IN THE FAMILY COURT AT LIVERPOOL

ON APPEAL FROM THE MAGISTRATES SITTING IN CHESTER

Neutral Citation Number A Local Authority v F, E, D, A, B and C [2023] EWFC 33 (B)

Case No. LV22C50397

Courtroom No. 25

35 Vernon Street
Liverpool
L2 2BX

Tuesday, 21st February 2023

Before:
HIS HONOUR JUDGE PARKER

B E T W E E N:

A LOCAL AUTHORITY

and

F, E, D, A, B & C

MR SENIOR appeared on behalf of the Applicant
MS HEWITT appeared on behalf of the Respondent Mother
MS DEANS appeared on behalf of the Fourth Respondent Father
MS JONES appeared on behalf of the Respondent Maternal Grandmother
MR HAGGIS appeared on behalf of the Children through their Guardian

JUDGMENT

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.

HHJ PARKER:

1. This is an oral judgment delivered from notes. In this appeal, I am dealing with three children, A, who is aged 11, B, who is aged 10 and C, who is aged five. They appear through the Children's Guardian, Michelle Smith, and are represented by Mr Haggis.
2. This is an appeal by the maternal grandmother, D, against a decision of the Chester Magistrates refusing her application for an assessment by an independent social worker. She is represented by Ms Jones.
3. The appeal is supported by the fourth respondent father, Mr E. He is father to C and is represented by Ms Deans. The appeal is also supported by the mother, F, who is represented by Ms Hewitt. In addition, the appeal is supported by the Children's Guardian.
4. The appeal is opposed by the Local Authority, who are represented by Mr Senior.

The Background

5. The three children have lived with their maternal grandmother since 24 May 2022. The grandmother was subject to an assessment which was completed in pre-proceedings in June 2022 to consider whether she could be approved pursuant to Regulation 24 of the Care Planning, Placement and Care Review Regulations. The assessment was negative.
6. The Local Authority issued proceedings on 30 June 2022 and the children had been subject to Child in Need planning from 21 September 2018 until they were made subject to Child Protection planning on 2 February 2021. The Local Authority were in a period of pre-proceedings from 21 April 2022. Unfortunately, that was ineffective in effecting change in relation to the risks that were identified for the children in their mother's care.
7. On 24 May 2022, the mother abandoned the children during an unannounced visit by the social worker. The mother said she was not returning, and the children should go into care. The mother confirmed on 8 June that that remained her position.
8. The risks to the children were set out as follows in the Local Authority evidence: domestic abuse within her relationship and her most recent partner, Mr E, the mother's poor mental health and wellbeing and the impact of this on the children, negative parental responses to managing the children's behaviour, missed health appointments for all the children, the

inconsistent role that the fathers had played in the children's lives and the children's exposure to domestic abuse, an allegation against Mr E that he had previously physically harmed B, the mother's lack of honesty with the Local Authority of her relationship status with Mr E, including not adhering to a restraining order that prohibited her from being near Mr E, the mother neglecting to keep the children safe whilst in the community.

9. At the first hearing within the care proceedings, the Local Authority agreed to further assess the grandmother pursuant to section 38(6) of the Children Act 1989. The Court sanctioned the plan. The full Kinship Carer Assessment of the grandmother, dated 31 October 2022, considered the grandmother as a long-term foster carer or special guardian for the children as well as placement of the children with her under a child arrangements order. The assessment concluded negatively.

10. On 11 January 2023, the maternal grandmother made an application for party status and permission to instruct an independent social worker to complete a further assessment of her. She filed a statement in support. A social worker's statement opposing her application was also filed and served.

11. The matter came before the Magistrates on 30 January 2023 for an Issues Resolution Hearing. The grandmother was supported by the mother, the fourth respondent father and the Children's Guardian.

12. In the order of 30 January 2023, the Magistrates refused the application for an independent social worker and provided written reasons for that decision. The maternal grandmother now appeals that decision.

13. This being a case management decision of the Magistrates, I now set out the law that applied to that decision. Starting from first principles, the Court must further the overriding objective to deal with cases justly having regard to the welfare issues involved. Rule 1.2 of the Family Procedure Rules 2010 provides that dealing with a case justly includes, so far as is practicable,

> (a) ensuring that it is dealt with expeditiously and fairly,
> (b) dealing with the case in ways which are proportionate to the nature, importance and complexity of issues,
> (c) ensuring that the parties are on an equal footing,
> (d) saving expense and
> (e) allotting to it an appropriate share of the Court's resources while taking into account the need to allot resources to other cases.

14. Rule 1.4 imposes a duty on the Court to manage cases actively. Active case management includes identifying the issues at an early stage, Rule 1.4(2)(b)(i), deciding promptly which issues need investigation and hearing and which do not, Rule 1.4(2)(c)(i), and considering

whether the likely benefits of tsking a particular step justify the cost of taking it, Rule 1.4(2)(h).

15. The Children Act 1989 has always recognised the general principle that any delay in determining the question is likely to prejudice the welfare of the child, section 1(2). In public law proceedings, this principle is sharpened by section 32(1), introduced by the Children and Families Act 2014, which requires the Court to draw up a timetable with a view to disposing of the application without delay and, in any event, within 26 weeks beginning with the day on which the application was issued and give such direction as it considers appropriate for the purpose of ensuring, so far as is reasonably practicable, that the timetable is adhered to. Subsection (3) requires the Court to have particular regard to the impact which the timetable would have on the welfare of a child to whom the application relates and on the conduct of the proceedings.

16. The Family Procedure Rules 2010, Part 25.4 states, "The Court may give permission for expert evidence only if the Court is of the opinion that the expert evidence is necessary to assist the Court to resolve the proceedings". Section 13 of the Children and Families Act 2014 states that the Court may give permission only if the Court is of the opinion that the expert evidence is necessary to assist the Court to resolve the proceedings justly. Section 13(7) of the Children and Families Act 2014 provides when deciding whether to give permission, the Court has to have regard in particular to,

> (a) any impact which giving permission would be likely to have on the welfare of the child concerned and the impact on the child of any assessment of them,
> (b) the issues to which the expert evidence would relate,
> (c) the issues with which the examination or other assessment would enable the Court to answer,
> (d) what other expert evidence is available, whether obtained before or after the start of proceedings,
> (e) whether the evidence could be given by another person are matters on which the expert would give evidence,
> (f) the impact which giving evidence would be likely to have on the timetable for and duration and conduct of the proceedings,
> (g) the cost of the expert evidence,
> (h) any matters prescribed by the Family Procedure Rules.

The Arguments

17. The appellant grandmother: the appellant grandmother sets out her argument in her Grounds of Appeal. In the first ground, she suggests that the Court was wrong to refuse the application for an independent social work assessment of the maternal grandmother and in so doing, failed to properly apply Rule 25 of the Family Procedure Rules 2010 24.4, which states

the Court may give permission for an expert in children's proceedings only if it is of the opinion that such evidence is necessary to assist the Court to resolve the proceedings justly. The Court also failed to properly apply section 13 of the Children and Families Act 2014.

18. The Court failed to consider the case of *Re TG (A Child)* [2013] EWCA Civ 5 wherein the former President Sir James Munby stated,

> "Whether applying the present test or the new test, the case management Judge will have to have regard to all the circumstances of the particular… expert evidence the admission of which is in issue… The argument for an expert in a care case where permanent removal is threatened may be significantly stronger than in a case where the stakes are not so high. We thrive to avoid miscarriages of justice, but human justice is inevitably fallible and case management judges need to be alert to the risks".

19. The children have been placed with the applicant maternal grandmother for in excess of the last 10 months and are settled in the placement, which is in place until the final hearing determination. The viability assessment completed by the Local Authority is negative. The appellant seeks to challenge that assessment and, in so doing, to present an independent social work assessment which will address gaps in the evidence.

20. It is suggested that the following are gaps, namely: long-term care capability for the maternal grandmother given the children are and have been placed with the appellant for a significant period and there are no issues raised in respect of care in the interim. The Local Authority evidence fails to address what support could be put in place to support or further work could be offered for the appellant in caring longer term for the children.

21. The mother, father and Guardian are in support of the application made by the appellant for an independent social work assessment given the highlighted areas of alleged deficiency. The independent social worker who was suggested was able to begin work in the week of 6 February and provide a report by the end of March.

22. The Local Authority stance was that the negative assessment could be challenged at the final hearing. It was outlined to the Court that that may then, if effectively challenged, result in further adjournment of the proceedings for further assessment. Also it is suggested that the Court will be left in the same situation of potentially further delay for that assessment if the Court were considering continued placement of the children with the appellant maternal grandmother.

23. The Court when providing their judgment outlined that the final hearing was not anticipated to take place until after May 2023 given the time estimate and witness number. It was

therefore suggested that the Court knew the timescales involved from the Court's perspective and yet refused the application at a stage when the assessment could be completed within that timeframe to enable the Court to have to the fullest picture at that final hearing to then consider placement options as opposed to being unable to consider finalising further placement with the applicant due to that negative assessment.

24. It is therefore suggested that refusal of the application has the very real potential to adversely affect the welfare of the children and is important evidence in addressing identified gaps in the evidence and may add to the delay in the case, which could be a bar to the Court being able to properly consider all placement options and to finalise matters.

25. It was suggested that the application for assessment was and is necessary and the absence of such evidence at this juncture to avoid further delay for the children and in the particular circumstances of this case, the children having remained resident with the maternal grandmother with the Local Authority long-term plan for long-term foster care was failing to deal with the case justly, fairly and expeditiously. It was suggested that the application for an independent social worker was aimed at putting the parties, and the maternal grandmother, being a new party to proceedings that very day, on an equal footing at final hearing, particularly given the children's long-term placement thus far and to final hearing with the maternal grandmother and the stark care plan now advanced by the Local Authority of long-term foster care. I note at this point obviously that the grandmother was legally represented at that hearing and of course legally represented for this appeal.

26. Also, dealing with that assessment within the timescale for final hearing would potentially save expense and court time in that the Court would have all evidence available as opposed to the real risk of further adjournment for reasons already referred to above.

27. It was suggested that permanent removal is the Local Authority care plan, based on the negative assessment of the maternal grandmother, the carer with whom the children have been and are placed throughout these proceedings. The stakes are, therefore, it is suggested, high, and impact on the children, which adds to the importance of the appellant being in a position to present her case in the most effective manner before the Court armed with all the evidence to consider all the options without having to consider delaying further.

28. The second ground: the Court in reaching their decision did so in a way that fell into error because the Court failed to consider, assess and analyse the oral submissions given by the parties against the backdrop of the court timescales. Had it done so, and evaluated the same and factored them into its overall decision, the outcome would have been materially different,

and the Court failed to properly consider and apply the overriding objective with regard to delay in that the Court utilised delay in deciding against the application when the element of delay should have been factored in favour of the application.

29. The Children's Guardian: in her final analysis, the Children's Guardian said this:

> "A, B and C all have individual additional needs including behavioural difficulties. They therefore need beyond reasonable parenting and a higher level of monitoring. As already established, there are concerns and issues regarding D's parenting and the Local Authority conclude that the gap with what she can offer and what the children need is too great to be safely supported. Also there is a limited support network available to D. Notwithstanding this, it is noteworthy that the children have made progress in her care. She has worked with agencies to protect the children and meet their needs and there is no doubt that she loves them dearly and accepts them for who they are and has been committed to caring for them. On this basis, it could be considered that there is a lack of analysis and consideration of relevant orders and support plans which could assist the placement of the children remaining with their grandmother, which would eliminate the harm that separating them from their grandmother will undoubtedly cause. However, due to the children's need of a therapeutic nature, the grandmother would need to engage in therapeutic supports and training to support the children in this area".

30. Further, the Guardian said this,

> "It is my view that there is a gap in the evidence pertaining to analysis of orders. I would ask that serious consideration be given to a care order, support and monitoring plans to consider the children remaining with their grandmother. Whilst I accept the issues that the Local Authority raise, there will need to be an assessment to see if these risks can continue to be managed without exposing the children to significant harm, also if the children's additional needs, which require beyond reasonable parenting, can be met with support by the grandmother as there will undoubtedly be harm experienced by the children in being separated from their grandmother as close attachments have been formed".

Also she recommends further assessment of the grandmother by the Local Authority setting out what support would be put in place to allow the children to remain with their grandmother.

31. It was argued that upon receipt of the Local Authority's position statement dated 26 January 2023, it became apparent that the Local Authority had closed its mind to the Guardian's recommendations to explore fully the viability of the children remaining in the

grandmother's care, where A had been since October 2021 and B and C since May 2022, with the following comment;

"Given the risks outlined above and the Kinship Carer full assessment not being able to recommend any training, support or advice that would adequately alleviate these concerns, it remains the view of the Local Authority that D is unable to safely care for the children long term".

32. Accordingly, at that point, the Guardian supported the application for an independent assessment as being necessary as set out in the supporting statement for that application.
33. The mother and the fourth respondent father argued that the Local Authority assessment of the grandmother was completed in October 2022. In addition, at the hearing on 30 January 2023, it was anticipated that a final hearing date would not be available until May 2023, therefore, by final hearing, the assessment will have been six to seven months old.
34. Moreover, the assessment was completed at a time when the older children, A and B, had only just transitioned to specialist education settings. It was understood that for both children, these settings are more appropriate to their individual needs. They have a number of therapeutic services on site and both children have responded extremely well to the changes.
35. By the time of the assessment, A had been in her grandmother's care for a year, having moved to live with her grandmother by agreement in October 2021. The Local Authority had taken no steps to remove A from the care of the grandmother in this time despite being aware of the move and being involved with the family and did not issue proceedings until June 2022 following further incidents involving B and C in the care of the respondent mother. The initial social work statement at C5 acknowledged that A's emotional presentation had improved in this time in contrast to B and C, who had each deteriorated in the same period of time living with their mother.
36. School reports at F168, in respect of C, and F476, information in respect of B, demonstrate there have been improvements in the children's presentation and behaviour in school. Overall, both children are reported to be less emotionally dysregulated and to have performed better at school since placement with the grandmother.
37. Moreover, the children are all reported to express a clear wish to remain with and being happy with their nan if they cannot return to the care of their mother and as A and B are aged 10 and 11 respectively, their wishes will be particularly important.
38. The psychological assessment at E108 notes the positives in respect of the placement with the grandmother and of maintaining the stability of placement.

> "*They have already experienced significant disruption to their primary care and repeated changes in primary caregivers is associated with increased attachment insecurity and emotional difficulties. There are reports of significant improvements in the children's wellbeing and functioning and if the placement is considered appropriate, then, in my opinion, it would be beneficial to maintain the consistency of their care within this placement at this stage*".

39. The placement with the maternal grandmother is the only placement that would enable the children to remain together, the Local Authority having identified separate placements for the children in foster care. The Local Authority filed evidence acknowledging it is likely to be challenging to identify a placement for all three children together.

40. The grandmother was living in a small flat at the time the children were placed in her care where they remain to date. Whilst the grandmother is criticised for this, the evidence does not identify any steps that have been taken by the Local Authority to alter this situation or assist the grandmother in identifying alternative accommodation.

41. The maternal grandmother had been the subject of a negative fostering assessment undertaken by Manchester City Council in 2009. However, this was undertaken in respect of different children whose individual needs and behaviours are not addressed in any detail in the assessment in October 2022 and at a time when the maternal grandfather was alive, save for identifying that the grandmother has a supervising social worker in the course of this assessment. The updated assessment does not specify what courses were undertaken with the grandmother, if any, and does not differentiate or specify what role the maternal grandfather played in the events that unfolded within those proceedings, nor does it examine differences of the factual matrix of the current proceedings.

42. The assessment appears to be based on relatively little observation of the children and their grandmother or include much detail of their wishes and feelings and/or their individual needs. The assessment does not consider whether the maternal grandmother can care for any of the children as opposed to all of the children together.

43. In light of the above, the respondent mother maintains, as per the position statement dated 29 January 2023, that the assessment of the Local Authority is flawed for all the reasons addressed by the Guardian. In addition, on the basis that it places insufficient weight on the progress the children have made in the care of the maternal grandmother, does not properly consider the care the grandmother has provided to the children to date or balance this properly against the historical information, does not contain detailed observation of the children and

the grandmother or reflect properly on their wishes and feelings in the assessment, places insufficient weight on the need for the children to be placed together and the likelihood of achieving this on a long-term basis within Local Authority foster care, fails to consider properly or at all the ways in which the professional support services and assistance could assist the grandmother in caring for the children.

44. In addition to the above factors, the respondent mother also argues that the assessment of the Local Authority and its evidence contains no analysis of the capacity of the maternal grandmother to care for the individual needs of the children.

45. In the brief reasons at B84, the Magistrates say as follows:

> "*The Local Authority has filed their final evidence and undertook a full assessment of the grandmother. The Court, therefore, does not feel there is any gap in the evidence which would make it necessary to appoint an expert. Further the Court respects the professionalism and integrity of those teams that are required to undertake these assessments. Also the maternal grandmother is granted party status and, as such, will have the opportunity to challenge evidence at a final hearing and, finally, the Court are alive to the fact that currently, the most realistic care plan for the children is one of long-term foster care".*

46. It is argued on behalf of the mother that the Magistrates failed properly or at all to engage properly with the arguments on behalf of the other parties as to why an updated assessment was necessary and why a simple challenge at final hearing to existing professional evidence would be insufficient or unhelpful.

47. In particular, it was argued that the Magistrates provided no analysis of the Guardian's opinion that the assessment of the Local Authority contained clear gaps, was flawed or how those gaps might be addressed.

48. It is submitted that cross-examination at final hearing might reveal or emphasise where the gap exists but that is not a substitute for proper assessment of the issues raised and the evidential lacuna would remain.

49. The Magistrates provided no analysis of the support services explored by the Local Authority to date to the maternal grandmother, if any, save financial support, or of any support provided historically or any changes in support available, for example, through the children's school, nor did the Magistrates address how the evidence would be addressed at the final hearing.

50. Also, the Magistrates did not analyse properly or at all the impact on the children of failing to provide a comprehensive assessment of the grandmother. The Magistrates did not consider

the attachment of the children to their grandmother, the significance of the placement of the children as a sibling group, which is the only placement that will enable the children to remain placed together, or how the current assessment addresses the impact of removal upon the children as part of a sibling group or whether the assessment has properly considered the ability of the grandmother to meet the individual needs of the children.

51. Secondly, the Magistrates' approach to the issue of delay was clearly flawed. The Magistrates cited unnecessary delay in the reasons, however, they went on to extend the timetable for a further eight weeks, acknowledging that there would be further delay before the final hearing. In fact, I note that as a result of my investigation, this case will in fact be listed for final hearing on 13 March.

52. Finally, it is clear that the reasoning of the Magistrates had been influenced by their erroneous conclusion that foster care is the most likely outcome, likewise the Magistrates noting the professionalism and integrity of the assessors.

53. The Magistrates were plainly wrong to reach such a conclusion when the evidence had not been properly tested and in circumstances where they failed to properly consider the arguments of all the parties.

54. The Local Authority, in opposing the appeal, argues that they were in a period of pre-proceedings from 21 April 2022 which was ineffective in effecting change in relation to the risks that were identified for the children. On 24 May 2022, the children's mother abandoned the children during an unannounced visit by the social worker. The three children had been in their grandmother's care since May 2022. The grandmother was subject to a full assessment in 2009 in respect of her older three grandchildren by G. The full assessment undertaken by them indicated that she could meet the day-to-day needs of the children, however, concerns were raised about safeguarding. The assessment concluded negatively.

55. The application by the grandmother for an independent social worker and party status was made at Week 30 of the proceedings. The 26-week timetable required by statute expired on 30 December 2022. The grandmother was subject to an assessment completed within pre-proceedings in June to consider if temporary approval for the children to remain in her care under Regulation 24 of the Care Planning, Placement and Care Review Regulations was suitable, and that was negative.

56. They had issued care proceedings on 30 June, and they had agreed at the first hearing to further assess the grandmother pursuant to section 38(6) of the Children Act. That full Kinship Carer Assessment on 31 October 2022 was negative.

57. The care proceedings were currently at Week 33 and still awaiting an effective IRH. The timescale for the children was significantly longer than this, 43 weeks, if the period of pre-proceedings was taken into consideration.

58. It was argued that it could not be said that the Court did not properly apply the relevant law. Within the Justices' reasons dated January 2023, the Court explicitly observed the relevant sections and applied them to the current case. Specifically:

> *"The Court is very conscious that delay in decision-making is likely to prejudice the welfare of a child who is subject to court proceedings, Children Act 1989, section 1(2), and there is a statutory requirement for public law cases to be completed in 26 weeks, Children Act, section 32. This case is regretfully beyond that now. Whilst the Court is not required to hold the child's welfare as the paramount consideration when making case management decisions, the child's welfare and the need to avoid delay will always be a most important factor and may well be determinative in many cases. Making a timely decision as to the child's further care is, in essence, what each case is about. The child's welfare should be at the forefront of the Court's mind throughout the process. The Court has also kept in mind the overriding objective as set out in the Family Procedure Rules, Rule 1.1. In these times, each of these elements is important but particular emphasis should be afforded to identify the welfare issues involved, dealing with the case proportionately in terms of allotting to it an appropriate share of the Court's resources and ensuring an equal footing between the parties. In considering this application, the Court has also referred itself to Rule 25 of the Family Procedure Rules".*

59. In application of the relevant legal principles and in refusing the application, the Magistrates gave the following reasons:

> *"We do not find that an expert appointment is necessary or proportionate in this case to resolve the proceedings in respect of the children justly. The Local Authority has filed their final evidence and undertook a full assessment of the grandmother. The Court, therefore, does not feel there is any gap in the evidence which would make it necessary to appoint an expert. The Court respects the professionalism and integrity of those teams that are required to undertake these assessments. The Court is mindful of the guidance of the President, Sir Andrew McFarlane, that the Court ought to rely more on those experts already available to the Court and do not consider that further instruction is proportionate or necessary in this case. The maternal grandmother is granted party status and, as such, will have the opportunity to challenge evidence at a final hearing. The Court considers that the application for further assessment is not necessary to resolve the proceedings justly, section 32(5) Children Act, and would*

> *cause an unnecessary delay. It was suggested that the Court could not predict what the outcome of a challenge to the assessment by cross-examination would be at a final hearing and to do so would be wrong. The Court, in granting party status to the maternal grandmother, gave them the proper platform to robustly challenge the assessment of her. The fact that the independent social worker might have completed the assessment before any final hearing could be listed, as suggested, is not the correct test. Equally, the fact that if the assessment is successfully challenged, then further delay will result is not a relevant factor for consideration when determining the ISW application. The test is whether the expert evidence is necessary to resolve the proceedings justly. At this stage, it was suggested there is no evidence to that effect. Only in the event that the Court determines the assessment is flawed or identifies a gap in the assessment will consideration of further assessment become necessary. That is for the trial Judge to determine once the evidence has been fully tested".*

60. The Magistrates' reasons specifically refer to their consideration of the oral submissions made by the parties and the Court is entitled to hear those submissions, consider them and depart from them.

61. It was suggested that it was wrong in law and contrary to the current direction of the President of the Family Division to suggest that delay is a positive argument when determining necessity to instruct experts. The instruction of an expert inherently brings with it wider delays beyond timescales for filing and adds a further complexity to proceedings which should only be introduced where necessary to resolve the proceedings justly. It is submitted that the Court cannot draw that conclusion today as the evidence is untested.

62. The President of the Family Division has reminded practitioners that section 32 of the Children Act 1989 is mandatory and requires the Court to draw up a timetable with a view to disposing of the care proceedings application without delay and, in any event, within 26 weeks beginning with the day on which the application was issued. There is provision for the Court to extend the period "but only if the Court considers that the extension is necessary to enable the Court to resolve the proceedings justly". By virtue of section 32(7), when deciding whether to grant an extension, it is to be noted that extensions are not to be granted routinely and are seen to be requiring specific justification.

My Decision

63. I dismiss this appeal.

My Reasons

64. I begin by setting out the legal backdrop to consideration of appeals against case management decisions.

65. Family Procedure Rules 2010, Rule 30.12 states:

> "*Every appeal will be limited to a review of the decision of the lower Court. The appeal Court will allow an appeal where the decision of the lower Court was wrong".*

66. In *Re TG (A Child)* [2013] EWCA Civ 5, Sir James Munby, the then President of the Family Division, said this:

> *"Fourth, the Court of Appeal has recently re-emphasised the importance of supporting first-instance Judges who make robust but fair case-management decisions: Deripaska v Cherney [2012] EWCA Civ 1235… and Stokors SA v IG Markets Ltd [2012] EWCA Civ 1706... Of course, the Court of Appeal must and will intervene when it is proper to do so. However, it must be understood that in the case of appeals from case management decisions, the circumstances in which it can interfere are limited. The Court of Appeal can interfere only if satisfied that the Judge erred in principle, took into account irrelevant matters, failed to take into account relevant matters, or came to a decision so plainly wrong that it must be regarded as outside the generous ambit of the discretion entrusted to the Judge: Royal & Sun Alliance Insurance plc v T & N Limited [2002] EWCA Civ 1964, Walbrook Trustee (Jersey) Ltd v Fattal [2008] EWCA Civ 427… and Stokors SA v IG Markets Ltd [2012] EWCA Civ 1706...*
> *This is not a question of judicial comity; there are sound pragmatic reasons for this approach. First, as Arden LJ pointed out in Royal & Sun Alliance Insurance plc v T & N Limited [2002] EWCA Civ 1964, para [47]: 'Case management should not be interrupted by interim appeals as this will lead to satellite litigation and delays in the litigation process'. Second, as she went on to observe: 'the Judge dealing with case management is often better equipped to deal with case management issues'. The Judge well-acquainted with the proceedings because he or she has dealt with previous interlocutory applications will have a knowledge of and 'feel' for the case superior to that of the Court of Appeal. Exactly the same applies in family cases. Thus, in Re C Thorpe LJ and I dismissed the appeal notwithstanding what I said was the 'robust view' His Honour Judge Cliffe had formed when deciding to stop the hearing. And in Re B I refused permission to appeal from an order of Her Honour Judge Miranda Robertshaw involving what I described (para [16]) as 'appropriately vigorous and robust case management'. I said at (para [17]): 'The circumstances in which this court can or should interfere at the interlocutory stage with case management decisions are limited. Part of the process of family litigation in the modern era is vigorous case management by allocated Judges who have responsibility for the case which they are managing. This Court can intervene only if there has been serious error, if the case*

> *management Judge has gone plainly wrong; otherwise the entire purpose of case management, which is to move cases forward as quickly as possible, will be frustrated, because cases are liable to be derailed by interlocutory appeals'. As Black LJ very recently observed in Re B (A Child) [2012] EWCA Civ 1742, para [35]: 'A Judge making case management decisions has a very wide discretion and anyone seeking to appeal against such a decision has an uphill task'".*

67. In the case of *Re P (Care Proceedings: Balancing Exercise)* [2014] 1 FLR 824, the Court of Appeal refused an appeal against a case management decision from a Circuit Judge refusing an application for assessment by a psychologist of the father's parenting capacity following the Local Authority's negative parenting assessment of the father. In giving the lead judgment of the Court of Appeal, Black LJ said this at paragraph 56:

> *"In my view, the Judge was not wrong to refuse the assessment the father sought. Case management decisions of this sort are particularly hard to appeal, and, in this case, it cannot be said that the Judge overlooked any considerations which were material. An assessment such as the Local Authority parenting assessment of the father can be challenged in ways other than obtaining a competing assessment. If the facts upon which the assessment has proceeded are wrong, they can be disputed. If the opinions are flawed, that can be explored in cross-examination, the author of the report being taken to the material which undermines or contradicts the conclusions he or she has drawn or, as the Guardian contemplated here, a party can take steps to address the problems that have been identified and/or that he or she acknowledges".*

68. The 26-week requirement under section 32 was introduced as a means of driving down the length of care cases. The philosophy behind it was well-expressed in 2011 in this extract from the foreword to the Family Justice Review by David Norgrove:

> *"Here, all the dedication to family justice can harm children not help them. Having read dozens of replies to our consultations, I was struck by the way in which almost every group thought things would be better were they allowed to do more including Judges, Magistrates, social workers and expert witnesses. Hardly anyone thought themselves should do less. The reality of course is that time and money spent on one child means less time and money available to help another. Dedication to achieving the best possible result for one child comes at the hidden expense of another whose case is delayed or whose social worker has to come again to court when they might have been working to help another child to remain safely with their birth family".*

69. More recently, the Family Court has again come under heavy workload pressure in response to the pandemic. Sir Andrew McFarlane, as head of Family Justice, gave guidance in June 2020 entitled "*The Road Ahead*" and in January 2021 in "*The Road Ahead 2021*". The key message of the first document advocated a significant change in time management. Paragraph 43:

> *"If the Family Court is to have any chance of delivering on the needs of children or adults who need protection from abuse or of their families for a timely determination of applications, there will need to be a very radical reduction in the amount of time that the Court affords to each hearing. Parties appearing before the Court should expect the issues to be limited only to those which it is necessary to determine to dispose of the case and for oral evidence or oral submissions to be cut down only to that which it is necessary for the Court to hear".*

At paragraph 47, it quoted the elements of the overriding objective and stated, "In these times, each of these elements is important but particular emphasis should be afforded to identify the welfare issues involved, dealing with the case proportionately in terms of allotting to it an appropriate share of the Court's resources and ensuring an equal footing between the parties".

70. In his publication headed "*President's Memorandum: Experts of the Family Court*", the President of the Family Division said this:

> *"An order authorising expert evidence will only be made where it is necessary to assist the Court to resolve the proceedings justly, section 13(6) of the Children and Families Act 2014 for children proceedings. Such expert evidence will only be necessary where it is demanded by the contested issues rather than being merely reasonable, desirable or of assistance, Re HL (a Child) [2013] EWCA Civ 655. This requirement sets a higher threshold than the standard of assisting the Court. The instruction of an expert is the primary reason for delay in the Family Court proceedings relating to children. The recent statistics show that an application for the instruction of an expert is almost invariably granted. To avoid delay, Courts should continue to consider each application for expert instruction with care so that an application is granted only where it is necessary to do so".*

71. In his paper "*Making Every Hearing Count*", published in March 2022, the President of the Family Division said this:

> *"Applications for independent social workers or psychological assessments should not be necessary. The culture should be of Judges and Guardians trusting assessments made by the Local Authority unless*

> *a reason not to do so is established. The social worker is likely to know the family better than an independent social worker or a psychologist, and many such assessments add little or nothing to what the social worker can and should be able to tell the Court. The statute is clear; the instruction of an independent social worker or a psychologist will only be permitted if the evidence is necessary to assist the Court to resolve the proceedings justly, Children and Families Act 2014 at section 13(6). If such expert evidence is necessary, then the Court order should limit any report to no more than 25 pages in 12-font typeface".*

72. It was further argued by the Local Authority that the appeal relies heavily upon the suggestion that there is a gap in the evidence following completion of the Local Authority's assessments and suggested failure to deal with the gap in the evidence pertaining to analysis of orders, support and monetary plans to consider the children remaining with their grandmother.

73. Whilst the Children's Guardian accepted the issues that the Local Authority raised, there would need to be an assessment of whether these risks can continue to be managed without exposing the children to significant harm.

74. However, the Local Authority's case is that the deficits in the grandmother's parenting cannot be sufficiently ameliorated to enable her to provide good enough care to the children. In the position statement of the social worker dated 26 January 2023, she states, "Given the risks outlined at birth and the Kinship Carer full assessment not being able to recommend any training, support or advice that would adequately alleviate these concerns, it remains the view of the Local Authority that D is unable to safely care for the children long term".

75. There is, therefore, a difference of professional opinion between the Local Authority social worker and the Children's Guardian. That is why there is provision for final hearings in care proceedings. The Family Court will often be presented with differences in professional opinion between safeguarding, medical and other professions and this is the role of the Judge, to determine which, if any, professional view the Court prefers. The solution is not for the Court to direct another expert, who may, after all, report a view that is inconsistent with both. It is not the role of an additional expert to be the arbiter between two contrasting and competing professional opinions. That is for the Judge. At a final hearing, the Court may prefer the evidence of the Local Authority and determine that the maternal grandmother cannot provide good enough care for these children or any of them. Alternatively, the Court may prefer the evidence of the Children's Guardian and the other parties and take a different course.

76. In this case, the grandmother has been assessed not once but twice, both of which concluded negatively. A summary of the Local Authority's concerns about the grandmother are set out

in paragraph 4 of the position statement of the social worker dated 26 January 2023. The application by the grandmother for an independent social worker and party status was made at Week 30 of the proceedings, 26 weeks having expired on 30 December 2022. The care proceedings are currently at Week 33. There is yet to be an effective Issues Resolution Hearing. The maternal grandmother was also subject to a full assessment in 2009 in respect of her older three grandchildren by Manchester City Council. A full assessment was undertaken showing that she could meet the day-to-day needs of the children, however, there were safeguarding concerns raised in the assessment, which concluded negatively.

77. There has been delay by the grandmother in pursuing this application, although I make no finding as to whether there has been any fault on her part. The full Kinship Carer's assessment was completed in October. Solicitors instructed by her wrote on 30 November 2022 confirming that they had been instructed to challenge the assessment. It was not until 11 January 2023 that an application was made for party status with permission to instruct an independent social worker. That delay amounts to approximately two months.

78. I am not satisfied that the Magistrates did not properly apply the relevant law. Within their reasons, the Magistrates referred expressly to the provisions of sections 1 and 32 of the Children Act. They acknowledged that the child's welfare is not the paramount consideration when making case management decisions, however, the need to avoid delay will always be an important factor. The Magistrates also had regard to the overriding objective in the Family Procedure Rules, Rule 1.1, and to Rule 25 of the Family Procedure Rules, dealing with the provision of expert evidence and also section 13(7) of the Children and Families Act 2014. The Magistrates also applied the right legal test in finding that they did not consider that the application for further assessment was necessary to resolve the proceedings justly. They also did not feel that it had been established that there was a gap in the evidence that made it necessary to appoint another expert at an interlocutory stage.

79. In my judgment, to suggest that an additional assessment by an independent social worker should be ordered to avoid any risk that at a final hearing, the Court decides that there should a further assessment is not the correct test to apply. The Court has to be satisfied at this stage that the additional assessment is necessary to enable the Court to deal with proceedings justly.

80. A decision as to whether the Local Authority is correct in its stance is a decision that can only be made once the Court has heard all of the evidence and performed a holistic evaluation of all the alternatives. The burden will be on the Local Authority to establish on the balance of

probability the risk factors and deficits posed by the grandmother's parenting of the children or any of them. It will have to provide the evidence to support its professional view and the Local Authority's case will be subject to scrutiny and, no doubt, rigorous cross-examination and a Judge will have to form a view of that evidence.

81. The application made by the maternal grandmother with the support of all parties apart from the Local Authority was for an assessment by an independent social worker. However, the maternal grandmother has already been assessed twice by the Local Authority. The issue between the Children's Guardian and the Local Authority is the failure to provide a detailed support plan that seeks to deal with the deficits and risks posed by the grandmother's parenting. There is no criticism of the assessment of risk by the Children's Guardian.

82. In my judgment, that does not mean that an additional assessment by a third expert is necessary to enable the Court to deal with proceedings justly. The right way to deal with that issue is for the Local Authority, without prejudice to its case that no support package will address the concerns and deficits of the grandmother's care, to prepare an alternative care plan setting out what support could be put in place by the Local Authority in attempting to meet those deficits and risks. There is clear authority for that in a decision of the Court of Appeal in *W (A Child) v Neath Port Talbot County Borough Council* [2013] EWCA Civ 1227 in which Ryder LJ said this, paragraph 81:

> *"It is likewise not open to a Local Authority within proceedings to decline to identify the practicable services that it is able to provide to make each of the range of placement options and orders work in order to meet the risk identified by the Court. That is the purpose of a section 31A care plan. If a local authority were able to decline to join with the Court in the partnership endeavour of identifying the best solution to the problem, then there would be no purpose in having a judicial decision on the question raised by the application. It might as well be an administrative act. Parliament has decided that the decision is to be a judicial act and, accordingly, the care plan or care plan options filed with the Court must be designed to meet the risk identified by the Court. It is only by such a process that the Court is able to examine the welfare implications of each of the placement options before the Court and the benefits and detriments of the same and the proportionality of the orders sought".*

83. In terms of any parenting work that the grandmother has done, any improvements in the children's presentation at home and at school are concerned and the issue of whether the Local Authority has applied sufficient weight to those factors, that will be a matter for the Court's scrutiny at final hearing.

84. In addition, the weight that the Local Authority has attached to the fact that the children have been with their grandmother now for a significant period of time, the opportunity to grow up in their maternal family, the children's wishes and the grandmother's willingness to support family time, arrangements with the children's mother and C's father, again, will fall under the scrutiny of the Court and, no doubt, form the basis of cross-examination of the social worker.

85. They do not justify a finding that it is necessary to appoint a third expert to provide yet another assessment of the grandmother.

86. It is also incumbent in my judgment upon a Children's Guardian in a situation like this, where the Guardian considers that the Local Authority may not have properly considered what support could be put in place for a potential carer to at least suggest what type of support the Children's Guardian would expect to see and how that would meet any safeguarding concerns or parenting deficits, not simply to abdicate responsibility by suggesting another expert should prepare another assessment.

87. In my judgment, this case is a good example of the bad habits that have become a regular feature in care cases before the Family Court, the over-preparedness to seek the input of additional experts, the apparent disregard for delay that the involvement of additional experts almost always brings to cases, the willingness to undervalue the role of social workers as experts in family proceedings and to elevate the Children's Guardian to a position of a superior expert.

88. In my judgment, these, with a willingness to abdicate responsibility to other experts have conspired to lead to far too many experts being sought in the Family Court and subsequently being ordered. This has to stop. That was the recommendation of the Public Law Working Group and is the clear and consistent message of the President of the Family Division.

89. I do not consider that in this case, the Magistrates were wrong in refusing the application for an assessment by an independent social worker and in those circumstances, the appeal is dismissed.

End of Judgment.

Transcript of a recording by Ubiqus
291-299 Borough High Street, London SE1 1JG
Tel: 020 7269 0370
legal@ubiqus.com

Ubiqus hereby certify that the above is an accurate and complete record of the proceedings or part thereof