Re S & L (Children) [2011] EWCA Civ 1022 (23 May 2011)

Case No: B4/2011/0962

IN THE COURT OF APPEAL (CIVIL DIVISION)

ON APPEAL FROM NORTHAMPTON COUNTY COURT

(HIS HONOUR JUDGE WAINE)

Royal Courts of Justice

Strand, London, WC2A 2LL

23rd May 2011

B e f o r e :

LORD JUSTICE WARD

LADY JUSTICE BLACK

and

LORD JUSTICE TOMLINSON

_____

Between:

IN THE MATTER OF S-L (CHILDREN)

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(DAR Transcript of

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Official Shorthand Writers to the Court)

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Miss Rachel Watkins (instructed by Woodford Robinson Solicitors) appeared on behalf of the Appellant Father.

Miss Hari Kaur (instructed by Wilson Browne Solicitors) appeared on behalf of the First Respondent, the Local Authority.

THE REMAINING RESPONDENTS DID NOT APPEAR AND WERE NOT REPRESENTED.

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HTML VERSION OF JUDGMENT

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Lady Justice Black:

This is an appeal by a father against a decision of Judge Waine made on 25 March 2011 in care proceedings. The care proceedings concern the father's three children, two boys aged nearly nine and nearly eight and a girl aged two. The decision was made at the end of a fact-finding hearing. The fact-finding hearing had been arranged to explore sexual abuse allegations made by the boy C against the mother's brother, D. Certain threshold matters had been conceded by the parties in the run-up to the hearing. The father accepted that his relationship with the mother had been volatile and at times there was arguing and shouting and also that he physically chastised the boys by smacking them and pushing them away. He conceded, too, that C had been out of control. He said that the mother was the primary carer and that he spent long periods of the day out at work. The mother was at the time of the fact-finding hearing, and may still be, represented by the Official Solicitor. There has been no

attendance on her behalf today nor by the Children's Guardian because both are neutral in relation to the appeal. The local authority have attended at the invitation of Wilson LJ. They too are neutral with regard to the appeal.

The mother is represented by the Official Solicitor by virtue of the fact that she has an extremely low level of intelligence and also has personality and mental health problems. She too made concessions before the fact-finding hearing about failures in the parenting that had been given to the boys. By the time of the fact-finding hearing she and the father had separated and they have remained separated since that time. The children are all in interim care. The father had been living in an annexe to the property where D was living, but upon hearing the court's findings with regard to the abuse by D made immediate arrangements to move out of that property and live elsewhere.

At the fact-finding hearing Judge Waine found that D had touched C sexually. Both parents gave evidence at the hearing and the judge made some limited comments, in his judgment on the facts, about his impression of the father's evidence. He made no factual findings against the father because no relevant factual findings were sought during the course of that hearing and, in particular, the local authority did not seek a finding that either of the parents had failed to protect the children from sexual harm.

The judge then gave a short judgment dealing with the father's application that he should be assessed with a view to caring for the children in the event that the mother proved unable to do so. A transcript of that very short judgment is now available. The judge determined that he should not permit assessment of the father. He concluded that assessments could not assist him, having concluded:

"I do not want to go back over the criticisms I made earlier of the father but I have to say that the way in which he gave his evidence and his description of his extreme lack of understanding or empathy in this case must be indicative of the fact that it would only be in the most extreme circumstances that I could foresee him being able to look after these children full time."

He concluded his judgment with these words:

"...I am afraid I am simply not prepared to order either a psychological assessment or a parenting assessment of the father. I think it is just unrealistic and in the end it would be a poor use of public funding."

In fairness to the judge this short judgment cannot be read alone. It must be looked at also in the context of the fact-finding judgment. In paragraph 38 of that judgment, speaking about his finding that the father must have been told sooner than he said about the allegations C made about D, the judge said this :

"Even this father, who has not shown a flicker of emotion throughout all of the court hearings could [not] have been unaware of what was going one. Whenever he was told he declined to do or say anything to [C]. As I understand it he has never in fact spoken to [C] about the allegations. He has also subsequently moved back into his in-law's house and never spoken to [D] or the maternal grandmother about the allegations. He has shown an extraordinary lack of empathy and understanding about what [C] might have been through in connection with these matters. He appears to show absolutely no capacity to provide suitable protection or support for his children, but that of course is predominantly a matter for another day "

And in the only other passage that seemed to me to be truly material to this issue, which appears at paragraph 49 of the fact-finding judgment, the judge said this:

"In the end, although it is desperately difficult to understand what the father does think he seemed to come round to the view that even he thought that [C] might be telling the truth..."

The father was seeking permission for a cognitive assessment by a psychologist, Dr Penny, who had assessed the mother and who would look at matters such as intellectual capacity, and by an independent social worker, at that time one of two possible independent social workers, who would carry out an assessment of his parenting and his ability to protect the children from risks. Both of those experts would have been able to report in time for the next stage of the hearing in front of HHJ Waine, which I think was going to be in September when decisions would be made about the future placement of the children.

The father wanted to have these assessments, as I have said, with a view to looking after the children full-time on his own if the mother was unable to do so. There had been a local authority assessment carried out of the parents. That is dated 18 October 2010. However, that had been an assessment of the father's ability to care for the children together with the mother, not an assessment of his capacity as a sole parent of the children and, whilst it refers to matters that arise from the father's conduct as a parent, it does not really seem to be based on much or indeed perhaps any direct discussion with the

father himself. It therefore is not sufficient by way of an assessment, and that it seems was recognised by the judge, who shortly after that gave permission for both parents to obtain assessments of the type that are now contemplated.

The father's case is that without some sort of assessment he has effectively already been ruled out as a possible carer and he submits that HHJ Waine's determination does that unfairly and prematurely. He submits that it is particularly unfair given the judge's previous order that the mother and father should have leave to commission assessments. It is unclear why that had not in fact been put into practice, but the father's submission is there was no good reason to suppose that it had become unnecessary. It was also of note that the other parties did not oppose the proposed assessment and that it could be carried out without any impact on the timetable for the case. The father had argued that there were a number of positive features in his favour. Firstly, he had complied with agreements made with the local authority about the children. Secondly, he had been a respite carer for the mother in the evenings on occasions. Both those matters of course applied whilst the children were still at home. After they had been taken into care he had completed a parenting course. He had arranged to attend an anger management course, although we are told today that he is still having difficulties in achieving attendance on that through Mind, not through his fault but for some other technical difficulties. And finally he had accepted that C's allegations were true and after the findings had made arrangements to move away from the place where D was living and find himself alternative accommodation.

The first four of those factors the judge had taken into account. We do not see the fifth of them featuring in his judgment.

This court is anxious not to interfere with case management decisions, which are particularly the province of the trial judge and it will not lightly do so. It is, as Wilson LJ observed when he commented on this matter in response to the application for permission, likely to support a robust exercise of discretion regulating the assessments that should be obtained and adduced in evidence in proceedings such as this. It is exceptionally difficult sometimes for judges to make decisions of this type and this judge recognised that he had to tread very carefully in excluding a parent at the stage that proceedings had reached in front of him and that the decision that he had to take was a hard decision and a draconian one. He steeled himself to take it in what was a very proper attempt to ensure that public funds, which are tight as everyone knows, would not be expended on what he had concluded would not be a fruitful exercise.

I am afraid, however, that in this case in my view the judge's decision came down on what I consider to be the wrong side of the line. He may prove ultimately to be right in the assessment that he made of the father's prospects based on his threshold concessions and his evidence, but the fact was that the true abilities of a parent can in some cases only reliably be assessed by a process carried out by relevant professionals outside the court room. That may particularly be so if the parents' intellectual capacity may turn out to be limited. This father had not been adequately assessed in the proceedings. It was in the children's interests that he should be in case it was possible for him to care for them. He had been part of their lives during their childhood so far to a greater or lesser extent and he is their father. Without an assessment he is or may well be effectively ruled out.

The mother was to be assessed further and the intention had been that the father would be too. There was no sufficient reason for a change of that plan. Indeed what the judge's thinking was on the change of tack from his earlier order we do not know because his judgment does not acknowledge the existence of the earlier order. An assessment carried out now will still, fortunately, not derail this case. If the matter were left until later until the mother had been ruled out, if that turns out to be the finding of the court, then the timetable would in fact be disrupted.

In all of the circumstances I cannot support this exercise of the judge's discretion. It is not merely that I would have taken a different decision on these facts, but that I have concluded that the decision that the judge took in this case was in error and for those reasons I would allow the appeal and give permission for the two assessments to be carried out.

Lord Justice Tomlinson:

I agree, and although we are differing from the judge in relation to a case management decision no useful purpose would be served by my adding any independent reasons of my own.

Lord Justice Ward:

I also agree.

Order: Appeal allowed