

IN THE SUPREME COURT OF JUDICATURE
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE PRINCIPAL REGISTRY OF THE FAMILY DIVISION
(MR JUSTICE COLERIDGE)

Royal Courts of Justice
Strand
London, WC2

28th November 2006

Before:

LORD JUSTICE THORPE
LORD JUSTICE WALL
LORD JUSTICE HOOPER

IN THE MATTER OF C (Children)

(DAR Transcript of
WordWave International Limited
A Merrill Communications Company
190 Fleet Street, London EC4A 2AG
Tel No: 020 7404 1400 Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

MISS C BUDDEN (instructed by Messrs Berryman) appeared on behalf of the Appellant.
MS C LISTER (instructed by Messrs Penman Johnson) appeared on behalf of the
Respondent.

Crown Copyright ©

1. LORD JUSTICE THORPE: The parties to this appeal married on 7 August 1993 and there were two daughters of the marriage: C, who was born on 27 October 1995, and M, born on 1 August 1997. So the girls are now respectively 11 and 8 years old. The marriage broke down in the year 2000. The parties separated. The girls naturally remained with their mother but the father had contact with them, initially, until February 2001. In that year the father began to live as a woman and that development may well be inter-connected with the cessation of contact. An application for contact was issued by

the father on 4 July 2002 and by February 2003 it had been transferred to the High Court. It seems that the proceedings then were allowed to slumber and that may be explained by the fact that in 2004 the father underwent gender reassignment surgery. The application was reinstated on 15 February 2005. It inevitably raised very difficult issues for the court and a report was sought from Dr Bester, a consultant child and adolescent psychiatrist.

2. He reported, initially in the summer and then, secondly, in the autumn of 2005, with the prospect of a trial in spring 2006. Unfortunately, that fixture had to be vacated as a result of Dr Bester's illness and the case reached the lists of Coleridge J on 16 May 2006. In his second report Dr Bester had explained to the parties and to the court that the very difficult issues arising out of the father's gender reassignment, and the reaction of the mother to that, required professional support and assistance. Dr Bester emphasised that this was highly specialised work and that there were no resources within the CAMHS authority in the vicinity where mother and children live. His recommendation was the National Youth Advocacy Service (NYAS) and approaches were made to NYAS at the end of 2005 and at the beginning of 2006. They in their responses made it perfectly plain that they were willing to undertake the work and that they had a specialist social worker to whom the case would be assigned. Accordingly, when the case came on for hearing on 16 May, the judge was able at the outset to define the issue he was determining in these terms:

"The only question which really falls for decision today is whether or not the process should be taken one step forward by the appointment of the National Youth Advisory Service, NYAS for short, as the children's guardian."

3. In the resolution of that issue he had first the expert evidence of Dr Bester and then the evidence of the parties. The mother clearly impressed the judge on the very slender differences in recollection between her and the father. He preferred her evidence. He paid fulsome tribute to what she had achieved in caring for, mothering and supporting the children in the six years since separation, particularly burdensome in that there had been virtually no contact, contribution or support from the father. He took a course which had not been advocated by either of the counsel in the case and which had not been specifically considered by Dr Bester. It is explained in paragraphs 19 to 21 of his judgment, and is essentially to inject a moratorium of some 20 months during which nothing would happen except that there would be cards sent by father to girls at Christmas Easter and each of their birthdays. At the end of that period, as his order expresses in paragraphs 1 and 2, there would be a fixture taken in January 2008 and not less than 28 days before the fixture the mother would file a statement "setting out how and when she proposes to inform the two children of the fact that their father has undergone the process of gender re-assignment."
4. The father was disappointed with this outcome and applied to this court for permission to appeal. The application was put before my Lord, Lord Justice Wall, on paper and he directed an oral hearing on notice with appeal to follow if permission granted. Unfortunately, between the date of the making of that order and the date of our sitting today there has been some delay. So we now look at the case some six months after judgment in the Family Division.
5. The attack on the judgment, skilfully mounted by Miss Budden for the appellant, is that the judge, while seeming to accept the premises upon which it was founded, ultimately

rejected the recommendation of Dr Bester, without any or any sufficient explanation. Ms Lister, who has come into the case in succession to a member of her chambers who appeared below but who has since left the Bar, supported the judge steadfastly and persuasively through her submissions. It was a skilful piece of advocacy and I am quite certain that it would not have been bettered by her predecessor in title.

6. I am in no doubt that the basic criticism advanced by Miss Budden has been made good. The judge accepted Dr Bester's fundamental premises in paragraphs 10 and 11 of his judgment. He said:

"I have also, as I say, had the huge advantage of hearing from Dr Bester in evidence today. He does not fundamentally alter his views as set out in his report. The bottom line is that he is completely clear that the children must understand the truth and be brought to knowing the truth. His concern is, and it is one which I am bound to say I share, that the children will if they are not told the truth in a planned, measured, structured, careful, sensitive way, they are likely, in due course, to find it out for themselves. They will know there is a secret in the family which they are not party to and they, if they do find out in this unstructured way, will suffer long-term damage.

"He went on to tell me that his fear also was that if they find out that they have been lied to then their relationship with their mother will be undermined and damaged, and he defines lying, quite rightly in my judgment, as keeping from them the truth about their father, and so he feels that the necessary steps need to be taken to progress the matter at least to a state of knowledge. He does not go beyond that, however. He does not recommend direct contact or anything of that kind, he only recommends that this early work is carried out. That is his position and I do no justice to his two very careful reports which I have read and ingested with great care, and it is of course the view, adopted in essence by the father."

The judge picks up this thread again in paragraph 17 where he says:

"The decision is extremely difficult. I have to take into account only what is in the best interests of the children, that is the only test by which I make a decision in the case of this kind. I have no doubt at all, having experience not only of this case, and having heard from Dr Bester and many other experts similar to him in similar situations, that the children's best interests will only be served if they are told this information in a timely way. I have also no doubt at all, as Dr Bester has emphasised, that the only person who can impart it in a way which the children will be able to absorb without difficulty is the mother."

7. Now within those two propositions there is a fundamental emerging conflict. For the mother has found it extremely difficult to adapt herself emotionally and psychologically to the father's gender re-assignment. The judge notices this in paragraph 9 of his judgment where he said:

"The mother today does not acknowledge, indeed positively denies that his need to do so was something which amounts to a psychiatric illness. She thinks that the steps which he has taken and the difficulties which she has been confronted with are things for which he should be held accountable in the real sense of the word. That much was completely plain from the evidence which she gave to me today. I

say that in no critical sense at all and it is a factor which I have to have in mind because it is very much a fact in the case."

To this he returned in paragraph 16, when he said:

"The mother's antipathy does, to some extent at least, extend from the fact that she feels, rightly or wrongly, that the father has put himself into this position by his own voluntary behaviour."

Again in paragraph 20:

"I have found her to be impressive as a mother and whether or not I agree wholly with her approach she is their mother, she has done as counsel emphasised an extremely good\ job on her own [...]"

8. So the mother's incapacity to manage the sharing of the truth with the children undoubtedly has its roots in her judgment that all that has befallen the family is something for which the father bears responsibility and must be accountable. The judge merely notes this position and refrains from criticism. Arguably, he might have done more to assist the mother in making the adjustments that have to be made, for the sake of the children, if he had more strongly emphasised to her the very deep psychological roots and impulses that underlie transsexuality. The judge does not specifically explain his rejection of the application for the appointment of NYAS but it is perfectly plain that, when in paragraph 20 he refers to "a regime" and in paragraph 25 to "the heavy handed route", in each instance he is referring to the appointment of NYAS.
9. In the first reference he rejects it because he says that it "would cause her enormous distress and stress and, perhaps as important in my judgment, would be almost certainly ineffective". Well I pose the rhetorical question: ineffective to achieve what? There are surely two separate strands. One is the restoration of contact, which may or may not be possible, even within the longest range, and there is the separate strand of imparting to the children the truth. So I do accept Miss Budden's principal complaint that there is no explanation within the judgment of how the judge reconciles his investment in the mother's capacity to change with the risks to which he has exposed the children by the imposition of the moratorium.
10. The problems that I identify in the judgment and the extent to which I have criticised the judge are, I emphasise, to be judged in the context of an application to the court that failed to distinguish between what, in reality, were two separate reliefs sought by the father. Of course he sought the restoration of contact. That, in any case, would be a very difficult issue given the interruption of some five years in any meeting, given that the younger child had really no recollection of the man who was her father.
11. But there was a separate relief which might well have been made the subject of a specific issue order application, namely an order requiring the mother to impart the truth to the children. If there had been two separate applications, the preparation of the case might have taken a different course and certainly the judge's focus would have been extended. This, as I see it, failure to analyse and separate out what are two distinct issues also has to some extent distorted Dr Bester's contribution. He was asked by the parties to answer a number of specific questions but all the questions were directed to the single question

of reinstating contact between father and children and not to the separate question of imparting the truth to the children. Of course if contact had been the only issue the judge's construction of a moratorium, during which the slow process of reconstruction could get under way, could not possibly be criticised but the longer the moratorium the greater the risk of the time-bomb exploding, and that is not to over dramatise. If the children discover from casual talk or chance discovery, they will not only have to come to terms with a shocking discovery, but also the fact that they have been deceived by their own mother. She will then, in turn, have to cope with a far greater challenge than telling them in her own way and at the time she chooses. In addition, she will be quite unprepared for this greater challenge by any professional preparation.

12. The father might well in this case have sought not an order for contact; he might have accepted that that was something that could only develop in a, perhaps, distant future of the children's own volition; he might have sought only the order to ensure that they were protected from chance discovery of the reality. Then surely the judge would have weighed different considerations and come to a different conclusion.
13. So it is not that the judge has impermissibly postponed the day when hard decisions will have to be taken over future contact. It is that he has not sufficiently perceived, and nobody has drawn his attention to the need to perceive, that the separate question of imparting truth to children simply cannot be thus deferred. I have every sympathy for the mother. She has had to cope with an extraordinarily difficult experience. She has, so far, coped with it largely unaided by professional expertise. She has done, as the judge has found, heroic work as a mother and carer but it is extremely unhealthy for children to live in some unreal world. The risks have been fully identified by Dr Bester. His solution for the minimising and the eradication of the risks is clear and in my judgment there can be no further delay in the commencement of the work that he advises.
14. Fortunately, we have a position statement from NYAS which shows that the intended case worker, Patricia Morrison, is still willing and able to undertake the work and can commence as soon as possible. One of the tasks that is recorded by NYAS is the one that will be at the forefront of her work, namely working with both parents towards C and M knowing the truth about the appellant. NYAS emphasise that the pace of their work will be dictated by the children and, further, that once Patricia Morrison begins and has met the children and the parents, she may well wish to adopt some different approach.
15. In my judgment these children, who have to deal with a fact of life that very few children have to deal with, both need, and are entitled to, professional help. Denial of that help to the children could hardly be more clearly contrary to their welfare. The creation of the professional aid package for the children cannot obviously succeed unless it has the support of the mother and I fully appreciate that the order which I propose places on her heavy demands and heavy responsibilities. The judge who saw and heard her in the witness box had no doubt of her capacity and I, accordingly, can only appeal to her to cooperate closely with Patricia Morrison, in the clear understanding that what is being done is, essentially, for the sake of her children and in order to protect them from magnifying the scale of the adjustment they will have to make.
16. So, all that said, I would propose to grant permission and allow the appeal; set aside the order of Coleridge J, and in its stead essentially make the order that was sought below. That is: join in the children as parties, which is necessary to achieve funding for NYAS

(and it seems that there is now a necessity to have the involvement of CAFCASS reflected on the face of the order: that emerges from paragraph 10 of the NYAS note). The work should commence as soon as possible and Patricia Morrison should be asked to make an interim report to the court which should be considered by the judge in the Family Division at a future fixture, which needs to be sought relatively quickly, given the long waiting period between seeking a fixture and getting it.

17. I see no reason at all why the case should not continue to be reserved to the list of Coleridge J. That is the order I would propose.
18. LORD JUSTICE WALL: I agree that this appeal should be allowed, for the reasons given by my Lord. I would like to say at the outset that I have very considerable sympathy for all the adults involved and indeed for the children in what is plainly a very difficult and sensitive case. Like my Lord, Lord Justice Thorpe, I am extremely grateful for the helpful and skilful submissions we have received today from counsel.
19. In my judgment, the critical issue in the case is that which was identified by Dr Bester and given expression by the judge in paragraphs 10 and 11 of his judgment, which my Lord has read and which I will not repeat. It is neatly summarised by the judge's words, "that the children must understand the truth and be brought to knowing the truth".
20. Dr Bester was equally clear in his second report that both the children and their mother needed professional help if the children were to learn the truth in what was described as a "planned, measured, structured, careful and sensitive way". The judge's order in my view denies them that assistance and at the same time does nothing to guard against the risk, of which the judge was all too well aware, that the children might find out about their father's change of gender in an unstructured way and thereby suffer long-term damage.
21. It follows in my judgment that the judge was wrong to reject Dr Bester's advice that the type of work required in the unusual and, indeed, extraordinary circumstances of this case should be carried out by NYAS. All the more so since Dr Bester advised that the work was indeed highly specialised and would not be available through local CAMHS or social services. Dr Bester also envisaged that the work would be likely to take at least a year and that the children would dictate its pace through their guardian.
22. For the record, and I hope in the interests of avoiding funding and other difficulties, I would, like my Lord, like to make it quite clear that this is not work, in my judgment, which could properly be given to or carried out by CAFCASS. Dr Bester has identified NYAS as the specialist resource required and in my judgment this is a clear case for the employment of NYAS.
23. I think it unfortunate that Dr Bester gave the advice I have identified in answer to a question, which was:

"What work could initially be done with the children to prepare them for the reintroduction of contact?"

That question in my judgment fails to separate out the two quite distinct issues in the case. The critical issue is that which I have identified and it is clear to me that, although in places in his report Dr Bester himself elided it with the question of the reintroduction

of direct contact, he was nonetheless fully well aware that the two were indeed distinct. The level of direct contact, he said, would need to be addressed bearing in mind the family's response to the work. The words he used in paragraph 16.5 of his second report were:

"... the prognosis for contact to occur and for the work to be effective is likely to be very modest".

By that I take him clearly to mean that whilst a need to inform the children of their father's change of gender was necessary in any event, the appellant should not be sanguine that it will necessarily lead to direct contact.

24. Direct contact, if it is to occur at all, is in my judgment a long way down the line in this case and should not be allowed to divert the court from addressing the issue which I have identified as the critical one. Against this background, and allowing for the fact that this was an extempore judgment, I think it unfortunate the judge, at least by implication if not directly, referred to the appointment of NYAS as "the heavy handed route" and, "the last resort".
25. Elsewhere in his judgment at paragraph 14 the judge acknowledges the expertise of NYAS and expresses the view that it would carry out any assessment process sensitively. I am confident that the judge's recognition of NYAS's skills in paragraph 14 of the judgment is fully warranted. I mention the point because I understand the respondent is arguing that she wishes to avoid further disruption in her life and in the lives of her children. She is plainly a devoted mother and has the best interests of the children at the forefront of her mind. I also understand that the appellant's change of gender, coupled with the breakdown of their marriage, has turned her world upside down. I do not underestimate any of these factors. But I hope very much that she will now accept the three key parts of Dr Bester's advice. These are:
 - 1) That the children need to know sooner rather than later about their father's change of gender;
 - 2) That they need to be protected from knowing about it in a way that will damage them; and
 - 3) That she does indeed need professional help in imparting the news of it sensitively to the children.

I therefore urge her, in the interests of the children, to co-operate with NYAS and to remember that NYAS has been appointed by this court to represent the interests of the children and that, like her, NYAS is motivated by the imperative that the children's welfare is indeed paramount.

26. In my judgment, therefore, the judge's order did not address the critical issue and, in addition, left the children unprotected for an extended period of time against the danger of the critical information being imparted to them in a harmful way. It follows that, although he was exercising a judicial discretion, I have come to the clear conclusion that he was plainly wrong not to appoint NYAS as the children's guardian. That said however, I see, like my Lord, no reason to disqualify the judge from conducting future hearings. Despite my criticisms of the judgment, the judge was acutely aware of the difficulty and sensitivity of the case, and I have no reason to think that the error we have

detected means either that he has pre-judged the issue or that he will not give both parents and the children a full and sensitive hearing, if further issues fall to be decided by him in due course.

27. Like my Lord, Lord Justice Thorpe, therefore, in allowing this appeal I would nonetheless direct that any future hearing should be before Coleridge J if he is available.
28. LORD JUSTICE HOOPER: I agree that the appeal should be allowed for the reasons given by my Lords and I also agree with the proposed orders.

Order: Appeal allowed.

www.thecustodyminers.com