Case No: B4/2016/4500

Neutral Citation Number: [2017] EWCA Civ 249
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM LUTON COUNTY COURT
AND FAMILY COURT
(HER HONOUR JUDGE DAVIES)

Royal Courts of Justice
Strand
London, WC2A 2LL

Friday, 24 February 2017

Before:

LORD JUSTICE McFARLANE

MR JUSTICE MOYLAN

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IN THE MATTER OF S (A Child)

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8th Floor, 165 Fleet Street, London EC4A 2DY
Tel No: 020 7404 1400 Fax No: 020 704 1424
Web: www.DTIGlobal.com Email: TTP@dtiglobal.eu
(Official Shorthand Writers to the Court)

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Mr James Schofield (instructed by Eskinazi Solicitors) appeared on behalf of the **Applicant**
Ms Ruth Cabeza (instructed by Bedford Borough Council) appeared on behalf of the **Applicant**
Mr Andrew Alexander (instructed by Cartwright Kind Solicitors) appeared on behalf of the **Respondent**
Mr K Lefteri (instructed by Machins) appeared on behalf of the **Respondent**

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Judgment

LORD JUSTICE McFARLANE:

1. This is an appeal brought by the mother of a young child following the making of a care order and an order authorising the child to be placed for adoption by HHJ Davies on 2 December 2016. The case has a substantial history before the family court. The child is now aged 16 months and from a time prior to the birth of the baby the local authority were concerned that the mother may not be able to cope with her new born child or provide good enough and safe parenting. The local authority's grounds for concern sadly arose not through any malevolent past behaviour on the part of the mother but entirely because of the internal difficulties that she has and has had throughout her life. The judge describes the cognitive assessment of the mother that was undertaken at the beginning of the proceedings which indicate that her level of functioning was at a very modest level indeed. In addition, the mother has been diagnosed as having an emotionally unstable personality disorder. This cocktail of difficulties was behind the local authority's concern and indeed came to be confirmed by the experts instructed in the case as providing hurdles that might prevent the mother from being an effective parent to her child.

2. And so, proceedings were commenced effectively at the time of the child's birth. Most fortunately the local authority were able to engage foster carers who were willing and able to take the mother and baby into their home to provide care for the interim period, no doubt intended to be relatively short, before a final hearing. Because of a sequence of events, including, tragically, the death of HHJ Arthur who was to have been the trial judge, the case did not come on for hearing until December 2016, some 14 months or so after it had commenced. It is not the function of this court in the course of our consideration of this appeal to look in any way as to the reasons for that delay but it

must be agreed by all that for the system to fail to achieve a final determination for a young baby who comes in to the family justice system at day one of his or her life at a time well before the age of one year, is a disaster in procedural terms.

3. The good news for the mother and the child is that through the generosity of spirit and commitment of the foster carers, the foster placement has been maintained throughout the long period that I have just described. Indeed, even following the judge's order in early December as a result of an order for stay granted by this court, and the cooperation of the foster carers, mother and baby continue to live together in the foster home even today.

4. The appeal focuses largely upon the judge's analysis of the evidence in the case. It is not necessary for me in this relatively short judgment to go into a substantive amount of detail. Having already described the unfortunate difficulties that the mother faces through no fault of her own as a result of her own internal make-up, it is also unfortunately the case that the father himself has difficulties and the couple did not present as a couple for the future care of the child. This appeal is brought by the mother and the father, I hope, will excuse me if I do not refer to him in any great detail in the remainder of this judgment.

5. The judge had assistance in terms of a range of evidence before the court. In particular she had the evidence of an adult psychiatrist who had assessed the mother, a psychologist who had assessed the father and an independent social worker who had carried out a parenting assessment. Unfortunately the parenting assessment had been undertaken promptly at the start of the proceedings but had not been updated. It was

therefore a year or so out of date at the time of the hearing and comment was made to the judge and made to this court about that apparent (Inaudible) in the evidence. In addition the judge of course had evidence from the social worker involved in the case and the children's guardian. In particular, unusually because of the history that I have described, the judge had direct evidence from the foster carer. She had been able to maintain a detailed log of all the events over the 12 months and more that were the entirety of this young child's life. The judge describes the foster carer in these terms:

> "The foster carer is a qualified teacher [this is paragraph 44 of the judgment]. She trains parenting practitioners. She is experienced as a foster carer, including for mothers and babies. She had an understanding of attachment but she is not an expert. She was clear that having supported mother and the care of A (the child) for over a year now, the mother continues to need support."

The foster carer's logs were made entirely available to the court and the parties and as I shall describe in a moment, the judge plainly immersed herself in the detail of the recent records that the foster carer had prepared.

6. In addition to the input that I have already described, those acting on behalf of the mother had identified an agency, Shared Lives, which might be able to provide volunteers who could provide a home for the mother and the child if the court and the local authority were minded to endorse that outcome. The judge heard detailed evidence from the local organiser for Shared Lives and we have read material and an account of that evidence. My understanding is that Shared Lives do not provide foster care for a child in these circumstances in the way that the current foster carer does and the important distinction between the two methods of providing support is important. The foster carer is charged with caring for the child and in this case, that is the baby A, the mother now being aged 22. The Shared Lives volunteers provide support for the

adult, the mother, but any placement in a Shared Lives setting requires the mother to be the primary carer of her child.

7. In addition to the evidence from those professional sources, the judge heard evidence from both of the parents who, of course, were in court throughout the nine days of the hearing and the judge had a privileged perspective from which to observe the parents in that setting over that extended length of time. The mother was supported throughout the trial process by an advocate, by that I mean a non legally qualified individual who sat next to the mother to support her. And it is plain from the judge's account of the hearing that everybody involved accommodated as best they could the mother's need for regular breaks to enable her to concentrate as fully as possible on the evidence that was being given.

8. The judge's analysis is in an impressively detailed judgment which runs to some 98 closely typed paragraphs. It was given as an ex tempore judgment but must be based on notes that the judge had prepared prior to delivery. The judge, helpfully for this court, summarises the evidence that she had heard. It is right to stress that there were a number of clear positives in the evidence about the mother. Far and away the most important was the clear love that this mother had for her young child and her desire to do her best to care for her. The mother has stuck to the task of doing her best for caring for A in the artificial setting of a foster home throughout this very long period. That she did so is impressive. That she did so with the disabilities that she has is doubly remarkable in my eyes and the judge rightly gave a premium in her consideration of the history to that factor. Because of the mother's approach which I have described and because of the length of time that they have been together, it was a given that the

mother was attached to the child and the child to the mother. The child also plainly had developed some relationship with the foster carer living as she was in the foster carer's home.

9. All of the professional evidence from the different perspectives that each expert came to speak about was unfortunately to the same conclusion. That there would be great difficulties in this mother providing long-term care for her daughter in anything other than a heavily supervised setting. The mother, on the evidence of the psychiatrist, had made some progress during the course of the build-up to the proceedings. She had engaged in cognitive behavioural therapy and was seen to be making some progress but there was a need for her to move further on to a course of more intensive therapy, which the psychiatrist considered might take a further 12 to 18 months. The parenting assessment, albeit it now some 12 months out of date, but refreshed to a degree that it was possible to refresh it by a reading of the foster carer's notes, was similarly negative as to the mother's ability. The independent social worker, is recorded by the judge at paragraph 41 as saying, "He could not recommend that the mother could safely care for A and it would not be in A's interest to have another carer present all the time."

10. It was the foster carer's evidence, on my reading of the judgment, to which the judge gave the greatest degree of attention, despite the detail that she clearly had from all of the other material. The judge summarises the foster carer's evidence over the course of three or four pages in the judgment and again, in my view, sensibly focused upon the last month or so of the available notes. A feature of the earlier background was that the foster carer had "stepped back" in the course of the summer in order to "test for independence", but had felt it necessary to step forward once again at a later stage

because of concern that the ever more mobile child would need care in addition to the care that the mother was able or astute enough to provide.

11. The judge gives a paragraph by paragraph, week by week summary of the foster carer's logs. Not all of it is negative. But the judge's summary at paragraph 54 is, however, clear. The judge says this:

> "I have gone through those (the notes) in some detail because it is clear that as time has passed the mother has managed to learn some skills but she has been inconsistent and it is clear that A is now looking to the foster carer for comfort. After 12 months of intensive input, the mother cannot demonstrate her ability to parent in a consistent way. I found the foster carer to be very sympathetic to the mother. Over the year, the relationship between the mother and foster carer has been up and down but overall it has been good. But now the mother resents the foster carer saying as she did in evidence that she is stepping in and intervening too quickly when it is not necessary to do so. The mother says the foster carer is not giving the mother a chance to try out any strategies.
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> Having heard the foster carer, having read the logs, I found the foster carer has, at all times, put A first. She has intervened when necessary. Without the foster carer's intervention A would have suffered harm, for example, by having a lack of routine in relation to feeding, sleeping and her clothes, which may be to big or too small. The mother cannot understand the need, for example, to wear footwear when outside on an autumn day. A may have injured herself by putting a battery or a balloon in her mouth but most of all A's emotional need for stability and consistency would not be met. Fortunately A is meeting her developmental milestones but having heard the evidence, I am satisfied that that is a consequence of the input from the foster carer."

I have quoted that paragraph in full because on my reading of the judgment it was plainly an important aspect of the case and the conclusion expressed there as to the mother's ability as seen through the evidence of the foster carer was one that the judge went onto rely upon, albeit in shorter terms, later in her judgment.

12. The judge summarises the evidence of the parents and my reading of that evidence is that the judge formed a favourable view of the mother but regarded the mother as

approaching the evidence in the case and the difficulties that she faced in a way that the judge considered was "unrealistic" or "naïve". At the conclusion of the judge's extensive summary of the mother's evidence at the end of paragraph 74, the judge states this, "It is extremely sad but it is clear from the mother's own evidence that she cannot meet all of A's needs." Again, in turn, that is a conclusion, although not expressly stated and repeated, that the judge clearly came to rely upon in due course. It was accepted that the threshold criteria were met as at the time of A's birth and so the primary focus of the judge's conclusions were on the issue of welfare.

13. At the early stages of the judgment, the judge had rehearsed a summary of the relevant law turning to the now very familiar territory of the Supreme Court decision in RE B [2013] UKSC 33 and RE B-S [2013] EWCA Civ 1146. In addition, however, the judge referred to a decision of the President, Sir James Munby, RE D [2016] EWFC 1 in which the President focused upon the additional impact on these difficult cases where a court is dealing with a parent who has learning disabilities. And the judge sets out, in some detail in her summary of the law, extracts from that judgment and those matters were plainly in the judge's mind when she came to consider her conclusions. No point is taken in relation to the judge's conclusion as to her reference to the relevant welfare checklist under the Adoption and Children Act 2002. The judge structured her conclusion around the relevant elements of that Act and, in particular, at paragraph 86 says this:

> "Her age, sex and background, she is a very young child. She has a long life ahead of her. She will be developing new skills and personalities. Those I am satisfied cannot be managed by the mother without intensive support on a full-time basis. I have identified in my summary of the evidence the harm which she suffered or is at risk of suffering. I am satisfied from the evidence before me the longer this situation goes on, the more emotional harm A will suffer.

> The frustrations identified by both the mother and the foster carer are growing in intensity and it is becoming more difficult to settle her because of the emotional impact upon her."

The judge's conclusions are then expressed at paragraphs 89 and 90. Again, I will read these out:

> "I turn then to the powers of the court and the orders that could be made, the advantages and disadvantages of each of them. Placing A with her mother or her mother and father in completely independent accommodation would have the advantages of A remaining with her birth family but would carry with it enormous disadvantages that her physical and emotional needs would not and could not be met. The risk of harm to A would be so great that the disadvantages significantly outweigh any advantages.
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> Mother and A living together in supported living accommodation or in Shared Lives or in some other accommodation where support is given from time to time from a number of agencies would leave A at risk of harm. The same advantages apply. She would remain living with her mother who cares for her and seeing her father who cares greatly for her but her physical and emotional needs could not be met and again I am satisfied the disadvantages of the risks to A are so great the disadvantages outweigh the advantages."

The judge then goes on to consider other options in similar terms. A residential assessment, which was the subject of a last minute application under Part 25 of the Family Procedure Rules and long-term foster care, if it could be arranged for mother and child to remain living together. More generally and, presumably as I read it, on the basis that each of these specific arrangements stated by the judge would have to be under a care order, the judge refers to the generic disadvantages of a child of this age being committed to long-term care.

14. The judge then draws her conclusions together at paragraphs 94 and 95:

> "So there are, in this case, no other options, realistic or unrealistic. I am forced into the position of saying the only option that is available for A is the last

> option, the Draconian option. The option of adoption. That will provide A with a long-term stable and secure home for the rest of her live. The disadvantage of adoption is she ceases to be a member of her birth family and her relationship with her mother and father would change irredeemably and forever. She may find that difficult to understand as she grows up if it is not explained to her in a sensitive way.
>
> I take care to ensure that I am not treating the mother a different way because she has cognitive difficulties. I am not treating the mother in a way that ignores the support that the adult disability team can provide her with. I am not trying to socially engineer A's life. I am doing as the president identified that on occasions the court has to do. I am not shying away from a difficult decision that sometimes has to be made of separating a child from the care of the parents because A's welfare requires it. This is one of those occasions where nothing but adoption will do. A's welfare should not be compromised by keeping her within her family at all costs. Consequently the order I make is a care order."

She then went on to hold that such was the requirement in favour of adoption driven by A's welfare, but the parents' consent for adoption should be dispensed with.

15. I granted permission to appeal to the mother. I did so primarily because of a need, as I perceived it to be, to focus in on the two concluding paragraphs of the judge's judgment, 94 and 95, to which I have made reference. Mr Schofield, on behalf of the mother, who represented her at trial and before this court and who has conspicuously done so with great care, skill and insight, submitted that at no stage in the judge's analysis did the judge weigh up the benefits and disadvantages of any form of placement (or each of the various forms of placement of A with the mother) against the benefits and disadvantages of adoption. And at no stage in the judgment does the judge ask herself the essential question, as it has been identified to be in the cases of RE B-S and others, whether the detriment to the child of remaining in the care of the mother on one basis or another was so great that only adoption could meet the child's needs. That is the proportionality evaluation. Secondly I was concerned that the judge's use of

words in the first sentence of paragraph 94 indicated that she ruled out all the options in connection with the mother and the child being placed together as being "unrealistic" and therefore only turned to look at adoption with that as the only option standing and that therefore this might be, as it has come to be termed, a "linear" evaluation.

16. In addition, Mr Schofield relies upon a number of other grounds of appeal. I will take each of them in turn. Firstly, that the judge failed to undertake a proper evaluation of each of the options and, in particular, that she had failed to consider the option of placement with Shared Lives. In the course of his submissions today, Mr Schofield has explained that ground in more detail. The court did have information about the Shared Lives option and heard live evidence from the local organiser. What was lacking, says Mr Schofield, was, first of all, any engagement by the local authority in conducting such an assessment other than to simply look at the physical accommodation provided by the particular volunteers who had been identified at that stage. And, more importantly, he submits, by the judge failing herself to have sufficient evidence of the Shared Lives option. Taking that point on its own having described it at some modest detail, the difficulty with the mother's case in relation to Shared Lives, and indeed it is a difficulty that she faces in relation to all of the other options, is that either because of the rules of the Shared Lives organisation itself, or more generally, it could not be contemplated that the court would endorse a placement in a Shared Lives home unless the court concluded that the mother could safely parent her child. Ms Cabeza for the local authority refers to a particular extract from the Shared Lives workers statement which says in terms that what would be required is for the court to decide that, "She could safely parent her child." Whether that is a sound basis upon which to describe the entire policy of Shared Lives or not, I know not. But the general point must be

right. Unless given the structure of the Shared Lives placement in which the primary carer of the child is the mother and not the other adults in the home, the court would have to conclude that this mother could safely parent her child, albeit with support for her provided by the Shared Lives workers and by those providing therapy for her, those from the adult disability team in the community and from social workers.

17. Mr Schofield submits that the judge failed to conduct, in his words, a "nuanced" or sophisticated risk assessment that looked at that set up in the way that I have described it. Whilst I understand the submission, reading the judge's judgment, I do not agree with it. The judge did have a detailed picture of what this mother was going to require and, to her credit, was going to accept in terms of support; continued therapy, work with the adult disability team and other support. And it was plain that the mother was, at least, accepting of, if not fully willing to contemplate, the Shared Lives placement. So that is there throughout the judge's judgment and it is a given that any arrangement for the mother to care for the child in the community would have and need to have that level of support. My reading of the judge's judgment in the concluding paragraphs where she rules out option by option the various structures within which the mother of a child could live, is that the judge's conclusions are the result of her own risk assessment on that basis and she concludes that the child's physical and emotional needs would not be met.

18. And so one needs to see whether the mother can, on appeal, challenge the core conclusion of the judge as to the mother's inability to provide safe and good enough parenting for the child. I have summarised the judge's approach and quoted as I see them, the relevant paragraphs from the judgment and I am afraid my view is that those

are unassailable on appeal. This judge had immersed herself in the detail of the case over the course of nine days. Her judgment bristles with detail and shows that she had internalised the story of this case and the factors for and against this mother continuing to care for her child. Any appeal against the judge's core conclusions in this regard would only succeed if this court were satisfied that the judge was wrong and had come to a conclusion which was simply not supported by the evidence. Sadly the evidence all went the other way. The expert opinion all went the other way and as did the detail that the judge relied upon, particularly the account of the foster parent. Not the foster parent's opinion, but the nitty gritty account of how life was lived which for the judge spelled out a picture which, in the judge's words at paragraph 54 indicated that the child's needs "would not be met".

19. The second ground of appeal is to point out, as may well be the case, that the local authority in its evaluation prior to the start of the hearing failed to undertake a full evaluation complying with the requirements described in RE B-S and we were taken to some of the paperwork. For my part, I am prepared to accept that may have been the case. The local authority may wish to argue to the contrary but in terms of the process that this court is involved in, that is part of the history of the case. But the appeal would only succeed if that failure, if failure it be on the part of the local authority, infected the judge's process in a way that compromised and flawed her own evaluation. I will come onto the judge's own approach and whether her analysis is RE B-S compliant, but it is utterly clear that the judge formed her own view of these matters and did so upon the totality of the evidence that she had before her.

20. And so we come to ground 3 which is, as I see it, the most important point in the case. Namely that the judge failed to undertake the required holistic analysis and asking herself the ballpark adoption question, are the child's welfare needs such that it is so disadvantageous for her to live with her mother in one setting or another that only adoption will do. I have spelled out the paragraphs on which this submission is based, being paragraphs 94 and 95. As a matter of semantics, it is an argument that can easily be made, that the judge went through each of the options favourable to the mother before holding that they were not realistic and only turning, at that stage, to speak more fully about the option of adoption. In the case of RE R [2014] EWCA Civ 1625, both I, to a limited degree, and Sir James Munby, the President, dealt with the question of what was required in these judgments. At paragraph 18 of my judgment, I say as follows:

> "There is, to my mind, a danger in casting a single judgment, or, indeed, the process of judicial analysis in any particular set of proceedings if spread over the course of more than one hearing, as "linear" simply because, as a matter of structure, the judge considers and then expresses a conclusion upon a particular option for the child before moving on to consider a further option, for example placement for adoption. The concern at which this court's judgment in the case of *Re B-S*, and the cases that preceded it, was focussed upon was the substance of the judicial analysis, rather than it's structure or form."

Pausing there, the point plainly made, I hope, is that any analysis on appeal must focus upon, "The substance of the judicial analysis rather than its structure or form." The President at paragraph 69 of his judgment adds his own further analysis to the same effect in the following terms:

> "A judgment, whether oral or written, is of its nature a literary work – a string of words following in sequence one after the other from the first to the last. In that sense, a judgment is necessarily "linear" in form or, to use my Lord's phrase, in structure. That form or structure almost requires, if the judgment is to have any coherence, that the various options are considered in sequence.

> The judge, after all, has to start somewhere. As my Lord emphasises, the focus must be on the substance of the judicial analysis, rather than its structure or form. In this context it is useful to have in mind what my Lord said in Re G (Care Proceedings: Welfare Evaluation) [2013] EWCA Civ 965, [2014] 1 FLR 670, para 54 (quoted in part in Re B-S, para 44):
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> "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."
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> I respectfully agree."

21. Thus, in looking at the judge's judgment, we are not to be blinded by what may or may not seem to be the semantic structure deployed by the judge. If the judge had asked herself the correct question, it is absolutely clear that sadly for this mother, her answer would be yes, adoption is required because no other option for this child would meet the child's needs and the disadvantages of care in the mother's care are such as to justify that. I am therefore satisfied that although the judge's judgment is of a linear structure, the substance indicates that she had undertaken the proper balancing exercise herself.

22. In relation to the use of the word "realistic" in the judge's judgment, I would simply refer to paragraphs 64 and 65 of the President's judgment again in RE R as is plain from that, if the word "realistic" is to have a meaning as any term of art (and one hopes it is not in these cases), it is to refer to an early pruning of options at a stage long before the beginning of the final hearing. It is simply to clear the decks so that obviously unrealistic options are not further investigated and the subject of evidence before the

court. In this case, the whole case was about placement of the child with the mother and whether that could be achieved. Nine days were taken up in evaluating it and so as a matter of ordinary language, it is impossible to say that the judge did not contemplate placement with the mother as a realistic option at the start of the case. By the conclusion of the case she had, on the basis that she described, been driven to the view that it simply could not occur on any basis. Mr Schofield submits that the judge should have adjourned the proceedings and developed some form of bespoke arrangement for this mother and child. No application for an adjournment of that sort was made but had it been made, my reading of the judgment is that it would not have made any difference because on the material the judge had about the mother did not get her to a position of being able to demonstrate that she could provide safe and good enough care for her child.

23. Ground 4 relates to the judges failure to articulate any proper analysis of the risk of harm and I have dealt with that. Ground 5 is that the judge erred in concluding that the mother does not have the ability to care for A unless she received support from another adult on "a 24 hour basis, 7 days a week." That specific reference is to the evidence of the foster carer, I think it was, but it is right that at paragraph 79 the judge says this, "I am satisfied that A was likely to suffer significant harm by reason of the neglect of all her physical and emotional needs and without the intensive support of an experienced foster carer 24 hours a day, 7 days a week." That is an extract from the paragraph dealing with the threshold criteria and plainly relates to the time at A's birth. The judge does conclude at paragraph 86, as I have already read out, that the mother requires "intensive support on a full-time basis." Mr Schofield is right that to point to this as a potential ground of appeal in the sense that there may not have been direct

evidence that the mother required support "24 hours a day, 7 days a week", but it is plain to me that the judge's judgment described evidence upon which she relied, principally the fostering of the need for, as she found, "intensive support on a full time basis", and so there is nothing in that point.

24. My lord agrees that the outcome therefore is that the appeal is dismissed. This process of granting permission to appeal, granting a stay and then considering whether the appeal should be allowed has taken some two months or more to achieve. I am clear that it was necessary to look at this matter because of the clear and firmly argued points Mr Schofield raised and because of my own concern about the apparent structure of the judge's judgment. I am extremely grateful to all involved, including the mother and also obviously the foster carers for going the extra mile, as it were, and allowing the arrangement for the care of A to be maintained. That has been particularly so in recent times for reasons I need not mention. I am therefore grateful to the local authority and in particular the individual people involved who have been able to support the continued placement of the mother and child until very shortly before this hearing. But for the reasons I have given, I dismiss the appeal.

Order: Appeal dismissed.