4PB, 6th Floor,
St Martin's Court,
10 Paternoster Row,
London, EC4M 7HP
T: 0207 427 5200
E: clerks@4pb.com
W: 4pb.com

W (A Child) (2010)

[2010] EWCA Civ 1535

24/11/2010

Barristers
Rex Howling KC

Court
Civil Division

Summary
Where a judge had erred in conflating the separate questions as to whether an order for adoption should be set aside on grounds of procedural unfairness (because the natural parent had not been given notice of the final hearing), and whether the natural parent should be granted leave to oppose the adoption, and he had further erred in misconducting the balancing exercise, his decision setting an order for adoption aside and granting the mother leave to oppose the adoption under the Adoption and Children Act 2002 s.47(5) was set aside.

Facts
The appellant potential adoptive parents (X) appealed against a decision of the judge setting aside an order for adoption in their favour and granting the respondent mother (M) permission to oppose the adoption. The child in question (J), who was aged five, had been removed from M's care in 2007 as a result of her drug dependence. The local authority obtained a final care order in 2008, and later a placement order. M did not participate in those proceedings. In February 2009, J was placed with X. X issued an application for adoption in August 2009. In March 2010, following the final hearing in the county court, a final adoption order was made in X's favour. Whilst it had been incumbent on the court to give M notice of the adoption hearing, because of an administrative error, notice of the hearing was sent to the wrong address and M did not attend that final hearing. She was informed of the adoption order two months later, and applied to set it aside. The matter was transferred to the High Court, where it was listed for determination as to whether the adoption order should be set aside and, if so, whether M should be given leave to oppose the adoption application under the Adoption and Children Act 2002 s.47(5). The High Court judge set himself the question of whether M should be granted leave under s.47(5) and whilst he recognised that there were very powerful current initiatives in favour of adoption, speculated that J might later learn that M had not been given notice of the adoption hearing and seek out M and his natural family, regretting that the possibility of his return to them was not properly investigated. He therefore set aside the order for adoption and granted M leave under s.47(5). X contended that (1) the judge had erred in conflating the two questions, first whether the order made should be set aside because of procedural irregularity, and secondly whether M should be granted permission to oppose the adoption, so that his decision on that second question had flowed from M's obvious success on the first question; (2) in exercising his discretion to grant permission he had

misconducted the balancing exercise or had plainly been wrong in his conclusion. The local authority supported and adopted those contentions, and submitted further that the judge had failed to follow the approach articulated by the judge in the decision of X v A Local Authority (Adoption: Procedure) (2009) EWHC 47 (Fam), (2009) 2 FLR 984 as to the high hurdle facing a natural parent in persuading the court of a sufficient change in his or her circumstances so that leave to oppose adoption was in the child's best interests.

Held

HELD: (1) It could not be too strongly emphasised that an application to oppose an adoption application was an absolute last ditch opportunity. Only in exceptionally rare circumstances would adoption orders be set aside after the making of a care order, placement order, the placing of the child and an application for adoption and then final hearing. Before granting leave under s.47(5), a judge had to be satisfied that a natural parent's change of circumstances since the placement was material and of a nature and degree sufficient to open the door to the exercise of the discretion to give a parent leave to defend the adoption, P (A Child) (Adoption Order: Leave to Oppose Making of Adoption Order), Re (2007) EWCA Civ 616, (2007) 1 WLR 2556 followed. The judge seemed to have reached a judicial conclusion by which he thought that it was urged on him that to grant the application to aside the adoption was useless unless he had also to grant permission under s.47(5). However, those elements were perfectly distinct. The judge had been sitting as a county court judge, rather than in an appellate court, and it had been within his power to set aside the order because of procedural irregularity but then to consider the matter afresh and grant the application as if it was unopposed. X and the local authority therefore succeeded in their first ground of appeal. (2) In reaching his decision, the judge had undervalued the very powerful current imperatives in favour of J's adoption and overvalued the much more speculative aspects of the future. The decision in X made it plain that a more stringent approach was necessary, and the judge had erred in adopting too permissive an attitude to M's application, X applied. The permission granted by the judge to set aside the adoption order would be set aside. Exercising its discretion afresh, the Court of Appeal granted the adoption order unopposed.

Permission