



Neutral Citation Number: [140] EWHC (Fam)

Case No: FD08C00046

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/01/2009

Before :

THE HON. MR. JUSTICE HEDLEY

Between :

F & L
- and -
A Local Authority
- and -
'A' (by her Guardian)

Applicants

1st Respondent

2nd Respondent

F & L (In Person) Applicants

John Tughan (instructed by **The Local authority**) for the 1st Respondent
Ms Kahatun Sapnara (instructed by **The Guardian**) for 2nd Respondent

Hearing dates: 14th/15th/16th January 2009

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....
THE HON. MR. JUSTICE HEDLEY

This judgment is being handed down in private on 30th January It consists of nine(9) pages and has been signed and dated by the judge. The judge hereby gives leave for it to be reported.

The judgment is being distributed on the strict understanding that in any report no person other than the advocates or the solicitors instructing them (and other persons identified by name in the judgment itself) may be identified by name or location and that in particular the anonymity of the children and the adult members of their family must be strictly preserved.

The Hon. Mr. Justice Hedley :

1. There are in form before me three applications made by the parents of a child known as 'A' who is now aged four by which they seek a residence order pursuant to Section 8 of the Children Act 1989 ('the 1989 Act'), a stay of adoption proceedings under the Adoption & Children Act 2002 ('the 2002 Act') current in respect of 'A' and a variation of a media injunction made herein by Baron J on 30th August 2007. I say that there are 'in form' three applications because not only cannot they be understood save in the context of extensive previous litigation but the real issue I have had to try is in respect of a discrete medical issue.
2. This case has attracted considerable publicity in the past. In particular it was the subject of an article in The Times of 21st December 2006 by Ms Camilla Cavendish (and set out in full in the earlier judgment of the Court of Appeal herein) and featured in an article in the Sunday Times of 6th July 2003 by Mr. Stuart Wavell. It has been held up as an exemplar of what is wrong with family justice with an undue reliance upon medical expertise and proceedings conducted in private. When these applications first came before me on 15th July 2008, I made it clear that whilst I was prepared to conduct these proceedings in public, I was not prepared to revisit the media injunction until judgment had been given on the applications. That has remained the position. I have heard the case in public and this judgment is given in public but the media injunction remains in force.
3. The parents appeared in person. It was obvious that the central issue was to be medical evidence as to causation of brain damage. At a Directions hearing I invited the parents to consider being represented. Having considered the matter, they have decided to continue to act in person which they have done with courtesy and restraint and, I may add, not without ability. They have been assisted at trial by a McKenzie Friend to whom the court is indebted.
4. At the original trial of this matter it was found that a child known as 'Y' had suffered non-accidental head injury whilst in the care of his parents, being this father and his then wife 'K' though no determination was made as to which parent had actually inflicted the injury. The parents first in May and then in September 2008 received a medical opinion that the cause of the original injury was likely to be a natural one rather than a non-accidental head injury ('NAHI'). Hence these applications. The local authority then obtained a further medical opinion which confirmed NAHI as the most likely cause of the original damage. It was that issue that I was invited to and did try. This is my judgment on it.
5. Most helpfully the parties are in agreement as to how any judgment of mine should be implemented. Were I to conclude that the original finding should stand it would follow that the parents' applications would essentially fail. On the other hand were I to reach the opposite conclusion, it is accepted that the parents should be given leave to defend the current adoption application in relation to 'A', their application for a residence order should be heard within those proceedings and the application to vary the media injunction stood over until the conclusion of those proceedings.
6. Although this case is ultimately about the future of 'A', it will be apparent that it cannot be understood outside the context of what happened to 'Y'. It is therefore necessary to set out the history of the whole of this litigation. In 1994 this father

married a lady known as 'K'. They had two children known as 'X' (a girl now aged 11) and 'Y' (a boy now aged almost 10). The family lived together without coming to the adverse notice of any statutory agency until 30th March 1999 when 'Y' (then aged about two months) was admitted to hospital with what transpired to be serious brain damage. It was and remains the case that neither parent could account for anything which might have caused this damage. In due course the view was expressed by Dr. Michael Nelson, a distinguished consultant radiologist, that the brain damage was most likely to have been a NAHI caused by shaking and, less clearly, an impact injury. Dr. Nelson had been instructed as the expert in care proceedings subsequently taken by the London Borough of Enfield ('The LA'). Although the parents disputed his evidence, it was and remained unchallenged by any other medical evidence.

7. Judgment was given in those proceedings on 6th March by District Judge Bradley sitting at the Principal Registry of the Family Division. The judge pointed out that there had been no adverse parenting history, that aside from the head injury, 'Y' was otherwise unhurt and that the parents had been consistent throughout in what they had said about what had happened. Nevertheless she concluded on the basis of the medical evidence that 'Y's brain damage was a NAHI caused whilst in the care of his parents but that she could not determine which had been the perpetrator. From that judgment there was no appeal.
8. The sequel to that hearing was unusual. Sadly 'Y' had suffered permanent damage by way of cerebral palsy and therefore suffered from global developmental delay. However, subsequently the children were returned to the care of their parents who in due course separated. The ultimate order was no order on the LA's application, a residence order in favour of the mother with contact to the father, an arrangement which continues until this day. The father's contact is unsupervised.
9. In December 2003 the father married his second wife a lady known as 'L'. They remain together and are the parents of 'A' who was born a year later. Unsurprisingly the LA became involved with 'A'. Indeed she was the subject of an emergency protection order followed by a series of care orders and has lived effectively the entirety of her life away from her parents. The LA took proceedings under Part IV of the Act of 1989. During the course of those proceedings the LA decided on a plan for adoption so that in due course an application was made for a placement order under the 2002 Act. The reasons for that decision appear broadly to have been threefold: first, the adamant stance of the father that neither he nor 'K' had or could have inflicted injury on 'Y'; secondly, the unstable and aggressive behaviour demonstrated by the father towards professionals; and thirdly that the mother, although no complaint could be made about her, aligned herself wholly and completely with the father. These applications came on for hearing in October 2006 before HH Judge Horowitz, Q.C. who gave judgment on 23rd October.
10. The learned judge made the orders sought by the LA. He of course relied on the findings made by DJ Bradley which still stood unchallenged by medical evidence. He relied upon the vehement denials of responsibility which he found were poorly reasoned and reflected aspects of the father's personality. He relied upon a series of findings of aggressive or unco-operative conduct by the father. He concluded that for those reasons the father posed a continuing risk to 'A'. He also held that the mother would not be able to oppose or defy him and thus be unable to offer safe care to 'A'. He concluded his judgment thus –

"With some considerable regret I have, therefore, reached the clear conclusion that I must exercise my discretion under Section 31 to make a care order in the terms supported by the LA and the guardian. In my judgment that step is proportionate and necessary to secure '[A]'s welfare."

11. In due course adoption proceedings were contemplated. The parents, then acting in person, had sought relief from the European Court of Human Rights and applied for orders effectively staying the implementation of the plan for adoption. On 2nd February 2007 HH Judge Horowitz, Q.C. refused to grant such relief. This order the parents did seek to challenge on appeal and their application for permission was heard on 27th March 2007 by Munby J sitting as a single Lord Justice who refused permission in a reserved judgment given on 30th April 2007. That judgment, which was of course delivered in public, contains a very full account of all that had happened in the case up until then, surveys the publicity which it had received, refers to all the documents drawn to the court's attention, treats the application as an application to appeal all previous orders and explains why such permission was to be refused.
12. It is important to say something about the burden and standard of proof in these cases. The father has never been prosecuted for any offence nor have I seen evidence on which a jury could be invited to be sure of guilt of any offence. Nevertheless a court has concluded that either the father or 'K' caused a NAHI to 'Y' by shaking. How could this be? This question has recently been considered again by the House of Lords in *Re B (CARE PROCEEDINGS: STANDARD OF PROOF)* [2008] 2 FLR 141. The approach in civil proceedings is explained by Lord Hoffman where he says this-

"[2] If a legal rule requires a fact to be proved (a 'fact in issue'), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary system in which the only values are 0 and 1. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of 0 is returned and the fact is treated as not having happened. If he does discharge it, a value of 1 is returned and that fact is treated as having happened."

The matter is clearly put by Baroness Hale of Richmond (with whom all others agreed) as follows –

*"[69] There are some proceedings, though civil in form whose nature is such that it is appropriate to apply the criminal standard of proof. Divorce proceedings in the olden days of the matrimonial 'offence' may have been another example (see *Bater v Bater* [1951] P 35, [1950] 2 All ER 458). But care proceedings are not of that nature. They are not there to punish or to deter anyone. The consequences of breaking a care order are not penal. Care proceedings are there to protect a child from harm. The consequences for the child of getting it wrong are equally serious either way.*

[70] My Lords, for that reason I would go further and announce loud and clear that the standard of proof in finding the facts necessary to establish the threshold

under s. 31(2) or the welfare considerations in s.1 of the 1989 Act is the simple balance of probabilities, neither more nor less. Neither the seriousness of the allegation nor the seriousness of the consequences should make any difference to the standard of proof to be applied in determining the facts. The inherent probabilities are simply something to be taken into account where relevant, in deciding where the truth lies."

and then she adds this about the inherent improbabilities of child abuse –

"[73] In the context of care proceedings, this point applies with particular force to the identification of the perpetrator. It may be unlikely that any person looking after a baby would take him by the wrist and swing him against the wall, causing multiple fractures and other injuries. But once the evidence is clear that that is indeed what has happened to the child, it ceases to be improbable. Someone looking after the child at the relevant time must have done it. The inherent improbability of the event has no relevance to deciding who that was. The simple balance of probabilities test should be applied."

13. In this case before DJ Bradley the LA undertook the onus of proof but once the medical evidence established NAHI by shaking it was inevitable that the court would conclude that a parent must have done it. There was simply no other option on the evidence. That finding stands until displaced. The burden is now on the father on the same balance of probability to show that the original finding was wrong.
14. There is, as the House of Lords accepted, a dreadful conundrum here. Wrongly to find that there has been NAHI is to risk tearing apart an innocent family – a shocking thing to happen. Likewise wrongly failing to find NAHI where such in fact occurred is to risk returning a child to a situation of high or even fatal risk as notorious cases have sadly demonstrated. There is for a court, however, no escape from that conundrum. It must make a finding one way or the other on the balance of probabilities as Lord Hoffman acknowledges.
15. And so matters were with a finding made until the Summer of last year. By then 'A' had been placed for adoption. This was a second placement, the reasons for an earlier failure being not unconnected with all the publicity that has surrounded the case. Then it was that the parents came into possession of what appeared to be new medical evidence. And it is to these matters that I must now turn.
16. Dr Waney Squier is a consultant neuropathologist to the Oxford Radcliffe hospitals and an honorary clinical lecturer in the University of Oxford. She has fairly frequently given evidence as an expert in alleged NAHI by shaking cases. She was consulted by the parents. In a report dated 30th May 2008 she wrote as follows:

"Review of the records available to me suggests that [Y] suffered cerebral venous sinus thrombosis when he was admitted to hospital in March 1999. I cannot be certain from the records I have seen and it would be important to have the original brain scans reviewed.....There appears to have also been brain swelling and hypoxic-ischaemic injury, findings which could also occur with sinus thrombosis.....The presence of subdural haemorrhage and brain swelling does not, of itself, indicate NAI although it has been accepted by some

