Re K (Children) [2008] EWCA Civ 1307 (09 October 2008)

Case No: B4/2008/1863

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL (CIVIL DIVISION)

ON APPEAL FROM PORTSMOUTH COUNTY COURT

(HER HONOUR JUDGE MARSHALL)

Royal Courts of Justice

Strand, London, WC2A 2LL

9th October 2008

B e f o r e :

LORD JUSTICE THORPE,

LORD JUSTICE KEENE

and

MR JUSTICE HEDLEY

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In the matter of K (Children)

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Ms J Bazely QC (instructed by Charles Russell) appeared on behalf of the Appellant.

Ms J Probyn (instructed by Woodford Stauffer) appeared on behalf of the Respondent.

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HTML VERSION OF JUDGMENT

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Lord Justice Thorpe:

This is an appeal from a judgment of Judge Marshall in the Portsmouth County Court, sitting at Basingstoke on 11 July 2008. Strictly, it is an application for permission, adjourned by Wall LJ into court for oral argument but, since the issue raised is finely balanced, we have effectively granted permission at the outset and heard Ms Bazely QC advance her appeal and Ms Probyn in response.

The issue raised is an unusual one, and I find very little guidance in determining it from any of the cases cited, all of which go more to the proper response of the trial judge to a submission of no case at the conclusion of the applicant's evidence in Children Act proceedings and specifically private law Children Act proceedings.

So what was the case about? The judge was dealing with private law proceedings in which each of the parents, following final separation, sought substantial rights and responsibilities in relation to the children of the family. The focus of the investigation in July was upon one of the children in particular, E, who is five years of age and who, when approaching her fifth birthday, had, on 31 October 2007, at school, out of the blue, made a remark to the school assistant which set all the alarm bells ringing. There is no contemporary record of the child's words made by the school assistant, and that is regrettable. She should have made a police statement on that very afternoon. The police statement was not taken until 22 May, some six months later. What she said in her police interview is as follows:

"Out of the blue [E] said to me "My Daddy Gets His Willy Out And Does rude things." She either said 'with it' or 'to me'. I was taken aback and aware that other children might be listening…"

The assistant, appropriately, immediately consulted the class teacher, who immediately consulted the head teacher, who immediately engaged Social Services, who in turn engaged the police. On that very afternoon there were further words spoken by the child which were not the subject of any very clear record. It seems that there was no child protection officer at the school. It seems that the Detective Constable's notebook did not record verbatim statements, and generally the standard of record-keeping at this vital stage was deficient. However, it seems that during the course of these ongoing investigations, E did suggest that what she had experienced had been in her bedroom, and there is no doubt that in conversation with the police, in the presence of the Social Worker, within hours of her first observation to the assistant, she said further worrying things, particularly that her father held his willy and joggled it and the like, again suggesting she experienced these things in her bedroom.

Beyond that there was a properly conducted memorandum DVD interview which took place on 6 November. It has been assessed by the expert who was subsequently to be jointly instructed in the family proceedings, Dr Kirk Weir, and his note of the content of the videoed interview demonstrates that it lasted some forty-five minutes, that the child was restless throughout and not concentrating on the questions, which she sometimes appeared to ignore. However, Dr Weir noted that when reminded of her conversation with the school assistant, she said:

"It was called he showed his willy and he does be rude… he's always rude, rude Daddy… because he does rude stuff…rude stuff is willy stuff."

Then, when asked where she saw this, she described her feelings, saying it made her feel:

"…a little bit scared… sad. It's horrible when he shows his willy."

When asked further as to where she was, she said:

"I just play."

Then subsequently, when asked what her father did with his willy, she said that he joggled it and went on to give what Dr Weir described as:

"…a vivid demonstration of touching the front of her trousers with both hands, quickly bending her knees and moving her hands up and down briefly."

She continued:

"He joggles his willy and he makes me sad."

Dr Weir's observation is to this effect:

"Her demonstration appeared to be of a man shaking his penis after urination, but it may have been an inhibited attempt to describe male masturbation."

The issues that inevitably arose within the private law proceedings were principally as to the whether inappropriate sexual behaviour had taken place in E's presence. Ms Probyn observes that there were wider issues beyond which the judge was going to have to tackle, each parent raising allegations against the other. The case was the subject of directions given by HHJ Davies, and when it came before Judge Marshall she was to hear evidence on 11 July and then there was to be, I think, a brief interval before she resumed to hear five further days of evidence. Ms Probyn, I think somewhat boldly, submitted before the case even started that the judge should reject the task, despite all the preparation, partially on the basis that she was unlikely to be able to arrive at any positive conclusion on the application of the standard set by the House of Lords in the recent case of Re B (Minors) (Sexual Abuse: Standard of Proof) [2008] UKHL 35. Ms Probyn submitted that accordingly the material before the court was no basis for a five-day hearing, which would be at great emotional cost to the parties.

The judge rejected that submission, saying that she wanted to hear from Dr Weir. Dr Weir gave his evidence and expressed his ultimate conclusion that it was possible that E had been exposed to inappropriate sexual experiences and that it was equally possible that she had not. Ms Bazely explains that Dr Weir adopts, for the expression of his opinion as to probability, a scale of 0 to 7 positive and 0 to 7 negative. Dr Weir, when asked to put this case on that scale, said that it stood on zero. He would not move in either direction, either towards positive or negative. He identified a number of issues which it was not for him as the expert to resolve, and the evaluation of these issues would be important to any judicial conclusion. Ms Bazely has helpfully identified the seven points that the doctor identified as requiring judicial evaluation.

Ms Probyn renewed her submission at the conclusion of Dr Weir's evidence and on this second occasion the judge accepted it and had therefore vacated the further days listed for oral evidence and said that the final day -- 18 July -- would be retained to consider the remaining issues of contact. The judge explained herself at once in a judgment. In the second paragraph she records that she has had

the advantage of reading all the written statements and reports and other documentation relevant to the hearing and that she had watched in full the DVDs of all three children and read the transcript of the father's two police interviews. She went on to explain that the reason she took the unusual course of declining to hear further evidence at paragraph 5 of her judgment:

"The difficulty I identify is that there is a lack of consistency and particularly a lack of accuracy about this first disclosure and how it has been reported further […] even on the fact of Mrs F's statement she was not entirely clear what had been said and not clear about what is, in my view, a very significant difference as to whether the disclosure that 'my daddy gets his willy out and does rude things' was 'to me', in other words to E, or 'with it'."

She went on to say in paragraph 7:

"The further difficulty is that, looking at E's interview, when asked about what she was doing when daddy was doing these rude things, is that she said she was playing […] So it seems to me it is not at all clear in all this evidence what was said by E right at the very beginning."

I find it impossible to support the judge's reasoning. It does not seem to me that there was a very significant difference, to take the judge's words, between whether Mrs F had heard that the rude things that the father was said to have done were "to me" or "with it". Either was suggestive of inappropriate exposure of a child to adult sexuality and either required judicial investigation and determination.

Equally, it does not seem to me that the fact that the child said that she was playing presented a further difficulty in itself. It seems to me that, on a proper evaluation, what was said at the interview some seven days after the first worrying words of the child only enhanced the need for investigation and determination. For the child at the interview was not just describing what she said she had seen but she was also describing her emotional distress at what she had experienced, and the fact that she said that she played when experiencing these events seems to me to suggest little more than a defensive reaction to her emotional upset.

I accept that it was profoundly unsatisfactory from the judge's point of view that the initial management of a child's words within well-established child protection procedures was so mishandled. I accept that from the judge's point of view it was profoundly unsatisfactory that the elaboration or embroidery of the child's first words was through so many different adult ears and so imperfectly recorded as to allow Dr Weir to liken the process to Chinese whispers. I accept that from the judge's perspective this was another of these cases where it would be extremely difficult for the judge to arrive at a positive finding that would meet the high probative standards set in the House of Lords authorities.

Nonetheless it was, in my judgment, crucial for the judge to have heard, at a very minimum, the evidence of the school assistant, Mrs F, and the evidence of each of the parents. The judge had the

responsibility for the management of a very difficult family breakdown. She needed to evaluate each of the parents, both in relation to the primary issue and possibly in relation to the wider issues raised. There were attendant difficulties relating to what had been said to the mother or what the mother said had been said to her by an elder child. There was a need for the judge to weigh the concerns inevitably flowing from the child's words against the considerable detail to be found within the father's police statement. Ms Bazely has identified a number of issues going to credibility that it was important for the judge to consider.

I have reached the conclusion that the judge was premature in aborting the fixture and, in so concluding, I am fully conscious of the very wide discretion that must be given to trial judges in these very difficult cases. Anything that I say in expressing my judgment that this appeal must be allowed is entirely specific to the facts of this case and the substance of the core concerns which undoubtedly exist in the child's words to the school assistant and the child's words to the police officer -- both on the 31st -- and the child's words in the memorandum interview on 6 November. Those concerns are not, in my judgment, negated by the failings of proper procedure, nor are they negated by inevitable differences in the recollection of what the child said to the several adults who were involved in the day of crisis. The core concerns simply demanded a fuller investigation.

It does seem to me that this appeal must therefore be allowed and the case must be remitted to the judge. Of course, from the family's point of view that is a dire outcome, and I would rely firmly on the experience and good sense of Ms Bazely and Ms Probyn to agree a programme for the determination of the remitted issue which will limit the essential evidence and which will hopefully render the case capable of re-listing with a much reduced time estimate.

Lord Justice Keene:

I agree.

Mr Justice Hedley:

I also agree.

Order: Appeal allowed