Neutral Citation Number: [2011] EWHC 517 (Fam)

Case No: FD10C00053

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/03/2011

Before :

MR. JUSTICE HEDLEY

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Between :	
LB Redbridge	**Applicant**
- and -	
B	**1st Respondent**
- and -	
C	**2nd Respondent**
- and -	
A (a child)	**3rd Respondents**
(Through his Children's Guardian)	

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Miss J Brown (instructed by **LB Redbridge Legal Dept.**) for the Applicant
Miss J Bazley QC and Miss S Segal (instructed by **Attwaters Solicitors**) for the **1st Respondent**
Mr A Verdan QC and Mr Clive Redley (instructed by **Sternberg Reed Solicitors**) for the **2nd Respondent**
Mr R Littlewood (instructed by **Edwards Duthie Solicitors**) for the **Child's Guardian**

Hearing dates: 21st December 2010

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR. JUSTICE HEDLEY

This judgment is being handed down in open court on 10th March 2011. It consists of 5(five) pages and has been signed and dated by the judge. The judge hereby gives leave for it to be reported. The judgment is being distributed on the strict understanding that in any report no person other than the advocates or the solicitors instructing them (and other persons identified by name in the judgment itself) may be identified by name or location and that in particular the anonymity of the children and the adult members of their family must be strictly preserved.

1. On 21st December 2010 I gave permission to the local authority to withdraw care proceedings in relation to a child A born on 4th October 2009. With the consent of all parties, I reserved my reasons indicating that I intended to adjourn their delivery into open court since it appeared to me that it was in the public interest that the reasons should be given in public. It remains, of course, the case that no reporting is permitted which may reasonably have the effect of identifying this child or his family.

2. A was born on 4th October 2009. From birth he has suffered from a very severe neurodevelopmental and neuromuscular disorder resulting in both complex and demanding care needs. The disorder has never been satisfactorily diagnosed. His care needs have been met essentially by his parents, assisted within the extended family and supplemented by substantial medical and other professional input. The evidence yields testimony to the skill and commitment of A's parents to his care.

3. These proceedings came about as a result of a scan in January 2010 which, it is now accepted, demonstrated fractures of the 5th and 6th ribs on the right side, the 7th rib on the left side and (very unusually) bilateral acromial fractures. Since no explanation was forthcoming for these injuries, the working diagnosis was that they were inflicted and care proceedings were instituted. A has, however, remained with his parents without any statutory order in place, for some time with 24 hour supervision which more recently has been significantly reduced. The preponderance of the medical evidence places the happening of those fractures between 5th December 2009 and 6th January 2010 though Dr. Calder would allow them to be a week or so older.

4. No explanation has ever been forthcoming for these fractures. The distinguished paediatrician Professor David was jointly instructed to provide an overview of the evidence. His view was that A had no underlying bone weakness or osteopaenia or rather that there was a real but only very small possibility of such. He could see "no plausible alternative" to a conclusion that the rib fractures were caused by an episode (or episodes) of squeezing of the chest. The same mechanism is postulated for the acromial fractures.

5. In the end all parties accepted (or did not contest) that these fractures must have been caused by a squeezing of the chest in the course of the care of this child. Of course, no-one sought to suggest otherwise than that the infliction of these injuries amounted to significant harm. There were, however, two major qualifications in Professor David's report which are highly relevant to these proceedings for, during part of the relevant time frame, A was an in-patient in hospital.

6. Both qualifications flow from the well documented evidence that A was generally "massively irritable and hugely difficult to handle". He needed to be swaddled to be fed or to pass a nasogastric tube so it was inevitable that greater than normal force would often be required in his care. The first qualification is that given his condition, the pain and discomfort attributable to a fracture would have been masked by his general irritability. Hence only the actual perpetrator of the injury would have any reason to suspect that the child had been injured. Any other carer would have no basis for suspecting any of the fractures found in this case. The second qualification appears in Paragraphs 153-161 of Professor David's report.

7. The effect of those paragraphs is to present to the court a real possibility that these injuries could have resulted from handling by medical staff. It is unlikely that they

were caused other than by actual carers and that in reality meant the parents or hospital staff. It was a matter, said Professor David, that only the court could resolve. These two qualifications self-evidently present obstacles to proof in this case.

8. It should also be added that the commitment of these parents to A is unquestioned and that the general standard and effect of the care given by them is admirable. In those circumstances, as alternative sources of care are considered, one can well understand the local authority's feelings of ambivalence about these proceedings. In truth no-one sought (or could) suggest a viable alternative to care by his parents which would promote the welfare of this child. That was reinforced by the steady reduction in the supervision of their care and the recognition that such supervision was indeed not required. Accordingly it came as no surprise that the local authority should have made the application that in fact they did.

9. Whilst I had no doubt that ultimately I should accede to the application, I was troubled as to the proper basis for so doing. If the local authority could not prove the threshold criteria, then of course their application would succeed without more as otherwise I would have no alternative but to dismiss the proceedings. If, however, the threshold could be established, then the application would really depend upon the court concluding under Section 1(5) of the Children Act 1989 that no order was necessary; that is to say on the basis that withdrawal was consistent with the welfare needs of A - see L.B. SOUTHWARK -V- Y [1993] 2 FLR 559 and WSCC -V- M, F AND OTHERS [2010] EWHC 1914 (FAM).

10. Notwithstanding the decision of the House of Lords in RE B (CARE PROCEEDINGS: STANDARD OF PROOF) [2008] 2 FLR 141, in this case the local authority correctly concede that it would not be possible on the evidence available (or reasonably likely to become so) to prove that the fractures (or any of them) were caused by the parents themselves (let alone to identify which of them) but that is not the end of the matter. Section 31(2) of the Act provides (so far as is material) as follows:-

> "(2) a court may only make a care order … if it is satisfied -
>
> a) That the child concerned is suffering … significant harm; and
>
> b) That the harm … is attributable to -
>
> i. The care given to the child … not being what it would be reasonable to expect a parent to give to him …"

As a general rule it could be safely said that the infliction of these fractures would amount to significant harm and would be outside the care that it would be reasonable to expect a parent to give. Yet it is the case that the threshold criteria may be met even where no specific fact can be proved against a parent.

11. For a consideration of this, it is necessary to turn to the decision of the House of Lords in LANCASHIRE C.C. -V- B [2000] 1 FLR 583. This was a case in which care was shared between the parents and a childminder; the child concerned suffered injury but it was not possible to decide by whom it was actually inflicted. The difficulties, the

solution and the potential unfairness of that solution are set out in the speech of Lord Nicholls between p.589C and p.590F. They are accurately summarised in the headnote as follows -

> "the threshold conditions could be satisfied when there was no more than a possibility that parents, rather than one of the other carers, were responsible for inflicting the injury which the child had suffered. The court had to be satisfied that harm suffered by the child was attributable to 'the care given to the child'. That phrase referred primarily to the care given by a parent or parents or other primary carers, but where care was shared the phrase was apt to embrace the care given by any of the carers. This interpretation was necessary to allow the court to intervene to protect a child who was clearly at risk, even though it was not possible to identify the source of the risk. It by no means followed that because the threshold conditions had been satisfied, the court would go on to make a care order, and when considering cases of this type, judges would keep firmly in mind, in the exercise of their discretionary powers, that the parents had not been shown to be responsible for the child's injuries. The steps taken so far in this case had been those reasonably necessary to pursue the legitimate aim of protecting the child from further injury, which was an exception to the guarantee for respect for family life contained within the Convention."

Justice to parents in such a case can be done at the second stage of the process, as Lord Nicholls says (p.590A) -

> "It goes without saying that when considering how to exercise their discretionary powers in this type of case judges will keep firmly in mind that the parents have not been shown to be responsible for the child's injuries."

12. Miss Janet Bazley Q.C. for the mother and Mr. Alex Verdan Q.C. for the father submitted that the court should be able expressly to exonerate the parents from responsibility for causing these injuries. The evidence clearly establishes that, had they not caused them, there was no basis at all for any allegation of failure to protect. It seems to me that the proper approach here is simply to apply the principles in RE B [2008] (supra) and say that since it cannot be proved that these parents inflicted these injuries themselves, then the case must in future be managed on the basis that they did not do so.

13. On the other hand it is simply not justifiable on the evidence to exclude the possibility that these parents (or either of them) caused these injuries. This is not a case where it can be shown that the injuries were caused whilst not in the care of their parents, in which case the threshold criteria could not be established. In this case, whether in hospital or, more particularly, at home, these parents were intimately concerned with the care of this child. It follows in my judgment that this case must come within the ambit of cases contemplated in the LANCASHIRE case (supra) with full recognition of the apparent unfairness to parents acknowledged by Lord Nicholls therein. I

accordingly conclude that had this matter been tried out it was highly probable that the local authority would have established the threshold criteria as required by Section 31(2). I do not believe that there is anything in the judgment of Baroness Hale SCJ in RE S-B (CHILDREN) [2010] 1 FLR 1161 which alters the approach advanced in the Lancashire case. Attributability focuses on care giving rather than parents specifically with the potential apparent unfairness to parents articulated by Lord Nicholls.

14. It follows that the question of withdrawal must be determined on a welfare basis. It is to that that I must now turn.

15. It is clear that the view of the Local Authority and the guardian is that A's welfare will be best served by his remaining in the care of his parents. He will of course remain a child in need within the meaning of Part III of the Children Act 1989. Equally he will remain within the purview of the medical authorities. Moreover his status and needs are not likely in these respects to change much over the next year or so. He needs the care of his parents and he will, without any order of the court, remain subject to professional oversight. The parents, notwithstanding the stresses of these proceedings, have shown themselves well able to work with professionals both from medical and social care.

16. This is also the point at which the court reminds itself (as Lord Nicholls observed) that nothing has been proved against the parents. Certainly one can be confident that, whatever may have happened in this case, these parents have never inflicted deliberate harm on this child. It is also in point to remember (as Lord Hoffman observed) that, no findings having been made, this case must now be managed on the basis that these parents do not present a risk to this child based on anything that may have happened in the past.

17. In these circumstances it seems clear to me that were this case to have been heard it would almost inevitably result in the conclusion that the outcome was governed by Section 1(5) of the Act with the making of no order. It was in these circumstances that I acceded to the local authority's application to withdraw these proceedings.

18. Although what has been said is sufficient to explain and justify that court's decision, I desire to add a word to it. It is important that the court's conclusion that the threshold may have been crossed is not understood as implying criticism of the parents. Such a finding will of course usually do so but it is not inevitable having regard to Section 31(2) as understood in the Lancashire case. It is not intended to do so here. On the contrary, the parents' fortitude in the face of the disabilities of their first child and the pressures of the proceedings and the scrutiny to which they have (properly) been subjected can only excite admiration. The same must be said of their ability to co-operate during his very difficult period. Moreover, I gave permission to withdraw not only because of the prospective outcome but because (insofar as the evidence went) I am entirely satisfied that it is in the interests of A that he is brought up by his parents without the compulsive intervention or supervision of the State.