[2010] EWCA Civ 1271

Case No: B4/2010/1629

IN THE HIGH COURT OF JUSTICE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM
MR RECORDER TOLSON QC
PLYMOUTH COUNTY COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

10/11/2010

B e f o r e :

LORD JUSTICE CARNWATH
LORD JUSTICE TOULSON
and
LADY JUSTICE BLACK

Between:

PLYMOUTH CITY COUNCIL	**Appellant**
- and -	
G (CHILDREN)	**Respondent**

Miss Elizabeth Ingham (instructed by Plymouth Legal Services) appeared for the Appellant, the local authority
Mr Jo Farquharson (instructed by Messrs Woollcombe Yonge) appeared for the First Respondent, the mother.
The Second Respondent father of the two younger children (Messrs Nash & Co. solicitors) did not appear and was not respresented.
The Third Respondents the children, acting by their Guardian (Messrs Foot Anstey solicitors) were represented by a written skeleton argument by Mr Mark Horton.
Hearing dates : 21st October 2010

HTML VERSION OF JUDGMENT

Lady Justice Black :

1. This appeal from the decision of Mr Recorder Tolson QC in June 2010 concerns three children: K, who was born on 4 June 2001, is 9 years old, Co, who was born on 21 Jan 2005, is 5 years old and C, who was born on 14 December 2006, is 3 years old. Their mother (M) is the first respondent to the appeal which is brought by the local authority. K's father has played no part in his life for many years and has not participated at any stage of these proceedings. The father of the younger two children (F) is the second respondent to the appeal. As M's and F's interests in relation to the appeal coincide entirely, M has been represented before us by counsel but F has not appeared. The children have the benefit of a guardian. She supports the local authority in all aspects of their appeal so, whilst counsel for the guardian has provided a very helpful skeleton argument, the guardian has not been represented before us.

2. The local authority had applied for care orders in relation to all three children and placement orders in relation to the younger two. The Recorder made a care order in relation to K on the basis of a care plan for long term fostering; there is no appeal in relation to that. In relation to the younger two children, the local authority presented their application for care orders on the basis of care plans for adoption. The Recorder granted full care orders in relation to the children but dismissed the local authority's allied applications for placement orders, finding that the case for adoption had not been established and that there was no basis on which to dispense with the consent of the children's parents. The local authority appeal against that

dismissal. They ask this court to substitute its own decision for the Recorder's, granting placement orders. In the alternative, if this court is inclined to uphold the Recorder's view that it had not yet been established that adoption was the right way forward for the younger children, the local authority appeal against the making of full care orders in relation to them when there remained an issue as to whether their future lay in adoption or in long term fostering. They submit that, in these circumstances, the Recorder should have adjourned the placement applications, given directions with a view to obtaining advice from an appropriate expert, and granted interim care orders until the matter was ready for final determination.

3. The local authority also appeal against the Recorder's decision in relation to contact for all 3 children. He ordered that the local authority were to allow contact of not less than 75 minutes per week between each of the children and their mother, with the rider that if a regime was set up for M to have contact for a rather longer period of 4 hours in circumstances of her choosing rather than in the contact centre, then contact could take place fortnightly instead of weekly. In relation to K, the Recorder invited the local authority to consider at an early stage whether the contact might be allowed to be unsupervised, although the contact he ordered in relation to the younger two was to be supervised. The local authority argue that the Recorder should not have imposed a defined order on them but should have left contact in their discretion because flexibility would inevitably be required and there was no reason to suppose that they would not put in place arrangements which were in the best interests of the children and fair in all the circumstances.

4. The Recorder's judgment was reserved after the hearing and is very careful, thoughtful and clearly expressed.

5. There was no material issue about the threshold criteria which he found to be satisfied. This was not a case in which either parent had been physically violent to the children or deliberately harmed them in any way. M had a long standing drink problem and she and F had had a turbulent relationship. The children had suffered emotional harm and there was a risk of physical harm to them because of the danger of accidents whilst the parents, in particular M, were drunk or otherwise behaving chaotically.

6. Dealing with the issues that were live, the Recorder first had to consider whether the children could be rehabilitated to the care of M as she wished. He identified this as "the sole issue on the applications for care orders" and said,

> "9…..If there is no reasonable prospect of rehabilitation with her then they must find a long term home away from their family and so care orders would be a minimum requirement. In K's case, if I were to make a care order, this would permit the care plan to be realised. He would remain in long term foster care. There are subsidiary questions concerning contact: his mother seeks more than the local authority is prepared to offer.
> 10. In the case of Co and C a care order would be but a step on the road to the realisation of the care plan which is for adoption of the children together, and with a relatively complex regime of contact to family members….If rehabilitation is ruled out then the local authority and the guardian invite me to make placement orders, dispensing with the parents' consent to placement for adoption under section 52(1)(b) ACA 2002 on the grounds that the children's welfare requires such consent to be dispensed with. A placement order would replace any care order. The care plan would then be realised, although again there would be subsidiary questions concerning contact."

7. The Recorder concluded, for perfectly good reasons, that M could not resume the care of the children. He found that her drink problem remained undiminished and she was likely to be evicted from her home. He said, that

> "I hope that she will address her difficulties. I believe there is a chance that she may. However, the evidence is such that no sensible care planning could proceed upon the basis of the slim chance demonstrated."

8. The parents do not appeal against this determination.

9. In these circumstances, in K's case the care order that the Recorder made followed inevitably and there was no debate over the care plan which was for long term foster care. Whilst there was evidence from a clinical psychologist that adoption would be the best option for K, that

recommendation was not accepted by either the local authority or the guardian, nor was adoption what M wanted.

10. The position was considerably more difficult, in the Recorder's view, in relation to the younger two children. He said

> "….this case is not 'heavyweight' in terms of the allegations against the parents, but is one that in terms of welfare disposal is subtle in many ways. I believe there are difficult questions concerning (i) the degree of disturbance to Co and C; (ii) the strength of their ties to their natural family; and, (iii) the Co's ability to 'bond' with female carers."

11. A clinical psychologist had been instructed jointly by the parties to advise on a wide range of matters, including assessing the children's needs and giving a view on what alternative placement should be preferred if rehabilitation was not possible. She carried out various investigations, including meeting the children and their foster parents. She provided a very long initial report and a supplementary report in response to extensive questions put to her after it.

12. The Recorder was critical of the psychologist's contribution. He summarised his reasons for this as follows:

> "(i) I am left troubled by the process by which she came to be instructed; (ii) her conclusions in respect of K and various other opinions offered during her evidence (some are mentioned later in this judgment) served to cause me to doubt her experience and expertise in this area; and as a result, I was left feeling on uncertain ground (iii) on all significant matters, in particular the degree of disturbance exhibited by the children; and (iv) the extent of [her] influence on the local authority and guardian."

13. In the light of his view of her, the Recorder put the psychologist's evidence to one side and concentrated on what the social worker and guardian had to say but then had reservations about their evidence for reasons to which I will come later. The Appellants argue that he was wrong to have rejected the psychologist's expert assessment in this way and that he failed to give adequate reasons for doing so.

14. Counsel for the local authority took us through the reasons that the Recorder gave one by one in an attempt to show that none of them were tenable.

Instruction of the psychologist

15. The psychologist was instructed, in accordance with local practice, through a company which provides psychological services, including providing experts to advise for the purposes of court proceedings in relation to children. The initial approach is to the company which then allocates an expert. The Recorder thought that neither the court nor the parties had had an opportunity to examine the psychologist's CV and took the view that there had been no active consideration as to her suitability for the task she was given. We have been told that in fact the guardian's solicitor circulated the CV to the parties' solicitors at a directions hearing on 30 March 2009.

Expertise of the psychologist

16. The Recorder set out what he understood to be the psychologist's qualifications in paragraph 25 of his judgment. Overall, he thought that her clinical experience was limited to one year full time and five years part time, all in junior posts. Dealing with the detail, he said, and her CV confirms, that she worked for an NHS Trust for one year as an assistant clinical psychologist, leaving in 2002. He said that she left to take a doctorate in clinical psychology, qualifying in 2005; in her CV, she is said to have been a "clinical psychologist in training" during this period. He said that since then "her experience as a clinical psychologist has been limited to part-time work in a junior NHS post"; her CV gives her employment from October 2005 to the present as being a clinical psychologist in the Child and Adolescent Mental Health Service of an NHS Trust but shows also a concurrent period as a clinical psychologist with Sure Start, running from October 2005 until April 2006.

17. The local authority point out that nobody raised any question about the psychologist's expertise prior to the final hearing. Nobody, they say, challenged the content of her

assessments of the children in any significant way. They submit that the Recorder understated her qualifications and that she was sufficiently qualified and experienced to carry out the piece of work required of her. Relying on the case of Re M (Residence) [2002] EWCA Civ 1052, they submit that the Recorder was only permitted to reject expert evidence on issues such as future placement and management and perhaps even on attachments but not the expert's assessment of the children's personality and needs.

18. I will deal with the last of these submissions first. In Re M, the judge had rejected the unanimous view of a number of experts about a father's emotional instability, substituting his own assessment of the father in the witness box. The Court of Appeal held that he had been wrong to do so. Thorpe LJ said, at paragraph 57,

> "….on the application of those principles to this case, the judge was at liberty to depart from the opinion of the experts, even if unanimous, on issues of future placement and management and perhaps even on attachment, balancing risks as against advantages. *But in this instance* I am of the clear opinion that the expert evidence in the assessment of the father's damaged core personality and continuing emotional and psychological instability was not evidence open to the judge to reject simply on the basis of impressions which he had formed of the father, not as to his truth, but as to his core, from witness box exposure." [my italics]

19. My reading of Re M suggests that this conclusion was very much based on the facts of the particular case, in which the Court of Appeal did not consider that the judge had the material upon which to differ from the expert views in the respect that he did. As Robert Walker LJ (as he then was) said in this regard at paragraph 65,

> "Even the most experienced and insightful family judge does not have the specialised training and skills of consultant psychiatrists and paediatricians who spend their lives working with damaged adults and children. Discourse between a judge and a witness in the course of a contentious hearing is very different from that which can take place in a consulting room."

20. I would therefore hesitate to draw from Re M a broad general proposition such as that advanced by the local authority here, effectively confining the scope for a judge to disagree with an expert witness to matters of future placement and management and perhaps attachments. Whether the judge can validly disagree with the experts on any particular matter will depend on the circumstances of the case before him. As is well understood, if he does differ, it is essential that his reasons for so doing are fully and clearly set out.

21. Counsel for the local authority took us to the transcript of the oral evidence that the psychologist gave about her qualifications and experience. Quite a lot of time was spent on the issue before the Recorder. The witness initially described working within a clinical psychology team in the NHS completing her doctorate. She said she then obtained her job with a local Child and Adolescent Mental Health Service in 2005 and said she had continued to work for the NHS in that team. Alongside it, three years ago she joined the company through which she had been instructed on this occasion and had done child care proceedings and contact disputes on behalf of different local authorities. When counsel for the mother asked her further questions on the same subject later, she spoke of a year working as an assistant clinical psychologist before she did her doctorate which involved three years' studying finishing in 2005. She said:

> "I was a salaried NHS worker on my Doctorate. It is funded by the NHS and then I obtained a full-time job….in the Child and Adolescent Mental Health team doing part-time Sure Start, which is an under 5s project, and part-time for the generic Child and Adolescent Mental Health Team…"

She explained that the Sure Start post had ended but she remained in the other post. The work she did alongside it for the company had involved 7 or 8 cases.

22. This material is not at all clear but it has certainly not been established that the Recorder was significantly in error in approaching the witness as having only 1 year of full time experience and 5 years of part time. It may be that at most, if her work with Sure Start should have been counted as experience as a clinical psychologist, he omitted to give her credit for the period in which that ran alongside her part time post with the generic CAMHS team, that is from October 2005 to April 2006, so a matter of months.

Recommendation of adoption for K

23. The way in which the psychologist was instructed and the question of her expertise logically come first in an examination of the Recorder's reasoning for not relying on her evidence but it seems to me that they may not have been the factors that carried the most weight with him. He laid particular emphasis on the fact that she was recommending adoption for K, which was out of line with the views of both the local authority (on behalf of whom a very experienced social worker gave evidence) and the guardian, who was also very experienced. The Recorder clearly took the view that this recommendation was mistaken and revealed inexperience, adding that during the course of her evidence, she

> "was to offer several opinions that I do not believe would have been offered by someone with more experience."

24. He also noted that,

> "it was only after the difficulties [with adoption for K] had been pointed out to her in a string of well-formulated questions on behalf of the mother that she even considered long-term fostering for K."

25. The local authority correctly point out that the psychologist explained why she recommended adoption for K. She said, for example, that K

> "deserves the opportunity to have a permanent sense of family who want him to join their family. This differs from long-term fostering in which a child is never permanently 'claimed' by the carers (although I do appreciate that foster carers with alternative motivation to foster do exist) and thus there is a greater possibility of placement change and being placed with respite carers during his childhood. A child with attachment difficulties would not do well, emotionally, with being placed with respite carers at all and would only reinforce the child's internal sense of isolation, abandonment and self-reliance. That would be detrimental to the long-term prognosis for K in terms of him being enabled to develop healthy and trusting relationships with a primary carer." (Supplementary Report paragraph 10).

26. In addition, she did recognise that there were a number of factors which might make finding an adoptive placement for K difficult to achieve and she advised that the period of searching for a family should be limited to six months so as not to delay decisions about permanency for him any further.

27. It would be wrong, in these circumstances, to work on the basis that the psychologist had jumped to a totally unreasoned conclusion. However, it is understandable that the Recorder should have had his faith in the witness shaken by her approach to the question of adoption for K and he was certainly entitled to take this into account in deciding what weight he could give to her evidence generally. It would not be at all unreasonable if her failure to give enough consideration to the potential problems of adoption for K and to consider long term fostering without prompting translated into a particular anxiety in relation to her evidence on the question of long term fostering versus adoption for the younger children.

Other opinions offered during her evidence

28. The Recorder gave further examples during his judgment of opinions that the psychologist gave that troubled him. He said that he had the impression that she had not really thought through the issues for Co and C from a practical point of view. The example he gave of this was that she expressed the view for the first time in cross examination that the children's current foster carers, Mr and Mrs B, would be a good option but then qualified this by adding that that would only be so if they were the only children in the placement. Reading the transcript of the oral evidence, the material on which the Recorder based this example is clear (H36G to H38B) and he was entitled to take this aspect of the witness's approach into account in his assessment of the weight to be attached to her views.

29. At paragraph 37 of his judgment, the Recorder set out the progress that Co had made with her current foster carers. Co had had frequent changes of carer within her family before the proceedings began, as well as a move from one set of local authority foster parents to Mr and Mrs B. The social worker's evidence was that she had settled very well with the Bs, was "no longer so bossy or controlling" and, the social worker thought, would prefer not to leave. The Recorder said,

> "This may be the first time in her 5 ½ years that Co has been able to achieve these gains. They should not, in my judgment, be underestimated. I am troubled because of [the psychologist's] inexperience in accepting her picture of Co as a disturbed child with complex needs. However, if she is right in this – and she may well be – then little of it appears to be showing at present after a year in Mr and Mrs B's care."

30. This has been taken by the local authority as a criticism by the Recorder of the psychologist and they argue that in making it, he has mistaken M's opinion of Co's disturbance for the psychologist's. In her first report, the psychologist said that Co's behaviour could be challenging but gave her view that it was a symptom of insecurity, distress and uncertainty and considered that once consistent boundaries, love and attention are provided, she can respond and settle down. In her supplementary report, she noted that M perceived Co as being extremely difficult when she herself considered that it was K about whom the most concern was needed. She attributed Co's "attention seeking behaviour, loudness and demanding actions" to psychological damage at home, noted that they had subsided considerably in foster care, and took the view that this suggested that Co is resilient enough to be able to recover when supported by the right carers. In her oral evidence too, she acknowledged the progress that Co had made in foster care. On the other hand, she also spoke of the fact that Co had "not been parented for almost five years" and "was difficult" when she assessed her in the initial stages of her stay with the Bs and she set out the problems that she felt Co may have with female carers in the future, in view of having been let down by women who have cared for her.

31. There is nothing to suggest that the Recorder is intending to quote from the psychologist directly when he speaks of her picture of Co as a disturbed child with complex needs as opposed to summarising the various facets of her evidence about Co. In any event, I am not sure that this passage in his judgment was intended as one of his examples of opinions which he put down to inexperience and which undermined his confidence in her views. The point he is making is perhaps the rather different one that although, as he acknowledges, it may well be right that Co was a disturbed child with complex needs, she was not showing this with the Bs. This recognition, at the end of paragraph 37 of the judgment, of the benefits of the placement with the Bs for both Co and C is the pre-cursor to the view he sets out, in paragraph 38, that a long term placement with them would appear to offer many advantages and that the prospects of that should be explored before it is concluded that adoption by another family is the best course for them.

32. The local authority complain about the Recorder's treatment of the psychologist's evidence in paragraph 44 where he said that her priority that Co and C should be the only two children in their placement probably dictated that they would go to first time parents and that this clashes with her advice that they needed particularly skilled parents.

33. This complaint arising from paragraph 44 needs to be taken with the local authority's submission that the Recorder was unfair to the witness also in paragraph 45 in saying that she did not know what she meant when she said that they required two carers because both issues arise from evidence given by the psychologist when she was asked, in re-examination, to list her priorities for the placement of the children.

34. In the passage which follows that invitation, she identified a number of factors. One priority was that the children would be in a placement with no other children. She also mentioned that it would be best if they had two carers and set out her concern that Co's relationship with a female carer may run into difficulty which meant that the children would be better off with a man and a woman and that there needed to be openness with the adopters about the possibility that Co's relationship with a female carer may run into difficulty. She expressed the view that the placement should be by way of adoption rather than fostering because it would offer "that sense of security and permanency" which Co had not experienced thus far. The Recorder put to the witness what he perceived to be the inconsistencies between her recommendation of adoption and the features she sought from the placement. The psychologist dealt, in reply, with the issue of difficulty with a female carer, explaining the difficulty caused with adoption when possible prospective adopters were not alerted to potential areas of conflict. She said,

> "I guess I wouldn't want the court to get too caught up on this idea that Co is going to sabotage her placement through the female carer."

35. The particular passage in paragraph 44 which troubles the local authority is as follows,

> "In an adoptive placement, the [requirement that the children be the only children in the placement] would probably mean that the children would be with first time parents: this does not sit easily in my judgment with [the psychologist's] view that particularly skilled parents would be required for these children."

They submit that the Recorder's reference to "particularly skilled parents" shows that he had not understood the psychologist's evidence correctly and this led him to be unfairly critical of her. What she was saying, the local authority say, was that the children needed "a good deal of parenting", that having a teenager present would distract from meeting their needs, and that Co needed someone who was there no matter what. This did not mean, they submit, that she was advising that they needed particularly skilled parents but that they needed a lot of attention and time.

36. In my view, the local authority's criticism of the Recorder is not a fair one. Paragraph 44 has to be read as a whole. Earlier in it, the Recorder refers to the psychologist's evidence that the children needed "a lot of parenting capacity" which is not an unfair summary of what she was saying. Nothing, I think, turns on his later reference to "particularly skilled parents".

37. Before I leave paragraph 44, I would observe that it contains an example of the Recorder differing from the psychologist in that he was not persuaded that the children needed to be alone in their placement as she said. He makes the valid point that they have been thriving with Mr and Mrs B where there are other children in the placement with them. The local authority raise no complaint about the way in which the Recorder approached this particular point and it seems to me that it must be counted amongst the material that validly contributed to his view of the witness.

38. As to paragraph 45, the local authority submit that the witness's evidence was not as confused as the Recorder said and did not justify the remark that she did not know what she meant. I agree that, as they say, the ultimate thrust of this passage in the oral evidence was that an adoptive family would need to be made aware of Co's potential difficulties with a female carer. Quite a bit of time was taken over the point in the oral evidence, however, and it is very difficult to get the flavour of a witness's evidence from the words of a transcript. The local authority have not satisfied me that the Recorder can properly be criticised for finding the evidence confusing and reaching the position he did about the witness's state of mind.

39. This leads me to make a more general point. Whilst it is important to look carefully at the individual reasons given by the Recorder for his uncertainty about the psychologist's evidence, it would be misguided to permit this detailed analysis to prevent a recognition that the assessment of a witness is a sophisticated process involving many factors which interact with each other. I suspect that it is quite rare that any one factor on its own leads a judge to the conclusion that he cannot rely upon a witness in a particular case. It is not always practical for the judge to identify in writing every consideration that has entered into this assessment. Lord Hoffmann reminded us of this in Piglowska v Piglowski [1999]1 WLR 1360 in which, dealing with the role of an appellate court, he said,

> "First, the appellate court must bear in mind the advantage which the first instance judge had in seeing the parties and the other witnesses. This is well understood on questions of credibility and findings of primary fact. But it goes further than that. It applies also to the judge's evaluation of those facts. If I may quote what I said in *Biogen Inc. v. Medeva Ltd.* [1997] R.P.C. 1:
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> > "The need for appellate caution in reversing the trial judge's evaluation of the facts is based upon much more solid grounds than professional courtesy. It is because specific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance. . . of which time and language do not permit exact expression, but which may play an important part in the judge's overall evaluation."
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> The second point follows from the first. The exigencies of daily court room life are such that reasons for judgment will always be capable of having been better expressed. ….. An appellate court should resist the temptation to subvert the principle

> that they should not substitute their own discretion for that of the judge by a narrow textual analysis which enables them to claim that he misdirected himself."

These observations about the constraints of time and language, whilst expressed here in the context of findings of fact and the evaluation of such findings, are equally valid in relation to other aspects of a judgment.

40. In all the circumstances, I do not consider that the local authority have raised any matters which fatally undermine the Recorder's rejection of the psychologist's evidence. It was within his discretion to put her evidence to one side and to concentrate on the evidence of the social worker and guardian.

Adoption versus fostering for these children

41. Whilst he paid tribute to their experience, the Recorder felt that the evidence of the social worker and guardian was also lacking.

42. The local authority argue that the Recorder was wrong to be concerned about the degree of influence the psychologist had had on the evidence of the social worker and the guardian. There is no doubt that they had taken into account what she said but, as the local authority point out, both showed independence by differing from her view with regard to adoption for K.

43. However, even if the Recorder's apprehension about the psychologist's influence was misplaced, the fact remained that he found the evidence of the social worker and the guardian left what he described as "a gap in the case" in that neither of them argued the case for adoption rather than long-term fostering for these particular children in any depth. The Recorder commented,

> "In short, nowhere can I find any thought process that has led the local authority or the guardian on from the point of the crossing of the threshold and the ruling out of rehabilitation (i.e. the outcome of the care proceedings) to a conclusion that only adoption will do for the 2 younger children. The documents read as if is simply the age of the children – that is to say a general principle – that leads to the conclusion…..In many cases involving no established family connections and little 'baggage' that might be sufficient, but I do not believe it is so in this case."

44. Later he said, at the end of paragraph 46, referring to the view of both the social worker and the guardian that, if an adoptive placement could not be found for both children together which would also accommodate some contact with the natural family, closed adoption in separate placements would be better than, say, remaining with the Bs:

> "….it tends to confirm my view that there has been too much emphasis on a supposed principle in favour of adoption for children of these ages and insufficient concentration on the particular circumstances of these children."

45. The criticisms made by the local authority in Grounds 6, 7 and 8 of their grounds of appeal are directed to this area of the Recorder's approach to the case. They argue that he was wrong to find that there was a gap in the evidence about whether adoption was a better option for children of this age than long term fostering and as to the availability of long term foster care (both generally and in relation to the potential availability of Mr and Mrs B as long term carers).

46. What the Recorder said in the passages I have just quoted, and elsewhere in the judgment, must be seen in the context of how well the children had settled and progressed with Mr and Mrs B whom the Recorder considered should be explored further as a permanent possibility, and also of the Recorder's finding that they had established family connections with the parents, K and other family members and that the parents make contact a positive experience for them. In many cases involving young children, the general benefits of adoption as opposed to long term fostering will be sufficient, without much, if any, further analysis, to persuade the court that adoption is what they need. The Recorder acknowledged this in the passage I have quoted at paragraph 43 above and also elsewhere in his judgment, recording, for example, the evidence of the social worker, endorsed by the guardian, that adoptive placements offer much better outcomes for children of these ages. I do not therefore interpret what he said as indicating that he was looking for additional generic evidence on the benefits of adoption as opposed to fostering. The point is that he had concluded, and was entitled to conclude, that this was a case in which general principles about adoption were not sufficient

given the particular factors which he considered might indicate alternative placements. He had rightly reminded himself of the test that would have to be satisfied in relation to the placement order application, namely that the children's welfare requires that the parents' consent to placement for adoption be dispensed with (section 52(1)(b) Adoption and Children Act 2002) and directed himself that the word "requires" carries "the connotation of the imperative - what was demanded rather than what was merely optional". No one criticised this formulation of the law and the Recorder's evaluation of the evidence was plainly carried out with it in mind.

47. A review of the documentation provided by the guardian and the social worker supports the conclusion that the Recorder reached about their failure to analyse the case for fostering as well as the case for adoption before concluding that the latter was required. In some respects the reports of the guardian and the social worker, and the social worker's statement, are very detailed, giving information about health and likes and dislikes, wishes and feelings. However there is surprisingly little detail about the central issue of the type of placement that will best meet the children's needs and the Recorder's conclusion that the decision follows almost inexorably from the age of the children can be seen to rest on proper foundations. In part, this may be an unfortunate by-product of the entirely proper use, by both witnesses, of the checklist of factors and, in the case of the social worker's placement report, of the required pro forma. However, the court requires not only a list of the factors that are relevant to the central decision but also a narrative account of how they fit together, including an analysis of the pros and cons of the various orders that might realistically be under consideration given the circumstances of the children, and a fully reasoned recommendation. The deficiencies of the written material in this case were not made up in the oral evidence.

48. As for Mr and Mrs B's position with regard to whether they were prepared to offer long term care, although the social worker had done her best to address the question during the hearing, the uncertainty in the evidence entitled the Recorder to take the view that the matter needed further exploration. It has since received attention and it seems now to be common ground that Mr and Mrs B wish to retire as foster carers in a few years and would not be able to continue to care for Co and C for the rest of their childhood. That option will not, therefore, be available to the court when it resumes its consideration of the future placement of the children. However, that does not mean that Recorder was wrong in the view he took about the state of the evidence on the issue at the time of the hearing.

Grounds 9, 10 and 11: the factors taken into account by the Recorder and his balancing of them

49. The local authority argue that the Recorder failed to consider the significant emotional harm caused to the children by the parents and their inability to meet their emotional needs, including, they argue, in contact sessions. They argue that he put too great weight on the fact that the parents had not deliberately harmed the children and on other factors such as the wishes of the children and their connections with their family and insufficient weight on the need for a secure and permanent placement.

50. I do not read the reference in paragraph 52 of the judgment to the "background of parents who have not deliberately harmed the children" as indicating that the Recorder attributed inappropriate weight to what he saw as the lack of deliberate harm. Paragraph 52 is a summary of his conclusions and must be read in conjunction with all the other matters to which he makes reference elsewhere. Furthermore, in this regard, as in relation to the rest of his analysis of the pros and cons of adoption, it is important to recognise the provisional nature of his assessment of where the balance lay. He had concluded that as things stood, whilst there were factors within the checklist that pointed towards adoption, the balance was against it but it is clear that he intended that to be understood as his view on the evidence "at present". He uses that phrase expressly in paragraph 51 in which he explains that he did not feel that the social worker and guardian had given full consideration to the particular position of the children. He also continues very shortly thereafter to set out what he contemplates will be done in the aftermath of the hearing which includes searching for all forms of placement, including adoption, as well as consulting the Bs. The Recorder says in terms, at paragraph 53, that should the local authority again decide to apply for placement orders, nothing in his judgment should be read as preventing them from doing so. He then seeks to fill the gap in expert evidence by advising that consideration be given to the appointment of a consultant child and family psychiatrist to report.

51. Once the Recorder's view that he did not have sufficient expert analysis (whether from the psychologist, the social worker or the guardian) of the pros and cons of adoption versus fostering for these particular children is recognised as a view which he was entitled to reach, detailed criticism of the weight he gave, in this vacuum, to this factor or that factor becomes academic in terms of this appeal. It could not change the outcome of the appeal and, furthermore, nothing in the Recorder's balancing of the factors on the evidence as it then stood should stand in the way of a full re-evaluation of the matter when it returns to court for a final hearing.

The outcome of the local authority's appeal against the dismissal of the placement orders

52. For the reasons I have set out above, I am not persuaded that the Recorder was wrong in his approach to the evidence in this case, in his conclusion that the case for adoption was not yet established, or in his refusal to grant placement orders in relation to the younger two children. I would not allow the appeal on these grounds. However, for the reasons I am about to give, I consider that the local authority are on safer ground in relation to the propriety of the Recorder granting full care orders in these circumstances and dismissing the placement applications rather than adjourning them.

Ground 1: final care orders should not have been made when rejecting the placement order applications

53. I think it would be fair to say that it was an uphill task for counsel for the mother to produce arguments to justify the course that the Recorder took in granting full care orders when he had pronounced himself in such fundamental disagreement with the local authority's care plan and was unwilling to grant the placement orders necessary to take it forward. In the circumstances, I can deal with that issue shortly and I propose to do so in conjunction with the question of whether the placement order applications should have been dismissed or simply adjourned. In so doing, I recognise that it may well have been that, in the context of a hearing that had thrown up a number of other difficulties and left the parties and the court contemplating a range of different outcomes, there was insufficient focus on the issue of whether a full care order should or should not be made if the judge was not prepared to make a placement order as well.

54. It will be recalled that the care plan of the local authority was for adoption. It was the basis on which the local authority sought a care order and no alteration was made to it during the hearing. The Recorder was not approving that plan and whether he would do so in future was not yet known. There was still a live issue as to whether long term fostering or adoption would be right for the children and, on the facts of this case, the difference between those two types of placement was a potentially fundamental difference, given the possible implications for matters such as continuing contact with the natural family, the availability of placements, the likely stability of placements etc. Matters had not yet reached the stage, therefore, when the court should have made a full care order. The proceedings relating to the younger two children should have been adjourned to a further hearing, with directions of the type that the Recorder contemplated concerning expert evidence, and interim care orders should have been made in the meanwhile.

55. The guardian's counsel has set out very clearly a number of the disadvantages for the children in the course that the Recorder took, not least potential delay and the lack of continuing independent input into decisions about their future. The making of the care order and dismissal of the placement application brought the involvement of the guardian and the children's solicitor to an end; similarly, M's legal representation would come to an end. The instruction of the new expert would be a matter for the local authority's internal processes. They would have to obtain funding for it. The guardian and her solicitor would no longer be available to contribute their expertise to the instruction. The court would have no role in scrutinising the suitability of the chosen person, the questions that were to be addressed by him or her and the timetable for the report. Any input the parents had would be entirely a matter between them and the local authority. It would be up to the local authority to decide when, if at all, to recommence proceedings for a placement order.

56. The Recorder gave as his reason for dismissing the placement application that simply adjourning it might imply that the main cause of the problem was the inadequate investigation of Mr and Mrs B whereas he thought the problem was more deep-rooted. He thought that

"merely to adjourn might detract from the objectivity and thoroughness in the search that I believe is required."

57. This conclusion of the Recorder's may well not have credited the local authority and the guardian with the professionalism that they could be expected to bring to the case in the light of the Recorder's refusal to approve adoption on the evidence as it then stood and of the general airing of the issues during the hearing.

58. However, even if he was entitled to take this view, the Recorder failed to take account of the practical difficulties that the dismissal of the placement applications would pose for the local authority. They would have to return to their adoption panel for approval before making further placement order applications; any expert's report that was commissioned would need to be obtained before this could be done. They would also have to reissue the placement applications and await directions hearings thereafter rather than a further hearing of the existing adjourned placement application being scheduled, probably by the Recorder if information as to the availability of experts could be speedily obtained, to tie in with the care proceedings.

59. As counsel for the guardian puts it, this was a case in which the court should have retained control over the proceedings, the evidence and the timetable for the children. The consequence of the court not doing this is that the children have been left in limbo without a clearly defined or timetabled path to permanence.

60. Accordingly, I would overturn the care orders made in relation to Co and C and the judge's order dismissing the placement order applications in relation to them and substitute (i) an order adjourning the placement order applications and (ii) interim care orders for 28 days. The matter must return for urgent directions so that an appropriate expert can be instructed and a timetable set for a hearing at which the outstanding issues can be determined. Speaking for myself, I see no reason why the directions, and indeed the final hearing, should not be dealt with by the Recorder who clearly took particular care over this case and has accumulated a significant amount of knowledge about it. Whatever views the Recorder expressed about adoption versus placement during the hearing were necessarily only provisional and that leaves the way clear for a full hearing at which the whole issue can be subject of comprehensive evidence and argument and a fully informed decision can be taken by the court.

Contact

61. The appeal in relation to the contact orders made by the Recorder has to be seen in the light of these orders. The local authority complain that the detailed regulation of contact imposed on them by the Recorder involved more frequent contact than the court had been advised was appropriate and is not sufficiently flexible to cater for changes in circumstances in the future. However, they are not presently encountering any particular difficulties in the regime that the Recorder ordered.

62. In these circumstances, the most practical course would be for the question of contact for the two younger children to be reconsidered at the final hearing, in the context of the decisions that will then be made as to the children's future placement. Should there be unexpected difficulties before that time, the local authority can, of course, apply for the contact orders to be varied and make temporary adjustments themselves if the situation is particularly urgent.

63. As far as K is concerned, the local authority argue that the order denies them flexibility that they may need in future whilst not currently serving any necessary purpose because they are committed to the contact at the present level and had, in fact, already arranged contact outside the contact centre before the hearing before the Recorder.

64. The Recorder set out the evidence in relation to contact and his reasons for the decision that he took. It cannot be said that he was plainly wrong to impose the order that he did in relation to K. I would dismiss the local authority's appeal in this regard. K's position has been changing and we were told that the heat has gone out of the situation in relation to him because he is going to be able to stay with his existing foster parents, rather than having to move. This is seen as a good thing. If it means that changes are required to the detail of contact, it is to be hoped that that can be done by agreement rather than requiring a further

court hearing. If any debate arises in the near future, no doubt that issue might also be addressed at the resumed hearing in relation to the other children.

Lord Justice Toulson

65. I agree and would particularly endorse Black, LJs observations in para 39 on the general point concerning the proper approach of an appellate court when considering reasons given by a judge for forming a view about the value of the evidence given by a witness, in this case a clinical psychologist.

Lord Justice Carnwath

66. I also agree.