Case No: BM18C00097

IN THE FAMILY COURT
(Sitting in Nottingham)

Date: 16 October 2019

Before:

HIS HONOUR JUDGE MARK ROGERS

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C (A child)

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Mr Andrew Bainham (instructed by **Brendan Fleming**) for the Mother
Ms Naomi Hobbs (instructed by **Anthony Collins**) for the Child
Ms Jaqueline Julyan S.C. (instructed by **Birmingham City Council**) for the Local Authority
The Father, Maternal Grandmother and Maternal Step-Grandfather appeared in person

Hearing date: 20 September 2019

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JUDGMENT

His Honour Judge Mark Rogers:

1. This is an appeal, permission having been granted by His Honour Judge Rowland, against the order of District Judge Mian made on 15 March 2019, following a five day hearing from 4 to 8 March 2019. The order and this appeal concern the future of a girl, aged 1, whom I will call M. By her order, the Judge made a care order, followed by a placement order to facilitate a care plan for M's adoption. She rejected the alternative option of placement with the maternal grandmother and maternal step-grandfather (for convenience "the grandparents").

2. At the conclusion of the argument, I announced that the appeal would be allowed for reasons which would be delivered later.

3. As will become plain, it is unnecessary for me to give a detailed factual background. The briefest summary (with some over simplification) is as follows.

4. M's mother has 3 other children, all of whom live or have lived with the grandparents. The most significant of the siblings is N, who is a 14 year old boy. Unfortunately, as a result of his medical and behavioural issues, he presents any carer with difficulties as he can exhibit challenging and aggressive behaviour, so severe that he can, unwittingly, pose a serious threat to the safety and wellbeing of those around him. Obviously, a very young child is particularly vulnerable in that environment. Proceedings in respect of N were taken by another local authority (LA A) than that involved in M's future. LA A have a care order in respect of N. He had previously lived with the grandparents but at

the time of the hearing he was in residential care. His care plan envisaged him returning to the grandparents' home in due course.

5. For reasons that I need not set out in detail, neither parent nor other family member could offer M a home. The Judge, therefore, had a simple choice, namely to place M with the grandparents or make a placement order. The seriously complicating factor was that, although the care plan of LA A to place N back with the grandparents was clear, there were substantial doubts in the minds of the family members and M's Guardian, whether the plan was still viable and/or whether it would ever be implemented. LA A was not present or represented before the Judge and the written material provided was equivocal. The Judge was right, in my judgment, to be worried about this aspect of the case.

6. The hearing was a substantial one and the Judge investigated the position in depth. Her reserved judgment (Bundle reference A4) is full of detail and runs to some 38 pages and 177 paragraphs. It is, in many respects, an impressive example. From paragraphs 34 to 46, the Judge sets out the statutory and other legal principles engaged in a clear and comprehensive fashion. She states, in terms, as I would expect, that the child's welfare is the paramount consideration. The legal exposition, read in isolation, could not possibly support an arguable case that there was a misdirection.

7. The Judge's ultimate decision was to reject the family placement and to prefer the placement order. Over many pages towards the end of the judgment, she undertakes an apparently careful balancing exercise looking at the advantages and disadvantages of each option before coming to a welfare-centred decision.

Again, I have no hesitation in saying that, without knowledge of the wider context, it would be difficult to criticise the Judge's approach to the discretionary element of the case.

8. Both the mother and M, through her Guardian, appeal. The mother's appeal is essentially a challenge to the substantive decision, whereas the Guardian concentrates upon procedural unfairness. However, each supports the other's appeal and the unrepresented other family members all support both appeals. Birmingham City Council (LA B) takes a more nuanced approach. But for the factual change of circumstances, to which I will turn, it would have been inclined to resist the substantive appeal. As to the procedural appeal, it indicated it preferred to make no detailed submissions, adopting a broadly neutral position. I expressed mild surprise at that stance but, upon reflection, having heard Ms Julyan SC explain the sensitivities and importance of the working relationship between LA B and the Court, I understand why it does not wish to associate itself proactively with the more severe criticisms of the Judge's conduct of the case.

9. A great deal of written material has been provided for this appeal. The bundle contains voluminous transcripts, not only of the judgment but of the hearing over all 5 days and the post-judgment exchanges. In sections B and C of the bundle are the Appellant's Notices with Skeleton Arguments. In addition, for the appeal hearings I have been provided with various supplemental Notes from counsel and was referred to a number of authorities. I have also been provided with a certain amount of updating factual material, specifically dealing with N's current position. Unusually, I have also been provided with digital recordings

of the hearing and, at counsel's request, have listened to specifically identified parts and, upon my own initiative, have listened to other passages to get a wider feel for the situation.

10. At B11, Mr Bainham, in his Grounds of Appeal identifies the 3 substantive points. They assert that the Judge wrongly found placement of M with the grandparents was unrealistic, that the Judge attached greater weight to N's welfare than to M's and that the Judge wrongly rejected the recommendations of the Guardian. In argument, Mr Bainham concentrated principally upon the second Ground which he submitted was a plain error of law.

11. At C13, Ms Hobbs, in her Grounds, asserts that the conduct of the Judge amounted to a serious procedural irregularity denying the parties an opportunity for a fair hearing and thereby breaching the fundamental Article 6 Right under the European Convention.

12. Any appeal in this jurisdiction is governed by Part 30 of the Family Procedure Rules 2010 (and Practice Direction 30A). Pursuant to Rule 30.12 (3):

"The appeal court will allow an appeal where the decision of the lower court was-

(a) Wrong; or

(b) Unjust because of a serious procedural or other irregularity in proceedings in the lower court."

13. Clearly in this case both limbs are engaged. Although starkly different in form, the complaints arise from the central factual issue of how the Judge had to deal

with the complicating feature of N's care plan, as already identified. I have read the transcripts and, notwithstanding the volume of material, one theme stands out. The Judge was not prepared to consider or even explore the practical realities of the case. She pointed out repeatedly the substance of N's care plan and refused to investigate whether it might not be implemented. She regarded that as outside the scope of the enquiry and an issue over which she had no jurisdiction or control. Mr Bainham submits this was a fundamental error leading to a flawed approach in law and factually. Ms Hobbs submits that the Judge's insistence upon her view throughout the hearing to the exclusion of any contrary argument meant that a fair hearing was impossible and, in fact, that the hearing degenerated into a tense and confrontational environment where no-one could perform to the best of their ability.

14. Mr Bainham hardly needs authority to support his central proposition that since M is the subject of these proceedings only her welfare can be regarded as paramount. In fact, in his Skeleton Argument he highlights the statutory basis with reported authority to make good his point. There is no doubt that the Judge had to have regard to N's position as it potentially impacted upon M's but axiomatically his welfare could not be the focus of her judicial determination, however compassionate or sympathetic she might have felt to his plight. As I have already said, the judgment itself does not suggest a misdirection. However, in my judgment, an analysis of the entire process leads obviously to a different conclusion.

15. Although not determinative, Mr Bainham has calculated that N is mentioned more than twice as often as M and references to his care plan are numerous. He

says the only fair reading of the whole case is that the Judge became fixated upon the implications of the plan. If so, he submits, the matter should have been explored fairly and from both sides. He rejects the view that the Judge was not entitled to go behind the plan as stated on paper. To the extent that there was a tension or a complication then the Judge's duty was to resolve it through the route of M's welfare not N's.

16. I do not propose to quote extensively from the evidence or judgment as that would be cumbersome and unnecessary. Simply by way of example the following are illustrative.

17. In the course of the Guardian's examination in chief the Judge intervenes (E222):

"No, there are two things going on here and this is what has, forgive me, with the greatest respect, seems to have, confused the front bench completely. There are two things going on here. One is the actual plan for N and that is to return home. And there were several attempts to go behind that plan which I have fairly robustly drawn an end to on the basis that you cannot go behind that plan. There are three ways of looking at it. The second is the reality and, as I said to everybody, in particular the grandparents, they may be absolutely right that N never comes home. But because we have the plan for him nobody can say that with any certainty."

18. Mr Bainham submits, in my judgment, with great force that if the Judge herself acknowledged the uncertainty of the situation, it was wrong of her to assume the absolute position of the care plan without exploring the contrary and worse it was wrong of her to shut down and ultimately extinguish argument on the

point. The explanation, he submits, is that the Judge became distracted by N's position to the point where she felt it her responsibility to promote it over M's. In my judgment, there are many examples in the evidence of the Judge's approach becoming less focussed on M's welfare than it should. At E230, the Judge intervenes in the questioning of the Guardian again and in a lengthy passage she speaks of "competing plans" and sets out forcefully the implications for N if his plan is overridden. Later at E242, still ostensibly in the course of the Guardian's examination in chief and clearly exasperated the Judge says:

"No. No. No. Oh my God, I am sorry. I am sorry. I am really sorry. I am going to try one more time and then we are just going to carry on with the hearing. I do not know how many ways in which to say this. I cannot interfere with N's plan."

19. The difficulty with that interjection, as Mr Bainham submits, is that no party was suggesting the Judge could or should interfere with the plan. Simply she was being asked to bear in mind the reality that there was credible evidence (counsel refers to it in his Skelton Argument in detail) that the likelihood was that the plan would never be implemented.

20. In the judgment the Judge is more circumspect. She analyses the position with some care and points out the obvious risk to M if N is then placed back in the home. Although she refers to the view that rehabilitation of N is unlikely in the view, for example, of the grandparents (A30, para.118), she does not, in my judgment, engage with the implications.

21. Mr Bainham emphasised a particular passage which, he submits, highlights the erroneous approach of the Judge. I agree. It is, in my judgment, both in isolation

and in the overall context of what I have been describing, telling. At A36, paragraph 147, she says:

"Given that N's plan is to be within their household, there are therefore already three children in their care. The fact that N is not physically present does not detract from the fact that this is his home with a plan for him to return to his home. Were M now to be placed in the care of the GPs, then as and when it comes to the time for N to return home he would not be able to do so. If M were to be placed with the GPs, then in effect N's care plan has been thwarted and the decision has been made for him."

I accept that the Judge grounds that passage in the dilemma facing the grandparents who might be faced with an impossible choice and she undoubtedly feels compassion for their plight. Nevertheless, it is clear that she felt the potential unfairness for N was a key factor. I am driven to the clear conclusion that the passage quoted when taken together with the entirety of the evidence reinforces the correctness of Mr Bainham's submissions.

22. I am quite satisfied that the Judge failed to drill down into the realities of this complicated situation and failed, notwithstanding her direction to herself, to ensure that M's welfare needs were paramount. Her understandable anxiety about N's situation blurred her analysis.

23. I have not yet dealt with any submissions put forward by Ms Julyan SC on behalf of LA B. Initially, the local authority was inclined to support the Judge's reasoning on the substantive appeal and indeed a detailed Skeleton Argument was filed. Counsel submitted that the Judge had not elevated N's needs above M's but had conducted a review in the round fairly and properly. However, in

the changed circumstances and taking a pragmatic view, she was instructed to concentrate on achieving the best outcome for M now rather than rehearsing matters which have become largely academic. I commend the local authority's realism although I was (and remain) persuaded of the need for a determination of the appeal.

24. I need not deal with Mr Bainham's third Ground as that overlaps with the procedural appeal to which I will turn in due course.

25. Grounds 1 and 2 are amply made out and would be sufficient in themselves for me to allow the appeal. But for the change of circumstances, I would have felt compelled to remit the matter for a rehearing.

26. Shortly before the appeal was due to be heard, LA A notified all concerned of its decision to revise N's care plan by reversing the proposal to place him at home but to secure his future in a suitable residential placement. The detail required confirmation but I was satisfied that the position was firm and so the very factual dilemma underlying the hearing below had now been resolved. The family members were all content with the change of plan and accepted it was impossible to envisage a safe return of N. In consequence the perceived impediment to a placement of M was removed.

27. LA B, through Ms Julyan SC, questioned the need for an appeal at all. She submitted the outcome now favoured by all could be achieved by a consensual revocation of the placement order and the variation of other orders to facilitate M's placement with the grandparents. Alternatively, she submitted that the appeal could be allowed by consent without a substantive judgment on the basis of fresh evidence. No relevant applications or formalities had been made or gone

through and the preferred approach under Rule 30.12 (2) was not debated in depth. However, given the obvious need for the child's welfare to be secured, I indicated that I would endorse the practical change for M without the need for further formality and, importantly, to avoid the need for remission. Having heard argument, I accepted the importance of hearing the appeal and of delivering a judgment come what may.

28. The benefit of hindsight is easy. The irony of what has in fact happened is not lost. Precisely what the Judge was being urged to consider has come to pass.

29. The Judge's conduct of the hearing has been the subject of sustained criticism by Ms Hobbs. She, as counsel, understandably told me it was a most uncomfortable position to be in. Nonetheless, she pursued her points fearlessly with the considerable support of Mr Bainham and the lay parties.

30. Recognising the potential sensitivity, the Designated Family Judge for Birmingham, Her Honour Judge Thomas, directed at an early stage that the appeal should be conducted by another DFJ on the Midland Circuit but at a Court distant from Birmingham and by a Judge without any significant day to day working relationship with the District Judge. Also, the slightly unusual direction that the digital recordings should be made available was given. Those were, in my judgment, prudent precautions in order to achieve absolute fairness and transparency in the appellate process. That notwithstanding, I have not found it easy to scrutinise critically a colleague's approach to a difficult case such as this.

31. It is worth remembering the pressures under which the judiciary at all levels operates. Public law or care work is enormously important and difficult. Family

Judges, at all levels, make life changing, profound decisions in relation to children on a virtually daily basis. Very often the subject matter underlying the cases is grim, highlighting the worst in human nature. The relentless and gruelling nature of the work for all involved, including Judges, can take its toll. My experience, however, is that there is not a single Judge or Magistrate undertaking this work whose aim is not to improve the lot and future of the child or children in question.

32. The goal of any case is to arrive at the just outcome fairly. Case management and, in particular, trial management depend upon the particular facts of each case. Naturally, the range of different situations is infinite. A useful starting point is the Overriding Objective in Part 1 of the Rules. It is a code to deal with "cases justly", no more, no less. The items in Rule 1.1 (2) are examples of how to achieve the objective. There are, of course, internal tensions. Expedition, proportionality, equality of footing, savings and allocation of resources are imprecise and plainly import the Court's value judgment on a case by case basis. It is very rare for an appellate Court to interfere with a discretionary decision as to how to progress a case through a hearing. The discretion is very broad and is normally best entrusted to the trial Judge.

33. It is axiomatic that a trial should be fair. That is at the heart of our system, is common sense and is enshrined, in any event, in Article 6. Fairness does not mean that a Judge should indulge every point and should never intervene to clarify or curtail as appropriate. Care proceedings can quickly become unwieldy with large amounts of unnecessary or marginal material in documentary form. Issues are often imprecisely defined so that analysis becomes vague, repetitive

or incoherent. It is the Court's duty to identify the key issues and to focus attention on them. Oral testimony can easily become unfocussed with a mixture of fact, assertion and opinion. Time estimates can become quickly untenable if a firm hold is not maintained. In short, the need for firm case and trial management is not only desirable but essential.

34. In every case there is a line which should not be crossed. It is difficult, in advance, to identify the precise position of that line but it may be easy to see when it has been crossed.

35. The criticism of the Judge is really two-fold. Not only, it is said, she shut down consideration of a central issue rendering it impossible to have a fair hearing but, further, that her conduct of the hearing and her own demeanour in Court made the atmosphere so difficult that all of those involved in the process were prejudiced.

36. I have already dealt extensively with the Judge's erroneous approach, as I have found it, to the central issue. She effectively prevented a proper debate. By intervening as she did, she distracted everyone from the proper focus. Even if she had her misgiving about the relevance or practicality of the discussions, she should, in my judgment, either have held back expressing a concluded view until her judgment or resolved the matter, subject to appeal rights, at an interlocutory stage. What actually happened was the worst of all possible worlds as the point was debated over and over, mainly by the Judge and Ms Hobbs, with no satisfactory resolution.

37. Of much more worrying effect are the criticisms of the Judge's demeanour. I do not regard it as necessary or fruitful to read significant amounts of the transcript

into this judgment. In her Grounds of Appeal Ms Hobbs refers expressly to the Judge's improper conduct as being exemplified by "blasphemous words, shouting, storming out of Court and general intemperate behaviour". In the course of her submissions and with reference to the transcript, she also referred to sarcasm, the Judge shaking with rage, the Judge turning her chair away from the Court and sitting with her back to everyone for several seconds, mimicking the advocate's words and to intimidating the Guardian.

38. I could analyse each of the matters referred to but need not as, sadly, I am satisfied they are all well-founded. I myself listened to the recording and heard, with dismay, the anger and tension in the Judge's voice. I also heard her banging her desk. Her exchanges with Ms Hobbs were sharp and substantially inhibited counsel from doing her job.

39. The Judge's frustration, to use a mild word of description, seems to have stemmed from her view that the Guardian's analysis was non-existent or deficient. The Judge felt that the Guardian had not grappled with the central issue of the case, namely the interplay of care plans. Whether this is right or wrong, Ms Hobbs submits that her treatment of the Guardian was unacceptable. The matter came to a head when the Guardian gave her evidence. The Judge permitted examination in chief but then effectively prevented counsel from conducting it. It was, in my judgment, wholly unsatisfactory and degenerated into a critique of the Guardian's perceived failure of approach. Perhaps a good example of what went wrong is to be found at E245-247. Over the course of those 3 pages the Judge effectively cross-examined the Guardian as if she were representing another hostile party. In my judgment, there and in many places

elsewhere the Judge went far beyond clarification or amplification and descended into the heart of the arena.

40. In her judgment (A33, para 135), the Judge records the Guardian's recommendation as a final care order and placement order. That is in contrast to paragraph 134 where she said she stood by her recommendations. In my judgment, it is clear that the Guardian was inhibited from explaining her position fully because of the Judge's apparent hostility. In the end the Judge stated (A41, para174) that "I do not take into account the evidence of the Guardian". Read literally that is a clear error. Even if she does not precisely mean what she appears to say, she plainly discounted the view of the Guardian. I am driven to the clear conclusion that, ironically, the quality of the Guardian's evidence was severely diminished by the Judge's own interventions.

41. Family proceedings should not be unnecessarily adversarial. One important function of a Judge, in a quasi-inquisitorial jurisdiction, is to help the witnesses give their evidence in a clear and unflustered fashion. Of course, points can be questioned and tested but not, in my judgment, to an extent that a witness is unable properly to fulfil his or her role. This, it seems to me, is all the more so in care proceedings when a Guardian is trying to explain her professional view to the Court. Here, Ms Hobbs reported that the Guardian felt considerably stressed and upset to the extent that her answers towards the end of her evidence became flat and virtually mono syllabic. It seems to me that the transcript broadly bears that out.

42. The difficulties surrounding this hearing must have been obvious. It is of significance that they were mentioned explicitly. At E247 Ms Hobbs says

"Madam, if I am frank, I am a little concerned about the atmosphere in the Courtroom. I really am and I do not know……". The Judge intervenes; "Well, please do not be." Later, Mr Bainham, although acting for the mother, informs the Judge on behalf of the unrepresented grandmother, who he has been told is highly distressed and will not re-enter the room, at E265;

"I think, madam, she also found that there was a lot of interruption of witnesses, a lot of interruption of the advocates. She found that difficult to deal with and I regret to say that she also told me that she thought it was unprofessional that there were certain outbursts from the judge which she found unprofessional."

43. Equally worrying is the letter that the grandparents sent to the Guardian before judgment was delivered which is reproduced at A53. I suspect the grandparents anticipated the probable outcome of the case, but I get no sense that the letter was written with any ulterior motive or to gain strategic advantage. The material passages read:

"1. I would like to recognise and give thanks for the care and consideration we received from Judge Mian whilst dealing with us personally throughout the week. However, we found the rest of the hearing highly distressing.

3. I wish to object to the constant barrage of interruptions aimed at professional witnesses and barristers questioning them……This in my mind brings into question the impartiality of the proceedings.

4. The way the Children's Guardian was questioned by the Judge for most of the day was in my view very wrong and particularly harrowing for both her and us. This seems particularly unprofessional."

44. This letter encapsulates the tragedy in this case. I have no doubt that the Judge was desperately trying to move a difficult case forward. I am sure she believed that the family members and the Guardian had missed the point about N's care plan and hoped to persuade them to see the reality as she perceived it. I am also sure, as the Judge said more than once and as the grandparents seem to have appreciated, that she had nothing but sympathy for their position. Yet, by the insistence of her position and her apparent refusal to listen to the contrary arguments before making a reasoned judgment, she not only derailed the substance of the hearing but created an atmosphere where completing a fair hearing became impossible. She seems to have alienated even those whom she sought to praise and encourage.

45. Examples of Judges overstepping the mark appear in the authorities. It is impossible and would be wholly unwise to be prescriptive as to what conduct and words are or are not acceptable. There is no advantage in a Judge of Circuit Judge level, sitting in that capacity, to seek to lay down rules or give guidance. I would simply say that it is a fundamental tenet of fairness to listen carefully to the competing arguments before coming to a firm decision.

46. In *Re A (Children) [2015] EWCA Civ 133* the Court of Appeal allowed an appeal against a decision of a Circuit Judge whose interventions were premature and whose language was intemperate. The consequence in the view of Lady Justice King was to leave the advocates feeling browbeaten and impotent. Lord Justice Aikens's criticism of the Judge's approach was even more pointed. The Court found the Judge's conduct to be a serious procedural irregularity.

47. Similarly, in *Re B (Children) [2017] EWCA Civ 1635* the Court of Appeal allowed an appeal against a Deputy Circuit Judge, characterising his approach as interventionist and his tone as unnecessarily adversarial. Lord Justice McFarlane, giving the leading judgment, indicated that it would have been preferable had the Judge allowed the parties to get on and ask their questions.

48. Each of these cases depends upon the individual factual context but are indicative of conduct which can, on occasion, overstep the line, even allowing a generous margin of discretion in the management of trial procedures.

49. *Re B* is also useful in describing the role of the advocate in these difficult circumstances. In paragraph 31 of the judgment Lord Justice McFarlane makes clear that there is an onus upon the advocate to stand up for his or her case and, at least, to get over the central points, however resistant might the Judge be. In this case, Ms Hobbs tried hard to explain the Guardian's position, ultimately to no avail. Even in the final submissions, from E 299 onwards, the predominant speaker is the Judge, appearing to challenge Ms Hobbs almost line by line.

50. As I said earlier, with the benefit of hindsight, it would have been wise for counsel to have asked the Judge to give a formal ruling on relevance or admissibility rather than allow the point to appear again and again in the unstructured way it did. Had that happened the Judge would have had to focus on the point and, even if she ruled against counsel, the hearing could have continued in an orderly fashion, with the Guardian's appeal rights reserved and protected. I realise that such a course might not easily have been pursued in the prevailing atmosphere.

51. In short, looking at the whole picture, I am quite satisfied that the Judge on this occasion crossed the line and that the hearing amounted to a serious procedural irregularity. But for the fortuitous change of circumstances described before, I would have been bound to allow the appeal on this Ground also and direct a full rehearing. Mercifully, that is not now necessary.

52. I have taken the decision to deliver a full judgment and identify the Judge by name, having heard argument on the point. I have no wish to embarrass or discomfort the Judge, but I am convinced that the public interest in the Family Court being transparent and open to scrutiny is the decisive factor. The anonymity of the children, the lay parties and the Guardian however has been preserved. At the request of the appellants, I am content for this judgment to be published on *bailii.org* but stress that it is merely illustrative of an issue rather than in any way a definitive statement of approach.