Re K (Children) [2009] EWCA Civ 987 (23 July 2009)

Case No: B4/2009/1342

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL (CIVIL DIVISION)

ON APPEAL FROM SWANSEA DISTRICT REGISTRY

(MR JUSTICE RODERIC WOOD)

Royal Courts of Justice

Strand, London, WC2A 2LL

23rd July 2009

B e f o r e :

LORD JUSTICE THORPE

LORD JUSTICE SCOTT BAKER

and

LORD JUSTICE WALL

_____

IN THE MATTER OF K (CHILDREN)

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(DAR Transcript of

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Official Shorthand Writers to the Court)

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Ms L Meyer QC (instructed by Messrs Avery Naylor) appeared on behalf of the Appellant.

Mr C Geekie QC (instructed by West Glamorgan Legal Services) appeared on behalf of the Local Authority.

Ms E Platt QC (instructed by Mark Saunders) appeared on behalf of the Mother.

Mr J Tillyard QC (instructed by Goldstones) appeared on behalf of the Father.

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HTML VERSION OF JUDGMENT

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Lord Justice Thorpe:

Public law proceedings in relation to three children have been ongoing for some time in the Swansea District Registry of the Family Division under the management of Wood J, the liaison judge for the Wales and Chester circuit. The judge is immediately concerned with three children, two girls, nine and four, and a little boy, IB, born on 19 September 2007. The proceedings arise out of serious injuries to IB and fatal injuries to a sibling, which were the subject of a fact-finding judgment by Wood J in the autumn of 2008.

There was to be a final hearing in February and at that stage there seemed to be a likelihood that one or more of the children would proceed out of the family into adoption. The adoption panel had considered and progressed that option. However, the expert in the case, Dr Holt, had seen the possibility of rehabilitating IB, the two girls having seemingly been well parented during the years preceding the non-accidental injury, the physical abuse found by the judge in his previous judgment.

So at the pre-trial review the judge asked the local authority to formulate alternative plans: plan A, which would be signposted "Adoption"; plan B signposted "Rehabilitation". The local authority complied and those alternatives were before the judge at the February fixture. However, the matter could not be concluded because the administrative consideration of the panel had preceded the emergence of rehabilitation as a possibility for IB, a possibility that had expert support. So it was agreed that the papers would have to be returned to the panel to see whether they held to their previous decision despite the emergence of fresh evidence.

The case was refixed for June, and it is that hearing in June 2009 which is the subject of our review today. The order that emerged from that hearing is expressed in ten paragraphs, the first of which is of considerable significance because it reads thus:

"the final hearing in this matter be adjourned to be heard on 13 October at Cardiff, time estimate 5 days, reserved to Wood J."

So the principal outcome of the June hearing was to set the whole thing over once again for a span of months with an interim that was to be covered by interim care orders of all three children, some provision for an assessment of the mother's mental health, and provisions in paragraphs 5 and 7 for professional work in the interim to which I will return in greater detail.

The judge had received some final written submissions. He then announced a result. He had then emailed a very full and careful judgment to all the parties a week later, and that attracted an application for permission to appeal, lodged in fact by the guardian. The application was refused by Wood J; he saying:

"I believe I have correctly identified the legal framework and make clear findings of fact. I do not believe I have misdirected myself in law."

Accordingly, the application was renewed to this court by an appellant's notice of 24 June which came before my Lord, Wall LJ, who drew an order directing an oral hearing on notice with permission to follow. He made that order on 9 June. He had not anticipated that it would be possible for the adjourned hearing to be listed this term; but in the event some other case has settled and we have been able to deal with it today.

There is a highly unusual feature of this appeal (and so we treat it) for although we have not formally granted permission we have conducted the hearing as though we had. The unusual feature is that we have four Queen's Counsel and not one of them supports the judge. Mr Geekie, for the local authority, is formally independent, but in his skeleton argument he is robustly critical of the judge. So we have had to proceed with care to ensure that we could see some principled foundation for allowing the appeal as both the appellant guardian, the parents (separately represented), and, to some limited extent, the local authority would have us do.

The problem with the order made by the judge lies in the procedural complexities that developed once the parties assembled for the opening of the fixture, expected by all to be a final hearing when they went into initial preparation. There had been, as is common in these cases, an unexpected and important development when, in May, the father indicated to the local authority, social workers and to the guardian that he was ready and willing to put himself forward as sole carer for all three children on the basis that he would sacrifice his marriage for the good of his children. That development was considered by the professionals in the case and was thought to have sufficient merit and reality to justify assessment. The local authority was less enthusiastic than the guardian and the parents but was sufficiently impressed to agree to give it fair trial. So, given the degree of consensus amongst the parties, this was a highly unusual case in which it would not be necessary for the court to make an order under section 38(6). The parties were all agreed and therefore the assessment could simply go forward.

So at assembly at the outset the parties discussed the detail and began to develop the plan. They wanted some assurance from the judge that the resolution that was beginning to take on a consensual colour was known to the judge and had his support. Mr Geekie informed the judge of the events and what was going on outside the court, asked the judge whether he supported the line that the parties were developing, and the judge gave his indication that he did. A consequence would be that the June hearing would no longer be a final hearing because obviously, if there was an agreed period of trial and assessment, the outcome would have to be returned to court, even if it were only returned in the shape of a consent order for approval.

However, what no one appreciated then was that the expert, Dr Holt, had arrived on the first day as a witness of the court. He had filed no statement indicating his position, particularly in relation to the novel disposal suggested by the father. Accordingly Ms Meyer QC, acting for the guardian, had a discussion to see what his position was. She discovered, I suspect to her dismay, that Dr Holt was minded to condemn the proposed assessment as being totally misconceived. The information was communicated to the other parties and to the judge, who then adjourned to take the evidence of Dr Holt on the following day. As forewarned, Dr Holt robustly and immediately condemned the development and was cross-examined by counsel for all parties in the case.

Mr Tillyard QC, who appears for the father, says that it is not as black and white as that, because Dr Holt accepted that his view was based on very limited evidence. He had not seen the father since January 2009, and he further qualified his view by recognising the validity of the contrary opinion expressed by other professionals.

It seems that, at the conclusion of evidence, all counsel felt that they needed an indication from the judge as to what sort of written submissions he would find helpful. Where did he stand? Particularly in response to Mr Tillyard, the judge indicated that he wanted submissions on the bare question plan, or no plan, and further indicated that he would not be delivering a final judgment. So in the end the judge decided to adopt a somewhat equivocal line. He was not prepared to endorse the assessment of father as sole carer; on the other hand, he was minded to grant an interim care order to the local authority, the legal consequence of which was to empower the local authority to decide whether or not to carry out the assessment. So the judge was, on one analysis, neither endorsing nor vetoing the further investigation of the father as a sole carer, and that is clearly expressed in paragraph 5 of the order which directs what was to happen if, despite his lack of enthusiasm for the assessment and his refusal to endorse the assessment, the local authority nevertheless exercised their power to carry it out. So paragraph 5 provides that, in the event that the local authority decide to proceed with the rehabilitation plan, they shall 1) by a certain date serve on the parties a schedule et cetera; and 2) by a later date serve on the parties other things. More curious to me is paragraph 7, which provides:

"The parties do jointly instruct Dr Holt to prepare a further report, the Guardian to be the lead solicitor. The parties do by 26th June agree a further letter of instruction to Dr Holt with a report to be filed and served by 11 September 2009."

We are told by the Bar that they proffered an order to the judge for his consideration. Paragraph 7 was just a general provision for the filing of such further evidence as the parties might seek to adduce. The judge deleted that and wrote the specific order for a further report from Dr Holt in the terms which I have already cited. I do not understand that. It seems to me that if the local authority, despite the judge's disapproval, proceeded with the rehabilitation plan, then there might be an obvious future role for Dr Holt, and he would have appeared as (iii) under paragraph 5. But if the local authority were not

to proceed with the rehabilitation plan, it is difficult to see what possible role there was for Dr Holt at the October hearing. Upon what was he to report? What was he to do in order to put himself in a position to prepare a further report?

The parties were unable to see how they could agree a further letter of instruction to Dr Holt in the circumstances that emerged, namely the local authority's decision to heed the judge's view and not to proceed with rehabilitation. Accordingly, the further letter of instruction has not been agreed or sent.

I wish to acknowledge the lucidity of the judgment of 12 June and the very obvious conscientious care that the judge has taken to explain his order. The judge has lived with this case for a long time and he has obviously brought the most conscientious responsibility to evaluating the weight and effect of Dr Holt's opinion. It can be said strongly that here is a very experienced judge exercising a discretion and founding himself on the evidence of one expert having necessarily to choose between a number of experts offering their differing opinions. How then can it be said that it would be a principled interference for this court to allow the appeal, particularly when there has not been a single advocate here to defend him?

So it is with some misgiving that I declare myself to be persuaded by the submission of Ms Meyer, Mr Tillyard, Ms Platt and Mr Geekie to allow this appeal. It seems to me that, as the judge sat, he really had to choose between two plain alternatives. The first was to countenance the fresh assessment of the father as a sole carer and provide for a further hearing at which the outcome would be considered and final order made. Alternatively, he had to conclude the intended final hearing by robustly vetoing further assessment as Dr Holt essentially advised. There are clear provisions within the statute enabling him to express in formal orders either of those alternatives. What he has chosen to do was to steer a course between either pronouncement. In his reasoned judgment he has rejected the assessment as misconceived, alternatively unrealistic, alternatively as having no discernible prospects of success. But, reading the order that gives expression to the judgment, the untutored might think that he had arrived at a different conclusion. It seems to me that the judge has fallen into error in his failure to conclude the proceedings, as it was open to him to do on the foundation of Dr Holt's evidence, or to provide for a further hearing on the firm foundation of assessment.

To provide for a further hearing on the assumption that there would be no assessment, which was the strong probability in the light of indications given to him by the local authority, was a conclusion that caused a degree of confusion that expresses itself in the united appeal to this court. Had he taken the bolder course, concluded the hearing robustly by vetoing the further assessment, he would, I think,

have been vulnerable in this court, since, as Mr Tillyard has pointed out, a judicial conclusion that the plan was misconceived and had so slender prospects of success that it had to be vetoed would have rested on very slender evidence.

First of all, the only expert voice, Dr Holt, had not seen the boy since January and had made no independent investigation of the father's proposal first expressed in May. Secondly, he had given no warning or indication to the parties that he was going to take that line. Although the judge called him as a witness of the court and allowed all parties to cross-examine him, Mr Tillyard would, I think, have been saying in this court that he was ambushed and that the conclusion plainly lacked fairness.

There are perhaps exchanges within the transcript which indicate that the judge was aware of the vulnerability of making the strong veto order, but it seems to me that, in the position that he found himself, the judge really had no realistic option but to endorse the assessment, expressing whatever reservations he might have had for the benefit of the expert professionals in the case, but nonetheless allowing it to go forward for consideration at the October hearing. It would be impossible to predict that the father would necessarily emerge from the assessment with the endorsement of all the professionals or perhaps of any of the professionals. It was only to give him that chance and it can, I think, be plainly said that there was simply no downside in giving the father that chance. There was no prejudice to the child and, as Ms Platt has reminded us, children are wronged if they are separated from a natural family without full professional investigation and without the judge having had due regard to the principle that, if at all possible, the children should be brought up by their own families.

I have every sympathy for the judge who was, as much as any of the parties, prejudiced by all these unforeseen procedural difficulties. However it seems to me that we should set aside paragraph 7 of the order and invite the Bar to rewrite paragraph 5 of the order to include a provision for an expert report if that is agreed. It may be that it will be perfectly sufficient for the judge at the adjourned hearing to reach final conclusion on the advice of those who have been directly involved in the assessment process: guardian, local authority and maybe an independent social worker.

Finally, I would accede to the submission from Mr Tillyard and from other members of the Bar that the final hearing, hopefully before the end of the Michaelmas term, should be in front of another judge. Although, of course, Wood J naturally suggests himself as the judge with the experience, it is easy to see that the father, who is not primarily an English speaker, might feel himself disadvantaged and at risk of something short of an open mind if the case returned to Wood J. He had provided for a Cardiff sitting, but it is a Swansea case and I would hope that it would be possible to obtain a listing

in Swansea before the designated judge, HHJ Parry. It seems to me highly unlikely that the case will require five days of her time, and I am sure we can leave it to the Bar to sort out those details. All that said, I would allow the appeal.

Lord Justice Scott Baker:

I agree.

Lord Justice Wall:

I also agree.

Order: Appeal allowed