Neutral Citation Number: [2004] EWCA Civ 597
Case No. B1/2004/0270

IN THE SUPREME COURT OF JUDICATURE
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM SHEFFIELD COMBINED COURT CENTRE
(HHJ SHIPLEY)

Royal Courts of Justice
Strand
London, WC2
5 May 2004

B e f o r e :

LORD JUSTICE THORPE
MR JUSTICE BENNETT

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RE: S (CHILDREN)

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The Appellant appeared In Person.
The Respondent was not represented and did not attend.
MR LOPEZ (instructed by Nicole Erlen) appeared on behalf of the Children's Guardian

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HTML VERSION OF JUDGMENT

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1. LORD JUSTICE THORPE: The appellant appears this morning in person with the assistance of a Mackenzie friend to pursue an application for permission to appeal the order of HHJ Shipley sitting in the Sheffield Combined Court Centre on 13th January 2004. The application was listed before Wall LJ on 23rd March when he ordered an oral hearing on notice with appeal to follow if permission granted.

2. There can be no doubt at all that Wall LJ's objective was to bring the parties to the court so that he could more profoundly test the causes and the possible resolution of the

seemingly implacable obstruction to spontaneous natural contact between the father and his two children who are L, nearly 13, and A, 10 and a half.

3. The judge concluded his brief judgment by saying:

"It is particularly important, in my judgment, that both [the respondent] and [B] attend the hearing, both plainly have important professional commitments, and a date should be fixed which is convenient to both, consistent with the need for the case to be heard swiftly."

4. The reference to professional commitments arises from the fact that the mother, the respondent, is a general practitioner and B is a CAFCASS officer who has for a little while acted as guardian to these two children.

5. Wall LJ's intention has unfortunately been frustrated because the respondent has filed with the court a skeleton argument in which she says:

"I have been advised not to attend court because of my medical condition. I am signed off work because of the complications of pregnancy. I am currently 28 weeks pregnant with twins and attendance could precipitate premature labour resulting in premature babies at risk of death or serious long-term disabilities."

6. Accordingly the scheme of Wall LJ has been frustrated by a development that he could not have foreseen. All we have been able to do today is to hear the forceful and plausible submissions of the appellant and the helpful submissions of Mr Lopez on behalf of the guardian.

7. The appellant's essential submission is that contact between himself and these two children has a 7-year history which, objectively reviewed with the benefit of hindsight, demonstrates that this is a mother who is implacably opposed to contact and who has progressively used one ploy after another to frustrate the development of a natural relationship between children and father.

8. He further charges the court with naivety in failing to perceive this reality and in failing to challenge the mother head-on. He also charges CAFCASS service with having failed these children in having too readily accepted the mother's apologia and in failing to work directly with the children beyond the traditional role of interview leading to report.

9. Accordingly, the appellant submits that HHJ Shipley on 13th January fell into error when she dismissed the mother's stance as being one of implacable hostility. He says that it is essential that this court now intervenes. That case for intervention is strengthened by the fact that HHJ Shipley's January order at least ensured for the father six-weekly visiting contact with A which between the date of order and today should have resulted in two meetings, each of 3 hours' duration, in the Matlock area. Neither has taken place. The mother is seemingly once again in breach.

10. We know from the written skeletons that she has filed that her defence is that on each occasion the father either came without, or indicated that he would come without, his baby son M and that accordingly A, predictably and reasonably, refused to go to the

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meeting. There is nothing in the form of the court order which would suggest that that evidence would constitute a good defence to a committal application.

11. However, in fairness to the respondent, paragraph 26 of the judgment of 20th January is in these terms:

"I also appreciate the practical difficulties in bringing [M] to B, particularly in inclement weather, for short periods of visiting contact. The father may feel that in those circumstances, he is unable to take up such contact. I know not."

12. That brief citation suggests to me that HHJ Shipley might well be supportive of the mother's case on this issue. However, the fact remains that at the end of a woeful litigation history, the father is faced with an order which gives him no more than three hours every six weeks with one of his two children, and that order is not worth the paper it is written on, since on the only two occasions when contact was ordered to take place, there has been no compliance.

13. So what is the way forward? Mr Lopez, skilfully presenting the view of B, the experienced guardian, says that M is the key to future meetings. Any hope of meeting between father and A rests on that slender thread. For the court to interfere with the order below and to adopt a more proactive policy runs the risk of destroying that slender thread so the children would be even worse off.

14. It is submitted on behalf of B that it is not meetings with the father that are potentially harmful to the children, but the very process of contact; and accordingly this court should be extremely wary of interfering and thinking it can do better than HHJ Shipley.

15. The appellant's specific suggestions are that this case should be transferred to a judge of the Family Division. He says that the mother should be required to re-engage in family therapy. He says that the mother should be required to undergo a psychiatric or psychological assessment of her parenting skills and of her readiness to promote a positive relationship between father and children. He says that NYAS should be invited to come into this case, not only to represent the children but to bring to bear their skill and experience in helping children to a better understanding of the need for a positive relationship with the absent parent.

16. Mr Lopez accepts that this case merits elevation to a judge of the Division. He accepts that a resumption of family therapy would be, at least in theory, of great benefit to the parents and children. He doubts the value of an assessment of the mother's psychological stance and points out there is no power to order it. He opposes the introduction of NYAS simply on the basis that the children have a relationship with B and should not be exposed to the introduction of strange professionals.

17. Let me then consider in turn these various options. The Family Division judge: it is a regrettable feature of this case that when a previous attempt was made to elevate the issue to a Family Division judge it only resulted in the case being listed before a circuit judge sitting with his section 9 powers. It is a case in which the passage of the years has almost become conclusive and should not be allowed to become conclusive without a major judicial effort to rescue for these children a relationship with their father before it is too late. The mother is already saying in her skeleton: L is nearly 13, L is taller than I

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am, how can I be expected to force him to do anything he does not want to do? And the same argument will undoubtedly be advanced in relation to A in the fullness of time.

18. So it seems to me that this case should be elevated to a Family Division judge at the earliest opportunity and before the fixture in the county court which is for 13th July. How is that to be achieved? That depends on the investigation of the deployment of the judges of the Division. If the Clerk of the Rules can list this case in London with a realistic time estimate of, I would hazard, half a day before 13th July, well and good. If she cannot, then arrangements must be made for the case to be listed in front of a judge of the Division on circuit, preferably on the North Eastern circuit but, if that proves impossible, on the Midland and Oxford circuit. This case is urgent and cannot be simply again delegated to a circuit judge exercising section 9 powers.

19. I turn now to therapy. This is something that was attempted in March and April 2003, only just 12 months ago, and it was something considered by HHJ Shipley at an earlier hearing in October. In the course of that judgment she said this:

"The parents saw Mark Pearson [he was the family therapist] three times (in March and April 2003). The father paid the fee for the sessions. The parents willingly engaged in the process, and Mr Pearson was impressed with their efforts. He identified high levels of mistrust and anger between the parents indicating a number of outstanding unresolved emotional issues between them. While ever the unresolved difficulties remained, he said, they seemed to block any effective communication between these parents. There is insufficient goodwill in the adult relationship.

"Mr Pearson recommended that the parents consider further meetings together with an appropriately qualified practitioner in order to begin the process of addressing their unresolved difficulties. He felt that for the process to succeed, both parents need to believe that change is possible, and need to want to be involved in the process. The father's current evidence is that he is willing; the mother's evidence to me is that she is not, because of something that the father said in an earlier session which leaves her feeling that the process would be pointless. It seems, therefore, that the case cannot at this stage be progressed by way of therapy."

20. With respect to the judge, that seems to me altogether too passive an assessment or acceptance. Manifestly there are between these adults unresolved areas of conflict which, unless resolved, will continue down the years to resound to the prejudice and harm of these two children. A process of family therapy is infinitely more likely to lead to resolution than continuing litigation between them.

21. Accordingly in my judgment it would have been better if HHJ Shipley in October had taken a stronger line with the mother and pointed out to her that her seemingly slender ground for refusing to re-engage in a process of family therapy was something that might lead the court to draw adverse inferences as to her commitment to progress towards a spontaneous and natural relationship between father and children.

22. So whilst the court has no power to order the respondent to re-engage in a process of family therapy, it is relevant to observe that her present condition, signed off work, at least gives her plenty of opportunity, plenty of availability, and if it emerges before the judge of the Division that reasonable proposals, reasonable both as to time and location,

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have been advanced for the revival of the family therapy and she has continued to refuse, then she must understand that the court may draw adverse inferences against her.

23. As to the third possibility suggested by the appellant, namely an assessment of the mother's parenting skills, it seems to me that at this stage it would not be helpful to expand that as something that could be usefully undertaken on a unilateral basis. It is only something that could be understood in the context of continuing litigation. I am urging these parties to consider a process that is more therapeutic than adversarial. If in the end there has to be a resumption of adversarial exchange, any direction as to assessment is better done by the trial court, and possibly on a basis that involves both parties rather than one party alone. So I would dismiss that as a present option.

24. The fourth option to involve the National Youth Advocacy Service: I am obviously influenced by the experience of Wall LJ as recorded in his judgment in the case of A A delivered on 4th February 2004. It is plain that B has reached the end of a professional road to the extent that the appellant has in reply suggested that her submissions to this court sound more like the submissions of an apologist for the mother. I am not myself adopting that characterisation but it is indicative of the extent to which the appellant has lost confidence in the interventionist and therapeutic role of the CAFCASS service.

25. We all recognise the extent to which the CAFCASS service has been overstretched in recent years and how it has struggled to maintain its primary service to the court, namely the service of investigation and reporting. But this case calls for something different. It requires that as yet largely undeveloped aspect of the CAFCASS service, namely the resource to work with the family to bring about the implementation of difficult orders. Accordingly, it seems to me that it would be appropriate for the National Youth Advocacy Service to be invited at least to consider this case and to see whether it would not from its resources, perhaps less restricted than those of CAFCASS, be able to undertake direct work to try and bring about the implementation of the existing order or such future orders as may be made by the judge of the Division.

26. Reference to existing orders brings me to my last point. Contact is due to take place on 8th May and on 19th June. It is certain that there will be no listing before the family division judge before 8th May and it is possible that there will be no listing before 19th June. So I wish to make it plain to the respondent that these two contact orders stand and the visits are to take place.

27. Given that it is predictable that she will continue to interpret compliance as being conditional upon M's inclusion in the party travelling to B, I would suggest to the appellant that he makes the exceptional effort to include M in the party on 8th May, providing that can be done without risk of harm to M. Obviously if the appellant takes that step and contact does not take place, it will have demonstrated convincingly the force of his submission that the absence of M is but a pretext.

28. More than that I would not say, given the intention of this court that there should be an early review by a judge of the Division. I would simply grant permission and vary the order of 20th January to the extent indicated, that is to say to vary the provisions for future review without in any way varying the provisions for continuing contact between this date and whatever date may be fixed for review.

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29. The order of transfer to the High Court for listing before a judge of the division and not a deputy or a section 9 judge will be recorded, as will be recorded the invitation to the parties to re-engage in family therapy.

30. MR JUSTICE BENNETT: I entirely agree with all that my Lord has said. I only wish to add that this may now represent the last practicable opportunity the court has of trying to bring about proper and meaningful contact between the children and their father.

31. I therefore entirely agree with all that my Lord has said and in particular his proposal that this matter be transferred to a High Court judge of the Family Division sitting either in London or on circuit for a very urgent hearing prior to 13th July 2004. I also agree with his comments about the involvement of NYAS and that the contact visits between father and children in May and June 2004 ordered by HHJ Shipley are to take place.

Order: application allowed

32. LORD JUSTICE THORPE: Well, an order will be drawn accordingly. Mr Lopez we would be grateful to you if you would do one more thing and that is to assist the associate with drawing the order because it is not entirely straightforward. Obviously the appellant has his right to be involved in the drafting process but it is more technical than anything else.

33. MR LOPEZ: Can I indicate one thing? Although the hearing was on 13th January, the order was actually made on the 21st as I understand it at page 383, the judgment being given some days later, so may I change that in reference to the amendment?

34. LORD JUSTICE THORPE: Yes, I am so sorry. Thank you for that correction. Any point from you?

35. MR SPARKE: Very briefly, my Lord. Since mother is unfortunately not present today, nor is she represented, you may find it difficult to get full knowledge of this judgment. May I ask that your judgment is prepared at public expense so that all parties have a copy of it?

36. LORD JUSTICE THORPE: Yes, public expense. You are not represented to avoid the cost of representation or of choice?

37. MR SPARKE: To avoid the cost of representation. I was at one stage.

38. LORD JUSTICE THORPE: Of course. We will say at public expense. Again I ask the shorthand writer if she would be kind enough to expedite the transcript and I will try and approve it quickly.

39. MR LOPEZ: May there be a detailed assessment of the respondent's costs?

40. LORD JUSTICE THORPE: Yes, of course, and once again, Mr Lopez, I express our gratitude to you and to B.

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