[2023 Gib LR 750]

B and C v. CARE AGENCY

COURT OF APPEAL (Kay, P., Rimer and Elias, JJ.A.):
November 2nd, 2023

2023/GCA/014

Family Law—children—care order—appeal dismissed against care order—parents with mental health problems failed to engage with support offered by Care Agency—judge's approach to welfare considerations unassailable

Care orders had been made in respect of two children.

The appellants ("the parents") had two young children. An interim care order had been made in respect of the children in 2019. Following the two-stage process provided for in the Children Act, the judge ruled that the s.64 threshold criteria had been met and adjourned the welfare hearing to a later hearing. The welfare hearing took place in 2022 and resulted in the making of care orders in respect of the children.

The parents had mental health problems and the mother had a significant intellectual disability. The judge found that the parents were, *inter alia*, unable to prioritize the provision of food over other expenditure, unable to ensure the children received regular medical care and attention, unable to follow advice from the Care Agency, unable to engage to the necessary degree with therapy and courses recommended by the Care Agency, unable to prioritize the well-being of the children, and unable to support the children's foster placements. The judge concluded that placing the children in the parents' care would put them at an unacceptable risk of harm and that the best course of action in the children's interest was to make a care order. In making the care order, the judge reminded herself that she had to treat the welfare of the children as the paramount consideration and that a care order should be an order of last resort and must be proportionate to the specific facts of the case.

The parents appealed on two main grounds: (i) the alleged inadequacy of the judge's approach to the law relating to welfare considerations; and (ii) procedural unfairness. The appeal was opposed by the Care Agency and the children's guardian.

Held, dismissing the appeal:

(1) The judge's understanding and assessment of the welfare issues was unassailable. There was nothing to suggest that the judge failed to appreciate the requirements of necessity and proportionality; failed to consider what assistance and support the authorities could offer; did not have in mind all the available options; fell into the trap of considering the options in a linear rather than a holistic way; or ignored mitigating steps that might have made a less draconian order workable. She recognized that the starting point was that children were better off with their biological parents and did not dispute the proposition that mental illness was no bar to parents retaining care of their children. The court did not accept the submission that because the parents were vulnerable and disadvantaged and in order to ensure that they had the fullest support in developing their parenting skills there should have been a referral to adult services. No such point was taken before the judge and, in any event, there was abundant evidence covering a three year period in which both parents demonstrated their unwillingness or inability to engage properly with recommended therapy and courses. No new expert evidence had been produced specifying the benefits which an adjournment might have generated while the case remained under consideration by the judge. In any event, the parents were in denial about their needs and the potential of therapeutic support. In addition, the judge would have had to consider the effect of any prolongation of the litigation on the welfare of the children. It seemed that, in the circumstances, the judge would not and should not have contemplated adjourning for such unspecified and speculative purposes (paras. 5–11).

(2) There was no doubt that the judge was alert to the parents' personal difficulties. She referred to them in various parts of the judgment. It could not be said that the judge should have intervened to adopt special measures, whether in the form of witness protection, the appointment of an intermediary or an advocate or anything else. It was significant that at no stage did the advocate who represented the parents at trial suggest to the judge that such measures might be necessary. Nor did the professional witnesses in their reports or evidence. There was no material before the judge which meant that she erred by not insisting on special measures and there was no such new material on the appeal. It would be fanciful for this court, having no further material, to conclude that the proceedings were tainted with unfairness. The grounds of appeal based on procedural unfairness were totally unsustainable (paras. 12–16).

Cases cited:

(1) *A* v. *Local Authority*, [2022] EWCA Civ 8, considered.
(2) *B-S (Children)*, *Re*, [2013] EWCA Civ 1146; [2013] Fam. Law 1515; [2014] 1 W.L.R. 563; [2013] 3 F.C.R. 481; [2014] 1 FLR 103, considered.
(3) *H-W (Children)*, *Re*, [2022] UKSC 17; [2022] 1 W.L.R. 3243; [2022] F.C.R. 46; [2022] 4 All E.R. 683, considered.
(4) *KD*, *Re*, [1988] 1 A.C. 806, considered.

(5) *L (Care: Threshold Criteria)*, *Re*, [2007] 1 FLR 2050; [2007] Fam. Law 297, considered.

K. Herbert with *A. Seruya* (instructed by Massias & Partners) for the appellants;
C. Rocca, *K.C.* with *D. Conroy* (instructed by the Care Agency) for the respondent;
C. Pizzarello (instructed by Hassans) for the guardian *ad litem*.

1 **KAY, P.:** On December 19th, 2022, Ramagge Prescott, J. made care orders in respect of two children, a boy (G) who was born on September 4th, 2017 and a girl (K) who was born on September 21st, 2018. They are therefore now aged six and five. Their parents are C and B, to whom I shall refer as "the mother" and "the father" or "the parents." On this appeal the mother and the father are seeking to contest the care orders. The appeal is opposed by the Care Agency ("CA") and the children's guardian. The case has a long history. Social Services first became involved in October 2017, when G was little more than a month old. A referral to the CA was made on December 5th, 2018. An application for an interim care order ("ICO") was filed on September 19th, 2019. An ICO was made by the judge on September 25th, 2019. Following the two-stage process provided for in the Children Act, on November 9th, 2021 the judge ruled that the s.64 "threshold" criteria had been met. She adjourned the second "welfare" stage to a later date. The welfare hearing took place in July 2022 and resulted in the making of the care orders which are the subject of this appeal.

2 In view of the time that elapsed between the initial involvement of Social Services and the making of the ICO (almost two years) and between the making of the ICO and the final welfare hearing (almost three years), it is unsurprising that the evidence before the judge on the welfare hearing was voluminous and wide-ranging. She referred to it in detail and at length in her judgment which runs to 64 pages. I do not intend to rehearse it all here. It is sufficient to record at this stage that having received and considered the evidence of social workers, a psychiatrist, the guardian, the mother and the father, the judge, applying the provisions of s.4 of the Children Act, expressed her conclusions in these paragraphs:

> "138. From the evidence before me apparent that the view of the allocated social worker Ms. Cardona, the author of the PAMS assessment, Ms. Nelson, Dr. Hallin and the Guardian, is that in order for these parents to be in a position to parent safely and appropriately they would require substantial support from the Care Agency and would have needed to have engaged fully with them in order to have undertaken and completed the various courses, therapies and routes of learning. Such engagement would not only have placed the parents in the strongest possible position to be able to parent effectively but

would also have been demonstrative of their willingness to change for the better and indicative of their commitment to sustain that change going forward . . .

140. There has been a passage of time of almost 3 years between the making of the ICO and this hearing, I assess that as a sufficient period of time in which to determine how the circumstances which gave rise to the imposition of an ICO have changed. I am of the view that without consistent and specific guidance, instruction and therapy the parents are unable to resume the care of the children. It is a distinct possibility that had the parents engaged fully with the Care Agency they might have been in a position to learn how to parent the children in a safe manner albeit with continued support. The unfortunate fact is that they have not engaged as required.

141. [B]'s attitude and approach has been marked by an ingrained lack of self-awareness, he remains oblivious to his limitations, he has refused to accept that he needs guidance and support and has not been open to participating to the necessary level with the Care Agency's programmes, recommendations and therapy. His demeanour whist giving evidence was concerning, he appeared unable to answer many questions in a coherent manner was inconsistent in his replies and given to rambling. He has taken the view that when proceedings are over he will, address his pain management issues and will engage with therapy. Although he has engaged with the Care Agency up to a certain point, he has been unable or unwilling to engage consistently and reliably, and the necessary therapeutic work in particular has been lacking. If the Parents have not engaged to the necessary level in the last three years when the incentive of getting the children back was a motivator, I can place little reliance on the assertion that once they get the children back they will engage with professionals. [B's] inability to follow advice from the Care Agency has resulted in a prolongation of an absence of self-awareness which in turn has prohibited the progression towards improvement of essential parenting skills.

142. [C] has also not engaged sufficiently with the Care Agency, that said, she has demonstrated a greater degree of self-awareness than [B], and her parenting skills are better than his because of it. A fundamental hurdle is that [C] allows herself to be influenced and manipulated by [B] even to extent of refusing treatment and medication for her mental health. Her blind hero worship of [B] is the basis for her dependency on him, and prevents her from understanding the reality of the dysfunctional nature of the relationship. [C] considers [B] to be a God and is completely reliant upon him and subservient to him. She defers to him as the expert in parenting, health matters, finances and life style. I agree with Ms. Guzman when she describes her as a vulnerable individual from a troubled background. She has

made [B] her focus and has entrusted him with all aspects of her health and development. In the 3 years post ICO [C] has been unable to assert herself as a parent free from the controlling and often negative influence of [B], even to the extent of not being able to participate in contact sessions in his absence and not taking medication at his suggestion. Failure and/or inability to assert herself where necessary means that faced with [B]'s inappropriate parenting she is, and remains, unable to be a reliable source of protection for the children. I do not ignore that at one point in the proceedings [C] tried to assert her independence by seeking separate legal representation to that of [B], but within a short time she had returned to being jointly represented with [B]. [C] has no support network of her own, and in my view is highly unlikely to be able to break free from the control of [B], because she simply cannot entertain a life without him.

143. I am of the view that the parents have not acted in a way which shows that they have prioritised the best interests of the children, not only because of their failure to follow advice from the Care Agency but also with regard to their participation in contact sessions and with regard to the issue of disrupting foster care. This has resulted in the children being placed at risk of harm.

144. In so far as contact sessions are concerned whilst there have been positive documented interactions between parents and children, parents have in the main conducted contact sessions with a focus on the activity that is preferable to them, at the expense of the children, most often sitting in cafeteria or walking through town. Despite appropriate guidance they have resisted contact taking place in the park where the children could play and interact directly with them. The numerous missed contact sessions are of concern as is the fact that the parents have often arrived late.

145. The issue of foster care is particularly troubling. The children were in a safe and stable placement with Mr. & Mrs. M for a period of approximately two years, before the arrangement broke down. I am in no doubt that there was no substance to any of the complaints levelled by the parents against the foster carers, and I am of the view that it is more likely than not that the parents made false allegations against the foster carers in order to frustrate the foster placement, perhaps in the mistaken view that this would result in the children being returned to their care. Those actions show a disregard for the well-being and welfare of the children and resulted in the children suffering because of the break in continuity of their care and indeed it resulted in the children being placed in institutionalised care whilst urgent attempts were made to find a second suitable placement.

146. I find that the parents have been:

(a) Unable to prioritise the provision of food over other expenditure (pre ICO)

(b) Unable to ensure the children attend and receive regular medical care and attention (pre ICO)

(c) Unable to follow or heed advice from the Care Agency generally but specifically with regard to appropriate diet for the children, location of contact, conversations between themselves and the children, appropriate responses to children's needs and engagement with social services

(d) Unable to meet their own healthcare needs adequately

(e) Unable to understand and apply principles of self-hygiene

(f) In the case of [B] unable to address distorted views on gender differences and unable to develop an awareness of his controlling behaviour

(g) In the case of [C] unable to free herself from the control of [B]

(h) Unable to develop an awareness of their limitations with regard to parenting and the need for professional help

(i) Unable to engage fully in contact sessions be it due to absence, to tardiness, to choosing inappropriate location or for reason of lack of energy

(j) Unable to engage to the necessary degree with therapeutic sessions, parenting sessions and other recommended therapy/ courses recommended by the Care Agency

(k) Unable to prioritise the well-being of the children by putting their needs, well-being ahead of their own preferences

(l) Unable to support the foster placements and have been instrumental in disrupting the first foster placement which has resulted in the children suffering harm as a result, their actions in disrupting the foster placement also evidenced a tendency to be manipulative and untruthful

(m) In the case of [B] untruthful and contradictory in his evidence

(n) In the case of [B] intimidating towards support workers

147. The unfortunate fact is that there has been no material change in the parents' ability to parent, or their disposition to improve. The causes for concern present in 2019 and prior to that remain extant and some of them have increased. Despite being given time and advice as to the importance of engaging with professionals the parents have

> remained entrenched in their views and behavioural patterns. In the circumstances placing the children into their care will put them at an unacceptable risk of harm. I am persuaded that the best course of action in the interest of the children is to make a Care Order and to follow the proposed arrangements as set out in the latest Care Plan, and I so order."

3 Before turning to the grounds of appeal it is appropriate to record that the mother and the father are afflicted by mental health problems and that the mother has a significant intellectual disability, while the father is on the verge of intellectual disability. It is common ground that these misfortunes do not in themselves mean that with support they would necessarily be inappropriate carers for their children.

The grounds of appeal

4 The original grounds of appeal were replaced with amended grounds dated August 23rd, 2023. They are advanced by way of a skeleton argument. The grounds were somewhat prolix and repetitive, and the skeleton argument suggests that they are sixteen in number. At the hearing, Mr. Kye Herbert helpfully clarified that they essentially seek to address two issues namely: (1) suggested inadequacy in the judge's approach to the law relating to welfare considerations, and (2) procedural unfairness.

(1) *Did the judge err in her understanding of the law relating to welfare considerations?*

5 In the course of their written and oral submissions, counsel on behalf of the parents referred to numerous statutory provisions, including s.4 of the Children Act and the incorporation of art. 8 of the ECHR into the Constitution of Gibraltar, by s.7 of the Annex to the Gibraltar Constitution Order. Reference was made to well-known authorities up to and including *Re H-W (Children)* (3), which was decided very shortly before the welfare hearing in the present case. In her judgment, the judge did not embark on a trawl through the authorities. It was not necessary for her to do so. That there was no significant dispute in relation to them is borne out by the fact that, in the skeleton argument filed on behalf of the guardian, at paras. 43–45, the relevant principles contended for by Mr. Herbert are set out in terms entirely consistent with his submissions. In the circumstances, it is not surprising that the judge's main exposition of the principles were set out succinctly in para. 139 of the judgment where she said:

> "I remind myself that I must treat the welfare of the children as the paramount consideration and this involves taking into account the provisions of section 4(3) & (4) of the Children Act. I must also take into account the powers available to the court. I remind myself that a Care Order should be an order of last resort and must be proportionate

> to the specific facts of the case. I should only make a Care Order if it is necessary to do so to protect the interest of the children and that includes their safety and well-being. When applying these considerations, I further remind myself that the starting point should be that the best interests of a child are best achieved by maintaining the relationship between the child and its biological/natural parents."

6 In that passage, this experienced judge clearly demonstrated that she was very familiar with the requisite approach. There is nothing to suggest that she failed to appreciate the requirements of necessity and proportionality, or failed to consider what assistance and support the authorities could offer; or did not have in mind all the available options; or fell into the trap of considering the options in a linear rather than a holistic way; or ignored mitigating steps that might have made a less draconian order workable. It is unthinkable that she lost sight of Hedley, J.'s well known observation in *Re L (Care Threshold Criteria)* (5) ([2007] 1 FLR 2050, at para. 50):

> "society must be willing to tolerate very diverse standards of parenting, including the eccentric, the barely adequate and the inconsistent . . . These are the consequences of our fallible humanity and it is not the provenance of the state to spare children all the consequences of defective parenting. In any event, it simply could not be done."

That formulation echoed the words of Lord Templeman in *Re KD* (4) where he said ([1988] 1 A.C. at 812):

> "The best person to bring up a child is the natural parent. It matters not whether the parent is wise or foolish, rich or poor, educated or illiterate provided the child's moral and physical health are not in danger. Public authorities cannot improve on nature."

Indeed, in her judgment in the present case, the judge said (at para. 137):

> "[Counsel] refers me to *Re L* as authority for the proposition that mental illness is no bar to parents retaining care of their children. I do not for one moment dispute that proposition and I agree that the starting point must be the children are better off with their biological parents."

7 When one stands back, it seems to me to be unarguable that the judge misunderstood or failed to apply the correct principles when considering the welfare issue in the present case.

8 There is one additional point advanced by Mr. Herbert that requires consideration at this stage. He draws attention to *Re B-S (Children)* (2), a contested adoption case in which Sir James Munby, P. said ([2013] EWCA Civ 1146, at paras. 48–49):

> "What the court needs is expert opinion, whether from the social worker or the guardian, which is evidence-based and focused on the factors in play in the particular case, which analyses *all* the possible options, and which provides clear conclusions and recommendations adequately reasoned through and based on the evidence.
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> 49. . . . If, despite all, the court does not have the kind of evidence we have identified, and is therefore not properly equipped to decide these issues, then an adjournment must be directed, even if this takes the case over 26 weeks. Where the proposal before the court is for non-consensual adoption, the issues are too grave, the stakes for all are too high, for the outcome to be determined by rigorous adherence to an inflexible timetable and justice thereby potentially denied."

9 Mr. Herbert submits that this reasoning applies to the present case because the parents are vulnerable, disadvantaged people and, in order to ensure that they had the fullest support in developing their parental skills, there should have been a referral to adult services. I cannot accept the submission. No such point was taken at the hearing before the judge and, in any event, there was abundant evidence covering a three year period in which both parents demonstrated their unwillingness or inability—

> "to engage to the necessary degree with therapeutic sessions, parenting sessions and other recommended therapy/courses recommended by the Care Agency." (Judgment, at para. 146j)

Moreover, Mr. Herbert has not produced before us any new expert evidence specifying benefits which an adjournment might have generated while the case remained under consideration by the judge. In any event, the parents were in denial about their needs and the potential of therapeutic support. In addition, the judge would have had to consider the effect of any prolongation of the litigation on the welfare of the children. It seems to me that, in the prevailing circumstances, she would not and should not have contemplated adjourning for such unspecified and speculative purposes.

10 There is a hint in the evidence as to what would have happened. When cross-examined, the social worker, Ms. Sophie Cardona, was asked about a meeting she had had with the mother in which there had been a discussion about a referral to adult services. A meeting was arranged and later postponed, but when it was re-scheduled, the mother simply failed to attend. There was no explanation for this.

11 I am entirely satisfied that the judge's understanding and assessment of all welfare issues was and remains unassailable.

(2) ***Procedural unfairness***

12 Under this heading, I shall consider numerous complaints that the parents were denied a fair trial in breach of their rights under the Constitution

of Gibraltar, the ECHR, the Family Procedure Rules 2010 (England and Wales) and the common law. There is an issue as to whether the Family Procedure Rules apply generally in this jurisdiction. I suspect that they do not but I do not consider that we need to resolve that issue because I have come to the firm conclusion that, even if they do, there is nothing in them, or in the Constitution, the ECHR or the common law that avails the parents on this appeal.

13 The submission on their behalf, put simply, is that their disabilities and vulnerabilities were so manifest that the judge ought to have adopted special measures to ensure that their evidence was not diminished or undervalued as a result of the difficulties under which they labour in relation to intellectual disability (especially in the case of the mother), social disadvantages and mental health issues.

14 There is no doubt that the judge was alert to the parents' personal difficulties. She referred to them in various parts of the judgment, including in the extracts I set out earlier. They show a shrewd assessment of the personalities of both parents and the dynamics of the relationship between them. These are sad features of the case. However, having considered the totality of the evidence and scrutinized the parts of the transcript to which we have been referred, I am unable to say that the judge ought to have intervened to adopt special measures, whether in the form of witness protection, the appointment of an intermediary or an advocate or anything else. It is significant that Mr. Seruya, who represented the parents at trial (and is Mr. Herbert's junior on this appeal), at no stage suggested to the judge that such measures might be necessary. Nor did Dr. Hallin or other professional witnesses in their reports or evidence.

15 In these circumstances it is instructive to refer to the recent case of *A* v. *Local Authority* (1), where it was acknowledged that there are circumstances in which a failure to adopt measures to protect a vulnerable witness will justify an appellate court concluding that a trial was unfair. The context there was one to which the Family Procedure Rules applied. The case is illustrative of two matters. The first is that, even when there has been a breach of the procedures contained in the Rules, it will not necessarily result in a successful appeal. Giving the judgment of the court, Baker, L.J. said ([2022] EWCA Civ 8, at para. 42):

> "The question on appeal in each case will be, first, whether there has been a serious procedural or other irregularity and, secondly, if so, whether as a result the decision was unjust. We are alive to the fact that many witnesses will give their evidence in a way which falls short of the standard that they would have wished for, or their advocates had hoped. Sometimes, this may be because of the very nature of human frailty, at other times it may be because a witness was deliberately deflecting or obfuscating or, worse still, lying."

Secondly, when the court proceeded to allow A's appeal in that case, it did so because of persuasive new expert evidence which had not been before the trial judge. Baker, L.J. said (*ibid.*, at paras. 43–44):

> "It is notable that the need for an intermediary was not identified in the initial cognitive assessment carried out by Dr Taylor and Ms Howe in June 2021 and the extent of A's difficulties only became apparent in the subsequent assessments carried out by Dr Josling and Communicourt.
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> 44. . . . But the new material that we have now read has an obvious bearing on the demeanour and credibility of the appellant. In some cases, there will be other evidence supporting the findings so that a flawed assessment of a witness's evidence will not warrant any interference with the decision. In this case, however, the judge's assessment of A's character and plausibility of the witness were central to her ultimate findings."

16 In the present case, there is no new material to underwrite either parent's case. There was no material before the judge which meant that she erred by not insisting on special measures. She had presided over the proceedings for over three years and the final hearing lasted several days, enabling her to form an experienced view of the parents' limitations. In my judgment, it would be fanciful for this court, having no further material, to conclude that the proceedings were tainted with unfairness. The judgment was a carefully considered one. Nothing in it is indicative of procedural unfairness and we have not been shown anything in the transcript of the proceedings which causes alarm. I consider that the grounds of appeal based on procedural unfairness are totally unsustainable.

Conclusion

17 It follows from what I have said that I would dismiss the appeal.

18 **RIMER, J.A.:** I agree.

19 **ELIAS, J.A.:** I also agree.

Appeal dismissed.