Judge rejects Welsh local authority's care plan and allows mother to keep her eighth baby

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reporting watch team

The judgment of His Honour Judge Gareth Jones in Re A (A Child) [2016] EWFC B101 (25 August 2016) was recently published on BAILII.

Although it is not an authority from a higher court we think it is a good illustration of some important principles, and also contains some interesting points about the impact on Welsh care proceedings of new Welsh-only legislation around social care responsibilities. The judgment is also an example of a case where a judge has listened to the evidence and disagreed with the local authority and the guardian, and refused to make a care order even in a case where the mother's first seven children had all been removed. So we thought it was worth a write-up.

Transparency points
The judgment dates from August, but has only just been published. It is not clear why this is, but the judgment provides that :

> *Unless any party objects (and applies for further directions within fourteen days of provision of this transcript) a copy of this anonymised approved transcript will be placed on the Bailii website in accordance with the Guidance on publication.*

It may therefore be just a question of the time taken for the transcript to be prepared, approved, and for fourteen days to elapse, along with any submissions about the extent of anonymisation and time for those anonymity amendments to be made.

We note that, somewhat unusually the identity of the local authority is anonymised, although the regional location is apparent from the identity of the judge and location of court. Some other geographical information is also redacted. This is likely to be because of factors such as the particular vulnerability of the mother and the (probably) unusual ethnic makeup of the family (depending on the locality where they live) combined with information on the number of siblings, which might make jigsaw identification a problem.

Oddly, the Cafcass guardian, who would normally be identified is identified only by initials. He is the subject of some quite strong criticism in the course of the judgment, so one might argue there was even more justification for his name to be published. However, the judge suggests this is a training issue and has asked for CAFCASS Cymru management to consider the case, so it appears likely the judge may have been attempting to buffer an individual where there might be underlying management issues (such as workload or illness or inappropriate allocation). It would have been helpful if the rationale for the anonymisation were spelled out, but it is common for it not to be addressed as the anonymisation is an adaptation to a pre-existing judgment.

Some explanations

There are some things in the judgment that might look like gobbledigook to non-lawyers. For example, the judge says that he announced some decisions at the outset of the trial :

> *…that the mother's case to care for her daughter A as a sole carer at this stage should be considered in accordance with the decision in North Yorkshire County Council v B [2008] 1FLR 1645 and Re R [2015] 1FLR 715.*

Translation : the judge is saying that even though he will have to postpone any decision about the father's ability to care for the child, as he is still in Pakistan and has not yet been assessed, the law says he can still use the trial to hear evidence and rule on whether the mother caring for the child is a "realistic option" i.e. he could rule her out of contention and decide on other options another day.

In fact, the judge goes on and decides that the mother and father can care together, once the father is back from Pakistan.

The background

The mother had already had seven children removed from her care. Some had gone to live with their birth fathers, some had been adopted. This child was her eighth and came after a gap since the last set of care proceedings. She had a low IQ and previous psychological reports had raised issues about her personality, need for therapy and ability to manage the care of a child. There was a background of domestic abuse (but not in this relationship).

Because it had not been possible to assess the father, the local authority wanted the court to approve a care plan with various contingencies depending on how their assessment of the father went (from joint care by both parents to adoption), but ruling out the mother as sole carer. The guardian's report approved that plan.

The interesting effect of Welsh law

Care proceedings in Wales operate under the same piece of legislation as in England : The Children Act 1989. But increasingly other pieces of Welsh legislation have had an impact on the way in which family cases operate. In this case the Social Services and Well-being (Wales) Act 2014 seems to have had a significant impact on the approach taken by the judge. He says :

> *Since 6th April 2016, the Social Services and Well-being (Wales) Act 2014 has carefully defined the obligations of Local Authorities within Wales towards children and others who need care and support. While the content of family law and procedure remains a reserved matter, the Welsh Government is entitled to legislate for social welfare as a devolved matter under Schedule 7 Part 1 of the Government of Wales Act 2006….A local authority with responsibility for a looked after child (which includes a child in its care or a child being provided with accommodation) must:*
>
> *"(a) safeguard and promote the child's well-being, and*

> *(b) must make such use of services available for children cared for by their own parents as appears to the Authority reasonable in the child's case."…under section 7(2) of the 2014 Act, Part One of [the United Nations Convention of the Rights of the Child] now binds Welsh local authorities in relation to looked after children."*

Every case on its own facts

The judge quotes the "Darlington case" (*Re A [2016] 1FLR 1)*, reminding himself of the need for the local authority to prove its case and that its care plan is justified. He goes on to make clear that just because a mother has had seven children removed, it does not automatically follow that the eighth will also go :

> *The Local Authority (for perfectly understandable reasons) has concentrated upon the mother's poor parenting history. That is inevitable in a case such as this. In ruling out the mother, the focus has unavoidably shifted to the father's capabilities to remedy the mother's alleged parenting shortfall. However, it would not be fair to "write off" the mother simply on the basis of her historic track record. Why assess her at all if upon the birth of each successive child, that child is removed from her care because the previous child or children had also been removed from her care?*
>
> *The court has a duty to the child to consider afresh any changed circumstances, while not of course disregarding important background information. In this case, four/five years have elapsed since the previous proceedings; the mother is nearly forty years of age; it is her care of one child, not multiple children, which is currently at issue.*

He then carefully considers the position and concerns in the previous proceedings, as against the current situation and risks / concerns.

Social engineering

The judge quotes the now famous extract of Hedley J's judgment in Re L about the need for society to tolerate diverse standards of parenting, and goes on to consider the assertions about the limitations in the mother's parenting :

> *The Guardian in his final report in these proceedings highlights the mother's limitations in stimulating A in contact. This may be because of her own innate limitations. However, parents have diverse capabilities and abilities and I remind myself that "social engineering" is not permissible. A parent of low average intellect may find it more innately difficult to stimulate a child in play when compared to a more intellectually gifted or resourceful parent. That, however, is not the point. I have to consider whether the mother's care and stimulation is unacceptably poor or deficient and is likely to remain so, thereby harming A's educational, social or emotional development. The Guardian in his oral evidence believed that the mother could be assisted to improve her abilities to stimulate A.*

He has the warnings about social engineering and for an evidential base firmly in mind when later he says :

> *The Guardian, the Judge and the Local Authority all share a common desire to protect children from the recurrence of a risk of future harm. However, I have to recognise, as does the President in the case of Re A, the acceptable limits of this protective desire, and of course I have to consider the duty placed upon the Local Authority to establish its case.*

The guardian

> *I have set out the Guardian's evidence at some length (which I believe bears examination from any transcript of his evidence), and I do so for these reasons:*
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> *(i) because his oral evidence substantially overshadowed his written recommendation;*

> *(ii) because it proceeded without forming an independent judgment of its own but as a result of the Local Authority and Dr Moshe's evidence;*
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> *(iii) because he appeared to be unclear about the scope of his assessment and his recommendation and the task expected of him;*
>
> *(iv) because in several respects his application of the basic legal framework was, I believe, deficient; and*
>
> *(v) for all of these reasons, I believe the Court can depart from the Guardian's recommendation in this case, which is unsafe.*
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> *At times, the Guardian's evidence appeared (I am afraid) to be a rudderless vessel on the high seas blown hither and thither and I was uncertain whether (in fact) this vessel would be blown into any particular harbour or whether indeed it would be blown into any harbour at all.*

The passage describing the Guardian's evidence is really quite shocking, particularly because it demonstrates that the Guardian does not appear to have formed his own independent view of the case, had not really considered at all the possibility of the mother, with support, being able to care for the child and seemed to be operating a reverse burden of proof in light of the previous removals for her to demonstrate she could now care – the thinking was all about risk and not about possibilities :

> *The underlying argument of the Local Authority and the Guardian was in effect jointly presented. However, there are other possibilities with regard to the future in respect of the mother. Her care of A may provide an outlet and a focus to her life. The mother has a great desire to succeed as a parent and her love for A is unquestioned. Far from being isolated and without support, the mother may engage (with perhaps some assistance) with child care Agencies, pre-school and nursery facilities, health visitors and others who would all provide a circle of new acquaintance, activity and experience for her.*
>
> *Why should I conclude that the father will either not return to this jurisdiction or abandon the mother and his daughter in the future? While the father may of course lack experience as a father, there is no obvious indicator of any viciousness in his character either towards the mother or indeed towards children in general. I have referred already to the cautions recorded in relation to the mother and the father (without there being a history of documented domestic violence) and the father after all had been in the United Kingdom since 2009 and he indicates that he would wish to seek employment, were he to return to this country. There is no obvious adverse indicator so far as he is concerned.*
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> *Furthermore, in my conclusion I am entitled to rely upon the Local Authority's statutory framework of responsibility towards A under the 2014 Act and more generally. In this case, there is an elusiveness in pinpointing the likelihood of future harm presented by the mother's sole care. I conclude that the Local Authority and the Guardian have struggled in that respect. For every indication pointing in one possible direction, there is another pointing in a contrary direction.*
>
> *The benchmark for the measurement of parental capability and behaviour (as indicated by the President) is a wide one. There are cases where the Local Authority fails to discharge the burden and where it cannot be established to the Court's satisfaction that the line of unacceptable future care either will or may be crossed, and this (I conclude) is one such case.*
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> *Accordingly, I do not approve the Local Authority's final Care Plan. The separation of the mother and*

> *the child A is not sufficiently justified by the evidence. The threshold having been established, I make a Supervision Order in favour of the Local Authority for a period of twelve months, which may of course be extended on application in accordance with the Children Act 1989.*

For those who worried that courts simply rubber stamp the plans presented to them by local authorities, or who have been told that lawyers are all “legal aid losers” this judgment ought to be some reassurance, although of course not every case has the same outcome. In spite of the united front presented by the guardian and local authority, the absent father and the poor starting point of having had 7 children removed – the parents’ advocates ran their cases (which probably looked like a pretty steep hill at the start), the judge listened carefully and really thought about the decision before deciding that he would not approve the plan.

The Welsh legislation seems to have helped bolster his decision, but of course even in England it is possible to argue that a plan should not be approved if, with support and services, a parent could manage (the judgment of Lady Hale in Re B provides some support for that proposition). However in English cases the advocates are always labouring under the difficulty of everyone knowing the LA can’t be made to provide services because there is no specific statutory duty to point to and the LA can legitimately say we can’t spend money we don’t have to fulfil a duty we don’t owe – where as here the judge has just said sweetly “Well, the LA will of course obey the law, so there is no problem”. Which is difficult for a LA to argue with.

Feature Pic : Welsh Senedd courtesy of Dave Griffiths on Flickr – thanks.