Re L-B (Children) [2010] EWCA Civ 1463 (24 September 2010)

Case No: B4/2010/2092

IN THE COURT OF APPEAL (CIVIL DIVISION)

ON APPEAL FROM PRINCIPAL REGISTRY OF THE FAMILY DIVISION

(HIS HONOUR JUDGE ALTMAN)

Royal Courts of Justice

Strand, London, WC2A 2LL

24th September 2010

B e f o r e :

LORD JUSTICE THORPE

LADY JUSTICE SMITH

and

LORD JUSTICE PATTEN

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Between:

IN THE MATTER OF L-B (CHILDREN)

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Ms Alison Ball QC and Esther Maclachlan (instructed by Sternberg Reed Solicitors) appeared on behalf of the Appellant.

Ms Judith Charlton, (instructed by The London Borough of Barking & Dagenham) appeared on behalf of the First Respondent

Mr Adrian Hall (instructed by Milner Elledge) appeared on behalf of the Third Respondent.

Mr Christopher Mitropoulos (instructed by H S Kang and Co) appeared on behalf of the Fourth Respondent

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HTML VERSION OF JUDGMENT

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Lord Justice Thorpe:

JB's family and her children have been a matter of concern to the local authority for many years, almost since the birth of her first child B, born on 13 January 1996. Since then she has had eight further children, M, J, S, R, O, J, F, and Z. Those children have different fathers M, J, S, O and F have

Mr B as their father, B R and J have Mr L as their father, and Z has Mr G as his father. I mention only them because those three fathers are parties to the appeal before us today.

Things seemed to go reasonably well until 2009 when the local authority issued care order applications in respect of the children. We have not been concerned in any way with J, who had been placed in care prior to the judgment that we review, and he is in a residential institution. But the continuing proceedings required decisions in relation to all other children born to JB. The preparation of this case was necessarily complex. The Marlborough Day Hospital were instructed to assess and did assess at the end of 2009, or the beginning of 2010. Then an adult psychiatrist, Dr Llewellyn-Jones, focussed on the mother and reported on her. The guardian has also done an enormous amount of work in the case and at the completion of the Marlborough report she was instrumental in bringing in two independent social workers, who looked at the situation and reported.

So by the time the case came on for trial there was a range of professional opinion. Pessimistic or negative were the opinions of the Marlborough Day Hospital and the two independent social workers. More optimistic and positive were Dr Llewellyn-Jones and most particularly the guardian, who has, broadly speaking, supported the mother's case throughout.

So this was obviously going to be a difficult case for any judge and required a sophisticated exercise of discretion having regard to the individual rights of each of the children and their differing needs.

In a way the magnitude of the task was compressed by the mother's acceptance that S and O could not be given by her what they were going to need in the future and that their prospects would be better met outside the family. There was a remaining dispute about O and whether he should be placed with S or separately, and whether he should go for adoption or for long term fostering, but the fundamental question should he be within or out the family was not contentious.

The trial took place between 2 and 23 June. Dr Llewellyn-Jones filed her second report as late as 19 June and gave her oral evidence on 21 June. The judge at the end of the evidence called for written submissions by 14 July and we are told that that deadline was met by all counsel. There was then a further wait, no doubt an anxious wait for all, on the judge's word. It had not come by the end of the month and the local authority respectfully pressed the judge for a decision, because they wanted to get

on with the management of the future of the children. Accordingly, the judge was persuaded to simply state his conclusions to enable an order to be drawn on 13 August with a view to handing down or delivering a reasoned judgment seven days later on 20th. That date had to be postponed because of a bereavement in the judge's family and the parties were warned to attend on the 25 August at 10.00 in the morning. When they assembled, the court clerk called for the written submissions of the mother and of Mr B, since he did not have them with him and wished to be reminded of their content. The judge had another case in the list, and how the day was divided is not entirely clear, but we do know that he gave an extempore judgment in this case between 11.30 and 1.30. The parties were back before him at 4.00 in the afternoon when Ms Maclachlan for the mother sought permission to appeal. She, in advancing her reasons, complained of deficiencies in the judgment and that led the judge to ask for the written report of 19 June from Dr Llewellyn-Jones again. He proceeded in due course to deliver what might be described as the second judgment, supplementing and perhaps fortifying his first and that continued until 6.45 in the evening. He refused permission to appeal, which was immediately sought in this court and Munby LJ imposed a stay on any removal of the children. That stay was continued by Wilson LJ, who directed that the case be heard today.

Ms Alison Ball QC, who has come into the case to lead Ms Maclachlan, is necessarily highly critical of the standard of this extempore judgment and Ms Charlton, who has represented the local authority, has been hard put to meet those criticisms and has been bound to concede that the judgment has its deficiencies. If I stood back and asked the simple question, is this judgment of a sufficient standard, is it good enough, I think I would undoubtedly have to answer no it is not. The judge was undoubtedly under huge pressure, at a very difficult time of the year, and it was a bold thing for him to attempt to give an extempore judgment on 25 August when he had concluded evidence in June and had as it were announced his decision some 12 days earlier. I would, I am bound to say, with the huge advantage of hindsight, observe that it would have been wiser had he composed a written judgment between the 13 and 25 August and handed that down to the parties. He would not then have been vulnerable to the criticisms that have been mounted and he would not have had to deliver a substantial secondary judgment dealing with the criticisms advanced by Ms Maclachlan.

Ms Ball is very critical, within the terms of what we do have of the judge's assessment, of his analysis of the evidence of Dr Llewellyn-Jones. He has not sufficiently noted and factored in the improvements of which Dr Llewellyn-Jones spoke, improvements in the mother's performance, and he does not sufficiently recognise and analyse that the mother's case below for a 12-week probationary adjournment rested on the expert evidence of Dr LlewellynJones that it was reasonable to expect some assessment of the mother's progress in psychodynamic psychotherapy at the expiration of three months of treatment.

In relation to the guardian, Ms Ball criticises the judge for failing to sufficiently record her positive contribution and failing particularly to record and analyse the essence of her case, which was not that

she had an emotional commitment to the mother's case but rather that she was urging that the removal of the children was not proportionate and did not reflect a proper balance of the risks, the risks of course inherent in leaving them in such a family, but set against that the very considerable risks of moving them to some alternative future in the care system, given the extent to which the children were rooted in the family and to some extent thriving in the family.

Ms Ball has a particularly forceful criticism in relation to the two oldest children, B and M. The judge himself acknowledged that he had stumbled and a stumble that could almost be described as a fall when attention is paid to what he said on 13 August in announcing his decision, recorded at page A33. What he later said on the 25 August, in announcing his principal reasoning in the extempore judgment, was an undoubted contradiction of what he had said on the 13th. When counsel popped up and said, well the children were given the good news that you announced on the 13th and they cannot now be told otherwise, the judge accepted that and then in a curious passage said that the conclusions he had reached in respect of those two children were a finding of fact. Nobody at the Bar objected to that pronouncement or challenged it, and it seems to me quite plain that the judge without that challenge did not himself resile from it. However it is quite unsupportable. The decisions that he was taking in relation to those children could not under any circumstances be classified as a finding of fact.

Although it is unclear how matters rested at the end of that long day, the order as drawn is relatively clear in that it places B and M in interim care (that is paragraph 6 of the order) and further submits them to a risk assessment concerning future placements. The one paragraph throws light on the other. There would only be a need for risk assessment if these two boys' future lay within the care system, when they would need to be placed in foster care, when there was a possibility that they might be a risk to younger children, a risk that required expert assessment. Of course if they were not passing into the care system there would be no need for that ancillary risk assessment.

In relation to R Ms Ball submits that she should not have been made the subject of an interim care order since there was no care plan supporting that placement. That is a technical argument, which finds little favour with me, for reasons that for the sake of brevity I will omit. Ms Ball's more effective submission in relation to R was that she is clearly a child who falls within the group whose future should not be decided until the expiration of the three month first stage of the treatment. In relation to Z, there is an alternative future for him which was approved by the judge, that is to say possible placement with his father, Mr G, subject to assessment. Mr G has made it absolutely plain to the court today that he does not seek to rely on that in any competition with the mother. He is only a fall back. He is fully supportive of the mother's appeal as are the other two fathers, Mr L represented by Mr Hall, and Mr B who appears in person.

I conclude by noting the important contribution of the guardian, who was represented below by Ms Jacobs, who has filed a full skeleton argument in support of the appeal and who has responsibly decided not to attend today to relieve the Commission of the costs of representation.

Other points that have been made by Ms Ball, partly encouraged by my Lady, are that there is very little if any, consideration of the mother's contribution to the hearing as a witness. There is no evaluation of her oral evidence. The guardian's evidence could be said to fall into the same bracket. Ms Ball has finally said that, had the judge applied the exercise of the statutory checklist in the Children Act 1989 and the Children and Adoption Act 2002, he would have achieved a more structured judgment rather than the present, which reads, Ms Ball says, as no more than a canter through the judge's notes. He has failed to deal entirely with the necessity to dispense with parental consent before making placement orders in regard to two of the children. It seems that that deficiency was not drawn to his attention by any who attended before him on 25 August.

Ms Charlton has done her best and undoubtedly there was material upon which the judge could have written an impregnable judgment, moving certainly the younger children out of the family. I have difficulty in seeing how, however carefully composed, the judge could have taken the same course in relation to B and M. They are of a different generation almost to the younger children, 1996 and 1997 respectively. They are doing surprisingly well at school. They are very happy at home. They are aghast at the idea of being removed from their home and for my part I cannot see sufficient within the professional opinion that would justify the discretionary conclusion that they must, at their ages face expulsion or exodus from the family into a very uncertain future in the care system.

So overall, I am in no doubt that the order below can not stand. I think that permission should be granted and the appeal should be allowed. I think that the interim care orders in relation to B and M should be set aside. I think the direction for the expert risk assessment concerning B and M should be set aside. I think that the placement orders in relation to J and F, should be set aside. I would not myself enter into any conclusion in the debate as to O's future. There is a consensus that he moves from the family into the care system. There is an issue as to whether he should be placed for adoption, or whether for long-term fostering. Long term fostering is proposed by the mother, but that does not have the support of the guardian. Ms Ball has taken, as she was bound to do, the point that the placement order is irregular, and so in relation to that, there must be a remission to the county court where any arguments concerning parental consent can be advanced and decided and that will settle the question of O's future. The mother also has strong views that he should not be placed separately from S, but there is expert evidence to suggest that S actually needs herself separate placement, so that again is an issue that will fall for further consideration in the county court.

But B and M are entitled, in my opinion, to know at once that they have a secure future with their mother, in the family, and that they are not at risk of being moved into the care system. In relation to R, J, F and Z, their longer term future will depend upon the mother's performance and the assessment after the expiration of the three-month trial period.

In the meantime interim orders can be made in relation to them, but there must be no removal without consent or order of the court. It is reassuring to learn from Ms Ball that the mother can immediately embark on a course of dynamic psychotherapy at the Munro Centre, which will be funded as to £25.00 per week by the mother and as to £65.00 per week by the local authority. Those then are the orders that I propose.

Lady Justice Smith:

I agree and have nothing to add.

Lord Justice Patten:

I also agree.

Order: Permission to appeal granted; Appeal allowed