

Re H (A Child) [2008] EWCA Civ 503 (03 April 2008)

Case No: B4/2007/2866

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM LIVERPOOL COUNTY COURT
(HER HONOUR JUDGE COPPEL)

Royal Courts of Justice

Strand, London, WC2A 2LL

3rd April 2008

B e f o r e :

LORD JUSTICE BUXTON

LORD JUSTICE WALL

and

LORD JUSTICE WILSON

IN THE MATTER OF H (A Child)

(DAR Transcript of

WordWave International Limited

A Merrill Communications Company
190 Fleet Street, London EC4A 2AG
Tel No: 020 7404 1400 Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

Mr A Hayden QC and Mr M Senior (instructed by Messrs Ballam Delaney Hunt) appeared on behalf of the Appellant.

Mr M Sharpe (instructed by Liverpool County Council) appeared on behalf of the Respondent.

HTML VERSION OF JUDGMENT

Crown Copyright ©

Lord Justice Wall:

With permission granted by my Lord, Wilson LJ, on paper on 21 February 2008, Mr and Mrs A (as I shall call them) appeal against HHJ Coppel's refusal of their application for leave to apply for a residence order under Part II of the Children Act 1989 ("the 1989 Act") in relation to a male child (whom I will call "MH") born in October 2003 and thus now four-and-a-half years old. Although the judge gave an extempory judgement and made her initial order on 3 December 2007, she confirmed it after a further hearing on 22 January 2008 which she instigated herself in order to address a further point not argued on 3 December. Her reserved judgment following the 22 January hearing was handed down on 29 January 2008 and, as I have indicated, reached the same conclusion.

The facts are somewhat unusual and helpfully summarised in a chronology and skeleton argument prepared on the appellants' behalf for this court. MH's mother (whom I will call "KH") has had three children. Although it is not explicit on the papers, it was confirmed by counsel this morning that each of the three children has a different father. The eldest, GH, is now eleven and lives with her paternal grandmother. The second was JH; he is now JA. JA was born in September 1998. He is thus now nine and lives with the appellants, with whom he was placed in October 1999. They adopted him by order of the Liverpool County Court on 11 April 2003.

The mother's third child, who is the subject of the present application, is also a boy, MH, who, as I have already stated, was born in October 2003. His mother, KH, is sadly a drug addict. She was and remains unable to care for any of her children, and neither the birth father of MH nor the birth father of JA appears to play any part either in the proceedings or in the lives of the children. All three children are, however, we are told, living in reasonable physical proximity to each other.

MH was the subject of care proceedings instituted by the local authority shortly after his birth and was made the subject of a full care order on 19 November 2004. At that point he was living with his present foster carers, Mr and Mrs M, with whom he has remained. The local authority's care plan for MH was that he should be adopted and, on 4 April 2005, he was made the subject of a freeing order under section 18 of the Adoption Act 1976 (the 1976 Act), the provision then in force. KH's agreement to the making of a freeing order was, it seems, dispensed with under section 18 1(b) and section 16(2) of the 1976. The care order in relation to MH was discharged and parental responsibility for MH vested exclusively in the local adoption agency under section 18(5). KH thus became a "former parent".

Mr and Mrs A put themselves forward as prospective adopters for MH. He was, however, neither placed with them nor with any other prospective adopters, but continued to live with his foster parents, Mr and Mrs M. In March 2005 the local authority commissioned an assessment of Mr and Mrs A by an independent social worker Mrs PN, but that assessment was delayed for a very long time by what turned out to be unfounded allegations made against Mr A by one of his adult children. It was not, accordingly, until those matters had been investigated and discounted that PN was able to finish her assessment. This she did in August 2007 when she made a positive recommendation in favour of Mr and Mrs A as long-term carers for MH.

In the context of this application, Mr Anthony Hayden, QC for the appellants, relies on passages from PN's report which emphasise the appellants' concern about MH's knowledge of his half siblings; the

appellants' appreciation of the bond which MH will have formed with Mr and Mrs M, his current foster carers; and the appellants' belief that the move to their care, if managed sensitively, would minimise the disruption and would provide the best solution to the case -- namely, the two half brothers being brought up together. Each, we were told, is aware of the other's existence, and JA in particular is keen for MH to join and be part of the family of Mr and Mrs A. It was, and remains, common ground that Mr and Mrs A's adoption of JA has been a success, and that they will be able to care properly for MH. It should perhaps be added that they had been foster carers for the local authority; their registration was, I think, suspended during the investigation of the allegations made by Mr A's son, but was fully restored at the end of May 2007. Indeed, as I understand it, Mr and Mrs A are currently acting as foster carers for the local authority.

Thus, it would seem that the only factor which militates against Mr and Mrs A as adoptive parents (all other things being equal) is their age. They are, however, not a great deal older than Mr and Mrs M and it was for this reason, we were told, that the local authority decided -- as I shall shortly relate -- that MH should be placed with a younger couple, namely Mr and Mrs G.

In January 2007, whilst Mr A was under investigation, Mr and Mrs M informed the local authority that they wished to be considered as prospective adopters for MH. The upshot was that in September 2007 there was what is described as a "linking meeting" organised by the local authority/adoption agency, at which the suitability of the As and the Ms as providers of permanent care for MH was considered. In the event, the local adoption agency preferred a third couple, Mr and Mrs G (who have no connection of any kind with MH) as being the most suitable to care for MH and the meeting determined to put Mr and Mrs G forward to the adoption panel which was due to meet in November 2007. As I have already indicated, the principal plank in the thinking of the local authority at this point appears to have been Mr and Mrs G's age. They were, as I understand it, considerably younger than either Mr and Mrs A or Mr and Mrs M.

It was against this background that Mr and Mrs A made their application to the court for leave to apply under section 10 of the 1989 Act to make an application for a residence order in relation to MH. What has happened since is that Mr and Mrs G have withdrawn. Mr Sharpe, for the local authority, told us that this was the direct consequence of the As action in making the application for permission to apply for a residence order. We now understand that the local authority/adoption agency's plan is that MH should be adopted by Mr and Mrs M. This, of course, is not a course of action with which Mr and Mrs A agree.

It is common ground that the As' application falls to be decided by reference to the criteria set out in section 10(9) of the 1989 Act, to which I will turn in just a moment. However, in addition to those

criteria, the judge of her own motion raised a point which, in her view, militated against the grant of leave. This is the point which forms the subject matter of her supplementary judgment, but as it is not adopted by either counsel I propose to deal with it briefly first of all, in order to dispose of it.

In essence, as I understand it, the judge was of the view that a residence order under section 8 of the 1989 Act could not properly or sensibly coexist with an order which had freed the child for adoption. In reaching this conclusion the judge relied on a case which, as counsel, she had argued in front of me at first instance, when she appeared for a local authority. The case is reported as *Re C (Minor) (Adoption: Freeing Order)* [1999] 1 FLR 348 (Re C)..

In that case I exercised the inherent jurisdiction of the High Court to discharge a freeing order which had been made in relation to a child, with the consequence that a previous care order, in relation to the same child, was restored. This meant that the local authority and the mother of the child shared parental responsibility for the child under section 33(3) of the 1989 Act, and the local authority was enabled to take steps, if it thought them appropriate, to reintroduce the mother and the child who had been freed for adoption when he was seven, but who had never been adopted. When I dealt with the matter the child was fifteen and, by common consent, was in what was described as "an adoptive limbo".

With all possible respect to the judge, it does not seem to me that *Re C* has any application to the instant case. The only point that the cases have in common is that, in each case, the child had been freed for adoption. In *Re C*, however, there was not only no prospect of the child being adopted; he was not even living with foster carers. He was in a residential unit provided by the local authority. His mother was not in a position to apply for contact with him, let alone residence of him. The critical question was thus how the child could be rescued from the "adoptive limbo". The effect of the freeing order had been to terminate the care order, and there was no statutory mechanism for the discharge of a freeing order. It was in these circumstances that I exercised the inherent jurisdiction of the High Court to revoke the freeing order.

All this in my judgment is many miles from the present case and, in my judgment has no application to it. In my view, both we and the judge are plainly bound by the decision of this court in *M v C and Calderdale Metropolitan Borough Council* [1993] 1 FLR 505. That case, in my judgment, is clear authority that the proposition that the court in family proceedings has jurisdiction to make orders under section 8 of the 1989 Act in relation to a child who has been freed for adoption. The actual question in the case was whether or not the birth father of a child who had been freed for adoption under section 18 of the 1976 Act required the court's leave to make an application under section 8 of the 1989 Act in relation to the child. The judge at first instance held that he did require leave and this

court agreed. It follows, in my judgment, that the question of Mr and Mrs A applying for "leave" to make an application under section 8 of the 1989 Act falls to be considered on its merits and by reference to the criteria set out in section 10(9) of the 1989 Act.

The relevant parts of section 10(9) read as follows:

(9)Where the person applying for leave to make an application for an section 8 order is not the child concerned, the court shall, in deciding whether or not to grant leave, have particular regard to --

- (a) the nature of the proposed application for the section 8 order;
- (b) the applicant's connection with the child;
- (c) any risk there might be of that proposed application disrupting the child's life to such an extent that he would be harmed by it;

Before applying the words of the subsection to the facts of the case, the judge made a reference to the decision of this court in *Re J (Leave to issue application for residence order)* [2003] 1 FLR 114 (*Re J*), and commented, in particular, on paragraphs 14-19 of the judgment of Thorpe LJ in that case, a passage in which he emphasised the need to apply the criteria laid down in section 10(9) of the Act to the facts of the particular case. Speaking for myself, I get no help in resolving this appeal either from the case of *Re J* or from the comments of the judge upon it. What matters, as it seems to me, is the manner in which the judge exercised her discretion when applying the terms of the section to the unusual facts of the case.

In relation to the criteria set out in section 10(9) of the 1989 Act, this is what the judge said:

"15. Having regard to the criteria, which are not exhaustive, I start with the nature of the proposed application and I look at it in the context of the other matters that I have to take into consideration. This is a significant application which will have a major impact on this child's life. The connection which I am asked to have regard to under the section is an indirect connection and arises by virtue of them being adopters of (JA). They themselves have no relationship with (MH). They have not met him. They are complete strangers to him. If at all possible, siblings should be raised together but (MH) is now four years of age, he has never met (JA) and therefore the extent of the advantages to siblings in being raised together are not present in this set of circumstances. There is no dispute that it is desirable that he should have a relationship with his brother and, as Mr Sharpe on behalf of the

Local Authority rightly points out, that is something that can be achieved between the brothers by means of contact.

16. Looking further along at the list of matters that I have to consider, the question of disruption arises. I am urged that there will already be a delay given the position of the (Ms) in applying for a residence order. However, I am concerned that there will be a delay greater than is already going to be the case by virtue of the (Ms)' application, not least because there will a multiplicity of parties, there will be a need for further investigation and there will be a more lengthy hearing.

17. The Local Authority plan for (MH) is permanence and permanence is what he requires either by way of adoption with suitable adopters or to remain where he has spent the last three and a half years of his life either under a residence order or by way of an adoption if the Local Authority change their minds about placing (MH), which I am told is likely to happen. Mr and Mrs G have asked to be considered for other children in the light of the difficulties in relation to this matter and so I am informed by Mr Sharpe that the Local Authority are going to reconsider. I am told that it is likely that the plan will result in (MH) remaining with the (Ms) where he has lived, as I say, for the last three and a half years of his life. Those plans either for adoption by another couple or to remain with the (Ms) will be disruptive if I grant leave and add yet another complexity to this already difficult matter.

18. I am urged in the context of Re: J to be careful not to dismiss the opportunity of (MH) being placed with his brother without a full enquiry. I am satisfied that I have a considerable amount of information in the terms of a full, positive social work assessment and therefore I do not dismiss it out of hand but I am invited to apply and for the reasons that I have given. The application for leave is refused."

In their grounds of appeal Mr and Mrs A submit that the judge misdirected herself in relation to section 10(9). Firstly, and most importantly in my judgment, they argue that the judge was plainly wrong to describe the connection between the As and MH as "indirect". Mr and Mrs A were, as a matter of law, JA's parents, and MH was JA's half sibling. The connection, accordingly, was one of principal importance. In addition to that error, it was argued, the judge give insufficient weight and significance to the fact that, as a matter of both principle and good practice, half siblings should be brought up together wherever possible. To these arguments, Mr. Hayden was able to add the material consideration that Mr and Mrs A had been actively investigated as prospective adopters for MH by the local authority; and that the assessment made by Mrs PN had been both positive and recent. All this, it was argued, constituted a very "direct" connection between Mr and Mrs A and MH and the judge was plainly wrong to designate it as the opposite.

In addition, Mr and Mrs A argued that the judge had also misdirected herself on the question of delay. There had, indeed, been delay brought about by the local authority and by the delay in the assessment, but there was no reason why the hearing of the As' substantive application should result in additional delay. As I have already reported, there had been a recent positive assessment of the As. Nobody doubted their competence to care for MH. There was no need for any further assessment; Mr and Mrs A were, in the trite phrase, "ready to go". Therefore their intervention would not, it was argued, cause any additional delay. There would have to be a hearing of the adoption application by Mr and Mrs M in any event, and there was no reason why the As' application for residence should not be heard by the same judge at the same time. The hearing would, it was accepted, be longer than an unopposed

adoption application by Mr and Mrs M and would, accordingly, be more difficult to accommodate, but the delay factor was minimal when compared to the importance of the decision for MH and the need to ensure that there had been a proper and full investigation before his future was finally decided.

In their skeleton argument the As also pointed to further dicta from this court which have emphasised the need for a broad assessment of the merits and the need for a full and careful investigation before a child is placed for adoption or with long term foster carers. They also argued that the local authority's original plan that placed MH with Mr and Mrs G had anticipated a major disruption in MH's life, no different from that which would be occasioned were he to be placed with Mr and Mrs A.

For the local authority Mr Sharpe submitted that the judge did not err in her application of the statute to the facts of this particular case, and that the decision which she reached was properly open to her in the exercise of a wide ambit of discretion. The judge had taken the investigation of the As' parenting capacity by the independent social worker fully into account and had weighed it properly in the scales. She had had a wealth of information available to her and had been fully entitled to decide the matter as she had.

In particular, Mr. Sharpe submitted, the judge's description of the appellants' connection with the child as "indirect" was factually accurate. The two children did not know each other and the appellants had never met MH. The judge had been right to take the view that the local authority's latest plan for MH was the correct one, and she had been entitled to refuse to allow the As' application (which she had heard fully and carefully) to go beyond the leave stage.

In short, I think I can properly summarise Mr Sharp's argument as being that the judge's exercise of her discretion was not outwith the area within which reasonable disagreement is possible. She could not be said to have been plainly wrong in dismissing the As' application.

Discussion

I have not found this an altogether easy appeal. I am acutely conscious of the fact that we are dealing with the exercise of a judicial discretion on unusual facts. It is a matter to which the judge plainly gave careful thought. In the event, however, I am persuaded that the judge's exercise of discretion in this case is sufficiently flawed so as to enable, indeed require, this court to interfere.

The highly unusual features of the case to which, in my judgment, the judge has given insufficient weight are: (1) the fact that the As are the legal parents of MH's half sibling; (2) that it is right in principle for half siblings to be brought up together wherever that is possible; and 3) the evidence that Mr and Mrs A are wholly capable of caring for MH. Moreover, in my judgment Mr and Mrs A are entitled to rely on the fact that they have been recently so assessed by an independent social worker instructed by the local authority so that any application for residence can proceed without further delay.

These factors, taken together, are in my judgment sufficient to vitiate the exercise of the judge's discretion and to demonstrate that she has got the well-known balancing exercise wrong. Furthermore, when these factors are added to the local authority's clear change of plan, the disruption criteria seems to me to lose much, if not all, of its force.

In these circumstances I do not think it necessary to decide whether or not the judge misdirected herself in her analysis of – in particular - paragraph 18 of this court's decision in *Re J*. Speaking for myself, I am content to decide the case on the issues I have identified.

I also take the view, I have to say, that, looking at section 10(9a) of the 1989 Act, the application by Mr and Mrs A for a residence order is, in my judgment, of a nature which, on the facts available to this court, requires it to be heard. To put the matter another way, the application made by Mr and Mrs A is one on which they are entitled to be heard by a court, and it would not, in my judgment, be appropriate on the facts of this case for MH's future to be decided by the local authority.

There is, in my judgment, a substantial difference between an application for leave to apply for a residence order and the substantive application for a residence order itself. The criteria are self-evidently not the same, whatever the volume of the material available to the judge on a leave application. In my judgment, therefore, the nature of the proposed application for residence is such that Mr and Mrs A are entitled to be heard on it. This is, I emphasise, in no sense to predict the outcome, which must of course be a matter for the judge who hears what will now be the two applications.

I would accordingly allow the appeal. I would set aside the judge's order and give Mr and Mrs A leave to make an application for a residence order. I would -- again speaking for myself -- think it preferable for that application and any application by Mr and Mrs M to adopt MH should be heard together. I would also think it appropriate for those applications to be heard by a judge other than HHJ Coppel; that judge to be assigned to the case by the Family Division liaison judge of the Northern Circuit, Ryder J, in consultation with the designated family judge for Liverpool.

There is, we were told, no date fixed as yet for the application by Mr and Mrs M to adopt MH. The two applications need therefore, as a matter of urgency, to be listed for directions before the judge allocated by Ryder J, and a date fixed for the substantive hearings. One of the matters which the judge in question will need to decide is whether or not MH should be represented by a guardian in both sets of proceedings.

I add a final paragraph with some hesitation. I do not doubt, myself, the devotion of both Mr and Mrs A and Mr and Mrs M to MH. For MH the decision about where and with whom he is to spend the remainder of his childhood is of course one of major importance. It will be also a difficult and emotive issue for both sets of adults. I simply express the hope that, whatever the outcome of the case, the adults will remain focussed on MH's needs, which plainly include -- wherever he is to live -- both the full knowledge and the enjoyment of the company of his half siblings.

Lord Justice Wilson:

I agree both with my Lord's analysis of the approach which the judge should have taken to the matters to which, by section 10(9), she was required to have particular regard and also with his conclusion. I

am clear that, in the discretionary exercise, the merits of the proposed application also fall for broad consideration and that, in the unusual circumstances to which he has referred, the proposed application should be considered to have sufficient merit also to militate in favour of the grant of leave.

Lord Justice Buxton:

I agree with both judgments. The appeal will therefore be allowed in the terms set out by Wall LJ. For my part, I would simply add this. I would venture to underline what my Lord said about the importance of this matter now being progressed with as much dispatch as is properly possible. I would also strongly support the view that he expressed that this application, and any application by Mr and Mrs M to adopt MH, should be heard together. That will enable the judge to take a global view of the situation and prospects of this young child against the background of the unusual facts that have led to this application to this court.

Order: Appeal allowed