Re A (Children)[2010] EWCA Civ 1490

Case No: B4/2010/1379

IN THE COURT OF APPEAL (CIVIL DIVISION)

ON APPEAL FROM PRINCIPAL REGISTRY OF THE FAMILY DIVISION

(MISS RECORDER SADD)

Royal Courts of Justice

Strand, London, WC2A 2LL

23rd September 2010

B e f o r e :

LORD JUSTICE THORPE

LADY JUSTICE SMITH

and

LORD JUSTICE PATTEN

_____

Between:

IN THE MATTER OF A (CHILDREN)

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Official Shorthand Writers to the Court)

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Mr Hugh Southey QC(instructed by Fisher Meredith) appeared on behalf of the Appellant.

Ms Kate Mather (instructed by London Borough of Lambeth) appeared on behalf of the Respondent Local Authority.

Mr David Bedingfield (instructed by Freemans) appeared on behalf of the Respondent Mother.

Mr Dennis Sharpe (instructed by Dunning & Co) appeared on behalf of the Respondent children by their Guardian.

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HTML VERSION OF JUDGMENT

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Lord Justice Thorpe:

The London Borough of Lambeth commenced public law proceedings in March 2009 in relation to three children of parents who had had undoubtedly a turbulent relationship. Interim care orders were made in relation to two of the children and an interim supervision order in relation to the third in September 2009. The appointed guardian was a Ms Coker-Thompson. She prepared an interim report in August in which she recorded that the children had been exposed to domestic violence. What had

been intended to be a disposal fixture in October was then adapted to investigate this issue of whether or not the children had been exposed to domestic violence. This four-day fixture commenced on 19 October and concluded on the 23rd, when the judge, Recorder Sadd, delivered her judgment, finding that the father had indeed been guilty of persistent domestic violence inflicted on his wife and to some extent on two of the children.

The arrangements were made for the consideration of the children's future at a hearing in May, but it is important at this stage to underline that at the investigation in October the guardian had not adopted a position of neutrality but had instructed her counsel, Mr Sharpe, to support the mother fully in her evidence and submissions and, accordingly, at the close of the case, Mr Sharpe was arguing that the evidence of the mother should be accepted despite some apparent inconsistencies, and that generally the evidence of the father should be rejected. The Recorder accepted Mr Sharpe's submissions, which she described as key.

The hearing, fixed for 17 May 2010, was destined to be adjourned for reasons quite unconnected with the issues raised by this appeal. By chance Mr Sharpe had been appearing in the same court before one of the regular judges, HHJ Cox, some seven days before the case was due to commence and, as a result of observations made by HHJ Cox, Mr Sharpe informed the parties to this pending case that there were concerns arising out of the fact that the Recorder in her practice had been instructed by Ms Coker-Thompson in another public law case and that those instructions were continuing and live at the date of the trial in October. Accordingly an application was made for the Recorder to recuse and, after an adjournment to allow the application to be formally prepared and fortified by a skeleton argument, on 18 May the Recorder delivered a judgment in which she recused herself from determining the outstanding issues as to the future of the children, but refused the father's application to set aside her findings and conclusions incorporated in the judgment of 23 October. The judge's reasons for recusing prospectively and refusing retrospectively are set out in a relatively brief judgment.

The refusal led to an application for permission to appeal, which was considered on paper by Black LJ and on 2 July she granted the application, explaining that the point was plainly arguable, although there were nice ancillary questions as to whether the Recorder had jurisdiction to set aside an order which was perfected and in respect of which she was essentially functus.

The case in this court has been very thoroughly prepared, and we have two skeletons from Mr Southey QC for the appellant father and skeletons from Ms Mather for the local authority, Mr

Bedingfield for the mother and Mr Sharpe for the Guardian ad Litem. All three oppose Mr Southey's appeal, albeit for different reasons.

The responsibility for the family has since passed from Lambeth to Camden, and Camden have helpfully submitted a note from their counsel in which he explains that his involvement is too recent to justify his attendance before this court today. Mr Southey's submission can be summarised in this very simple way: the Recorder having recused in respect of the future, on the ground -- although she does not thus express it -- that an informed objective observer might question her impartiality, it must follow logically that the same taint is there in respect of her past adjudication and therefore, as a matter of simplicity, she was wrong to have refused to set aside her findings on the domestic violence issues. Mr Southey makes the point that the guardian is not an ordinary litigant and is not a party to the proceedings. The guardian is an expert and, accordingly, is not covered by the classic line of authority, which makes it plain that a practitioner acting as a judge may not sit in judgment in a case in which there are continuing live instructions in another matter from a party to the case.

Mr Southey stresses that the rationale of the general rule rests on three ingredients: the commercial aspect of the relationship between the part-time judge and the litigant, the relationship of trust between lawyer and client and the continuing professional duty that the lawyer owes to the client. As Smith LJ emphasised at the outset of argument, in relation to a professional such as a Guardian ad Litem the real foundation for the rule must be the relationship of trust which is engendered between the child's guardian and the solicitor for the child, who are both essentially working in harness to advance the welfare issues created by the case.

The contrary arguments were advanced firmly by Mr Sharpe for the guardian, who emphasises that in modern times the House of Lords, particularly in Helow v SSHD [2008] 1 WLR 2416, have emphasised the qualities and attributes of this informed bystander. Such a bystander must be taken to be informed as to the background and the facts, and here a well-informed bystander would know that practitioner recorders in this public law domain will almost always have a public law practice when not sitting in a judicial capacity. This is a very small world in which the few specialists are continuously exchanging roles in individual cases, and the operation would become impractical or unworkable were the principle advanced by Mr Southey upheld by the court. He and Mr Bedingfield both draw attention to a relatively recent decision of this court in the case of Re G and B (Fact-finding Hearing) which is reported at [2009] 1 FLR 1145. However, with respect to Mr Sharpe and Mr Bedingfield I am clear in my conclusion that the case cited does not bear in any way upon the issues which we consider, which are essentially the circumstances in which a judge must consider recusal. In the cited case all that the court addressed was the limited question of whether a remitted or continuing case after a successful appeal should be returned to the first judge or to some other, giving due respect to the subjective view of the successful appellant that he or she might not expect justice from the first judge.

So my clear conclusion is that Mr Southey is entitled to succeed on this appeal. We were told this morning that Recorder Sadd is a solicitor and a consultant with the prominent public law firm of solicitors Messrs Hornby & Levy. I would emphasise the breadth of role of the guardian in public law proceedings. The guardian, as Mr Bedingfield correctly submits, has a statutory function and the statutory code is extensive, but the role of the guardian will vary from case to case. The guardian may be the detached expert in the case for instance of a very young child or, at the other end of the scale, in the case of a teenager of strong convictions who has chosen to part company with the guardian and instruct her own lawyers. By contrast the guardian may be an advocate for articulate children in between those two poles, who have strong wishes and feelings consistent with their future welfare.

In split trials very often, indeed normally, the position adopted by the guardian at the fact-finding investigation is one of neutrality. For instance in a case of physical injury the first task of the judge is to decide whether the injury is accidental or non-accidental and then to contemplate the pool of perpetrators. The guardian seldom has much contribution to make to that judicial inquiry. It is rare for a preliminary issue trial in public law proceedings to investigate domestic violence, which is more usually the subject of a preliminary hearing in private law proceedings, and it seems to me almost a fortiori the guardian will ordinarily have a position of neutrality. Here the guardian entered the arena supporting the mother's case to the full. I say that just as a matter of record, not in any criticism of the guardian, but it is an important factor in determining whether the earlier conclusions enshrined in the judgment of 23 October can stand.

Another point that I emphasise is that the spectre of delay to these children, which is much emphasised in the respondent's skeletons, has evaporated as a result of an approach to the county court that seemingly anticipated the success of the appeal. For the fixture commencing on the 24 January before HHJ Cox has been extended to a ten-day fixture to enable that judge to start from scratch, to investigate the history again and to reach conclusions on the history as well as determining difficult issues as to the future.

So finally I would emphasise that each case in this field is heavily fact dependent. We have very little information as to the extent of the relationship between the Recorder and the guardian. It was not investigated in the court below and very little in the preparation of this appeal has entered that arena. If we turn to the judgment of the Recorder, she only recognises in paragraph 41 "a professional involvement with the guardian in another case", but she so records only in the context of her conviction that that involvement had not affected her judgment in any way. That of course is not the

issue that the Recorder had to consider, nor in the previous paragraph, paragraph 30, does she approach the real test, for there she says only :

"30. Having considered both the case law and submissions. In my judgment I am not obliged to recuse myself. However, whilst I bear in mind the importance of not recusing myself as it would be more comfortable to do so, in my view it is important that justice is not only done but seen to be done."

So those passages, which are at the heart of her judgment, do not approach the question in the manner that is now manifest from the decisions of the House of Lords: stressing the informed bystander test and the extent of the information that is to be assumed in the bystander.

So it seems to me that it is worth emphasising that a judge is always wise to err, if at all, on the side of caution and reveal anything that might provoke an application to recuse at the outset. That was not done in this case and it was almost fortuitous that at the halfway stage information emerged which provoked the application to recuse. It can be seen that the belated emergence of the relevant circumstances has led to unfortunate consequences, particularly the necessity for this appeal.

Once the Recorder had decided not to continue and explained that decision, it seems to me that the consequential question as to whether her past judgment required to be set aside and the question relitigated would perhaps have been better referred to HHJ Cox for decision. But, all that said, I would allow the appeal.

Lady Justice Smith:

I agree. I add a few words of my own only to stress that this court is not seeking to lay down any general rule that a professional relationship between a guardian and a solicitor instructed by her in a public law family case is such that it inevitably follows that the solicitor sitting as a recorder in another case must recuse him or herself if that guardian has been appointed to safeguard the children's interests. Issues in recusal are often not clear-cut and will usually be case-specific.

I agree Thorpe LJ that this appeal must be allowed, principally because the professional association between the Recorder and the guardian was current. The result here might have been different had the relationship been closed some time ago. It might also have been different if, during the fact-finding hearing, the guardian had taken a completely neutral stance, as guardian's often do. That did not happen here; the guardian took a partisan position. If the guardian's position had been neutral, I might well have said that there was no need to set aside the facts found. I would however, have still been of the view that the Recorder should recuse herself from involvement in the disposal hearing, where the guardian's evidence and submissions were bound to be of real importance.

I would not wish it to be thought that this Court is laying down a general rule. I merely say that, on the facts here, the Recorder should not have been involved at all because of the currency of the relationship with the guardian. The findings of fact must be set aside.

Lord Justice Patten:

I agree with both judgments and would add only this. Where a judge is faced with an application that he should recuse himself on the ground of apparent bias, it is in my judgment incumbent on him to explain in sufficient detail the scale and content of the professional or other relationship which is challenged on the application. The parties are not in the position of being able to cross-examine the judge about it and he is likely to be the only source of the relevant information. Without this it becomes difficult, if not impossible, properly to apply the informed observer test set out by Lord Hope in his speech in Helow v SSHD [2008] 1 WLR 2416. In this case the Recorder has not done this and, as Thorpe LJ has pointed out, has in fact given no reasons at all for her rejection of the argument that her professional relationship with the guardian is not such as could give the informed observer any reason or cause for concern.

So for the reasons given by my Lord I would therefore also allow this appeal.

Order: Appeal allowed