Neutral Citation Number: [2014] EWHC 97 (Fam)

Case No: BM11P08244

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/01/2014

Before :

THE HONOURABLE MR JUSTICE KEEHAN

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Between :

RO **Applicant**

- and -

A local authority (1) **Respondents**

N (2)

TM (3)

F (4)
(A child acting through her Guardian)

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Ruth Cabeza (instructed by **the local authority**) for the **Second Respondent**
Richard Hadley (instructed by **Anthony Collins**) for the **Fourth Respondent**
RO appeared in person
N and TM did not appear and were not represented

Hearing dates: 17th January 2014

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Judgment

THE HONOURABLE MR JUSTICE KEEHAN

The judge gives leave for this judgment to be reported in this anonymised form. Pseudonyms have been used for all of the relevant names of people. The judgment is being distributed on the strict understanding that in any report no person other than the advocates or the solicitors instructing them may be identified by his or her true name or actual location and that in particular the anonymity of the child and the adult members of their family must be strictly preserved.

Mr Justice Keehan:

Introduction

1. This Judgment should be read with the judgment I delivered in this matter on 26 March 2013.

2. I am concerned with one child F who was born on [a date in] 2006 and is 7 years of age. Her mother was SM; very sadly she died suddenly and unexpectedly on [a date in] 2012. Her father is RO. He has a new partner, JA. They live in Manchester with their son, E, who was born on [a date in] 2013, and JA's son from a previous relationship. N, who is an adult. F is currently in the care of a maternal family friend, JG, who has cared for her since September 2012.

3. The local authority applied for a placement order in respect of F on 3 September 2013. It subsequently applied for an order pursuant to s28 Adoption and Children Act 2002 for permission to place F with her maternal aunt and uncle, TM and KM, in the USA.

4. The children's guardian supports the making of both orders. RO opposes the same. He invites the court to consider making an order for F to live with him, his partner and her baby half brother.

Background

5. The background history in this matter is set out in my previous judgment. On that occasion I dismissed the father's application for a residence order.

6. Since then, albeit not without a number of unforeseen delays, the local authority has pursued a plan of placing F with her maternal aunt and uncle in America. The only route by which F can be placed permanently with her aunt and uncle is by them adopting her. The US immigration will not permit F to enter the USA to live permanently with her maternal relatives unless all the rights, duties and obligations of her surviving parent are finally terminated. In this jurisdiction that outcome can only be achieved by the making of an adoption order.

7. The local authority proposes that ultimately, if the court approves, F be the subject of a Convention Adoption Order.

Law

8. In considering the local authority's two applications my paramount consideration is F's welfare throughout her life: s 1(2) of the 2002 Act. I take account of all those matters set out in the welfare checklist of s 1(4) of the Act but especially, on the facts of this case, of ss 1(4) (c) and (f).

9. In considering the father's application for a residence order I take account of the fact that F's welfare is my paramount consideration and of all those matters set out in the welfare checklist: ss 1(1) and 1(3) of the Children Act 1989.

10. When considering all of the applications I have in mind the Article 6 and Article 8 rights of F and of her father. When, however, there is a tension between the rights of the child and the rights of a parent, the rights of the child prevail: *Yousef v Netherlands [2003] 1 FLR 210.*

11. In the case of *Re B (A Child) [2013] UKSC 33* each of the five justices made it clear that an adoption order is an order of last resort. Lord Wilson said the making of such an order required a "high degree of justification" [para 34], Lord Neuberger, Lady Hale and Lord Kerr preferred the phrase "nothing else will do" [paras 76-78, 130, 145 and 198 respectively]. Lord Clarke said "only in case of necessity will an adoption order be proportionate "[para 135].

12. The judgments in *Re B* were considered by the Court of Appeal in the case of *Re G (A child)* [2013] EWCA Civ 965. McFarlane LJ said:

> *49. In most child care cases a choice will fall to be made between two or more options. The judicial exercise should not be a linear process whereby each option, other than the most draconian, is looked at in isolation and then rejected because of internal deficits that may be identified, with the result that, at the end of the line, the only option left standing is the most draconian and that is therefore chosen without any particular consideration of whether there are internal deficits within that option.*
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> *50. The linear approach, in my view, is not apt where the judicial task is to undertake a global, holistic evaluation of each of the options available for the child's future upbringing before deciding which of those options best meets the duty to afford paramount consideration to the child's welfare.*
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> *53. A further concern about the linear model is that a process which acknowledges that long-term public care, and in particular adoption contrary to the will of a parent, is 'the most draconian option', yet does not engage with the very detail of that option which renders it 'draconian' cannot be a full or effective process of evaluation. Since the phrase was first coined some years ago, judges now routinely make reference to the 'draconian' nature of permanent separation of parent and child and they frequently do so in the context of reference to 'proportionality'. Such descriptions are, of course, appropriate and correct, but there is a danger that these phrases may inadvertently become little more than formulaic judicial window-dressing if they are not backed up with a substantive consideration of what lies behind them and the impact of that on the individual child's welfare in the particular case before the court. If there was any doubt about the importance of avoiding that danger, such doubt has been firmly swept away by the very clear emphasis in Re B on the duty of the court actively to evaluate proportionality in every case.*
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> *54. In mounting this critique of the linear model, I am alive to the fact that, of course, a judgment is, by its very nature, a linear structure; in common with every other linear structure, it has a beginning, a middle and an end. My focus is not upon the structure of a judge's judgment but upon that part of the judgment, indeed that part of the judicial analysis before the written or spoken judgment is in fact compiled, where the choice between options actually takes place. What is required is a balancing exercise in which each option is evaluated to the degree of detail necessary to analyse and weigh its own internal positives and negatives and each option is then compared, side by side, against the competing option or options.*

13. The proper approach of the courts to applications relating to adoption was also considered by the Court of Appeal in *Re V (Children) [2013] EWCA Civ 913, Re S, K v The London Borough of Brent [2013] EWCA Civ 926 and Re P (A Child) [2013] EWCA civ 963.*

14. The fundamental principles to be applied in applications relating to the adoption and concerns about the current approach adopted by professionals and the courts in such cases were addressed by the Court of Appeal in *Re B-S (Children) [2013] EWCA Civ 1146.*

15. The President, giving the judgment of the court, emphasised:

    a) That an adoption order was only to be made "where nothing else will do" [22]

    b) "although the child's interests are paramount, the court must never lose sight of the fact that those interests include being brought up by the natural family, ideally by the natural parents, or at least one of them, unless the overriding requirements of the child's welfare make that not possible" [26];

    c) The court "must" consider all the options before coming to a decision [27];

    d) The court's assessment of the parents' ability to discharge their responsibilities towards the child must take into account the assistance and support which the authorities would offer [28];

    e) There must be proper evidence both from the local authority and from the guardian. The evidence must address all the options which are realistically possible and must contain an analysis of the arguments for and against each option [34];

    f) The court must produce an adequately reasoned judgment [41]; and

    g) The judicial exercise should not be a linear process; it must be a "global holistic evaluation". The judicial task must be to evaluate all the options, undertaking a global, holistic and multi faceted evaluation of the child's welfare which takes into account all the negatives and the positives, all the pros and cons, of each option. [44].

16. Where a parent does not consent to the child being placed for adoption or the making of an adoption order, his consent may only be dispensed with if the child's welfare requires this: s52 (1) (b) of the 2002 Act.

17. 'Require' has the Strasbourg meaning of necessary, "the connotation of the imperative. What is demanded rather than what is merely optional or reasonable or desirable". *Re P (Placement Orders: Parental Consent) [2008] EWCA Civ 535, [2008] 2 FLR 625, at paragraphs 120,125.*

Evidence

18. I have read all the documents in the trial bundle. I heard oral evidence from the social worker, SP, the children's guardian, PB, and lastly the father. At the conclusion of submissions at the hearing on 17 January 2014, I reserved judgment which I hand down today.

19. The father appeared in person at this hearing. He was assisted by a skilled and experienced French interpreter; that being the father's first language. At my suggestion the social worker and the guardian gave evidence before the father and he went last in making submissions.

20. The father presented his case eloquently and fully and, at times, with considerable emotion. I do not doubt the love he has for F nor his considerable desire to care for her.

21. I dismissed the father's application for a residence order on 26 March 2013. Nevertheless in light of the recent authorities, referred to above, the local authority rightly thought it appropriate to undertake a further assessment of the father prior to pursuing the application for a placement order and the s28 order.

22. The assessment, the social worker's analysis of that assessment and her conclusions are set out in her statement of 5 November 2013. She concludes that "RO lacks any insight into how F would be feeling both prior to her mother's death and presently and he refuses to accept any version of events other than his own" [C300].

23. The social worker then considers the realistic options and sets out the advantages and disadvantages of each. The four options analysed were:

    a) to reside with the father;

    b) to reside with a family member;

    c) to reside with long term foster carers; and

    d) to be placed for adoption with strangers.

24. After conducting that exercise, the social worker concluded that a placement with the father was not in F's best interests. She recommended a placement with the maternal aunt and uncle even though that placement could only be achieved by the making of an adoption in their favour. She confirmed those conclusions in her oral evidence.

25. The guardian undertook a careful analysis of the realistic options and weighed the advantages and disadvantages of each. He concluded, "RO's insight into the needs of F is limited and in my opinion is based on a belief that the natural biological link of a father and daughter, combined with his love will be enough to provide F with the care she will require in the future. RO's involvement in the majority of F's life for whatever reason [has] been inconsistent and does not demonstrate enough evidence of a father that is able to promote his daughter's needs ahead of his own in the short term or long term. F needs absolute certainty about the ability of her care providers in the future, and the security of her care providers in the future. I am of the opinion that kinship care, by way of adoption is the best possible outcome for F and will provide her with long term stability and security that she desperately requires. Nothing short

of adoption will do, as the identified placement with her maternal aunt and uncle is in America and F will have to be adopted to meet the requirements of their immigration law. This is a placement that will allow F to be brought up within her own family and will benefit from having contact with both her maternal and paternal family members, and half siblings." [D128-129].

26. In the course of his oral evidence the guardian remained of the view set out in his report. When questioned by the father he replied, "F has extensive needs. I have not seen enough evidence from you and F that you are able to deal with those needs appropriately or sensitively or that you would put her needs first. F is not displaying a true grieving process that she needs to go through in respect of her mother. Her instability at the moment results in her withholding that process. She needs stability, unconditional care and a loving family. Some of that you can deal with but not to the level that F needs".

27. A little later he said, "When available you go to great lengths for F, eg in contact. But there are inconsistencies in what you have provided to F and in what you have said to me and to the social worker. The improvements in your life are not sufficient to offer the stability and long term care that F needs. You have not taken on board what F needs."

28. Whilst not accepting that the father was able to meet F's needs, both in the short and long term, the guardian acknowledged the important and continuing role the father had to play in her life.

29. The social worker and the guardian are both extremely experienced social work professionals. They have been involved in this case from its inception and have both had considerable involvement with F, most especially the social worker, and the father. I accord considerable weight to their views, opinions and conclusions.

30. The father told me in his evidence that there had been improvements to and changes in his life. These are accepted by the local authority, the guardian and by me, namely:

    a) he has remained in a relationship with his partner JA which had been in its relative infancy when I gave judgment in March 2013;

    b) he and his partner have secured suitable and appropriate rented accommodation;

    c) he has secured employment; and

    d) they now have a young child, E, who is now seven months old.

31. It was his view that he could care for F. He said, "I felt in March [2013] and do now that I could meet F's emotional needs. I do not accept the judge's findings against me to the contrary……After my wife died I had the impression that all these people are against me. That is what I regret. They do nothing to help me".

32. On a recent contact visit when JG travelled to Manchester with F and her daughter, the father had an extended period of contact. He took her to his family home. She had not been there before. From the photographs the father showed me which had been

taken on that visit, it is plain F had an extremely enjoyable time with her father, his partner and her baby half-brother.

33. The father told me that they had decorated a bedroom for F. They showed her this room and the father said he had told F that this was her bedroom and always would be. When the father was asked in cross-examination whether this was a sensitive or appropriate thing to say to F when her future had yet to be decided, he could not see the point that was being made nor that he had done anything wrong. He did not accept it may have been confusing for F. He said, "I do not see the point. I am the father and this house is open to her. This room will always be her bedroom".

34. This is a minor but not insignificant example of the father not being sensitive to F's needs and of his inability to have any insight into this child's emotional needs. He must know from the extensive written evidence filed in this matter that F is desperate for a loving family to care for her and, most acutely, for a mother figure.

35. The father was adamant that he did not want F to go to live with her maternal aunt and uncle in the USA because "she would have to be adopted and I have never accepted that". Save for requesting that he care for F he has not, nor did he in this hearing, suggest an alternative care arrangement for her if she could not live with him.

36. Once again it was a feature of the father's written and oral evidence that he viewed all matters from his perspective and not from F's: see paragraph 21 of my judgment of 26 March 2013.

37. In that judgment I set out recitals to the orders of 14 November 2012 and 30 January 2013 which record that, in terms, the father agreed with F being placed with her aunt and uncle in the USA and that F should be told her father supported that placement: see paragraphs 6 and 7.

38. Just 19 days later the father had changed his mind and sought, in due course, to care for F. In March 2013 the father could not give me any satisfactory reason for that change of position: see paragraphs 7, 16 and 19.

39. At this hearing the father was asked about this change of position. He told me that, " I did not read the statement…. I did not know what I had signed. I should have had an interpreter." When asked by Mr Hadley for the guardian, the father said his solicitor had wrongly included reference to him agreeing to the placement of F with the aunt and uncle in his statement.

40. The problem with that explanation is that the father's concession about F's placement does <u>not</u> appear in any statement filed and served by him.

41. When that was put to the father he changed his account. He said that that concession was something said by his then solicitors and not by him. He claimed never to have accepted that F should live with her aunt and uncle in the USA. He claimed it was only when his partner pointed out the recitals to him before the 18 February 2013 hearing that he was first aware of the same.

42. In a statement of 19 February 2013, which I required the father to file and serve, another explanation is given by the father. At paragraph 6 he contends that he did in

fact give instructions to his solicitor that he agreed a permanent placement of F with the aunt and uncle was in her best interests. It was, however, asserted in that statement that he only did so because of the strong views expressed by the judge at the November 2012 hearing and that he immediately regretted making the concession [C134].

43. The account given in that statement does not explain why there is a recital in the 30 January 2013 order that it is agreed F should be told her father supports that placement. It is inconsistent with the same. The 19 February 2013 statement makes no reference to and gives no explanation for the recital set out in the January 2013 order.

44. I regret I am driven to the conclusion, as I reached in my previous judgment, that the father is lying.

Analysis

45. No party has suggested or now asserts that it would be appropriate for F to be placed in long term foster care or to be placed for adoption with strangers. In my judgment it would be wholly contrary to F's welfare best interests to contemplate either type of placement for this child.

46. Since September 2012 JG has provided F with the most excellent care, she has provided her with a loving and stable home where consistent boundaries have been applied. She has cared for F for far far longer than either she or anyone else involved contemplated at the outset.

47. JG has raised her own children. She has recently remarried and has been on her honeymoon with her new partner. Neither of them had planned in their twilight years together to be responsible for the care and upbringing of a young child. I wish to express the court's grateful thanks to her for the dedicated care she has given to F. She has acted at all times in F's best interests. I completely understand why she does not feel able to offer herself as a long term carer for F.

48. Accordingly the only realistic options for F's future care are either she lives with her father or she lives with her maternal aunt and uncle in the USA. I accept the submission of the local authority and the guardian that, because of the US immigration provisions, the latter outcome can only be achieved by the making of an adoption order in favour of the aunt and uncle.

49. I make it plain, for the avoidance of any doubt, that when considering the latter option, I have not lowered the bar set by the Supreme Court in *Re B (A Child)* and by the Court of Appeal in the cases referred above, most particularly, *Re B-S (Children).* The fact that this option is a family placement has the advantage that, contrary to the position in the vast majority of adoptive placements, F will continue to enjoy contact with her father, with her baby half brother and with her half sister M. It is but one of the potential advantages which must be weighed in the balance with other factors.

50. A placement with father has the obvious advantages that F would be cared for by her sole surviving parent and would be living with her half brother. I entirely accept those are powerful factors for me to consider.

51. F is, in my judgment, a little girl who has suffered the sudden and dramatic loss of her mother who was her primary carer. I accept the evidence of the social worker that F is desperate to have a 'mother'. I accept the evidence of the guardian that F has not yet started the process of grieving for her mother. She will need to do so. It will undoubtedly be a difficult and traumatic process for her. She will need, to a high degree, a loving, caring and stable home with carers who are aware of and can meet her emotional and psychological needs.

52. On all of the evidence, including the finding in my previous judgment, the evidence of the social worker, of the guardian and of the father and of my assessment of the father, I am wholly satisfied that this father is incapable of appreciating and/or meeting the emotional needs of F.

53. His inability to have insight into her emotional needs and his inability to meet those needs consistently or at all are very significant disadvantages to F being placed with her father.

54. Moreover the father's repeated lies about his change of position in respect of the placement of F with the aunt and uncle lead me to find that he cannot be trusted to be honest or reliable or consistent in his co-operation with professionals or in his care of F. I further find, on all I have read and heard, that the father is incapable of putting F's needs ahead of his own. I further refer to paragraphs 18-22 of my earlier judgment.

55. The father's immigration status has improved but only insofar as he was granted a six month visa to reside in the UK; it expires on 10 March 2014. The father has not produced any evidence about his prospects thereafter of being given indefinite leave to remain by the Home Office. He has instructed solicitors to act for him but no application for indefinite leave to remain has yet been drawn up or filed.

56. Thus there remains very considerable uncertainty in respect of whether the father will be permitted to remain living in the UK. That is another significant disadvantage to F being placed with her father.

57. A placement with the maternal aunt and uncle will have the singular disadvantage that it will terminate the father's status as a parent. I accord very considerable weight to that consequence.

58. It will have the further disadvantage of F growing up in a household separated form her half brother.

59. The placement with the aunt and uncle will have the advantage that F will continue to enjoy regular indirect contact with her father, his partner and her half brother and, albeit not as frequently as hitherto, direct contact with all of them.

60. A positive I800a report has been provided by the US Central Authority to the Department of Education. An application is in train for the US Consulate to issue F with a B2 visa.

61. On 2 August 2013 the local authority's decision maker approved the plan for F to be adopted by her aunt and uncle. If I make the placement order and the s 28 order, the plan is for F to travel to the US accompanied by JG, by her sister M or by her

maternal aunt. She will live with her aunt and uncle first to complete the 10 week period required by s42 of the 2002 Act and thereafter to remain living with them if and until a Convention adoption order is made.

62. Having received the Article 15 report, the local authority will, if the father is not successful in his application for a residence order, proceed to match F with her aunt and uncle. If approved the local authority will send the Article 16 report to the US Central Authority via the Department of Education. Thereafter Nightlight, the US adoption agency will apply for a I800 certificate which, together with an article 5 certificate issued by the US Consulate, will be sent to the Department of Education and then to the local authority. F would then be formally placed for adoption with her aunt and uncle.

63. They will then be entitled to apply for an adoption order with the support of the local authority.

64. From all I have read about the maternal aunt and uncle I am wholly satisfied that they both have the skills, the determination and the emotional empathy to meet F's complex emotional needs. I am wholly satisfied that they will be able to provide F with a warm, loving, caring, secure and stable family home and will put her needs first and foremost. That is a very considerable advantage which must be accorded the utmost weight given the current and future needs of F.

65. Thus I must stand back and consider the available options and weigh the advantages and disadvantages of each adopting, as I do, a global, holistic and multi-faceted evaluation of the child's welfare.

66. F's primary need is for a carer or carers who are able to meet her emotional needs and are able to afford her stable and consistent care throughout her minority. Such care is vital to F's welfare throughout her life.

67. On the basis of the totality of the evidence and on the findings I have made in this and in my previous judgment I am satisfied that the father cannot meet that primary need. I am satisfied that the maternal aunt and uncle are able to meet that need.

68. Accordingly I dismiss the father's application for a residence order.

69. I am satisfied that only a placement for adoption with the maternal aunt and uncle will meet F's welfare needs and nothing else will do.

70. I am therefore satisfied that F's welfare requires me – in that it is imperative – to dispense with the father's consent to her placement for adoption with TM and KM. I so dispense with his consent.

71. For all the reasons set out above I am satisfied that the conditions in s31 (2) of the 1989 Act are met in respect of F. On the basis that I have dispensed with the father's consent, I make a placement order in favour of the local authority.

72. Further I approve the plan of the local authority to place F with the maternal aunt and uncle once all US visa and other procedural requirements have been met. It is in her welfare best interests.

73. Accordingly I shall make an order pursuant to s28 of the 2002 Act authorising the local authority to place F out of the jurisdiction with TM and KM.