Re S (A Child) [2008] EWCA Civ 1333 (07 October 2008)

Case No: B4/2008/1116

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL (CIVIL DIVISION)

ON APPEAL FROM SWINDON COUNTY COURT

(HIS HONOUR JUDGE WADE)

Royal Courts of Justice

Strand, London, WC2A 2LL

7th 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 S (A Child)

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Mr S Leach (instructed by Messrs Bevirs) appeared on behalf of the Appellant.

Mr H Griffiths (instructed by Swindon Borough Council) 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 an order of HHJ Wade, sitting in the Swindon County Court, for which the judge himself gave permission. He had before him a mother's application for leave to revoke a placement order in respect of one of her children. He refused her application on the ground that the child had already been placed for adoption. However, he observed that there was very little guidance as to what placement for adoption meant, and accordingly he granted permission to appeal to enable this court to clarify the area that he found obscure.

The history that lies behind the application can be briefly stated. The child in question is L, born on 16 March 2001, so he is now 7 years of age. He is thought to be the child of a Mr R, although that has never been scientifically confirmed, since Mr R refused DNA testing. Undoubtedly Mr R is a violent man and has a criminal record. His relationship with the mother endangered the wellbeing of any child in the family, and care proceedings were issued in relation to L very shortly after his birth. Interim care orders were made; there were full enquiries and reports, resulting in a care order in favour of the local authority made on 17 June 2003. Subsequently, the appellant sought the discharge of the care order and the local authority sought an order freeing L for adoption under the legislation then current.

Those applications were determined by Mr Robin Tolson, QC, sitting as a Recorder on 29 July 2005. He dismissed all the applications before him. Accordingly, under the current statutory provisions to be found in the Adoption and Children Act 2002, the local authority applied for a placement order on 20 January 2006 and that order was granted on 14 March 2006. The local authority, in obtaining the placement order, had a particular family in mind. However, unfortunately that arrangement fell through, and on 14 July 2007 they placed L in a therapeutic foster home. On 11 October 2007 the mother applied to revoke the placement order, asserting wide changes of circumstance which, in her submission, justified her reconsideration as L's safe carer. That was the application determined by HHJ Wade on 25 April.

I turn briefly to the admirably clear judgment below. HHJ Wade, having reviewed the family history, noted the breakdown of the local authority's plan immediately following the making of the placement order, but then posed the question:

"… whether the care plan has in effect, or specifically, been altered to a plan […] which is for long-term foster care rather than adoption."

He referred to minutes of the adoption panel dated May 2007. Within the minutes was posed the question, "Is the door still open if we do get a match?" and the answer given, "Not sure if adoption is the best route". He then referred to the minutes of the panel meeting of November 2007. The minute recorded that the social worker:

"…welcomed the fact that the panel at its meeting in May had recommended the decision that [L] should be placed for adoption should not be rescinded."

The judge, when the case had been listed before him in March, was concerned to establish the current position and accordingly required further evidence from the local authority. The social worker in his statement of 17 April 2008 stated:

"As far as the Local Authority is concerned, the plan continues to be to place [L] for Adoption… The minutes make it clear that the decision to place [L] in a therapeutic foster home was a part of the process of preparing him for adoption."

The judge also took from that statement the assessment of the position of the foster carer to this effect:

"She does not feel that [L] is emotionally strong enough to face the adoption issue at this time. She would not preclude the possibility of her family adopting [L] in the future, but was not willing to make a specific commitment at this time."

The judge, having found the facts in that fashion, posed himself the question:

"Is [L] now placed for adoption?"

The judge answered the question in these terms:

"It seems to me that the reality here is that [L] is placed with the foster carers, certainly so far as the Local Authority is concerned, with a view to him being adopted by those foster carers […] although that carer has not specifically committed to [adoption], she has not precluded it, and it seems to me a matter of commonsense and interpreting the word 'potential', that that must mean that this foster carer is a potential adopter. Now the fact that the foster carer has honestly I think and realistically not committed to adopting at this stage, does not make that foster carer any less a potential adopter. What that means is that [L] is placed with a foster carer who is a potential adopter. That means that [L] is placed for adoption…"

That brings me to the statutory language. Section 24 of the Adoption and Children Act 2002 deals with the revocation of placement orders. The section states:

"(1) The court may revoke a placement order on the application of any person.

(2) But an application may not be made by a person other than the child or the local authority authorized by the order to place the child for adoption unless --

(a) the court has given leave to apply, and (b) the child is not placed for adoption by the authority."

Placement is defined by Section 18(5), which states:

"(5) References in this Act (apart from this section) to an adoption agency placing a child for adoption -

(a) are to its placing a child for adoption with prospective adopters, and

(b) include, where it has placed a child with any persons (whether under this Act or not), leaving the child with them as prospective adopters;"

In my judgment, the judge's pragmatic approach is erroneous. He has, it can be simply said, focused on the wrong adjective. Section 18(5) required him to focus on a prospective adopter, whilst he chose to focus on a potential adopter. As Mr Stuart Leach has pointed out in his skeleton argument, those two adjectives have distinctly different dictionary meanings. The Oxford English Dictionary describes "prospective" as an adjective attributive of a person expected or expecting to be something particular in the future; alternatively, as something likely to happen at a future date. "Potential", by contrast, is defined as an adjective having or showing the capacity to become or develop into something in the future.

The reality is that L, on and after 14 July 2007, was placed with the carer under the fostering regulations and not under the placement regulations, the adoption regulations. In those circumstances, the local authority had sole parental responsibility for L. Had he been placed under the placement regulations, then parental responsibility would have been shared between the local authority and the carer. As my Lord, Mr Justice Hedley, has analysed in argument, there are three necessary stages to the statutory placement of a child. The first question that has to be asked by the panel is whether adoption is in the best interests of the child. If the answer to that is in the affirmative, then there is an obligation on the local authority to apply for a placement order. Once the placement order has been granted, it is the responsibility of the panel to consider whether specific individuals -- say, Mr and Mrs X -- are in principle approved as adopters. If that question is answered in the affirmative, then the third stage for the panel's consideration is whether the child in question is matched to Mr and Mrs X, and therefore to be placed with them.

As my Lord has observed, the construction of Sections 24 and 18 must be considered within that framework, and I fully share his view that a child is not deemed to be placed for the purposes of Section 24 until all three stages have been accomplished. Here the only stage accomplished was the first; the current carers had not been approved in principle, nor had L been matched to be placed with them. As the judge himself saw, at the highest the current foster carer had no more than the potential to emerge at a later stage as a prospective adopter with whom L had not been placed, but whose placement might, under Section 18(5)(b), be enlarged from foster to adoptive placement.

So, in my judgment, HHJ Wade reached the wrong conclusion on a point of law. I only add the footnote that he took that course very much of his own motion since both counsel below had not sought the determination of the application on the preliminary basis that the mother had no standing since L had already been placed. Mrs Griffiths, for the local authority below, conceded that the arrangements that her client had made did not amount to placement. She sought the dismissal of the application on the consequential ground that no change of circumstance had been demonstrated; alternatively, that the prospects of any revocation application succeeding were too slight to justify a grant of leave to apply. So it has of course been awkward for Mrs Griffiths to seek to support the judge in this court, when in the court below she had presented the contrary argument.

We have ascertained from Mrs Griffiths some highly pertinent information which was nowhere to be found in the appeal bundle. The fact is that the appellant has not seen the child for two-and-a-half years. So any assessment of whether the revocation application would have any prospects of success, were leave granted, must, in realistic terms, depend in large measure on whether she has the capacity to re-establish beneficial contact and whether the restoration of contact would be in L's best interest. So we learn that on 19 November 2007 the appellant issued a freestanding application for a contact order. That was considered on 25 April 2008 for directions, and again on 28 May 2008, by which time it was known that the appeal had been fixed for hearing today. Accordingly, the judge adjourned the contact application for further directions to be heard tomorrow, 8 October. And Mrs Griffiths, who knows the court, hazards that tomorrow, when the appellant, the local authority and the guardian will all be before the court, the judge is likely to fix the substantive hearing with a one-day time estimate early in the New Year.

Mr Leach has, in his skeleton argument and in his oral submissions, urged us to determine the mother's application for leave in its entirety. He has submitted that there have plainly been changes of circumstance, both in relation to the appellant and in relation to L. Accordingly he says that he has, as it were, flown the fence which has been set up by subsection (3) of Section 24:

"(3) The court cannot give leave under subsection (2)(a) unless satisfied that there has been a change in circumstances since the order was made."

He submits that on the discretionary balance, having regard to all the circumstances, the scale clearly comes down in favour of giving the mother a chance. Mrs Griffiths I understood to concede that there had been a sufficient change of circumstance to clear the obstacle presented by Section 24(3), but she inevitably relies on the profound severance of any relationship between the mother and child and invites us to refuse the application for leave.

I have reached the very clear conclusion that the determination of the application on merits is too intertwined with the application for contact to allow any discretionary determination to be made safely today. Clearly, if HHJ Wade refuses the contact application at the final hearing in the New Year, the prospects of a revocation recede. Alternatively, were he to grant a contact application and set up a progressive regime, the prospects for the revocation application would be enhanced. Accordingly, I would direct that the issue of whether or not permission should be granted, having regard to all the circumstances, be remitted for determination by HHJ Wade immediately following the determination of the contact hearing, preferably in one conjoined hearing.

In conclusion, I would allow the appeal and remit the remaining issue to the judge.

Lord Justice Keene:

I agree that the appeal should be allowed and I agree also with the terms of the order which my Lord, Lord Justice Thorpe, proposes.

Mr Justice Hedley

I also agree both with the allowing of the appeal and the order proposed.

Order: Appeal allowed.