Re S (A Child) [2008] EWCA Civ 365 (05 March 2008)

Case No: B4/2008/0398

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL (CIVIL DIVISION)

ON APPEAL FROM BRIGHTON COUNTY COURT

(HER HONOUR JUDGE BLACK)

Royal Courts of Justice

Strand, London, WC2A 2LL

5th March 2008

B e f o r e :

LORD JUSTICE THORPE

and

LORD JUSTICE HUGHES

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IN THE MATTER OF S (A Child)

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(DAR Transcript of

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Official Shorthand Writers to the Court)

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Mr Campbell (instructed by Bosley & Co Solicitors) appeared on behalf of the Appellant Father

Mr T Bergin (instructed by Bosley & Co Solicitors) appeared on behalf of the Applicant Mother

Mrs Moore (instructed by East Sussex County Council) appeared on behalf of the Respondent Guardian

Miss Lazarus (instructed by East Sussex County Council) appeared on behalf of the Respondent Authority.

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HTML VERSION OF JUDGMENT

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Lord Justice Thorpe:

This is an appeal from a case management decision of HHJ Black, sitting in the Brighton County Court on 14 February 2008. The papers were put before my Lord, Wall LJ, who, on 21 February, gave permission for an oral hearing on notice with appeal to follow.

The proceedings in the county court relate to a child born on 4 January 2008 and the final hearing to determine her future is fixed for 10 June. This is a not unfamiliar case, in which the parents have four older children who have all been made the subject of care orders in the past on the culmination of applications brought by the local authority, so the parents are no strangers to public law proceedings. Specifically, children born respectively in 2000 and 2001 were the subject of care orders made by

HHJ Norrie in August 2002, and HHJ Coates made a care order in respect of another child on 26 November 2004. Finally, lay justices made a care order in respect of a child born in 2005 at a hearing in September 2006. So the local authority is quite properly very concerned as to these parents ability to provide safe and adequate parenting for the fifth-born child.

There is a wealth of material drawn from the history to justify its concerns and to found its application for care order. Probably the essential issue before the judge in June will be: have the parents changed sufficiently? Is there sufficient evidence that what they could not provide in the past they will be able to provide in the future?

Now, washing about in the history are reports and records relating to possible sexual misconduct by the father. Descending to detail, he has been cautioned in respect of bigamy and twice he has been prosecuted for sexual offences and twice acquitted. Those are matters of record. But there are, within the files maintained by the local authority and by the police, reports of other complaints and assertions, either of sexual interference or of sexual grooming, which have never been the subject of any criminal proceedings or, indeed, any family proceedings; but it is important to stress that the local authority do not found this care application on any allegation of sexual misconduct by the father or any suggestion that he represents a sexual risk to this child.

Under those circumstances a dispute developed on 14 February as to whether material relating to past reports of sexual misconduct should go to the expert to be instructed jointly by the parties. The expert is to be an independent social worker and the letter of instruction is a very detailed one running to five pages and includes -- almost at the outset -- the material that will accompany the letter. The material itemised is a dramatis personae: all the documents filed in the current case, judgments, guardians, reports and threshold documents extracted from the previous proceedings; and a copy of the court's order, enabling the expert to see the child and the documents filed.

Within the documents filed in the case to date are the local authorities' social service records, recording allegations of sexual misconduct and even expressing opinions as to the validity of the allegations, and there are also police reports, extensive reports relating to the material relied upon by the prosecution in support of the charges for which Mr S was acquitted.

Mr Campbell, who has filed a comprehensive skeleton argument, relies strongly on the authority of Re R (Care Disclosure: Nature of Proceedings) [2002] 1 FLR 755, particularly the passage at page 765 and at page 767:

"Re M and R (Child Abuse: Evidence) [1996] 2 FLR 195 confirms that the decision of the local authority not to pursue the allegations of sexual abuse means that if the threshold criteria are satisfied on a different basis (ie neglect and emotional harm) then, at the welfare or disposal stage, the court

cannot access risk on the basis either (a) that there was sexual abuse or, and importantly, (b) on the basis of a suspicion that there was or might have been sexual abuse, as alleged by the younger boys. A similar or identical situation would have arisen if the allegations of sexual abuse had been pursued and the court had been unable to make findings that there had been sexual abuse, or who the perpetrators were, to the requisite standard of proof.

In my judgment, the existence of these proceedings and the decision therein not to pursue the allegations means that the position is now different from that which existed during the period that the allegations were pursued during the currency of the proceedings because:

(a) the allegations have been put before a court but have not been proved for the purposes of either s 31 or s 1 of the Children Act 1989, or otherwise;

(b) it follows that the court and the local authority are not authorised, pursuant to statute, to interfere in the lives of the relevant individuals by reason of any public law orders made in these proceedings on the basis that the sexual abuse alleged by the three younger boys, or some of those acts of sexual abuse, have taken place;

(c) further, at the welfare or disposal stage of these proceedings and thus in recommending and approving care plans, the local authority and the court should not, in my judgement, assess risk for the purposes of s 1 and thus (i) what public law order should be made, and (ii) the terms of the care plan on the basis that allegations of sexual abuse and future risk based thereon have been established.

Additionally, in my judgment, having regard to the circumstances that now exist, unless and until the local authority either:

(1) pursue further proceedings to seek to establish to the civil standard that the sexual abuse alleged by the three younger boys has occurred, or

(2) a significant change in circumstances occurs,

it would be wrong for the local authority:

(a) to advance care plans; and

(b) thereafter, if public law orders are made, to proceed in their dealings with the family on the basis:

(i) that the fact the local authority have not proceeded with and are not seeking to establish the allegations of sexual abuse made by the younger boys makes no real difference because, for example, the local authority believe those allegations or some of them to be true or believe that the younger boys have been sexually abused; or

(ii) as they have done during the period that the interim care orders were in place (and thus on the basis set out in s 38(2) of the Children Act 1989) that the local authority had reasonable grounds for believing that those allegations of sexual abuse would be established."

It seems to me that it can be said powerfully that if in accordance with Charles J conclusion at paragraph (c), allegations that have not been pursued or proved by the local authority at the disposal stage of proceedings are not to be considered by the court in assessing risks and in considering what public law orders should be made, then logically that material should not be considered by the jointly instructed expert; logically, because, most evidently, it would be irrelevant for the expert to consider and opine upon something irrelevant to the judge's task at disposal. So, says Mr Campbell, all the material itemised at pages 16-18 of his bundle should be excised from the case papers to be submitted to the expert.

Miss Lazarus, in responding, advances skilfully an attractive argument that the allegations of sexual misconduct, even if not made the subject of any forensic investigation, may still have an importance because they have been significant historic events in the life and experience of the family. The family have had to face the stress of living in a local community where the assertions were circulating. They have had to cope with prosecution and the removal of the accused for a substantial period between charge and acquittal. There will have been an emotional impact in consequence in the relationship between the parents. Even if the allegations were quite untruthful, they are relevant in the family's response to the challenge that they posed and to that extent they should be made known to the experts and, insofar as the experts think appropriate, reflected in their opinions in court.

Mr Campbell in reply says that local authorities' case has never previously been articulated on that basis and it is something said and heard for the first time in this court. So, it may be that the identification of general principle is difficult. However I would fully support all that Charles J said in the case of Re R and I am clear that his words are by logical extension to be applied to the preparation of material conveyed to experts.

Secondly, I would say that, in instructing experts, nothing relevant must be excluded but, equally, material that is unnecessary (because irrelevant) must be rigorously excluded. Experts should be spared files of documents which are peripheral or of little relevance to their essential task. The cost of the expert's involvement is simply unnecessarily inflated by overburdening the expert with papers that are not significant to the expert's defined task.

Thirdly, I would say that it is important that local authorities should abstain from introducing into proceedings, and sending to experts, material which will inevitably be perceived -- perhaps reasonably perceived by the adult who is being assessed -- as being unfair; unfair in the sense that it is purely prejudicial. This is a case, again familiar, in which the parents are said to have a bad record of cooperation with professionals. The incapacity to cooperate with professionals is often a powerful consideration in the conclusion that a care order is necessary. It may almost be the single consideration and, accordingly, where there is already a history of fractious relationships, untrusting relationships between the family and the professionals, it is important that their capacity to improve cooperation is not unnecessarily prejudiced by a litigation presentation that is regarded by the family as a blow below the belt.

Now it is necessary to try and apply those considerations to the disputed material in this case. I am in no doubt at all, and indeed Mr Campbell concedes, that there can be no objection to the inclusion of the caution for bigamy which rests upon a confession. Equally, I would accept that the local authority is entitled to record prior prosecutions resulting in acquittal: their relevance, as Miss Lazarus has said, may rest in the fact that the accused was in custody for a substantial period between charges. On the other hand, I would exclude not only opinion in relation to their worth, but also the very fact of reported allegations which were not the subject of proceedings, either criminal or in the family justice system. It has been conceded throughout that any opinion should be redacted. I would go further and say the report itself should be excluded from the papers to go to the expert. In relation to the police papers, it is accepted by Mr Campbell that police incidents' summaries, 42 pages, are not objectionable. What their relevance to the expert's task is another matter, but there is no reason why the material should not go to the expert.

What should not go to the expert is the crime reports' material to be found from section G, page 9 onwards, and the police papers relating to the rape prosecution to be found at section G (63) onwards. I hope that that will be a sufficiently specific direction to enable this letter of instruction to go swiftly to the expert. I fully support the terms of the direction, given to the expert in paragraph 8 of the draft letter, that allegations of sexual misconduct by the father do not amount to risk that needs to be assessed within the report.

I would grant permission, allow the appeal in part and invite the parties to draw a paragraph, which will specify the boundary that I have sought to draw.

Lord Justice Hughes:

I agree. Like my Lord, I will make no attempt to set out any exhaustive set of principles which can be applied to what is essentially a case management decision. It must be made on the facts of each case. There are, however, plainly, at least two root principles. The first is that set out by Charles J in Re R and already cited by my Lord. The second is that what should go to experts in a case of this kind should be confined to what is or may be relevant.

It is not a proper presentation of care proceedings simply to take everything that the local authority has accumulated over the years and present it as part of the case file. That is especially important if the material which is under consideration is inaccurately prejudicial to one party and its inclusion may, accordingly, be simply unfair. There must be no possibility of the unspoken suggestion that allegations, which have not been proved, nevertheless are relied upon, unacknowledged by one party or another.

On the facts of this case, it is, as it seems to me, possible that the fact of allegations of sexual misbehaviour might, irrespective of their truth, be relevant. Whether they are or not seems to me to be highly questionable, but at this stage one cannot safely say that one way or the other. What cannot be relevant is the detail of the complaints, the kind of complaint and, still less, any opinion that has ever been expressed by anybody as to whether they are true or not. The dates of the allegations, the nature of the complainants and the kind of conduct alleged are not, as it seems to me, even arguably relevant.

Accordingly I agree that, applying that principle in relation to section G of the papers, pages 63 onwards and 9-13 are plainly irrelevant. In particular, I am quite satisfied that father's response to an allegation of criminal misbehaviour put to him by the police, and when he had been cautioned in accordance with the Police and Criminal Evidence Act, is incapable of providing any useful guide as to his ability to cooperate with statutory child protection authorities in this or any other set of proceedings.

There must also be removed, as my Lord has said, the detail which appears elsewhere in the papers, in particular at F1, F3 and C25 and it may be elsewhere, which are expressions of opinion as to truth.

As to the letter of instruction, it is not for us to attempt to settle it, but I would, for my part, commend to the parties two possible considerations. First of all at paragraph 2, second bullet point: it might be thought to be sensible to be telling the expert that what he is getting is all the relevant documents in the case; and, as to the important paragraph at paragraph 8, consideration might perhaps be given to expanding the last sentence along the lines of such as the following: the assessment of the parents must thus not be on the basis that these allegations are, or may be, true, nor on the basis that father presents any form of sexual risk to children. But, as I say, the detail of drafting is something much better left to the agreement of the parties than it is to an extemporary judgment at this stage.

Order: Appeal allowed