

2010] EWCA Civ 826

Case No: B4/2010/1238

**IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM NOTTINGHAM COUNTY COURT
(HER HONOUR JUDGE BUTLER QC)**

Royal Courts of Justice
Strand, London, WC2A 2LL
15 June 2010

Before:

**THE PRESIDENT OF THE FAMILY DIVISION
(LORD JUSTICE WALL)
LORD JUSTICE THORPE
and
MR JUSTICE HEDLEY**

IN THE MATTER OF F (Children)

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Official Shorthand Writers to the Court)**

**Ms Elizabeth Szwed (instructed by Nottingham Family Law Associates) appeared on behalf of
the Appellant**

**Miss K Branigan QC and Mr P Bowen (instructed by Nottingham City Council) appeared on
behalf of the 1st Respondent, the Local Authority.**

Mr Brian Jubb appeared on behalf of the 2nd Respondent, the Children's Guardian.

HTML VERSION OF JUDGMENT

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Lord Justice Thorpe:

1. This is an appeal from the judgment of Her Honour Judge Butler QC given in the Nottingham County Court on 14 May and the appeal comes to us as a result of permission given by Wilson LJ. He also fixed the hearing of the appeal for today.
2. The proceedings before the judge concerns twins, and before the court was an application by the Local Authority for interim care orders and by the parents for leave to instruct an independent social worker on the developing case.
3. The background has been admirably summarised in two paragraphs of the skeleton argument submitted by Miss Branigan QC on behalf of the respondent Local Authority. She writes as follows:

"8. [The twins] are the 5th and 6th children respectively to be born to the Mother. The Mother's previous four children have been the subjects of 2 separate sets of public law proceedings in Nottingham County Court, both of which have been conducted by H.H.J. Butler QC. None of these children have returned to the care of their mother.

9. [The twins] are also the 5th and 6th children of the father. A residence order in respect of his second child... (born 1.04) was made by the Nottingham [Family Proceedings Court] in 2005; however, care proceedings were commenced in respect of [the child] in 2007 and, at their conclusion, the maternal grandparents received a residence order. The remainder of the father's birth children are in the care of their (2) mothers."

4. It is unnecessary to record any of the detail of the previous litigation prior to a judgment given by Her Honour Judge Butler on 30 March 2010 to conclude the future of a one-year-old girl, S, the mother's child thought initially to be also the father's child, although that notion was dispelled by DNA testing during the course of the proceedings. S is a child with disability. At the time that the judgment was given these parents were expecting the delivery of the twins probably in the month of June. The judge's order in relation to S was to commit her to the care of the Local Authority, no doubt to the bitter disappointment of her mother.
5. In fact, the twins were born prematurely, less than four weeks later on 25 April and the Local Authority immediately issued care proceedings on 27 April. They sought an interim care order, and His Honour Judge Mitchell on 30 April made a case management decision that that contested application should be listed before District Judge Oliver on 10 May. That was a crucial date, because the hospital had said that they wished to discharge the family on that day.
6. Her Honour Judge Butler was not available to hear the case on that date and therefore it was listed before the experienced District Judge. He heard, during the course of a day, oral evidence, at the end of which he refused the Local Authority's application for an interim care order and granted the parents' application for leave to instruct an independent social worker.
7. The Local Authority immediately sought permission to appeal. I questioned Miss Branigan as to why that application had been mounted, since it is my understanding that no permission is required to appeal such a decision from District to Circuit Judge. Be that as it may the application was made and granted and immediate arrangements were made for the appeal to be heard that same week in front of Judge Butler, commencing on Thursday 13th.
8. There was no time to transcribe the judgment of the District Judge and, in accordance with convention, counsel submitted to the District Judge an agreed note of his judgment for his approval. That was probably done on the 12th and no response from the District Judge emerged until, on the 13th, Her Honour Judge Butler informed the parties that the District Judge did not approve the agreed note, but had not apparently had the opportunity to correct it. Judge Butler then proposed to the parties that, in the absence of an approved note of judgment, she would embark upon a re-hearing of the case on the same oral evidence that had been paraded on the 10th. The parties agreed to that course. I well understand that from the Local Authority's perspective it was a fair and indeed perhaps even an attractive development. The Guardian was at the time on leave and plainly Mr Jubb was not in a position nor would he have wished to raise any objection.
9. Ms Szwed for the parents said that, with the advantage of hindsight, she should have demurred and required the relatively simple conclusion of the proceedings before the District Judge to be achieved. After all, there was no reason why he should not have made whatever corrections he wished or additions during the course of that day. However, be that as it may, the judge embarked on the hearing, concluded it on the 13th and announced her decision to grant the Local Authority's application and to refuse the parents' application for reasons which she would give on the following day.
10. Judgment was duly given on the 14th. Application was made to her for permission to appeal by Ms Szwed and refused by the judge. Accordingly, the appellant's notice was received in this court on 24 May.
11. This is a bizarre procedural history and has led to what seems to me to be a fundamentally unsatisfactory conclusion, namely that two judges in the same court in the same week have reached diametrically opposite conclusions on the same material. That is because of the procedural eccentricities that I have already recorded. So it is not surprising that the appellant's notice is endorsed by the grant of permission by the single Lord Justice.
12. In relation to the interim care order, Ms Szwed advances a strong case. It is common ground that the parents are competent to deliver good enough standards of care to these twins in the interim. No criticism has been raised of their management within the confines of the hospital. Since then they have been seeing the children five days a week for five hours a day.
13. Ms Szwed relies upon the decision of this court in the case of Re LA (Care: Chronic Neglect) [2010] 1 FLR 80. This was the only authority to which the judge referred, albeit briefly, in her judgment. The case establishes two propositions. The first is that, on an application for an

interim care order, the court should limit itself to issues that cannot await the trial and must not extend to decide issues that are being prepared for trial at that final hearing. The second proposition is that separation is only to be ordered if a child's safety demands immediate separation.

14. Miss Syed submits that the judge has essentially decided this case prematurely. She was led to the determination of issues that are apt for decision at the final hearing. She was over-influenced by the evidence that was before her on 30 March and the conclusions that she reached on that day. Effectively, she has decided that since the parents were judged unfit to care for S on 30 March, it therefore follows that they must be unfit to care for the twins.
15. On the parents' application to instruct an independent social worker, Ms Szwed refers us to the CV of the chosen expert, a Mr Tansey, which shows that he has a much greater range of skills and experience than his title suggests. He has a degree in psychology and he has specialised over the years in dealing with a broad range of problem cases. She plainly submits that without the investigation of an independent expert these parents will have no effective case to advance at an autumn trial.
16. Miss Branigan, in a forthright submission, made it plain that the Local Authority's case is that the combination of past failings and, particularly, past failings to engage in necessary therapeutic processes, combined with present antagonism to the social worker in the case, leads the Local Authority to the inevitable conclusion that they cannot possibly be contemplated as safe long-term carers for the twins. They have made no change since the judgment of 30 March, and, given their history, they have no realistic prospects of change. That was the case presented. The judge was plainly entitled to uphold the Local Authority's analysis.
17. Mr Jubb, in a full and carefully considered submission, both written and oral, supports the Local Authority to the hilt. He accepts that the Local Authority and indeed the Guardian would review their respective positions if any change manifested itself in the interim. That concession is made in the face of another, namely that the Local Authority have every intention of going to the panel to seek a permanence endorsement at a meeting in July and, if successful, that will effectively set the course for the development of the case to final hearing. Both Miss Branigan and Mr Jubb submit that really an independent social worker has no contribution to make. Mr Jubb says that it is a matter for a judge to decide whether additional expertise is necessary for the fair resolution of the case and the judge here decided it was not.
18. I come to clear conclusions on these rival submissions. It is necessary to turn at once to the judgment and to note the heavy emphasis that the judge placed on the history and particularly of the proceedings in relation to S, which had led her to the conclusions that she announced on 30 March. She then proceeds to consider the birth of the twins and the parents' achievements or want of achievements in relation to searching out for themselves the therapeutic help that the expert in the earlier proceedings had identified. The judge really approached a conclusion at pages 8 and 9 of her judgment. She said that safety embraced both emotional and physical state and she continued:

"... and here, the expert evidence is, the evidence of Dr Sawtell at the end of March, that these parents could not safely parent children unless further therapeutic work was undertaken, and that that could only be done on a voluntary basis."
19. She continued that she accepted the submission of the Local Authority and the Guardian that the children could not be safely left in their parents' care with the lack of psychological therapy and with a low level of cooperation with social services, both in terms of the relationship with the actual social worker and indeed their co-operation with the parenting assessment. She then recorded that both parents in their oral evidence had asserted they had no need of therapy and were perfectly competent to parent without. She continued with this passage:

"There are very few welfare issues in this case, because the practical day-to-day care is not an issue. What is an issue, and it comes to the three reports by Dr Sawtell and her evidence at the end of March, is the psychological aspect of this. And that cannot be covered by an independent social worker."

20. She then went on to cite with approval a passage from the skeleton or written submissions of Mr Jubb, which had asserted that the minority of cases show circumstances such that the court can properly make a decision whose effect in reality is to conclude the care proceedings. He went on to submit that on the facts this was one such.
21. It is plain to me that the judge has rested her decision on the conviction that to refuse the interim care order would be to expose the twins to the risk of emotional harm. It seems to me that the secondary consideration, antagonism, cannot have been to the forefront because she concluded her judgment by indicating that the parents would still have to co-operate with the social services, with health visitors and with doctors, and that would be a test of their resolve. So, plainly, the judge was accepting inferentially their capacity so to do.
22. So, for me, the judge has fallen into error. She focused on the issues that will fall to be addressed at the final hearing. She has too much concluded that the history is in itself the determination of the interim care order. She has thereby breached the first of the propositions in Re LA. Secondly, her identification of the risk of emotional harm does not, in my judgment, meet the high test that is there in the second limb of Re LA.
23. Rhetorically I ask, what are the risks to the safety of the twins that demands their immediate separation? In a case in which there are no welfare concerns, no doubt as to the parents' ability to care for the twins on a day by day basis, given their very tender age, given the fact that there will be a final hearing in the autumn, it seems to me that the judge's elevation of emotional harm to justify the making of an interim care order for separation of parents and children does not begin to meet the high threshold set by the authorities in this court. So for those reasons I would set aside the interim care order.
24. Equally, I am in no doubt that the parents' application for the instruction of an expert in the case should be granted. I think that the judge prematurely refused that application. This is a situation in which the Local Authority have yet to prepare and present their case. Any decision as to what would constitute litigation fairness is difficult to assess until the extent of the Local Authority's battle line has been declared. It is a case in which the parents have little obvious ability to assess available therapeutic services, to determine which is appropriate for their respective needs and then to access those services, having no independent means with which to engage them. It seems to me that Mr Tansey, the selected expert, has an obvious role in assessing what the parents need, what is available locally and within what timeframe the service could be expected to deliver benefit. Whether he would be the only expert in the case would depend upon the Local Authority's deployment, whether they will be instructing Dr Sawtell to prepare a report in the final hearing in this case or whether they be relying only on historic material. I would see every advantage in getting Mr Tansey to the case at a relatively early stage with the knowledge that his report can be available by 26 August.
25. For the good management of this interim future and in the hope that the relationship between the parents and the Local Authority can be improved, it would be sensible for undertakings or agreements to be entered today: an acknowledgment by the parents of their duties to cooperate, particularly with health visitor services, with social services and with whatever medical or therapeutic services may be engaged, either for the children or for themselves. That is the disposal that I would propose.

Mr Justice Hedley:

26. I agree with the disposal proposed by my Lord for the reasons that he has given. I desire just to make four very brief comments of my own. The first is that this decision is not authority for the proposition that there can never be a case in which the circumstances are such that the final disposal is obvious from the outset, merely that this case is not one of them. And it is not one of them for the reasons given by my Lord in explaining why an interim care order should not have been made in this case.
27. The second comment is that it is a great pity that the learned District Judge was not pressed to provide the corrections to his judgment. He had a very full note of a very short judgment and would have been under a clear duty to attend to it at once had he been pressed to do so, and perhaps the procedural problems in the case would not then have arisen.
28. The third comment is simply to indicate that since the coming into force of the 2002 Act, it has not been possible for courts and local authorities to undertake parallel planning and,

therefore, there is much greater pressure to try to find at a very early stage the correct route forward in order to obviate delay. And it seems, purely speaking for myself, that trial judges may need to be astute to ensure that cases are not being progressed at a speed to prevent delay which actually prevents a proper consideration of options for permanency in cases where the outcome is not on the face of it immensely promising.

29. The fourth comment is simply that although once the threshold is crossed, welfare becomes the paramount and principal consideration of the court, it is not in my judgment correct to suggest that fairness to parents is not necessarily a factor to be borne in mind at that point. It can hardly be in the welfare of a child for the parents not to be given a fair opportunity for that child to be able to be brought up by them rather than by strangers. And whilst of course the welfare of the child will be the paramount consideration, fairness to parents is a matter that a court would have in mind at every stage of the proceedings.
30. But having made those four comments, for the reasons that my Lord has given I entirely agree with the disposal proposed.

Sir Nicholas Wall P:

31. I agree with both judgments and with my Lord, Thorpe LJ's, analysis. I wish myself to add only one point and it is this. I think it important always to bear at the forefront of one's mind that one is, here, dealing with an interim order. In his helpful and very full skeleton argument Mr Jubb, for the Guardian, has looked at decisions later than Re LA, in particular two decisions of this court both of which bear the initial B; one the neutral citation of which is [\[2009\] EWCA Civ 1254](#) and the other neutral citation [\[2010\] EWCA Civ 324](#).
32. In the former case the test which the trial judge had proposed was whether or not in the circumstances the continued removal of the child from the care of her parents was proportionate to the risk of harm to which she would be exposed if she were allowed to return to her parents' care. Plainly, on any given set of facts, Re L (Care Proceedings: Removal of Child) [\[2008\] 1 FLR 575](#) applies. Equally, in my judgment, had the judge applied the test of Re B to the facts of this case, she would have reached the same result. It would not have been a proportionate exercise of discretion to remove a child in the circumstances of this case.
33. Therefore, in my judgment, whatever test one applies to the facts of this particular case, the judge was premature in making an interim care order and should not have done so. I, therefore, associate myself with the orders which my Lord proposes.

Order: Application granted