

**Re B (Children) [2010] EWCA Civ 363 (17 February 2010)**

Case No: B4/2010/0312

**IN THE COURT OF APPEAL (CIVIL DIVISION )  
ON APPEAL FROM READING COUNTY COURT  
HIS HONOUR JUDGE MCINTYRE**

Royal Courts of Justice  
Strand, London, WC2A 2LL  
17th February 2010

Before:

**LORD JUSTICE THORPE  
LADY JUSTICE ARDEN  
and  
LORD JUSTICE PITCHFORD**

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**IN THE MATTER OF B (CHILDREN)**

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**Mr Piers Pressdee (instructed by Griffiths Robertson ) appeared on behalf of the Appellant.**

**Ms Isabelle Watson (instructed by Deborah Baxter and Co) appeared on behalf of the 1st Respondent, the local authority.**

**Ms Janet Mitchell (instructed by Wokingham Borough Council Social Services Joint Legal Team) appeared on behalf of the 2nd Respondent, the children by their Guardian.**

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**HTML VERSION OF JUDGMENT**

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**Lord Justice Thorpe:**

1. There are public law proceedings in relation to five children, all members of the same family. They range in age from 10 to 19 months. They are all the children of Mr and Mrs B, a married couple, and they have struggled as parents, given the fact that they are each somewhat disabled. The family has been known to social services for the last decade. Wokingham Borough Council became involved in 2006, and matters came to a head when on 18 February 2009 all five children were moved into foster care, being voluntary accommodation under section 20 of the Children Act 1989. The local authority issued care proceedings about a week later.
2. A consultant psychologist, Dr North, was instructed at an early stage to assess the capacity of both parents. Having noted their limited intellectual capacity, it was suggested that the father would benefit from a psychiatric evaluation and, in the light of his report, the Official Solicitor agreed to act as guardian ad litem for both parents.
3. Dr Banerjee, a consultant psychiatrist in learning disabilities, was then instructed to provide an assessment of the parents. He reported in August 2009, a full and careful report which culminated with the view that, whilst the concerns expressed by the local authority were fully understood, nevertheless an attempt should be made to gradually rehabilitate the family.
4. The third source of expertise was Symbol Family Support Services, who in June 2009 were jointly instructed to undertake a preliminary assessment of the family with a view to undertaking thereafter a full residential or community assessment. The preliminary report was dated 2 September 2009, and concluded with the recommendation not of a residential assessment but a detailed community assessment. That led to a letter of instruction of 14 October, again a joint instruction, to Symbol to undertake comprehensive parenting assessment in a community. On completion of that assessment Symbol reported again in

writing on 7 January 2010. It was their clear recommendation that all five children should be placed permanently away from their parents. However, there was a rider:

"Given the trauma that the children have suffered at the length of time that they have taken to settle their placements we consider that it would be prudent to ask the advice of the Child and Family Psychiatrist in respect of the therapeutic needs of the children and the permanent needs of each child. We do not consider that we have undertaken sufficient work with the children as a group or individually to comment on the combinations of placement and consider that again, this would be a helpful question to pose to a Child and Family Psychiatrist..."

5. The Official Solicitor, having digested the report, issued an application on 21 January which had been foreshadowed at an IRH hearing on the 15th. The application was for permission to instruct just such an expert, namely Dr Bester.
6. In November 2009 the local authority had placed some assessment work in-house with their Oaks Therapy Assessment Team. The work was commissioned by the local authority alone although they did seek the agreement of Mr Robertson, who is the solicitor instructed locally by the Official Solicitor, to conduct the parent's case. Unfortunately Mr Robertson's request for information and particulars of the Oaks Therapy work was not supplied. Seemingly in advance of his consent, an e-mail of 6 November was lost in the ether and his subsequent request for information was simply ignored. It is my opinion that the local authority would have been wise to have asked for the judge's permission to carry out this work of assessment which clearly was commissioned within the context of the developing contested care proceedings. It was going to form part and parcel of the case. It was going to be presented as expert evidence that would be the subject of testing within the litigation by the usual processes of rebuttal and cross-examination and it involved the children themselves.
7. The Oaks team consists of three very experienced social workers, and their report was dated 27 January, two days before the fixture of the hearing of the Official Solicitor's application for permission to instruct Dr Bester and the local authority's application for interim care orders. Those two applications would be heard by HHJ McIntyre on the 29th. So when the Oaks Therapy assessment report became available on the 27th it was relayed not only to the parties but also to Symbol.
8. Symbol immediately commented in writing, and their comment was to this effect:

"In terms of the need for a child and family psychiatrist, we consider that this report will be very helpful to them that essentially such a referral is still required to consider ongoing contact needs of the children both with each other, and particularly, their parents.  
We have significant reservations in respect of the ongoing contact but also appreciate the merits of this or at least some of the children and consider it to be necessary to consult with an expert specifically in this field. We were thinking of a person such as Dr Berelowitz of the Royal Free Hospital."
9. On 29 January HHJ McIntyre granted the local authority's application for interim care orders but refused the Official Solicitor's application for permission to instruct Dr Bester. He set down the final hearing in HHJ Elly's list on 24 May 2010 with a time estimate of five days. He refused the Official Solicitor's permission to appeal. When the case was before HHJ McIntyre, it was thought that Dr Bester could report by 30 April but subsequently it seems that he will need until 14 May.
10. It was following HHJ McIntyre's refusal that a notice of appeal was lodged in this court on 12 February. It was referred to me on paper on 15 February and I granted permission and directed a hearing today. This was of course very short notice and extremely inconvenient to both the local authority and the guardian, but there was no alternative, for if Dr Bester is to hold to his timetable he must receive instructions by close of business tomorrow.
11. In support of this appeal Mr Piers Pressdee has prepared a comprehensive skeleton argument running to some 45 pages. All of the material is pertinent and helpful. He has incorporated within his skeleton not only a full history of the case but also a review of the relevant statutory provisions, the relevant authorities and the judgment of the court below. It has not yet been transcribed, but we do have a note which has been approved by the judge

himself. So to prepare for this hearing it was really not necessary to do any more than to read carefully and thoroughly Mr Pressdee's skeleton argument and then this morning the skeletons which have been very helpfully filed both by the local authority and by the children's guardian.

12. Mr Pressdee advances his appeal essentially on one general proposition which he says is almost compelling of outcome. He says the duty of the Official Solicitor in circumstances such as this is to garner all relevant evidence to enable him to make a balanced judgment of the merits of the case of the incapacitated litigant and the likely outcome. Mr Pressdee emphasises that the Official Solicitor has the power to override the instructions of the incapacitated litigant. Counsel instructed by the Official Solicitor has to take instructions from the Official Solicitor and to advance the case that the Official Solicitor deems fit. He may have to say to the incapacitated litigant "I am not in a position to advance the case you wish me to advance": but at least he can reassure them that the Official Solicitor has left no stone unturned before arriving at his balanced judgment and issuing the instructions which he has.
13. This power carries with it a heavy duty to take every reasonable step to safeguard the incapacitated litigants from injustice. Accordingly, says Mr Pressdee, an application by the Official Solicitor for permission to instruct an expert to report is one that, save in the most exceptional cases, will be approved by the judge. In support of his submission he relies on the decision of this court in the case of Re M (Assessment: Official Solicitor) [2009] 2 FLR 950. In descending to the specific case and an analysis of the judgment, Mr Pressdee endorses defects which seemed to be clearly visible from an analysis of the judicial reasoning.
14. Miss Watson and Miss Mitchell both have a difficult row to hoe in opposing this appeal but nonetheless made spirited and helpful submissions. However, they concur with Mr Pressdee's principal submission and accept the general principle that the court should be very slow to reject an application from the Official Solicitor to instruct an expert whose opinion would be pertinent to the discharge of the Official Solicitor's responsibility to the incapacitated litigant.
15. The appeal undoubtedly must be allowed. The only word from the judge on the law is to be found in a single sentence in his concluding paragraph when he said:

"I have considered the authorities relied upon but for the reasons set out above the section 38(6) application is refused."
16. The reasons set out above were all considerations specific to the case. Counsel had pointed out that there were very full position statements and the law was carefully presented to the judge including the decision of this court in the case of M, but that is simply not enough to rescue the judge. The judge had to acknowledge the overriding principle and explain why this case on its facts was sufficiently exceptional to allow departure.
17. For that reason alone I would allow the appeal but I would add that it seems to me that the judge fell into specific error. First of all he concluded that the further assessment of Dr Bester "would involve unnecessary and unjustified delay for the children". That seems to me to indicate something close to a misunderstanding of the proposed timetable. At the date he sat, there would have been 24 or 25 clear days between the date of the receipt of the report and the final hearing.
18. The second proposition that I cannot support is the judge's conclusion thus expressed:

"I think an assessment of the family by Dr Bester would just repeat the exercise already done"
19. That seems to me to suggest a misunderstanding. Nowhere does the judge refer to the recommendation in the second Symbol report of 10 January of this year. Obviously if Symbol thought that their work was comprehensive, they would not have been recommending the instruction of the child and adolescent psychiatrist. It is true that the judge does refer to Symbol's reiteration of that recommendation, having read the Oaks Therapy report of 27 January, but all the judge said about that is:

"I do not see the need for a further expert to be instructed. Symbol have carried out the work they have."

20. Those two sentences seem to indicate that the judge has not fully grasped that Symbol themselves thought that their work was incomplete and were still recommending the instruction of the consultant psychiatrist.
21. And then finally, if more be needed, I cannot support what the judge said in this quotation:
- "I have some difficulty in seeing Dr Bester has any more suitable qualifications to give his opinion on attachment than The Oaks or indeed Symbol, who employ persons suitably qualified."
22. No disrespect to the great expertise that was mustered by those two organisations, but manifestly the expertise of a team of three social workers, even ones who are specialist in attachment theory, is different from the expertise of a consultant psychiatrist, and it should not have been difficult for the judge to see that Dr Bester certainly had the most eminent qualification and that that qualification was distinguishable from the qualification of the other professionals and accordingly had the potential to introduce into the case a valuable additional perspective.
23. So for all those reasons I would allow the appeal and grant the permission which the judge refused.

**Lady Justice Arden:**

24. I agree.

**Lord Justice Pitchford:**

25. I also agree.

**Order:** Appeal allowed