Resolving an impasse between professionals in care proceedings (Re T-S (Children))

22/05/2019

Family analysis: Donna Roberts, partner at McAlister Family Law, analyses the decision of Re T-S (Children), in which the Court of Appeal was concerned with the correct approach for the courts and local authorities in order to achieve sufficient common ground in relation to a care plan and final orders.

Re T-S (Children) [2019] EWCA Civ 742, [2019] All ER (D) 40 (May)

What are the practical implications of this decision?

In *Re T-S (Children),* the Court of Appeal identified and reasserted the existing case law that 'the court has a power and a duty to assert its view of risk and welfare by whatever is the most effective means', in a case involving care proceedings and the local authority's care plan within those proceedings, in relation to which there was disagreement between the professionals involved in the case.

The Court of Appeal found that while the agency decision maker (ADM) has an independent role in determining whether an application for a placement order for adoption should be made, a judge may also properly and legally invite the local authority and ADM to make such an application.

If the ADM still refuses, a judicial review application can be made, but that would not be without difficulties as while others may not agree with the decision of the ADM, that decision may not be *Wednesbury* unreasonable (per *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1947] 2 All ER 680, as to a decision that no reasonable ADM could come to). It would also cause further delay.

In this regard, the approach of Jackson LJ in *Re T (A Child) (placement order)* [2018] EWCA Civ 650, [2018] All ER (D) 198 (Mar) was reaffirmed by the Court of Appeal in *Re T-S* when it quoted from the judgment in *Re T (A Child) (placement order)* (at para [46]) as follows:

> 'What the court can, however, expect from a local authority is a high level of respect for its assessments of risk and welfare, leading in almost every case to those assessments being put into effect. For, as has been said before, any local authority that refused to act upon the court's assessments would face an obvious risk of its underlying decisions being declared to be unlawful through judicial review. That must particularly be so where decisions fail to take account of the court's assessments.'

What was the background?

Care proceedings were initiated in respect of three children, all boys—B aged eight years, J aged four years and K aged 21 months. B and J were full siblings however K had a different father. The history in this case related to evidence of poor and chaotic parenting over the course of four years. The children had been removed from their mother's care shortly before the conclusion of the case.

The threshold criteria for the making of public law orders was not in dispute. The appeal focused on J, then five years old, and related to a difference of opinion as to whether he should be placed for adoption or in long-term foster care.

The court had made a final care order in respect of B with a plan of long-term foster care. K was made the subject of a care order and a placement order authorising the local authority to place him for adoption.

The care plan for J sought to prioritise his relationship with B and was for long-term foster care. The independent social worker who had been instructed to assess the children's attachments, together with the children's guardian, advised that J's welfare required adoption, if possible with his younger half-sibling K.

In order to apply for a placement order for adoption, a local authority must be satisfied that a child 'ought to be placed for adoption' (section 22(1)(d) of the Adoption and Children Act 2002 (ACA 2002)), which must be determined by the ADM.

The court heard oral evidence from the ADM who concluded that J's welfare would be best met by a long-term foster placement. The ADM had placed substantial weight upon the evidence of the social worker, which had evaluated the attachment between J and B as being of importance.

The judge at first instance had concluded that the assessment of attachment conducted by the social worker in the case had been both superficial and 'fatally flawed'. He stated that he 'much preferred' the evidence of the independent social worker and the children's guardian (para [8]). The judge concluded that the local authority should be invited to reconsider the care plan for J, and extended the interim care order with respect to J for a short time to enable the local authority to reconsider its care plan for him.

At the next hearing, there was a written statement from the ADM confirming that her view remained the same, ie that adoption was not in J's best interests. The basis of her opinion was as follows (para [14]):

> 'In addition to the information I considered when making and then revisiting my decision in October, I have had the opportunity to consider the verbal judgment and the conclusions reached by the court. I have also been able to consider the recordings of the foster carer and the social worker and the draft minutes of the children looked after review which took place on [3 December 2018], chaired by Mr X and attended by the foster carer, the social worker, the school and the health visitor. I have also had the opportunity to receive updated information regarding the position of Mr T (J's father).'

As the court at first instance considered an impasse had been reached, the judge granted permission to the local authority to appeal to the Court of Appeal.

The local authority's appeal relied on five grounds (see para [23]):

- that the judge had erred in concluding that he was in a far better position than the ADM to determine the best outcome for J, rather than considering whether the ADM's decision could be successfully challenged on public law grounds
- that the judge had erred in failing to reconsider his decision in the light of the ADM's December 2018 witness statement which took account of the judge's determination and which could not be properly challenged on public law grounds
- that Parliament had given the decision of determining whether a child ought to be placed for adoption to a local authority rather than the court
- that as the decision to apply for a placement for adoption order was one solely within the determination of the local authority, and as the ADM had reconsidered her decision in a manner that was not open to challenge on public law grounds, the judge was in error in continuing to refuse to endorse the care plan and make a final care order, and
- given that the statutory threshold criteria set out in section 31 of the Children Act 1989 was satisfied, and the court had determined that J could not return to the care of his family, the court should have made a final care order at the hearing on 20 November 2018

The mother attended the appeal hearing and confirmed her position that if J could not return to her care, she supported the plan of adoption. J's father supported the local authority's position and also advanced four additional grounds of appeal (para [26]). The children's guardian opposed the appeal.

What did the court decide?

While the Court of Appeal rejected the five grounds advanced by the local authority, it allowed the appeal with the case to be remitted to a different judge to determine what, if any, orders should be made (paras [47] and [50]).

McFarlane P explained his reasoning as follows (at para [48]):

> '…the approach of a court to a potential impasse with a local authority on an important element in the care plan for a child has been well established for over 20 years. Insofar as there has been movement, it has been in the direction of emphasising the role of the court during proceedings (see Ryder LJ in *Re W* [*Re W (Care Proceedings: Functions of Court and Local Authority)* [2013] EWCA Civ 1227, [2014] 2 FLR 431)], but, in like manner to the approach taken by Jackson LJ in *Re T* (with whom I agreed in that case), I consider that when, as here, the focus is upon the care plan after the proceedings are concluded, there is a need for mutual respect and engagement between the court and a local authority.'

He went on to add (at para [50]):

> 'Whilst at the end of the process of mutual respect, cooperation and re-consideration a court may have to evaluate a local authority's position solely in terms of a public law challenge, the authorities are all to the effect that before that stage is reached, the court and the local authority must each use their best endeavours to achieve sufficient common ground in relation to the care plan and final orders.'

Thus, the judge at first instance had been entitled to reach his determination on the question of J's welfare as he did and was, therefore, also entitled to look towards a plan for adoption (para [51]).

McFarlane P added that (para [52]):

> 'The judge's decision and his order were entirely in keeping with the authorities to which reference has been made…because of the local authority's pre-emptive application for permission to appeal at the December [2018] hearing, the judge was not given any opportunity to reconsider his decision in the light of the ADM's statement and the judge never got to the stage of "continuing to refuse to endorse the care plan and make a final care order".'

And noted (at para [53]) that the statement of the ADM, which reproduced the previous 'balance sheet', was unchanged from the November 2018 hearing, which indicated that she had 'failed to engage with the substance of the judge's analysis as described in the judgment'. In addition, McFarlane P noted that if the local authority accepted the criticism of the social worker's assessment, there was a need to investigate how, if at all, this change of position had been taken into account by the ADM. He considered that the ADM was entitled to have relied on new material that had become known since the November 2018 hearing, but noted that this material had not been submitted to the judge at first instance for his consideration.

Finally, it was the conclusion of the Court of Appeal that the father had 'made good' his appeal, and on that basis it found that the judge was 'in error in stating a clear predetermined conclusion on the question of whether the parents' consent should be dispensed with under ACA 2002, s 52 in the event that, in future, the local authority applied for an order authorising placement for adoption' (para [58]).

Interviewed by Emily Meller.

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