and identity needs could be best met and enable R to have contact with her siblings. This would also mean if JW's situation changed consideration could be given to R returning to JW's care. NP's position was to support JW's position and he did not seek to play any role in R's life in Poland.

9. As in the care proceedings, the Polish Embassy has taken an active part in these proceedings through the attendance of their representative at the court hearings. Such involvement has been of assistance to JW and the court.
10. As this hearing has proceeded without the attendance of JW or NP it is necessary to set out the procedural background in some detail.
11. The adoption application dated 6 August 2019 was originally listed for hearing on 30 January 2020, that hearing was adjourned to enable JW and NP to be given notice of the hearing.
12. Permission was given to serve them by way of email and text. The local authority filed the report pursuant to rule 14.11 Family Procedure Rules 2010 (FPR 2010) dated 19 March 2020, and the matter was re-listed on 25 March 2020.
13. The allocated social worker emailed JW and NP on 2 March and phoned them on 5 March, with no response.
14. Due to the Covid 19 restrictions the hearing on 25 March 2020 was adjourned and re-listed on 17 June 2020.
15. The 25 March 2020 order directed JW and NP that if they sought leave to oppose the adoption order being made, they were to file and serve a witness statement by 3 June 2020.
16. In the subsequent statement from the social worker he sets out the steps he took to send the order to JW and NP on 24 March and 11 May 2020. No response was received from JW until 2 June 2020 when she emailed the team manager and the local authority solicitor stating she opposed the application and sought an extension of time to file a statement. Over the following days there were a number of emails from JW and NP requesting further time.
17. These requests were considered by the court on paper and directions made on 11 June 2020 gave JW and NP until 15 June 2020 to file their statements setting out any change of circumstance they relied upon, as well as making directions to enable them to join the hearing on 17 June 2020.
18. Both parents joined the hearing on 17 June 2020, as well as a representative from the Polish Embassy (who has attended all but one of the subsequent hearings) and an interpreter for JW. Both JW and NP requested further time to prepare a statement and secure legal representation.
19. Directions made on 17 June 2020 required the parents to file a statement by 1 July 2020 as well as other directions leading to a hearing on 30 July 2020. That order made clear that if the statements were not filed the court may consider making final orders at the hearing on 30 July 2020.
20. The statements filed by the local authority dated 5 June, 1 and 29 July 2020 set out the extensive steps both the allocated social worker and the local authority solicitor have taken to serve JW and NP with the order and seek to engage them with the proceedings. These steps only elicited a response from JW on 28 July 2020 when she stated she

would be attending the hearing on 30 July 2020 and would be providing a statement beforehand. Nothing was heard from NP until the morning of the hearing, when he said he would join the hearing, which he did.

21. The mother did not join the hearing and attempts to contact her by phone and email were unsuccessful save for a response by her at 9.41 on 30 July 2020 to state she was still writing the statement and at 11.35 she requested by email a further 2 hours to write her statement. With the agreement of the parties the hearing was put back to 2pm and a response to her email sent at 13.20 stating that the court hearing would start again at 2pm and she should send her statement beforehand. JW responded stating 'Yes, I will'.
22. When the hearing resumed there was no statement from JW, although she sent at 14.04 a picture of her at her desk purporting to write the statement but in the covering email said she had technical issues with her computer. JW did not join the hearing. NP confirmed that he did not wish to make any separate application but would be relying on what JW said.
23. At the hearing on 30 July 2020 the court had a report from the Children's Guardian dated 29 July 2020. The report was completed by the Service Team Manager as the allocated Children's Guardian was on extended leave through ill health. That report contained information about JW and NP. First, the unsuccessful attempts to try and contact NP. Second, the contact made with JW on 24 July 2020. JW reported she believed her circumstances had changed. She returned to Poland in the summer of 2019 and successfully applied for contact with her older children. According to JW when lockdown occurred it was agreed the children would remain in her care. JW said she was going to be assessed and a further hearing was going to take place in September. She said she had a new partner who she had known for some time. The Service Team Manager stressed the need for her to file a statement with the court and she said she would do so by email to the court on 29 July.
24. In her report the Service Team Manager stated '*If this information is true it would constitute a change in [JW's] circumstances, but it is not possible to conclude that it is a change that would affect the court's decision making for [R]*'. As she observed, the assessments in relation to the older children were not finalised and there was no evidence JW has undertaken the work recommended in the care proceedings by Dr Szpak.
25. Due to the request for further time by JW and the fact that she had not seen the information about her in the Service Team Manager's report I concluded there should be a further time-limited adjournment until 10 August 2020.
26. The detailed order on 30 July 2020 set out the attempts the court had made to engage JW in the application and directed her to produce a statement by 6 August. The order made clear that if the evidence is not filed the hearing may proceed as a final hearing. Directions were made for JW to be sent the information about her in the Service Team Manager's report by 30 July, with a Polish translation of this by 3 August.
27. JW sent an email on 7 August and her statement on 8 August 2020. In addition, she sent information about solicitors in Birmingham who were submitting a legal aid application on her behalf.

28. At the hearing on 10 August 2020 JW informed the court that the legal aid application was ready to be submitted. Again, the court decided she would be given a short time-limited adjournment to 12 August 2020 to enable the application to be submitted. Directions were made for the local authority to communicate with the solicitor and send copies of recent orders. The email exchanges in the days that followed confirmed the application had been submitted but further information was required by the Legal Aid Agency (LAA).
29. At the hearing on 12 August 2020 JW attended and the court was updated, she had provided some information for the LAA although it required translation. The local authority agreed to fund the translation of the documents needed for the LAA application and the hearing was adjourned to 16 September 2020. The order made clear that at the next hearing the court may consider determining her application, it set out the issues JW would need to address and made directions for the court to be kept updated regarding the LAA application.
30. By the time of the hearing on 16 September 2020 the court was informed the LAA application had not been determined as further documentation from JW had been requested. The matter was further adjourned until 23 September 2020 for a further update regarding the LAA application and the representative from the Polish Embassy agreed to inform the local authority of the nature of the assessment JW referred to regarding the older children; when it was going to start and finish and when any report would be available. At the hearing on 16 September 2020 both JW and NP confirmed they had received a copy of the electronic bundle, JW said she did not require an interpreter for the hearing or for her planned discussion with the Children's Guardian.
31. At the hearing on 23 September 2020 NP did not attend, an update was given about the progress of JW's legal aid application and the Polish Embassy had confirmed that the outcome of the assessment being undertaken of JW would be known by the end of October, they outlined how a copy of the report could be obtained via the Central Authority and may take up to 6 weeks. The matter was adjourned again to 2 October 2020 to consider the progress of JW's legal aid application, whether there should be a further adjournment to await the outcome of the Polish assessment and receipt of that report and JW's application for leave to oppose. The order also provided for the Children's Guardian to make contact with JW and NP and to file a further report by 30 September 2020. That report gave a detailed account of the meeting the Children's Guardian had with JW, set out the online courses JW said she had attended and planned to attend as well as their discussion about the background.
32. At the hearing on 2 October 2020 JW attended and the matter was further adjourned to 23 October 2020. The order recorded the update regarding the legal aid application and the timescales for the Polish assessment. During that hearing JW requested a translated version of the documents and the order recites the documents that were to be translated and the timescales. It was made clear in that order that the court may determine JW's application at the next hearing.
33. Due to some delays in securing translated copies of the documents the hearing on 23 October 2020 had to be adjourned until 11 November. During the hearing on 23 October 2020 JW was able to confirm what translated documents she had received by email and as set out in that order she had received all of the relevant documents from the bundle

in Polish by that date. She confirmed during the hearing she had received them and could access them. The information provided by the solicitors who were dealing with JW's legal aid application informed the court that they had not had any contact from JW between 2 and 20 October and she had not provided the outstanding documents that had been requested by the LAA. It was made clear to JW during that hearing, as set out in the order, that the court was likely to be invited to proceed to determine her application on 11 November and explained to JW what she needed to consider for that hearing. A direction was made for JW to provide an updating statement in English, as she had previously, but that any documents she attached could be in Polish if she summarised what they said in the statement. That statement was to be sent by 30 October 2020. Directions were made for the local authority to send JW a court bundle by 28 October 2020 including the documents that had been translated into Polish.

34. JW did not file a further statement or communicate with the court or the parties. The local authority informed the court and the parties that they sent the bundle to JW on 28 October 2020. Despite repeated requests to do so JW did not confirm by email she had received it. The court was informed on 11 November that the allocated Team Manager, Ms H, had tried to contact JW three times on the phone and once by email on 9 November, twice by phone and once by email on 10 November and twice by phone, once by email and text prior to the hearing starting on 11 November. JW had not responded to any of these attempts to contact her. Ms Perumall, from the Polish Embassy, informed the court she had tried to phone JW on two occasions on the morning before the hearing started on 11 November. On each of these occasions described above the court was informed the phone rang until it stopped, it was a number JW had responded to before. An updating email was received from the solicitors who submitted the legal aid application. They confirmed they still awaited information and had been trying to contact JW but had not received any response.
35. Against that background Mr Wilson, on behalf of LR, submitted the court should not adjourn the matter further and should determine JW's application. He submitted the court had given JW every opportunity to participate fairly in the proceedings and that it was unlikely any further adjournment was going to result in any change, particularly as JW had failed to respond to any of the recent attempts to contact her. Mr Pearman on behalf of the local authority and Ms Peacock on behalf of the child supported that position.
36. I concluded at that stage I would continue with the hearing and determine the application. Mr Wilson made characteristically well focussed oral submissions to support the arguments set out in his position statement dated 7 October. They were supported by the other parties. I adjourned the hearing until 2.30 and asked Mr Pearman to arrange for an email to be sent to JW informing her of what the court planned to do, as well as to the solicitor who submitted the LAA application asking when they last had contact with JW.
37. Mr Pearman sent an email to JW at 13.21. JW responded at 14.03 with a two page position statement which her email said explained why she would not attend the hearing. The position statement complained about what she said was the unfairness of the process, that it broke her human rights, that she had sought the assistance of her eldest daughter to write the statement, emphasising R's Polish nationality, that she will not give up on R and asking the court to show empathy for her position and restore R

to her care. An email was sent to JW from the court shortly after her email was received informing her that a Polish interpreter was available for her as well as a representative from the Polish embassy and asking her to attend the hearing. JW did not attend when the hearing resumed.

38. The solicitor responded to Mr Pearman's email and confirmed a representative from the firm had spoken to JW the previous afternoon (10 November) after missing three calls from the solicitor on 9 November. She reports JW was upset, referred to the fact that the court may proceed to determine her application and wanted the court to await receipt of the parenting assessment and the next hearing in the Polish case was on 6 December. The email confirms that prior to the contact yesterday they had last spoken to JW two weeks previously, although they had chased her with calls and emails since then. They confirmed they had submitted what they had to the LAA but consider the LAA are still likely to require the missing information.
39. Ms Perumall confirmed to the court in an email that she had made two further calls to JW with no answer and had also sent a text in Polish informing her that the hearing will resume at 2.30 and it would be an opportunity for JW to present her position. There was no response to that text.
40. All parties remained united that the court should continue to determine the application. Ms Perumall asked the court to weigh in the balance that R is a Polish national, but they did not seek to delay the hearing any further, recognising the steps the court had taken.
41. Following a short adjournment, I announced the court's decision that the application for leave to oppose the court making an adoption order would be refused and the reasons would follow in this judgment.

Legal Framework

42. The helpful summary in Mr Wilson's position statement dated 7 October 2020 is not disputed and it is one of the documents translated for JW, which she received prior to the hearing on 23 October.
43. Section 47(5) of the Adoption and Children Act 2002 ("ACA 2002") provides that a parent may not oppose the making of an adoption order without the court's leave. Section 47(7) provides that the court cannot grant leave '*unless satisfied that there has been a change in circumstances since...the placement order was made*'.
44. In *Re P (Adoption: Leave Provisions)* [2007] 2 FLR 1069, the Court of Appeal held that the court must apply a two-stage approach, as follows:
 - a. First, the court must ask itself whether there has been a change of circumstances '*of a nature and degree sufficient, on the facts of the particular case, to open the door to the exercise of the judicial discretion to permit the parents to defend the adoption proceedings*' (at [30]).
 - b. Second, the court must exercise its discretion, governed by section 1 ACA 2002, to determine whether to grant leave.

45. The Court of Appeal cautioned at [32], that *'the test should not be set too high'*. The Court took the view that the question of whether there has been a relevant change in circumstances *'must be a matter of fact to be decided by the good sense and sound judgment of the tribunal hearing the application'*.
46. In respect of the second stage, Sir James Munby in *Re B-S (Children)* [2014] 1 FLR 1035 articulated the exercise as follows, at [74]:

'The court will in particular have to consider two inter-related questions: one, the parent's ultimate prospect of success if given leave to oppose; the other, the impact on the child if the parent is, or is not, given leave to oppose, always remembering, of course, that at this stage the child's welfare is paramount.'

47. In *Re W (Adoption: Set Aside and Leave to Oppose)* [2011] 1 FLR 2153, Thorpe LJ held that the court *'must have great regard to the impact of the grant of permission on the child within the context of the adoptive family'* (at [20]). Given the potential consequences of granting leave, Thorpe LJ proffered the following approach when considering prospects of success:

'So such a consequence should surely not be contemplated unless the applicant for permission demonstrates prospects of success that are not just fanciful and not just measurable. In my opinion they should have substance. Perhaps, to borrow from the language of Lord Collins in another sphere, they should have solidity.'

48. In *Re B-S*, at [74], Sir James Munby repeated that, at stage 2, the court must consider *'all of the circumstances'*. He set out in detail the relevant principles which govern the balancing exercise to be undertaken. That paragraph was attached to Mr Wilson's document and the factors set out there are important to bear in mind.

Change in circumstances

49. In her statement, her discussions with the Children's Guardian and what she has told the court at previous hearings JK places reliance on the fact that the older children have spent increasing amounts of time with her and since the Covid-19 restrictions have been largely based at her home. Her ability to care for them is the subject of an ongoing assessment, which is likely to have recently completed. JW reports she is in a new settled relationship that brings stability and the older children have done well in her care, as well as at school. In addition, JW reports that she has attended or taken part in domestic abuse courses and other parenting programmes. JW relies on this positive change in her ability to care for her older children and her eldest daughter's child born earlier this year as being a sufficient change in circumstances to meet the first step.
50. Mr Wilson, supported by the other parties, submits there has not been a relevant change in circumstances. JW has shown no evidence of insight or change from the findings made in August 2018, highlighted by what JW says that the reason for the care proceedings relates to a misunderstanding by the social worker. JW shows no recognition or understanding of the findings made about her eldest daughter regarding risks of sexual harm or emotional neglect. In her recent discussion with the Children's Guardian JW denied the findings of sexual harm. There is no evidence JW has

undertaken any of the work recommended by Dr Szvak and JW's level of co-operation with the local authority has not changed. R's circumstances also need to be considered, they have not changed, she remains settled in LR's care who she regards as her forever family and the findings made about the significant loss if she were removed from LR's care remain.

Welfare

51. JW's position is that she regards it as hers, her other children and R's right for R to be restored to the care of her birth family. JW places emphasis on the fact that R is a Polish national and stresses the importance of her biological and cultural identity.
52. Mr Wilson, supported by Mr Pearman and Ms Peacock, submits the court needs to undertake a balancing exercise focussed on R's welfare being the court's paramount consideration. He relies on the following as being relevant factors.
53. The granting of leave would have a significant impact on R's welfare. She has been the subject of proceedings for most of her life and continuing uncertainty about her future care is contrary to her welfare. There would be further delay, which will have an impact on LR and R, as well as the prospect of further assessments which require the co-operation of all parties. JW has shown little change in her ability to consistently co-operate within this application.
54. JW's prospects of success lack solidity because any move of R from LR is likely to cause R considerable emotional and psychological harm, as the court found in May 2019, even balancing in the benefits in terms of her identity of placement within the birth family. R has no existing relationship with JW, who she has not seen since June 2019. In addition, JW's current household consists of her partner, her three older children and her grandchild where it is unlikely that R's particular needs can be met. LR recognises the importance of R's background and cultural needs, the importance of knowing about her birth family and ongoing sibling contact.

Discussion and decision

55. Turning first to the decision to proceed to determine this application in the absence of JW. The court needs to carefully weigh in the balance the Article 6 and 8 rights of both R and JW, as well as NP. As can be seen from the history outlined above the court has taken significant steps to ensure JW and NP can engage in these proceedings. At each stage the court has understood the difficulties they have had in joining the proceedings by remote means and taken steps to ensure that can take place. Those steps have included delaying the start of hearings, adjourning hearings and directing translation of relevant documents. At each stage, as in the care proceedings, JW has had the additional support of a representative from the Polish Embassy attending hearings, as well as a court interpreter. Whilst the court and the parties were hopeful of JW being able to secure legal representation, it is clear that a contributing factor to the delays in the determination of any legal aid application have been caused by the difficulties in JW promptly responding to requests for further information from the solicitors, with no sign that position is likely to change. JW knew from it being explained to her by the court at previous hearings, as she acknowledged in her discussion with the representative from her solicitor, that this hearing could determine her application. She

has been given the opportunity to file an additional statement, which she has not taken up. The document she produced over the short adjournment, together with the other material available to the court, demonstrates JW is aware the court may determine her application today and has decided not to engage. In those circumstances, whilst the court has enormous sympathy for her position, the application cannot continue to be adjourned in a vacuum, with little prospect of any change. In my judgment the proportionate balance of the relevant factors come down in favour of the application being determined. JW has all the material to be able to fairly take part in this hearing, she knows that could happen and has chosen, on an informed basis, not to attend or participate. In the circumstances of this case, there is no benefit to R in delaying this issue any further. NP's position is different. He has failed to attend recent hearings, knows of the way to communicate any information to the court and has chosen not to engage any further.

56. Turning to the application for leave to oppose the legal framework is clear. As regards the change of circumstances the court must factor in not setting the test too high. The question is has there been a change in circumstances *'of a nature and degree sufficient, in the facts of the particular case, to open the door to the exercise of the judicial discretion to permit the parents to defend the adoption proceedings'*. If what JW reports is correct about the arrangements with the older children and her current partner those are positive steps that JW has taken and do indicate an ability to co-operate with assessments. However, this can't be viewed in isolation of the findings made by the court in August, JW's continued denial or minimising of those findings, the history of JW's lack of co-operation with the local authority and professionals, the difficulties the court and the parties have had within these proceedings in getting JW to consistently engage and the lack of any evidence that JW has engaged with any of the work outlined by Dr Szpak in the care proceedings, or that she sees any real need or understanding to do so.
57. In my judgment JW has failed to satisfy the first test. Acknowledging it should not be set too high and recognising the steps she has taken in Poland in relation to the older children and her own personal circumstances there remain significant features of this case where there has been no real change. These include JW's lack of acknowledgement of the findings made, the risks to the children (including R) and the steps that need to be taken to reduce those risks and her failure to consistently co-operate within these proceedings, despite the support arrangements that were in place. Whilst her care of the older children and her new relationship are positive steps, they alone are not of a nature and degree sufficient to demonstrate a change of circumstances relevant to R on the facts of this case.
58. Even if I am wrong about that I am satisfied, in any event, the court should not exercise its discretion to give leave. Whilst the court recognises and understands JW's particular emphasis on R's background and cultural needs the exercise of this discretion is governed by the lifelong welfare needs of R, in accordance with section 1 Adoption and Children Act 2002, of which that consideration is but one of many factors. The application to oppose the making of an adoption order would, in my judgment, have little prospect of success due to the lack of any real understanding or acceptance by JW of R's current position, the background and findings made in the previous judgments in the care proceedings. JW's strong feeling about what happened to R has, sadly, not translated into any demonstrated real change in her ability to consistently co-operate

with the local authority and other professionals here. Consequently, there would be a real risk of further significant delay if JW was given leave which would be detrimental to R. During the hearings she attended JW came across as someone who was able to articulate herself very well. This was evident during her discussion with the Children's Guardian in September, yet as the Children's Guardian observed '*Considering the passion with which [JW] talks about having [R] returned to her care, I would have expected [JW] to be more proactive and allocate time to prepare her statement...*'. A feature of the history of this case is the mismatch between JW's strongly held views and her actions. The failure to remain in regular contact with her solicitor to progress her legal aid application is but one of many examples. The court found in May 2019 that any move from LR's care was contrary to her welfare, there is no evidence that position has changed. All the evidence points to R being more settled. Whilst that fact alone cannot determine the outcome it is a welfare reality for R. The court must carefully weigh in the balance R's background and cultural needs, which need to be considered through the welfare lens, and not in the absolute terms set out by JW. Part of this evaluation needs to take into account the evidence that LR is someone who has shown an understanding of this as an important part of R's welfare needs, including the importance of sibling contact. The court has also weighed in the balance the finality of an adoption order, however further delay in the particular circumstances of this case is contrary to R's welfare needs.

59. For those reasons, even if the court is wrong about the change in circumstances, I am satisfied the court should not exercise its discretion to give JW leave to oppose the making of an adoption order.