**Judgment Approved by the court for handing down.**

Neutral Citation Number: [2024] EWCA Civ 837

Case No: CA-2024-001190
CA-2024-001023
CA-2024-001143

**IN THE COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM THE FAMILY COURT AT MANCHESTER**
**HH Bernard Wallwork sitting as a deputy circuit judge**
**MA22C50572**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25 July 2024

**Before :**

**LADY JUSTICE KING**
**LORD JUSTICE BAKER**
and
**LADY JUSTICE ELISABETH LAING**

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**W AND OTHERS (IMPLEMENTATION OF ADOPTION PLAN PENDING APPEAL)**

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**Frances Heaton KC and Paula Davitt** (instructed by **Molesworths**) for the **First Appellant**
**Michael Jones KC and Matthew Carey** (acting pro bono, instructed by **Advocate**) for the **Second Appellant**
**Karl Rowley KC and Sara Harrison-Fisher** (instructed by **Makin Dixon**) for the **Third Appellant**
**Jacqueline Thomas KC and Kirstin Beswick** (instructed by **Local Authority Solicitor**) for the **First Respondent**
**Shaun Spencer KC and Joseph Lynch** (instructed by **WTB Solicitors**) for the **Third to Sixth Respondents**
The Second Respondent was not present nor represented at the hearing.

Hearing date: 4 July 2024

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# Approved Judgment

This judgment was handed down remotely at 10.30am on 25 July 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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**Judgment Approved by the court for handing down.**

## LORD JUSTICE BAKER :

1. In this case, we were concerned with three appeals arising out of care and placement orders made at the conclusion of care proceedings concerning four children. In the event, the appeals were all compromised – either through concession or withdrawal – on the morning of the hearing. But it became clear that the local authority had taken inappropriate steps – in particular by arranging a farewell visit between the children who were subject to placement orders and their parents and other family members – at a point where it knew that appeals against the orders were in the pipeline. This Court therefore decided that a short judgment should be delivered explaining what went wrong and what should be done in future to avoid similar errors occurring.

2. The court papers disclose a detailed family history. For the purposes of this judgment, it is only necessary to set out the salient points.

3. The proceedings concern four children, hereafter referred to as W (a girl, now aged rising 9), X (a boy aged 4), Y (a girl aged 3) and Z, (a boy born during the proceedings and now aged 2). They are the third to sixth respondents to the proceedings and appear by their children's guardian. The first appellant is the father of all four children. The second respondent ("M1") is the mother of the eldest child, W. The third appellant ("M2") is the mother of the three younger children. The second appellant is the paternal grandmother of all four children.

4. The family has been known to social services since W was a small baby, when she was in the care of her mother, M1, who had separated from the father. There were concerns that W was being neglected as a result of her mother's drug and alcohol abuse and that she was being exposed to domestic abuse in M1's relationship with her then partner. In April 2018, W was made subject to a child protection plan. In November 2020, she was again made subject to a child protection plan and at around the same time moved to live with her father and his then partner, M2, and their child, X, who was then a few months old.

5. In March 2021, M2 gave birth to her second child, Y. A few months later, the father and M2 separated. The father and W remained in the family home, and M2, X and Y moved to another address. In August 2021, a child arrangements order was made in private law proceedings providing that W would live with her father.

6. Meanwhile, children's services became concerned about the welfare of X and Y in the care of M2. There were allegations that she was associating with M1, abusing drugs and alcohol, and neglecting the children. In September 2021, X and Y were made subject to child protection plans.

7. Concerns about the children continued during 2022. The local authority became aware that the father and M2 were continuing to have a relationship as a result of which M2 became pregnant again.

8. In August 2022, the father was arrested for dangerous driving following an incident in which he had been chased by a police car in the early hours of the morning. At the time, W was in the father's car. It was alleged that he was under the influence of alcohol. In due course, he pleaded guilty to dangerous driving and received a suspended prison sentence.

9. Following this incident, on 11 August 2022, the local authority started care proceedings in respect of the three children. On the following day, they were made subject to interim care orders and placed with their paternal grandparents on an emergency basis. On 5 December 2022, the grandparents' care of the children was extended following a positive full assessment of them as long-term carers. In light of this, the local authority's initial plan was for the children to remain placed with the paternal grandparents, with a recommendation that they be approved as special guardians under s.14A of the Children Act 1989.

10. In January 2023, M2 gave birth to Z. Care proceedings in respect of Z were started immediately, and on discharge from hospital he was made subject to an interim care order and placed in a local authority foster placement. Unlike his siblings, Z has never lived with the grandparents or indeed with any family member. In due course, the two sets of care proceeding were consolidated.

11. In April 2023, the grandparents decided that they could no longer care for the three children, and the following month X and Y moved to live with foster carers. W initially moved to live with a paternal aunt but subsequently she too moved to a separate foster placement. The reason for the grandparents' decision was that each of them was suffering from health problems and felt that they could not continue to care for the children alongside other family commitments.

12. Within the care proceedings, parenting assessments were carried out on the father, M1 and M2 The outcome of all three assessments was negative. In November 2023, the local authority filed final care plans proposing long-term foster care for W and adoption for the three younger children. Applications for placement orders were made under s.21 of the Adoption and Children Act 2002. The threshold criteria for making care orders under s.31(2) of the 1989 Act were agreed and the case proceeded to a welfare hearing in March 2024. The care plans were supported by the children's guardian and by M1 in respect of W. The plans were opposed by the father and by M2 in respect of the three younger children.

13. At the final hearing, the father and M2 each applied for an adjournment and for an independent social worker assessment, arguing that their circumstances had changed. Those applications were refused by the judge for reasons set out in a short ex tempore judgment. There was no appeal against that decision. The paternal grandmother attended court in person and also made an oral application to be reassessed as a long-term carer for the three younger children. Her application was also dismissed by the judge in a separate ex tempore judgment. That decision was the subject of the first appeal.

14. At the conclusion of the hearing on 4 April, the judge delivered a third ex tempore judgment approving the local authority's plans and made the care and placement orders sought. An application on behalf of the father for permission to appeal was refused. The care and placement orders were the subject of the second appeal and third appeals.

## Events following the hearing

15. On 5 April, the father's counsel sent an email to counsel for the local authority informing them that an appeal to this Court was being prepared. Counsel added: "it is imperative that the plan is not progressed in light of our application." On the same day,

the mother's solicitor sent an email to the local authority stating that it was likely that her client would seek permission to appeal and asking the local authority to agree not to proceed with introductions of the children to prospective adopters.

16. On 8 April, the father's solicitor informed the local authority's solicitor that he was seeking permission to appeal and that they were awaiting written advice from counsel before making an application for public funding. On 10 April, the father's solicitor received advice from counsel and submitted an application for the extension of public funding to cover the costs of an appeal.

17. On 23 April, the local authority solicitor emailed the father's solicitor asking whether an appeal had been lodged. On 29 April, the father's solicitor replied saying that he had not lodged an appeal notice as he was waiting for a response to the public funding application. The mother's solicitors emailed saying that they were in the same position. Later that day the local authority solicitor responded that they would proceed with adoption planning as over 21 days had passed since the hearing and that it was not in the children's interests to wait for legal aid to be processed.

18. On 30 April, the father's solicitor sent a further email to the local authority asking them to confirm that they were aware that the grandparents had filed an appeal notice. (In fact, no appeal notice had been filed on behalf of the grandparents at that stage.) The father's solicitor further stated that that, once the father's legal aid application had been granted, he would be applying to this Court for a stay of the local authority's actions in processing the adoption pending appeal.

19. On 2 May, the father's solicitor informed the local authority that he had been granted an extension of his legal aid to cover an appeal. He asked the local authority whether sealed copies of the orders were available, adding that he would proceed with the application for permission to appeal in any event.

20. On 3 May, the father's solicitor filed the appeal notice via the Court of Appeal portal. The notice included a request for a stay of the proceedings and

> "an injunctive order … against the local authority progressing their current planning in respect of placing the children imminently with their prospective adopters".

On the same day the father's solicitor emailed the local authority in the following terms:

> "I can confirm that I have submitted appeal documentation on the portal and now await to hear further from the Court.
>
> In the meantime please find for your attention a copy of the N161 application together with the skeleton argument and grounds of appeal.
>
> On the basis that I have submitted the application (although [I] accept that it has not yet been processed or issued by the Court) would you take instructions as to whether you would agree to pause the placement of the children with the prospective adopters and also that the current contact arrangements should

> continue for the father and not proceed to a final 'farewell' visit pending a Court decision as to whether to grant leave to appeal."

The local authority solicitor acknowledged receipt and said she would take instructions.

21. On 10 May, the Court of Appeal Office sent copies of the sealed appeal notice to the father's solicitor for service on the respondents. In an accompanying email, the Court of Appeal family lawyer directed the appellant's solicitor to file a bundle by 15 May and the respondents to file any responses in accordance with the practice direction by the same date. She also stated: "The application for a stay will be considered alongside the application for permission to appeal, unless urgency is indicated otherwise. Parties are [to] ask LA to keep us informed of any urgency."

22. Later that day, the father's solicitor sent an email to the respondents' representatives, including the local authority solicitor, serving the sealed documentation from the Court of Appeal. He drew attention to the obligation on the respondents to file a response.

23. On 14 May, the local authority solicitor informed the father's solicitor that the social workers were planning a farewell visit for the children and that, until such time as the local authority was told by the Court to stay the planning for the children, the local authority intended to continue taking steps to ensure permanence for the children. On the same day, the father was informed by the social worker by telephone that a farewell visit would take place two days later.

24. Meanwhile, there were various email exchanges between the father's solicitor and the Civil Appeals Office concerning difficulties with the documentation which needed to be resolved before the application for permission could be referred to a judge. It is unnecessary to set these out in detail, save to note that the solicitor was informed on or around 15 May that the initial bundles filed had been rejected because they did not include sealed copies of the judge's orders. As a result, the solicitor asked for an extension of time for complying with the directions. An extension was granted until 22 May and subsequently extended to 29 May.

25. After receiving notice on 15 May that the bundles had been rejected, the father's solicitor informed the other parties, including the local authority, that the bundles had been rejected because they did not include sealed copies of the orders. He noted that the draft orders were on the portal awaiting the judge's approval and had been there since 20 April. He asked the local authority solicitor to chase the matter for the judge's approval. He added that he had applied for an extension of time for filing the bundles.

26. On 15 May, the father sent an email to the social worker in the following terms:

> "Hi [name], Knowing that an appeal has been put in and knowing that I'm awaiting sealed court documents can you outline why you think it is in the best interest of the children to have [their] final good bye session Thursday (16.05.24)? Surely you would want the children to keep in contact with the family considering the appeal could be accepted and the children could be returned home? "

27. On 16 May, the local authority solicitor emailed the social worker:

> "I have been informed by father's solicitor that father's application got rejected due … to the final orders not being sealed by the court. Father is seeking an extension of time until the sealed orders are received and the judgment. I will update you in due course."

28. Later that day, on 16 May, the "farewell" visit took place between the children and members of the family.

29. On 28 May, the Civil Appeals Office sent an email to the local authority inquiring whether they intended to file a response to the appeal notice. Later that day, the local authority solicitor replied saying "The father's solicitor had confirmed that this application was rejected on the basis that there isn't a transcript of the judgment available and sealed orders for the final hearing. Please can you confirm if that is the case?" The local authority was informed in reply that the matter was a "live application for permission to appeal waiting to go to a judge".

30. On 28 May, the grandmother (nearly five weeks out of time, at a point when she was still acting in person) filed a notice of appeal against the judge's refusal of her application for an assessment.

31. On 29 May, the local authority filed a response to the father's application for permission to appeal.

32. On 4 June, the three children were considered at an adoption matching panel, and matched with prospective adopters.

33. On 5 June, the applications for permission to appeal was referred to me. On 10 June, I granted permission to appeal on both applications. In addition, I stayed the proceedings and directed that no further step be taken with regard to the placement of the children under the placement orders pending determination of the appeals.

34. Notwithstanding that order, on 24 June, the local authority's agency decision maker approved the placements.

35. Also on 24 June, M2 filed an appeal notice against the care and placement orders in respect of X, Y and Z. Permission to appeal was granted to her on the same day.

36. In a statement, the social worker has given the following explanations for the local authority's actions after the hearing:

> "Whilst the Local Authority accept that verbal permission was requested by the father and declined by HHJ Wallwork at the hearing the previous day to appeal the placement order, it was deemed to be in the best interest of the children to pursue with the contact reduction for a number of reasons. The first being that these proceedings had already superseded the 26-week timescale by 59 weeks, the children had the right to permanence and no further delay. The second reason being that, although the original contested hearing was listed from 18th March – 22nd March 2024, there was a number of additional hearings added on

to the end of this along with the Easter bank holidays meaning the children had already had a reduction in their family time due to no fault of the birth parents thus a period of over three weeks of reduced contact in any event. Thirdly, legal advice was sought in relation to this reduction and senior managers agreed that it should progress and that any stay on adoption planning should only be actioned following an order by the honourable court given the delay to permanence these children had already experienced.

The Local Authority committed to waiting 21 days following the placement and care orders being granted to await any formal application to appeal being submitted by the parties before progressing with any further adoption planning.

It should be noted that given the current national shortage of adopters, particularly for sibling groups of three alongside the duty to twin track, family finding had begun prior to any placement order being granted by the court. It should be noted that no child permanence reports are shared with prospective adopters until a placement order is made. This process is not unique to this specific case and a procedure that is undertaken within all care proceedings to prevent delay for permanence. During family finding within the twin tracking process only three adopters nationwide were identified to be able to care for a sibling group of three. After exploring these families, it was determined that only one of them were a cultural match. It has been the upmost commitment of the local authority to ensure that regardless of the outcome of the court, X, Y and Z have a care plan of being placed together given the fact they are full siblings and also the positives within their siblings' relationship ….

After waiting past the 21 days and no formal appeal having been lodged by either party, the local authority were minded of the further delay caused in achieving permanence for the children and after discussions with the legal department and senior management, on 26th April 2024 a decision was made to progress the match and plan of adoption for the children which inevitably includes a farewell family time ….

It was at this point, a farewell contact was arranged to take place on 16th May 2024. This decision was made following the prospective adopters having been identified and progressing to matching panel on 4th June 2024. It should be noted the Independent Reviewing Officer was also consulted in relation the farewell contact taking place and she also supported the decision."

## The appeals

37. Although the father's appeal was first in time, it was agreed that the grandmother's appeal should be the "lead" appeal. Two grounds of appeal were put forward on her behalf.

    (1) The judge was wrong to refuse the grandmother's application for further assessment as a carer on the basis of the information available to him and in the context of her having been previously subject to a positive assessment as Special Guardian.

    (2) In refusing to allow further assessment of the grandmother, the judge deprived himself of further evidence necessary in order to allow him to properly undertake the appropriate welfare balancing exercise when considering the local authority's application for care and placement Orders.

38. Five grounds of appeal were put forward on behalf of the father.

    (1) The judge failed to carry out an adequate analysis of the factors under the checklist in s.1(3) of the Children Act 1989 in respect of W.

    (2) He failed to conduct a comprehensive evaluation and comparison of the realistic options in respect of W or undertake an adequate risk analysis of placing W with the father and his current partner.

    (3) He failed to carry out an adequate analysis of the factors under the checklist in s.1(4) of the Adoption and Children Act 2002 in respect of X, Y and Z.

    (4) He failed to conduct a rigorous evaluation and comparison of the realistic options in respect of X, Y and Z by failing to permit a further assessment of the paternal grandmother.

    (5) He failed to undertake an analysis of the proportionality of the care plans for X, Y and Z in response to the risks posed.

39. In her appeal notice, which concerned only the three younger children, M2 put forward the same grounds as the father under (3) to (5) above.

40. Until the morning of the appeal hearing, the local authority and the guardian both opposed the appeal. At that point, however, there was a change of position. In a position statement on behalf of the local authority, Ms Jacqueline Thomas KC, who had not been instructed at the hearing before the judge, informed the Court that, following a consultation with her and discussions with senior management, the local authority no longer opposed the appeal brought on behalf of the grandmother and conceded that it was appropriate for an ISW to be instructed to assess her ability to care for the three youngest children, and the matter remitted for case management before a different judge. The local authority further conceded that the father's appeal should be allowed on the basis of ground (4), and M2's appeal allowed on the same basis. On behalf of the children, Mr Shaun Spencer KC, who like Ms Thomas had come into the case for the purposes of this appeal, informed the Court that, having taken instructions from Cafcass management in the absence through ill-health of the guardian, Cafcass supported the grandmother's appeal and did not oppose the appeals brought by the father and M2 on the basis of the father's ground (4).

41. Both the local authority and the guardian indicated in their position statements that the father's appeal in respect of W continued to be opposed. At the start of the hearing, however, we were informed that the father no longer wished to proceed with that appeal.

42. As the appeals have been compromised in this way, it is unnecessary to make any comments on the merits of the appeal, save to say that, for my part, I consider the concessions made by all parties were well advised. Although it is impossible to know precisely how the appeals would have been resolved after full argument, my preliminary impression was that all the appeals were likely to have been allowed save for the father's appeal against the care order in respect of W.

43. Following the hearing, we approved an order setting aside the care and placement orders in respect of X, Y and Z; permitting the father to withdraw his appeal against the care order in respect of W; remitting the proceedings to HH Judge Singleton KC, the Designated Family Judge for Manchester, for a case management hearing later this month; and joining the paternal grandparents as parties to the proceedings. We further made an order permitting the instruction of an independent social worker to complete assessments of the father, M2 and grandmother, with appropriate ancillary directions.

**Discussion**

44. At the appeal hearing, Ms Thomas KC accepted that the local authority had been wrong to proceed with the farewell visit knowing that an application for permission to appeal against the placement order was pending. She explained that, having been informed that the Court of Appeal Office had rejected the bundles filed on behalf of the father, the local authority had mistakenly believed that the application for permission to appeal had been refused. Ms Thomas further accepted that, this Court having stayed the proceedings and directed that no further step be taken with regard to the placement of the children under the placement orders pending determination of the appeals, it had been wrong for the agency decision maker to proceed to approve the match of the children with the prospective adopters.

45. I acknowledge that the local authority was understandably anxious that the plans for placing the children should be advanced without further delay. But their decision to proceed with the farewell visit while the father's application for permission to appeal was pending was plainly wrong and contrary to the children's interests. As the appeals are now being allowed (by consent), contact between the children and their parents and other family members will resume. The children are likely to be confused and distressed by what is happening, and will require very careful support and assistance to come to terms with it. There remains the possibility that, for one or more of the children, the decision at the end of the day will again be that they should be placed for adoption. If so, there will in all probability be a further break from their birth family. The damage caused by what has already happened will be compounded.

46. It may be that there was a misunderstanding within the local authority about the significance of the appeal bundles being rejected by the office. It is clear from the emails sent by the Court of Appeal Office, however, that the refusal to accept the bundles did not mean that the application for permission to appeal was being refused. I have seen nothing in the emails sent by the father's solicitor to suggest that this was the case. On the contrary, his emails were very properly keeping the other parties fully informed

about the progress of the appeal. In *Re S (Care and Placement Orders: Procedural Failings)* [2015] EWFC 20, problems arose because of failures by legal representatives to keep other parties informed with the consequence that a child was placed with prospective adopters before an appeal against the placement order had been determined. In the present case, there was plenty of communication between the legal representatives but, despite being informed of the prospective appeal, the local authority proceeded to take steps to implement the plan for adoption. Even if it is correct that there was a misunderstanding about the significance of the appeal bundles being rejected by the office, that cannot excuse the actions of the local authority in arranging the farewell visit at a point when it knew that there was an outstanding application for permission to appeal. It was a grave error for the local authority to proceed with the farewell visit in this case.

47. In addition, the decision by the agency decision maker on 24 June to approve the match was a blatant breach of the direction of this Court when granting permission to appeal that no further step be taken with regard to the placement of the children under the placement orders pending determination of the appeals.

48. In making these observations, I am not intending to criticise any individual within the local authority. I am conscious that the individuals involved have not had an opportunity to respond. It is clear from the papers that this has been a very troubling and challenging case for the children's services department, and the care and concern which the allocated social worker devoted to the case is evident from the judgment and from her statement filed for this appeal. This Court also appreciates the very great pressures on local authority solicitors.

49. The following lessons may usefully be learned from this series of events.

(1) A local authority should take no steps to implement a placement order and care plan for adoption until after the expiry of the 21-day period for filing a notice of appeal against the order.

(2) After that point, an application for permission to appeal can only proceed if the proposed appellant is granted an extension of time for filing the notice pursuant to CPR 52,25(1) and Practice Direction C paragraph 4. In practice, given the life-changing importance of placement orders, extension of time is frequently granted if the appeal notice is filed fairly shortly after the appeal period has expired.

(3) In cases where, after the expiry of the 21-day appeal period no appeal notice has been filed and the local authority is concerned that further delay would be contrary to the child's interests, it should inform the other parties that it intends to proceed to take steps to implement the placement order and care plan. Having been given such notice, the onus is then on any party wishing to appeal to file an appeal notice without further delay and seek an immediate stay of the order.

(4) Once an appeal notice has been filed and served on the local authority, but before a decision has been made on the application for permission to appeal and/or on an application for a stay, if the local authority is concerned that delays in the process are having a damaging effect on the child, it should contact the Civil Appeals Office so that consideration can be given to accelerating consideration of the application

for permission to appeal. It is not acceptable for the local authority to proceed as if the application for permission to appeal has never been filed.

(5) The local authority and any other respondents to the application for permission to appeal against a placement order must give urgent consideration to whether they should file a respondent's statement pursuant to CPR Practice Direction 52C Paragraph 19(1) and, if they decide to file such a statement, to do so without delay.

(6) If this Court, either before or on granting permission to appeal, grants a stay of the proceedings and directs that no further step be taken with regard to the placement of the children under the placement orders pending determination of the appeals, any step taken in breach of such a direction by this Court is manifestly unlawful and prima facie a contempt of court.

(7) If there is any particular step that the local authority wishes to take to implement the placement order, it may apply to this Court for the stay to be varied . Reasonable requests of this sort are unlikely to be refused provided they do not adversely affect the welfare of the children or prejudice the outcome of the appeal. But it is difficult to think of any circumstances in which it would ever be appropriate for a farewell contact visit to go ahead when an appeal against a placement order is outstanding.

**ELISABETH LAING LJ**

50. I agree.

**KING LJ**

51. I also agree.