

Re J (A Child) [2009] EWCA Civ 1210 (29 October 2009)

Case No: B4/2009/2204

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL (CIVIL DIVISION)

ON APPEAL FROM THE BIRMINGHAM

CIVIL JUSTICE CENTRE

(HIS HONOUR JUDGE CARDINAL)

Royal Courts of Justice

Strand, London, WC2A 2LL

29th October 2009

B e f o r e :

LORD JUSTICE THORPE

LORD JUSTICE WALL

and

LORD JUSTICE MOORE-BICK

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IN THE MATTER OF J (A Child)

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The Appellant mother appeared in person, assisted by a McKenzie friend.

Mr M Brown (instructed by Birmingham City Council) appeared on behalf of the First Respondent, the local authority.

Mr S Novolini appeared on behalf of the Second Respondent, the child, by the Children's Guardian.

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HTML VERSION OF JUDGMENT

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Lord Justice Wall:

This is an appeal brought by leave of Ward LJ against in particular an order made by HHJ Cardinal sitting on 28 August 2009 in the Birmingham County Court.

In the event we are today dealing with two issues and I propose to address them in this judgment in the reverse order to which they were presented to us this afternoon. The first is the classic difficulty which frequently arises in care proceedings whereby the mother of the child in question seeks a further assessment of her capacity to care for a child who is the subject matter of the proceedings and the local authority says "No, we have done all we can. There have been plenty of assessments in the past. This is not a case we really feel we should invite the court to go further on".

This case exhibits that phenomenon in an acute form because the mother concerned has had a total of ten children. The eldest nine range from the age of about 14 to the child with whom we are today concerned, who was born last year.

The mother was represented in the care proceedings which have been by the local authority. She parted company with her lawyers and has engaged a McKenzie friend, Mrs Haines, who has argued the two points I have identified today. The first point, as I say, is: should there be a further assessment of the mother by an independent social worker? The second point is that, whereas the judge allowed Mrs Haines to argue the social worker assessment point fully by giving her rights of audience to do so, he declined to give her rights of audience to conduct the final hearing on behalf of the mother, Miss Johnson, and it is against that order which Mrs Haines this afternoon seeks to appeal.

Dealing first with the question of the further assessments by an independent social worker, the judge gave what is, I have to say, a full and careful judgment in which he explained why it was that he was not minded to grant that assessment. The position was this: that following his birth, the little boy in question was taken off to a residential assessment centre called Appledore where an assessment was carried out. Mrs Haines criticises it on the basis that it took place over the Christmas period and her client was not given the assistance she should have been given in relation to her care of the child. In any view, the upshot of that assessment was unsuccessful, and following the assessment at the Appledore the local authority took care proceedings. The consequence of those care proceedings was that the child should remain in foster care and that the local authority's care plan is for him to be placed for adoption with strangers. That is of course a course that the mother strongly resists.

The history is relevant, however, because in relation to the other children there have been numerous assessments made of the mother and we have in our papers the file of a number of reports in relation to previous proceedings which have been obtained. In my bundle they start with a report from an organisation called the FSU, "Investing in families". That report, which deals with older children, as I have already indicated, runs to a number of pages and in common with the other reports before us comes sadly to the conclusion that this mother is not in a position to properly care for her children.

Of course the matter goes further because the mother has been assessed by a psychologist, Doctor Banks, by a psychiatrist, Doctor Anderson, in relation to previous children, and there have been other

assessments in relation to her. The last judgment in our papers is that given by Judge Donald Hamilton in 2008, relating to the child who was then the subject to proceedings, born on 24 September 2007, and once again the judge in a long and careful judgment came to the conclusion sadly that this was not a case in which the mother could care for her child.

The judge, having as it seems to me not unsympathetically dealt with all these matters in terms of history, asked himself the question: could an independent social worker add anything to that which had gone before, particularly the overwhelming professional evidence, supported as it were by the guardian in the case, that sadly this mother was not in a position to care for her child? The judge came to the conclusion that in the circumstances, having based himself carefully on the decision of this court in which I see I gave the leading judgment, came to the conclusion that this is one of those cases where really it was not in the public interest to spend further money carrying out an assessment by an independent social worker who would not be in a position effectively to contradict the evidence which the judge already had from psychologists and psychiatrists and indeed from the Appledore Centre.

I think the fact that the mother and child were sent to the Appledore Centre immediately after the child's birth indicates that it wasn't the local authority setting this mother up to fail or seeking immediately to remove the child, but the local authority has come to that position and it has formed the view that there is no point in any further assessment. They say enough is enough. They have done all that they need to do or all they can properly do and the court has sufficient information to deal with the mother's parenting capacity. That is a matter which the mother will challenge at trial and it will of course be a matter for the judge finally to make his mind up on that particular topic.

I think it important to remember when one is looking either at the independent assessments by social workers or at applications under section 38(6) of the Act that one needs to be child focused. It is not a question of the mother's right to have a further assessment, it is: would the assessment assist the judge in reaching a conclusion or the right conclusion in relation to the child in question? And on this particular issue it does seem to me that the judge was exercising a discretion and doing so appropriately on all the facts available to him. He thus reached a conclusion which I cannot for myself say in any way is plainly wrong, and since he has based himself on the latest authority on the point and considered the matter carefully, I, speaking for myself, cannot say either that he has erred in law and would dismiss the appeal in relation to a further social worker assessment.

But that is by no means the end of the matter because it does lead on to the second issue, which fortunately, thanks, if I may say so, to the good sense of the local authority, is not an issue troubling or

mind to trouble us a great deal. The judge was concerned about Mrs Haines because she is associated with a well known Member of Parliament who in turn is the principal motivator of an organisation which seeks to investigate family cases and is often highly critical of the Family Justice system. We have been assured by Mrs Haines this afternoon, and I for my part have no difficulty in accepting, that she wishes to represent this mother on this application on the merits of this application. She is not making any form of political point. She is not seeking to score any form of political point. She is not, as the judge appears to have thought she was, a professional McKenzie friend, and since the mother, who otherwise might qualify for legal aid or public funding, does not wish to instruct a solicitor and wishes to have Mrs Haines representing her, there does seem to me, speaking for myself, an illogicality in the judge on the one hand allowing her to speak and advocate the application for an assessment whilst denying her the ability to represent the mother on the substantive application.

The judge seems to have imported into his judgment a number of factors relating to Mrs Haines which may not be warranted and. Speaking for myself, although I am aware that the judge was exercising a discretion, and although I am aware this is very much his patch and that he would be in control of his own court, I nonetheless have come to the view, perhaps with the slightly more relaxed way the Family Division approaches these things, to think that process is very important and it is important that whatever the ultimate decision this mother should feel she has been represented to the best of her ability. She wants Mrs Haines to represent her, and in my judgment it is likely to save time and effort if at the end of the day she is represented by Mrs Haines.

Therefore, accepting as I do that this case will be determined on its merits by the judge by a McKenzie friend who will be representing the mother in the application on the basis of the merits of the application and the merits of the mother's opposition to the application, I speaking for myself would give Mrs Haines permission to appeal against the judge's judgment relating to McKenzie friends. I would give her rights of audience before the judge.

Mrs Haines will need to remember of course that the judge is in control of his court and that he is likely to expect a cooperative attitude from lawyers, however difficult the issues and however emotive the issues are before him. There is no more emotive issue than taking children away from their parents. I have always been an advocate of due process in family proceedings. I do believe that it is important that this mother should have the opportunity to be represented as she wishes on the facts of this particular case and, speaking for myself, therefore, it seems to me appropriate that Mrs Haines should represent her. Although she is not legally qualified, the courts are given the power, as is conceded in the local authority's skeleton argument, to grant representation in given circumstances. I am very grateful to counsel from the local authority and counsel for the guardian for their attitude on this aspect of the case. I think it will in fact save time in the long run, and if it goes some way to assist the mother in her difficult task then I for one would be pleased if that is the case.

Therefore, for the reasons I have given, whilst I would dismiss the appeal in relation to the application to instruct an independent social worker, I would allow the appeal in relation to the question of Mrs Haines being given rights of audience to conduct the final hearing before the judge.

Lord Justice Moore-Bick:

I agree.

Order: Appeal allowed