[2010] EWCA Civ 1744

Case No: BT09C11434

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

12/07/2010

B e f o r e :

Sir Nicholas Wall
President of the Family Division

LA	**Applicant**
- and -	
SB	
- and -	**1st Respondent**
AB	
- and -	**2nd Respondent**
MB	
- and	**3rd Respondent**

Alison Ball QC and Alison Brooks (instructed by Barnes & Partners) for the 1st Respondent
Jenny Boswell (instructed by Donald Galbraith) for the 2nd Respondent
Mike Tait (solicitor, Powell Spencer and Partners) for the 3rd Respondent by David Duncan a Children's Guardian
Hearing dates : 6 July 2010

HTML VERSION OF JUDGMENT

Crown Copyright ©

Sir Nicholas Wall P:

1. I heard this case on 6 July 2010. On that day I gave the local authority, the London Borough of Haringey, unconditional permission to withdraw care proceedings relating to the 5 children of the B family, whose ages range from 12 to 5. I made no other order. I reserved my reasons, however, because I refused; (1) an application by the local authority under section 100 of the Children Act 1989 (the Act) for leave to invoke the inherent jurisdiction in relation to one of the children, MB, alternatively for permission to make an application for a specific issue order in relation to MB; (2) an application by the children's father for the permission to the local authority to be granted only on terms; and (3) an application by MB's guardian– which would itself have required an adjournment - for permission to instruct an expert to give a second opinion on MB's treatment.

2. In my judgment, the case aptly illustrates the different areas of responsibility which exist within the family justice system, and the proper limits of the court's role within that system. As the most recent case cited to me was the decision of the Court of Appeal in ***Re T (Wardship: Medical Treatment)*** [1997] 1 FLR 502 (and in particular the judgment of Butler-Sloss LJ (as she then was)) I thought it sensible to revisit the point to see if the law needed to be moved on. In my judgment, it does not.

3. I should, however, make it clear that I have considerable sympathy for the local authority in the instant case, and would not anything in this judgment to be read as critical of the stance which it has adopted in the proceedings. However, in order to understand my reasons for the course of action which I took in this case, it is necessary for me to relate the essential facts.

The facts

4. In the event, the case has centred on MB, a boy, who is now six. Although the local authority had taken care proceedings in relation to the other B children, three of whom have particular difficulties, it acknowledged that, in their cases, its entirely proper concerns had abated, and that proceedings in relation to them were no longer appropriate. They are, accordingly, cared for by their parents at home. This has always been the position, and it will remain.

5. MB, sadly, suffers from a rare but progressive brain disease called Rasmussen's encephalitis. This means that means that he suffers from very frequent epileptic seizures, has global developmental delay and is registered as partially sighted. In addition, MB suffers from precocious puberty.

6. The local authority issued proceedings in respect of MB on 14 December 2009, following receipt of reports from Dr. AD, MB's locum paediatric neurologist and M's consultant paediatrician Dr. CF. They set out the serious and life-threatening nature of MB's seizures and expressed significant concerns about the parents' lack of co-operation in considering treatment options, including the mother's failure to bring MB to a two day assessment programme fixed for 14 and 15 November 2009.

7. In her report dated 29 September 2009, Dr. AD described a difficult visit to her clinic by MB and his parents. She stated:

   > …..the clinic consultation despite being over one and a half hours could not come to an agreeable conclusion despite my best efforts. I am also extremely concerned about the dynamics of the situation as in attempting to address parental concerns in conjunction with gaining their confidence, MB's needs may not be optimally addressed."

   Later in the report, she stated: -

   > ….. overall MB's's epilepsy is continuing to get worse ….. and unabated, this is clearly posing a significant risk to his life, not least to his development, learning and cognition. …... I feel there needs to be an advocate for MB to act in his best interest so that a holistic teamwork can be employed to improve the situation for MB and offer him the best chance for seizure control and optimising his development potential. There is indeed an urgent need for this to happen.

8. The care proceedings relating to MB came before me on 27 May 2010 as a review hearing for MB and as the adjourned case management conference in respect of his siblings. At the point I had a report from MB's hospital treating team signed by his Paediatric Neurologist Dr.SV and dated 24^{h} May 2010. This report was prepared following a multi-disciplinary assessment on MB in April 2010. The report recommended epilepsy surgery as "the most optimal way forward in MB's management".

9. In that report, MB's seizures are stated to have become more frequent, and amounted to hundreds each day, with a consequential risk of death and further retarded development. This is because obstructive apnoea during seizures deprives MB's brain of oxygen. The report stated clearly that surgery was recommended. Surgery, it was said, had an 85% chance of seizure freedom, and a further 10% chance of "significant improvement".

10. In addition, the report concluded that, without surgery the final outcome would be that "the disease progresses until there is total destruction of the left cerebral hemisphere". This, it was stated, posed a severe danger to MB in view of the risk of harm from seizures and the risk of further neuro- developmental problems.

11. Other therapies were considered in the report. However, it was stated that any benefit was likely to be transient and temporary. A trial of steroids did not change the recommendation for surgery. Steroids were not a long-term option. Immunotherapies such as azathioprine, it was said, had been discussed before, and the team did not think them likely to be helpful at this advanced stage of the disease. In short, the team's view was that MB had reached the stage where the effect of any anti-epileptic drug was temporary, and further drugs were not expected to be helpful. Dr. SV had apparently indicated orally to the local authority that surgery could take place within 2 months of this being agreed or authorised.

12. The parents filed position statements for the hearing on 27 May 2010. The father made it clear that he did not agree that MB had reached the stage where any anti-epileptic drug effect

was temporary. He supported further treatment by medication and further investigation into the types of medication that could be used. The father had consistently rejected the use of steroids. The father set out his concerns that surgery was irreversible and that it might affect MB's current level of mobility. The father also raised concerns at his lack of inclusion in discussions with the hospital over MB's treatment.

13. The mother also did not agree to surgery. Her position as to whether she supported any treatment for MB's epilepsy was, however, unclear. The mother had previously indicated that she thought immuno-modulatory drugs should be given a chance to work before surgery was considered. Unfortunately, the mother only had an opportunity to see Dr. SV's report for the first time at the hearing on 27 May 2010.

14. At that hearing, I ascertained from the local authority that it was not its intention to remove MB from his parents' care under a care order. The local authority, however, took the view that surgery was in MB's best interests, and invited me to determine the question of surgery at the hearing fixed for 6 July 2010.

15. I made it clear in argument that I did not regard the care proceedings relating to MB as a proper process for such a decision. The local authority was not seeking a care order with a care plan for surgery: it simply took the view that surgery was in MB's best interests and should be ordered by the court. I therefore took the view that if I was being asked to make a decision that surgery was in MB's best interests that issue had to be properly formulated. In the normal course of events the "lis" underlying such an issue would be between the hospital and the parents. Care proceedings were not the appropriate forum for such a "lis", since a care order involved broader welfare considerations of which surgery was only a part.

16. I therefore gave a short judgment on 27 May 2010, in which I invited the hospital treating MB either to intervene in the proceedings or to issue a summons in respect of the proposed surgical treatment for MB, so that the court could decide on a properly constituted summons whether I should order surgery as being in MB's best interests. I also gave directions requiring the local authority to notify the parties and the court as to the orders it was seeking in respect of MB and further whether they were proposing to withdraw the proceedings in respect of his siblings.

17. The result was a position statement from the hospital and a further statement from Dr. SV' dated 21 June 2010, in which she revised her previous view that it was too late for drug treatment for MB and also indicated that she wished to investigate further concerns the parents had raised about other matters relating to MB. Dr SV remained of the view that surgery was the optimal treatment. It was not, however, the only treatment. Dr.SV made it clear that she did not wish to proceed with surgery without further consultation with the parents.

18. In these circumstances, the hospital declined to intervene in the proceedings or to issue a summons. However, it assured the court that if its position changed in a few months' time, it would make the necessary application.

19. It was against this background that on 6 July 2010, the local authority sought permission to withdraw the care proceedings in relation to each of the children (including MB) whilst at the same time inviting me to allow it to invoke the inherent jurisdiction under section 100 of the Act; alternatively to give it permission to make an application for a specific issue order so that the court could make a decision as to whether or not MB should undergo surgery. In this latter application the local authority was supported by the guardian, and opposed by the parents. As I have already indicated, the guardian sought a second opinion on MB's treatment and the father invited to me impose conditions on the local authority's application for permission to withdraw.

The position of the local authority

20. For the local authority, Miss More O'Ferrall submitted that the issue of proceedings in both cases (that is to say both in relation to MB and in relation to his siblings) appeared to have had a positive effect on the parents' engagement with the hospital and with social services. On the first day at court, she said, the mother had signed a written agreement. Thereafter at later court hearings the mother agreed to and did facilitate MB attending the two day comprehensive assessment at the hospital in April 2010. Both parents had now agreed to MB

receiving treatment for his precocious puberty. The mother had been prepared to meet with Dr. SV to discuss her report, having previously declined to attend any meeting to discuss surgery.

21. The proceedings, Miss More O'Ferrall argued, had also given the parents an opportunity to air their concerns with the benefit of expert legal representation and the children had had the benefit of a guardian focusing on their interests. The level of communication between the hospital and the parents, particularly the father, appeared to have improved.

22. In relation to the hospital's position, Miss More O'Ferrall submitted that its change of view was related only to the question of surgery. She submitted that no consideration had been given as to whether the parents would agree to such drug treatment for MB as may now be proposed.

23. Secondly, counsel submitted that the local authority was concerned as to the circumstances which prompted the hospital's change of view in respect of surgery. The recommendations made in the report dated 24 May 2010 as set out above were, she submitted, unequivocal and had been made following a comprehensive multi-disciplinary assessment. The recommendation for surgery had been first made in 2007 so could not have come as a complete surprise to the parents. The reasons why drug treatment was no longer being recommended for MB were clearly set out in this report. The second report dated 21 June 2010 stated that other treatments were available for MB but none of the treatments outlined were in fact recommended for him. Dr.SV stated that at her recent meeting with the parents it had become clear to her that " both parents and certainly the mother, had not appreciated just how life-threatening the frequent seizures MB has are for him". That this was stated some three years after the initial recommendation for surgery indicated at the very least, counsel argued, difficulties in communication between the hospital and the parents.

24. Miss More O'Ferrall accepted that a decision as to treatment of a child should usually be a matter for the relevant treating specialists and the parents. She submitted, however, that in this case it was in MB's best interests for the court to continue to review MB's progress under the framework of the orders sought for the following reasons:

(a) MB had already suffered significant physical harm as demonstrated by the differences observed in the MRI scans from 2007 and 2009 and as set out in the report of 24 May 2010;
(b) there was evidence in the reports of Dr.AD and Dr. CF referred to above that prior to commencement of the care proceedings the parents, in particular the mother, were not cooperating with the hospital in considering treatment options for MB and the mother had failed to bring MB to the assessment fixed for 14 and 15 November 2009. This concern is perhaps borne out by the fact that as late as 21 June 2010 Dr. SV was saying that she still needs to discuss treatment options with the parents.
(c) the communication between the hospital and the parents, particularly the father, has improved since the commencement of the proceedings.
(d) the history suggested that communication and cooperation may deteriorate significantly if proceedings end and the parents no longer had the benefit of legal representation.
(e) the hospital's position was at the very least unclear. It had made an unequivocal recommendation for surgery. It has then said that other treatment options were available but recommended none of them. It said that it wished to discuss matters further with the parents and to investigate other concerns of the parents. The hospital did not indicate whether the parents agreed to any proposed treatment for MB's epilepsy. There was a real risk that, as feared by Dr.D, MB's best interests were not being kept in focus;
(f) given the differing recommendations of the hospital and the communication difficulties with the parents there was a real need for MB's best interests to be safeguarded by a guardian.

The position of the parents

25. For the mother, Miss Alison Ball QC was minded to concede that I had the jurisdiction to decide question of surgery. She submitted, however, that I should not exercise it.

26. For the father, Miss Boswell submitted that the local authority should not be granted permission to withdraw the care proceedings until a proposed package of support for the family had been placed before the court to include the hours of family support workers offered, support for suitable housing and "the expectations of the parents". She also sought a direction that a tabulated schedule of matters raised at Child Protection Conferences since the inception of the proceedings (to be prepared by the father's) solicitor be placed on the local authority social work and legal files rating to the children with a copy to be provided to the responsible Independent Reviewing Officer.

27. The guardian also proposed that I should direct that a second opinion be obtained in relation to MB's treatment.

The Law

28. After I had given my short interim judgment, I made provisional arrangements to hear one of MB.s doctors, who could not attend on 6 July 2010. When I learned, however, that the hospital had declined my invitation to intervene or to issue a summons, I vacated the hearing at which I was due to hear the doctor in question, and sent the following note to the parties: -

> I have read the (hospital's) position statement and the witness statement of Dr SV.
> Judges decide issue which are live between parties. Surgery for MB is not currently an issue before the court. (The hospital) is not seeking to argue that I should direct surgery.
> What are before me are ***care proceedings***. Unless the local authority is seeking a care order (or interim care order) with a care plan for surgery for MB, I not only see no purpose in hearing evidence on 30 June, I simply do not have any jurisdiction to do so. The evidence does not go to any issue which I have to decide.
> The decision whether or not MB should undergo surgery is for his parents, not for the court. They are the only people with parental responsibility.
> Section 100 of CA 1989 prohibits the LA from inviting me to adjudicate on the issue.
> Unless persuaded to the contrary, therefore, I propose to vacate the hearing on 30 June. The doctor should be warned at the earliest opportunity that his presence is not required.

29. None of the parties sought to protest, and the hearing on 30 June was duly vacated. With the exception of the final sentence of the penultimate paragraph, that note reflects my current view. This judgment thus addresses the issue of surgery for MB on the assumption that I do have jurisdiction to give permission to the local authority either to invoke the inherent jurisdiction or to issue a summons seeking a specific issue order. Should I exercise my discretion in the local authority's favour, and if so, should I order a second opinion as sought by the father and the guardian?

30. The two cases most directly on point are the decision of Johnson J in ***Re O (A Minor) (Medical Treatment)*** [1993] 2 FLR 149 and of Booth J in ***Re R (A Minor)(Blood Transfusion)***[1993] 2 FLR 757. Both involved the use of blood or blood products in operations on children whose parents were Jehovah's witnesses. In the former case, the local authority applied for a care order in relation to the child, on the ground that there was an urgent and continuing need for medical treatment which included blood transfusions. Johnson J had to decide two issues: (1) whether the court should override the sincerely held beliefs of the parents; and (2) the legal framework in which the question was best decided. The judge decided that his duty to the child required him to ensure that whenever the need arose the child would receive the transfusion of blood or blood products that medical advice dictated. On the second question, the judge's view was that the correct route was to make an order under the High Court's inherent jurisdiction.

31. For present purposes, it is interesting to note that Johnson J rejected the interim care order route. Of that he said [1993] 1 FLR 149 at 151: -

> Counsel submitted that it was wholly inappropriate for the court to make even an interim care order where the child's parents were caring, committed and capable and only this one issue arose for decision, albeit one of the gravest

> significance. Reflecting on the statutory provisions, and in particular section 33 (of the Children Act 1989) , I accept that joint submission.

32. Johnson J rejected the "specific issue" route on the ground that the trial of an "issue" arguably required the preliminary step of giving directions, and that in an emergency, an issue could not be determined on an *ex parte* basis.

33. In Booth J's case, the child's doctors considered that she would need treatment over the following two years and that this could involve the need for blood transfusions at any time. Booth J took the "specific issue" route. She took the view that the child's need for blood was so overwhelming that, in her best interests, her parent's beliefs had to be overridden. On the procedural issue, she said: - [1993] 2 FLR 757 at 759/60: -

> I am in complete agreement with the essential premise of the conclusions reached by Johnson J. Such issues are of the utmost gravity and are of particular anxiety since the decision of the court may run counter to the most profound and sincerely held beliefs of the parents. For these reasons the most strenuous efforts should always be made to achieve an inter partes hearing. Such issues should also be determined, wherever possible, by a High Court judge and this is of particular importance in those exceptional circumstances where an application must be made ex parte so that the parents cannot be heard. But in my judgment these prerequisites can be as well met by an application for a specific issue order under s 8 as by an application for the exercise of the court's inherent jurisdiction. A section 8 application can, and in circumstances such as these undoubtedly should, be made to the High Court. When leave to make it is sought by a local authority, or other appropriate body or person, the district judge, as in this case, can give all necessary directions for a speedy hearing. It will then be heard by a High Court judge. Although there is yet no reported decision as to whether or not a specific issue order can be made ex parte, I should be very surprised if the words of the statute had to be interpreted so narrowly as to deny the court power to give such relief where it was otherwise justified and the circumstances compelled an ex parte hearing. But if such an issue were to come before a judge of the Family Division who was constrained to find the court's jurisdiction to be so limited, the power to invoke the exercise of the inherent jurisdiction of the court would be immediately available and appropriate.
>
> In the present case I am in no doubt that the application is well-founded under section 8 of the Act. The result which the local authority wishes to achieve, namely, the court's authorisation for the use of blood products, can clearly be achieved by the means of such an order. There is no need for the court otherwise to intervene to safeguard the little girl, so that I am satisfied that it is unnecessary and inappropriate for the court to exercise its inherent jurisdiction.

34. I note in passing that the specific issue order made by Booth J [1993] 2 FLR 757 at 761 was in the following terms: -

> It is ordered that there be a specific issue order in respect of the child, namely that:
> (1) In any imminently life-threatening situation, when it is the professional opinion of those medically responsible for the said child, that she is in need of the administration of blood products, she shall be given such blood products without the consent of her parents.
> (2) In any situation which is less than imminently life-threatening, those medically responsible for the child shall consult with the parents and will consider at every opportunity all alternative forms of management suggested by the parents. In the event that those medically responsible for the child conclude, after such consultation, that there is no reasonable alternative to the administration of blood products, they shall be at liberty to administer such blood products without the consent of the parents.

35. Miss More O'Ferrall very properly drew my attention to a further authority, namely that of the Court of Appeal in ***Re T (Wardship: Medical Treatment)*** [1997] 1 FLR 502. In that case, the Court of Appeal reversed a decision by the judge that the child should undergo a life saving liver transplant as advised by her doctors but opposed by her parents. In that case, the three issue on which the local authority sought the ruling of the judge were as follows: -

	(1)	whether it was in the best interests of the baby to undergo surgery for liver transplant;
	(2)	for permission to perform the operation notwithstanding the refusal of the mother to consent; and
	(3)	for the child to be returned to the jurisdiction for the purposes of surgery.

38. The evidence from the hospitals involved was that without a liver transplant the baby would die within 18 months. The judge answered all three questions in the affirmative. All three members of the Court of Appeal gave judgments. Butler-Sloss LJ's judgment contains a helpful review of the authorities relating to court intervention, which repays re-reading. Having reviewed the law, she said: - [1997] 1 FLR 502 at 509: -

> In my view, however, the judge erred in his approach to the issue before the court. He accepted the unchallenged clinical opinion of the three consultants and assessed the reasonableness of the mother's decision against that medical opinion. Having held that the mother was unreasonable he accepted that the liver transplant would be likely to prolong the life of C and in the absence of any reasonable argument to the contrary he came to the clear conclusion that he should consent to the operation. Since he had already decided the mother's approach was unreasonable he did not weigh in the balance reasons against the treatment which might be held by a reasonable parent on much broader grounds than the clinical assessment of the likely success of the proposed treatment. Some of the objections of the mother, such as the difficulties of the operation itself, turned out, from the evidence of Mr R, to be less important than the mother believed. Underlying those less important objections by the mother, was a deep-seated concern of the mother as to the benefits to her son of the major invasive surgery and post-operative treatment, the dangers of failure long term as well as short term, the possibility of the need for further transplants, the likely length of life, and the effect upon her son of all these concerns. The judge did not assess the relevance or the weight of such considerations in his final balancing exercise.

Discussion

39. In my judgment, the question of MB undergoing surgery is currently a matter between his parents and the hospital. The hospital is not inviting me to decide that issue, nor are MB's parents. There is, accordingly, in my judgment no proper "lis", and no issue for the court to decide.

40. Furthermore, it seems to me that the court should be acute to recognise the limitations of its role. Parliament, in passing the Children Act 1989 (the Act), has placed a sharp and clear division between the functions of courts and local authorities. It is properly within the court's province to decide whether or not MB and his siblings should be the subject of care orders: it is plainly not the court's function to decide issues which are the responsibility of others or outside the ambit of its proper role. The court cannot control the activities of social services or any other of the departments of local authorities, nor should it attempt to do so. Not only is the issue of surgery for MB not before me, therefore, but as presently constituted it is not an issue for the court.

41. Whether the court would exercise its jurisdiction if the issue was properly constituted before it is a matter on which I do not propose to speculate.

42. The local authority is not now seeking care orders: to the contrary, it seeks to withdraw its applications for such orders. It seems to me, therefore, that my function, on the facts of the case as presented to me, is to satisfy myself that such withdrawals are appropriate. Having

done so, I have no further function. MB will undoubtedly remain a child in need within section 17 and Part III of the Act, and will be subject to the statutory procedures laid down by Parliament for local authority support under the Act. The court has no role to play under Part III.

43. I can, accordingly, deal swiftly with the father's submission (set out in paragraph 26 above) that I should only grant the local authority permission to withdraw on terms. I repeat what I have already said. In my judgment, these are matters for the local authority not the court, and there is no nexus between the local authority's application and what the father seeks. In any event, even if I were to take the view that conditions should be attached to the local authority's application, there is nothing which I could do to enforce the conditions, should the local authority decline to implement them.

44. Since, on the facts and issues as presented to me, I see no further role for the court, I see no purpose in ordering a further report on MB. In my judgment, these proceedings should now come to an end.

45. I repeat that I fully understand the position both of the local authority and the guardian. Both, I am sure, wish to do what is best for MB. In my judgment, however, neither the court nor the guardian has any current role in that process, and on the facts as currently presented, MB's welfare falls to be decided outside the ambit of court proceedings.