Re L-A (Children) [2009] EWCA Civ 822 (14 July 2009)

Case No: B4/2009/1297

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL (CIVIL DIVISION)

ON APPEAL FROM THE HIGH COURT OF JUSTICE

FAMILY DIVISION, PRINCIPAL REGISTRY

(HIS HONOUR JUDGE SLEEMAN)

Royal Courts of Justice

Strand, London, WC2A 2LL

14th July 2009

B e f o r e :

LORD JUSTICE THORPE

and

LORD JUSTICE MAURICE KAY

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IN THE MATTER OF L-A (Children)

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Official Shorthand Writers to the Court)

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Mr J Baker QC (instructed by Coventry City Council Legal Department) appeared on behalf of the Applicant, the local authority.

Ms F Judd QC and Ms M Grundy (instructed by Wilsons Solicitors) appeared on behalf of the First Respondent, the mother.

Ms J Moseley (instructed by Penmans Solicitors) appeared on behalf of the Third to Eighth Respondents, the children, by their Children's Guardian .

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HTML VERSION OF JUDGMENT

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Lord Justice Thorpe:

On 8 June 2009 HHJ Cleary sitting in the Coventry County Court refused to sanction an application by the local authority for the swift removal of four children from the home of their mother. The children are aged respectively five, two and twins of about 16 months.

The care proceedings had been initiated by the local authority on the grounds of chronic neglect. There had been a number of directions hearings with a view to a formal hearing on 27 July 2009.

However, on 7 May a social worker visiting the mother and children in the home found a state of affairs that suggested that chronic neglect was deteriorating into something more serious, which, even in the short term, placed the children in jeopardy. Accordingly the local authority decided to seek the court's leave to remove the four children into foster care pending the final hearing. There were immediate discussions as to whether further assessment necessarily preceded the fixture. In March there had been a suggestion that there should be a further psychological assessment of the mother but she at that time was resistant, and accordingly at the directions hearing HHJ Bellamy had decided not to direct such an assessment. But following the incident of 7 May it seems that the mother reconsidered her position and offered her assent provided that was a report also from an independent social worker. That led to the recognition that the commissioning of these further reports would necessitate the vacation of the fixture on 27 July. The case was then reprogrammed to a seven-day fixture which unfortunately the court could not accommodate before 10 February 2010.

So when the judge sat in early June he contemplated an eight month interim during which he had either to grant the application and break up the family or leave things as they were for the deployment of the full case on each side. The hearing before HHJ Cleary was spread over four days, although it is agreed that only nine hours of court time was devoted to this case during that period because of other listings. The local authority's application was supported by the children's guardian, but the judge indicated at the conclusion of submission that he was not minded to accede to the local authority's application but felt that there should be a sharing of parental responsibility which could be achieved by the local authority's amendment of the care plan to acknowledge that the children should remain in the family home but under the protection of an interim care order. That was the outcome favoured by the judge and that was the outcome that emerged from his judgment.

With the support of the guardian the local authority applied for permission to appeal, which was granted by Wilson LJ on 18 June. In granting permission he fixed the appeal for today's date. The local authority is represented by Mr Jonathan Baker QC. He was to have led Mr Miller who appeared below, but Mr Miller cannot be with us today so Mr Baker has presented the case on his own. The mother's opposition has been presented by Ms Judd QC, leading Ms Grundy, who appeared below, as did Ms Moseley, who represents the guardian today.

Mr Baker's fundamental submission, which is fully supported by Ms Moseley, is that the judge misdirected himself in law in refusing the application. The judgment below is characteristically clear and thorough from a judge who has very great expertise and experience in this field. In directing himself as to the law he first of all considered sections 31 and 38 of the Children Act 1989 which provide the essential threshold that an applicant must cross before successfully completing an application for an interim care order. In a sense that was no more than a prelude, because on the mother's behalf it was conceded that the home circumstances as discovered on 7 May and on earlier occasions were sufficient to take the local authority over the threshold. Accordingly the judge's task

was to consider whether the order sought by the local authority was within the principles to be found in section 1 of the Children Act 1989, and particularly the paramountcy of the child's welfare, the principle that delay is likely to prejudice welfare, the welfare checklist in section 1(3) and the provision that no order should be made unless the making of an order would be better for the child than making no order at all.

The judge did not consider those provisions or recite them independently, but having set out the statutory provisions in section 31 and 38 went on to consider what he described as the "significant judicial gloss over the year since 1989". He considered specifically the case of Re M [2006] 1 FLR 1043, decided by this court in 2005, and the case of Re H [2001] 1 FCR 350, again decided in this court. However, he then continued to consider a decision at first instance, the decision of Ryder J in the case of Re L [2008] 1 FLR 575. The paragraphs in the judgment of Ryder J that require particular consideration are paragraphs 10 and 16, and they are thus:

"10. Even more stark is the failure to acknowledge the need to consider on the alleged facts of this case whether:

a) there is an imminent risk of really serious harm i.e. whether the risk to ML's safety demands immediate separation (per Thorpe LJ in Re H (a child) (Interim Care Order) [2003] 1FCR 350); and

b) if not, the question whether mother is able to provide good enough long term care should be a matter for the Court to decide at a final hearing not to be litigated at an interim hearing which effectively pre judges the full and profound trial of the Local Authority's case and the parents' response to the same thereby usurping or substituting for the function of the final hearing or issues resolution processes: Re G (minors) (Interim Care Order) [1993] 2 FLR 839 at 845 CA and Re H (Supra) at paragraph 38."

"16. The second is the nature and extent of the risk. The fact that the Local Authority and/or the children's guardian do not have knowledge of matters either generally or even because of an alleged course of conduct including the deception of a parent does not change the actual risk that a child faces it merely changes their perception or assessment of that risk. If in fact the perception of risk could have been greater had the Local Authority or the children's guardian known of the parents alleged covert meetings, then the question still arises as to whether the consequences of that risk have been adequately protected against or can be so as to ameliorate the same. If so, there will not be an imminent risk of really serious harm because of the new information but rather a risk of harm that may be really serious but which has not yet occurred and may not do so within the proceedings if adequate arrangements can be put into place."

It is common ground at the bar that Ryder J did not intend by those paragraphs to restate or to alter the approach that appears from the two Court of Appeal cases that I have already cited, augmented by a third case in this court, namely Re K and H [2007] 1 FLR 2043. That is transparent from paragraph 10(a) of the report where Ryder J identifies the source of the summary as being my judgment in the case of In Re H. What is it then that the three authorities in this court seem to establish? In the first,

the case of Re H, the crucial paragraphs are 38 and 39, from which can be extracted two propositions, the first that the decision taken by the court on an interim care order application must necessarily be limited to issues that cannot await the fixture and must not extend to issues that are being prepared for determination at that fixture. The second proposition which appears from the final sentence of paragraph 39 is that separation is only to be ordered if the child's safety demands immediate separation. In the subsequent case of Re N in paragraph 27 I described that a local authority in seeking to justify the continuing removal of a child from home necessarily must meet a very high standard. In the final authority, K and H, the key paragraph is paragraph 16 in which I described the court's approach thus:

"…at an interim stage the removal of children from their parents is not to be sanctioned unless the child's safety requires interim protection."

In his review of these authorities Ryder J coined a phrase which according to Mr Baker has given rise to considerable problems. The phrase is to be found in the first line of paragraph 10(a), namely: "an imminent risk of really serious harm". Mr Baker says that it has been the experience of practitioners and local authorities that this is the phrase within all these reported cases that is being emphasised as the key phrase, the key definition of the standard that must be achieved to justify the making of an interim care order. So for me the question today is: did HHJ Cleary construe these paragraphs in the judgment of Ryder J as simply restating the test defined in the appellate cases, or as the definition of the new standard to be applied to future cases? As a matter of principle it is transparent to me that a judge as experienced as Ryder J would not have been seeking to break fresh ground that was not for him. He was bound by the authorities in the Court of Appeal. He plainly recognised that and so expressed himself.

The question is: did HHJ Cleary so read paragraph ten of Ryder J's judgment? And the answer to that question emerges clearly between paragraphs 155 and 160 of his judgment. I read into this judgment the most material passages:

"155. Mr Justice Ryder in Re L, reported at [2008] 1 FLR 575 puts down a marker. He says, in my brutally short summary, that there should be an imminent risk of really serious harm … and urgent reason to remove …

"156. That, argues the local authority and the Child(ren)'s guardian sets the bar too high.

"157. For my part I quite accept that it might be argued that the comments of Ryder J might more properly be the test for an Emergency Protection Order. But that is the law which binds this court.

"158. First I find that I am bound by that decision and that I have not been persuaded that there is an imminent risk of harm ….

"160. I cannot say that the position in which I find myself is a happy one. I have no enthusiasm at all for leaving the children where they are, but I am not able to override the decision of Ryder J -- that would be the responsibility of the Court of Appeal."

In my judgment it is clear beyond argument that HHJ Cleary construed paragraph 10 of the decision in Re L as a decision that altered the law and that raised the bar against the applicant local authority. By that evolution he was bound and only the Court of Appeal could unbind him. For the reasons already sketched, that, in my view, was a misdirection. Plainly the judge was wrong to think that the words of Ryder J that there should be an imminent risk of really serious harm prevented him from doing what he instinctively felt the welfare of the children required. That that was his instinct seems to me to be plain from paragraph 160 of his judgment.

Once that conclusion is reached it follows that the appeal must be allowed. What should be the disposal or what should be the future disposal might have been a difficult question had Mr Baker not conceded in opening his appeal that we should remit for retrial. Although that is an unattractive course it is a necessity given that in the interim it seems that here have been no fresh causes for concern and that, given some extra support that has been introduced, some improvement has been noted in the mother's standard of care. Another pragmatic reason is that the local authority recognises that any short term placement should keep these four children together and that they will need time in order to find such a resource.

Mr Baker has told us that the current interim care order expires on 3 August and accordingly it will be necessary for the County Court to list this case for retrial on or shortly before the 3 August. Obviously it would be helpful to listing in that court if the bar would this afternoon give a considered time estimate for the retrial.

But I would simply allow the appeal and remit the issues.

Lord Justice Maurice Kay:

I agree.

Order: Appeal allowed