Re M (Children) [2008] EWCA Civ 66 (22 January 2008)

Case No: B4/2007/2492

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL (CIVIL DIVISION)

ON APPEAL FROM CHICHESTER COUNTY COURT

(HIS HONOUR JUDGE BARRATT QC)

Royal Courts of Justice

Strand, London, WC2A 2LL

22nd January 2008

B e f o r e :

LORD JUSTICE THORPE

LORD JUSTICE WALL

and

MRS JUSTICE BLACK

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IN THE MATTER OF M (Children)

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(DAR Transcript of

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Official Shorthand Writers to the Court)

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Mr H Travers (instructed by The Owen-Kenny Partnership) appeared on behalf of the Appellant.

Miss R Magee (instructed by Messrs E J Moyle) appeared on behalf of the Respondent.

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HTML VERSION OF JUDGMENT

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Lord Justice Thorpe:

HHJ Barrett QC sitting in the Chichester County Court had a complex family situation to consider at a trial which he conducted on 2, 3 and 30 July last year. On 2 October he sent out his written judgment which was reduced to an order of the court on 18 October. An application for permission to appeal was filed in this court on 1 November and at the end of the year, having read the papers, I directed an oral hearing on notice with permission to follow. That is what we have conducted today.

The complexity of the family relationship is illustrated by the chronology which Mr Travers has incorporated in his excellent skeleton argument. The judge considered the children of Mr and Mrs Mayne, who are each approximately 30 years of age. Into their marriage Mrs Mayne brought an earlier born child, Ashleigh, whose date of birth was 22 May 1995 and who was accordingly four and a half years of age at the date of the marriage on 18 September 1999. Within the marriage three children were born: Leyton in 1999, Casey in 2000 and Kiera in 2002. The parents separated in August 2004 and entered into an agreement, the effect of which was to divide the children between

their parents and from each other in the sense that at certain times one child would be with father and the others with mother and vice versa.

In the spring of 2006 the father commenced a relationship with Amy Jones who is roughly 12 years his junior. She brought to their relationship two children: Megan, who was born in 2002, and Toby, born in 2003.

The amicable arrangements between the parents broke down in November 2006 when the father failed to return the children to their mother, asserting that he had discovered that Leyton and Casey had been subjected to relatively serious sexual abuse over a period of about two years by their stepsister, Ashleigh. The mother conventionally applied for a return order. The father cross-applied and the district judge swiftly and conventionally ordered the return of the status quo ante, pending a full investigation. During the week that the children were away from their mother, child protection services, both local authority and police, carried out an investigation of the allegations that Leyton and Casey had made whilst in their father's care. The allegations, when repeated to child protection officers, were considerably watered down and at the end of the week social services closed their file. There was, however, a CAFCASS report before the judge, and the CAFCASS officer essentially adopted the report that the Child Protection Services had made in writing to the district judge at the inception of the proceedings.

The judge heard oral evidence from mother and father and from Amy Jones, as well as from the CAFCASS officer. In his reserved judgment the judge came to the summary conclusion that Ashleigh had indeed interfered with her step-brothers sexually over a period of approximately two years. He, however, set that consideration aside when approaching the question of what arrangements should be made for the future. The advice of the CAFCASS officer was that splitting the children over the period of the agreements clearly worked to their disadvantage. He accepted her recommendation that in future they should be kept together as a group of three. However, he rejected the welfare officer's further advice that the three children should have a primary home with their father and that they should simply have generous contact to their mother during school terms and holidays.

The judge explained why he regarded this as a classic case for a shared care arrangement expressed as a shared residence order. He finally considered how such orders should be spelt out in terms of the division of the children's lives between the parental homes during school terms. The conclusion at the end of his judgment was expressed in the order of the court, which provides for the children in each period of fourteen days to sleep for nine nights with their father and five nights with their mother.

That arrangement has been challenged by Mr Travers in his grounds and in his skeleton on the basis that it is quite contrary to the welfare, particularly, of the youngest child Kiera. Miss Magee who has argued the respondent's case with equal vigour and clarity characterises this as an appeal limited to the arrangements for Kiera. That is certainly a permissible reading of the grounds of the appeal but I do not regard it as precluding Mr Travers from ultimately seeking an equal division of the time of all three children between the two parents, given that the judge has concluded, in my view rightly concluded, that these children should at all times be together. If there is an overwhelming need for Kiera to spend more time with her mother and if the children cannot be divided, then the consequence is that the older children spend more time with their mother too.

So I begin by considering the first of Mr Travers's grounds, which is that the judge was quite wrong to deny Ashleigh the opportunity of participating in the proceedings to defend herself against the possibility of an adverse judicial finding. That submission should in order to succeed, rest on stronger foundations than it does in the present case. If there was a clear case for separate representation for Ashleigh as a juvenile perpetrator, it should have been articulated at a directions hearing well in advance of trial. All we know is that the application was advanced during trial. It was refused by the judge in the exercise of a discretion, for reasons which have not been transcribed and made available to us. We are simply told that in explaining himself he placed great weight on the need for early resolution and thus the need to avoid the delay consequential upon granting separate representation to a child half way through proceedings. Clearly there is no possible basis for our interfering with the judge's discretionary conclusion on the application of some sort of general principle which he could be said to have ignored.

My Lady has pointed out to Mr Travers a brief report in a family journal of a decision of this court in February 1999, reported as Re: BJ, in which the then President had determined that a child in public law proceedings of much the same age as Ashleigh was not entitled to separate representation in order to defend himself against a charge of abuse. Times may have changed, given that the Human Rights Act 1999 now bears on all such decisions; and it may well be that in another case on another day this court will have to consider more profoundly the argument in principle that Mr Travers has advanced. But this is not that case and given the circumstances that I have outlined there is no more to be said about the first ground.

The second ground has much greater strength. Mr Travers submits that it was not open to the judge to make such a grave finding against Ashleigh on the application of the elevated standard of proof in a case such as this, where the allegation is of relative gravity. I am in no doubt that Mr Travers succeeds in this second submission. The judge, bizarrely in my view, incorporates his adverse finding against Ashleigh in paragraph 34, in which the question he poses is whether the mother had any complicity in or responsibility for Ashleigh's sexual interference with her half-brothers, which he has seemingly accepted as a given, without any analysis of the evidence pro and contra such a conclusion. Later in

his judgment he seeks to retreat by suggesting that what he has found against Ashleigh is no more than juvenile mutual physical exploration. There is a glaring inconsistency in that categorisation, and the essential judicial task required to precede any adverse conclusion against Ashleigh is simply absent. The two boys have given differing accounts to their father and to child protection agencies. Ashleigh has consistently denied any improper behaviour with her stepbrothers throughout. Social services and child protection services, having investigated, had closed the case swiftly. None of these considerations is apparent in the judge's analysis.

The remaining question is whether, having reached his conclusion for a shared residence order, the judge has exercised in his discretion as to division of time in a way that is proof against Mr Travers' criticisms. Again I reach the conclusion that he has not. In paragraphs 80 and 81 he has sought to explain why he rejects the CAFCASS officer's recommendation of the father as the primary carer. He continues by fortifying his preference for shared care by saying in paragraph 82:

"Such an order and such a label reaffirms the continuing major equal role this mother must play in the lives of all three children when they reside in her household during the periods defined in the order."

He continues in relation to Casey that that would restore to him the role of his mother in his life, in what in his judgment she should have continued to play. In relation to the other two children he said:

"Equally important however is the fact that such an order will not radically change the label used to define the relation between Leyton and Kiera and their mother. This will reflect the reality of the future arrangements, spending a substantial period of time in the mother's household every fortnight during both the school term time and the school holiday. It will also respect both children's wishes and feelings and ensure all three children will be with the same parents at the same time..."

Now the reference to the children's wishes and feelings takes me back to an earlier paragraph of the judgment, 16, in which the judge had recorded:

"CAFCASSS has ascertained that the children have the following wishes and feelings. Casey wants to see more of his mother. Leyton wants to spend equal time with both parents and cannot decide with whom he wants to live. Kiera's definite wish is to remain living with her mother but wants to spend time with her father. I think in this case these collective wishes and feelings are a matter of considerable weight especially in the case of Kiera, despite her age, and because of her sex as the mother's second daughter."

Well I inevitably observe that the considerable weight to which the judge referred in paragraph 16 seems not to have been reflected in paragraph 84 when he sought to introduce the children's wishes and feelings as a justification for his detailed conclusion. The detailed conclusion was to leave the children with their father for nine of the fourteen nights and only five with their mother. The judge seems to think that that was a pattern proposed by the CAFCASS officer. I have a difficulty with that, since of course the pattern proposed by the welfare officer was a pattern to reflect a conclusion that the children should primarily live with their father, a conclusion that the judge had of course rejected.

So ultimately we arrive at the bizarre conclusion that the judge, having rejected the CAFCASS officer's recommendation of children to live with father but to have contact with mother, in favour of the sharing of care, shared the care in such a way as to give the mother less time with the children than she would have received as the contact parent under the CAFCASS officer's proposals. So analysed, the exercising of the judge's discretion is plainly flawed and can not be upheld. The obligation is on this court to exercise the discretion afresh and, given the undoubted wisdom of keeping these three children together and of enabling them to enjoy the benefits of a shared care arrangement, equality is, if not indicated, certainly a starting point in any consideration. Given the strength and clarity of the children's wishes expressed in paragraph 16 of the judge's order, it seems to me that equality is plainly the answer that this court should support.

For all those reasons I would grant permission; allow the appeal; vary the order below. As to the division of the children's time recited in paragraph 1A, the parties had best agree between themselves how equal division is to be arrived at. There is no need for any revision of the order in relation to Ashleigh. The finding against her has not been reflected in any order of the court. It will be enough to make it plain that the finding has at this level been discharged.

Lord Justice Wall:

I agree. In my judgment this is a paradigm case for a shared residence order, and in reaching that conclusion the judge was in my view plainly correct. Having reached that conclusion, however, I look in vain in the judgment for any reasoning behind his conclusion that the children's time be divided during each fortnight of the school term between their parent's households, nine days to five in the father's favour.

For the father, Miss Magee makes the point that in her grounds of appeal on this part of the case the only challenge which the mother makes is for the alteration in the balance of Kiera's residence, and she does not complain about the judge's order in relation to the two boys. However in paragraph 3 of the grounds the mother does complain that the judge was wrong to make an order which meant that the three children will now spend six consecutive nights in their father's household. On balance, therefore, I have come to the view that the exercise of the judge's discretion to split the children's time between their parents nine days to five during school term is flawed, and that the proper course is for the children's time to be split equally between their two parents. In my judgment this course best meets their needs to be together at all times and to enjoy the company of both their parents to the fullest possible extent.

As to the finding against A, I agree with my Lord's judgment on both limbs of the mother's first ground of appeal and do not wish to add anything.

Mrs Justice Black:

I agree with everything that has been said so far and do not want to add anything, thank you.

Order: Application granted; appeal allowed