Neutral Citation Number: [2007] EWCA Civ 873

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM BOURNEMOUTH DISTRICT REGISTRY
(HIS HONOUR JUDGE MESTON QC)

Royal Courts of Justice
Strand, London, WC2A 2LL
25th July 2007

B e f o r e :

LORD JUSTICE THORPE
LORD JUSTICE LLOYD
and
LORD JUSTICE TOULSON

IN THE MATTER OF F (Children)

(DAR Transcript of
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Official Shorthand Writers to the Court)

Miss R Butler (instructed by Messrs Dutton Gregory) appeared on behalf of the Appellant.
Mr J Ward-Prowse (instructed by Messrs Dickinson Manser) appeared on behalf of the Respondent.

Lord Justice Thorpe:

1. Miss Butler pursues an application for permission with appeal to follow on behalf of the mother of twins, who were born on 3 March 1999 and are therefore 8¼ years of age. The other party to the proceedings is Mr B, who issued an application on 28 February 2006 seeking a declaration of parentage in relation to the twins and, if paternity proved, a contact order.

2. During the subsequent progress of the proceedings, DNA testing established that he was indeed the father of the twins. A complication in the case is that the applicant has a third child B, born on 25 July 1996 of whom Mr C is the father. Mr C co-habited with the mother for a substantial period and is recognised by the twins as their natural father. The united position of the applicant and Mr C is that this apparent reality should not be disturbed by disclosing to the twins the truth.

3. The proceedings came before HHJ Meston QC for the first time on 18 January 2007. He had clearly prepared most conscientiously for that hearing and at the outset drew counsel's attention to two reported cases. The first is the case of J v C decided in this court in May 2006 and reported at the first page of the 2007 Family Reports. The second case is also, by chance, reported under the initials J v C. It is the decision of Sumner J at first instance and is reported at [2007] 1 FLR 1064. The relevance of these two cases is that in the first at paragraph 41 of Wall LJ's leading judgment, doubt is cast on the justiciability of orders under section 8 of the Children Act to require a parent to disclose to a child the truth of his or her parentage. That perhaps influenced Sumner J to say in paragraph 12 of his judgment, given in November 2006, that he was presuming that he had the jurisdiction to make such an order but concluded on the merits that he should not exercise it.

4. So on the 18th the expectation of counsel that there was first to be a preliminary trial as to whether or not the twins conception was the result of consensual intercourse, followed by a discretionary determination of the difficult question of how and when the children should be told the truth, was put back behind. It might be described as pre-preliminary issue: namely, the question of the courts jurisdiction to order the mother to inform the children or to order her to permit them to be informed. The judge took that pre-preliminary issue in June and delivered his judgment on 8 June, explaining why he came to the clear conclusion that, despite the reservations expressed by Wall LJ, the court held jurisdiction to make the order.

5. I would wish at once to pay tribute to the very full and careful judgment of HHJ Meston, in which he sets the scene; considers the relevant statutory provisions; considers the authorities directly or indirectly touching the question; and then finally reasons his conclusion. He had defined the issue on the first page of his judgment thus:

   "The issue presently before the court is whether there is jurisdiction enabling the court to compel the mother by specific issue order to tell the children the truth about their paternity."

6. In the course of his judgment he defined the relevant factual and legal context in paragraph 33 of his judgment:

   "(a) It is now clear that Mr B is the biological father of the twins.
   (b) The twins do not know or suspect the truth. They believe C to be their father, B to be their full brother and Mr C's parents to be their grandparents. Mr C could at present properly be described as their only father figure *i.e.* as their psychological and social father.
   (c) Mr B has seen the twins twice when they were less than a year old, the last occasion being in December 1999. He has had no indirect contact and they know nothing of him. It is not agreed between the parties whether his very limited contact with them

was sufficient to establish family life within the meaning of Article 8 of the European Convention on Human Rights. The mother and Mr B never lived together, and their relationship was brief, lasting three a few months in 1998. Because Mr B and the children have never been part of the same family unit and there is no past or present relationship between them, he could only base any claim to respect for family life on the existence of the blood tie and on a potential relationship in the future.

(d) Their births were initially registered without a father being named; Mr C was registered as their father in 2005, and thereby he acquired parental responsibility. However his parental responsibility would be revoked once the registration is corrected.

(e) The mother gave the Child Support Agency the name of Mr B as the father when the CSA contacted her.

(f) The mother is their primary carer and the only person with valid parental responsibility.

(g) Mr B now seeks a specific issue order or an order under the inherent jurisdiction of the High Court that the mother shall forthwith disclose to the children the identity of their biological father, either by herself or through or with some suitable intermediary.

(h) The mother and Mr C both resist the making of any such order. They fear the consequences of informing the children of their paternity, and they doubt the value of doing so and of establishing contact between the twins and Mr B. They are prepared to consider informing the children of the true position when they are about 18 years old, but not before; and they are not prepared to commit themselves to doing so at any age. The mother finds it difficult, if not impossible, to accept the view that that the children should be informed of the truth and that they should be informed sooner rather than later.

(i) If the court decides that there should not be any form of specific issue the mother and Mr C reserve the right to ask the court to make a prohibited steps order to restrain Mr B or anyone on his behalf from informing the children in any way."

7. He then went on to summarise the legal framework, in particular focusing on section 8, section 3(1), section 9(5) and section 11(7) of the Children Act 1989. The most important of those provisions for the purposes of this judgment is section 8, which defines a Specific Issue Order as:

"… an order giving directions for the purpose of determining a specific question which has arisen, or which may arise, in connection with any aspect of parental responsibility for a child."

8. It seems to me absolutely clear, and even Miss Butler, in the course of her submissions conceded, that a specific question as to whether or not a child should be told the truth of his or her parentage is a question which has arisen or which may arise in connection with an aspect of parental responsibility for a child. Thus, why the doubts the judgment of Wall LJ in the case of J v C must be seen in the context that the preliminary issue tried by Hedley J in the Family Division was, and I take this from the outset of judgment: did Mr J need leave pursuant to section 10(9) of the Children Act 1989 to bring the proceedings?; and, if he did, should leave be given? Hedley J answered those preliminary issues by holding that Mr J was not a parent within the meaning of section 10(4)(a) of the 1989 Act and so required leave under section 10(1)(ii) to make his application.

9. On the facts and on the merits, Hedley J refused to grant such leave because the mother of the child in question had given an undertaking to the court to take the advice of a consultant psychiatrist as to how and when E should be informed of her origins. It was against Hedley J's conclusions that both of law and of discretion that Mr J appealed to this court, so the observations made by Wall LJ in paragraphs 41 and 42 of the judgment must be seen in that context. He opens paragraph 41 by saying:

    "While the question of Mr J's status is plainly a matter of importance to him, the real question in the case is how both C and E are to be informed about their respective origins."

10. His question mark as to justiciability was within that context and he acutely stated in paragraph 42 that, in the light of Mrs C's sensible agreement to take expert advice, the court had, as it were, no further part to play and Mr J, by securing her undertaking, had achieved all he could reasonably expect to have achieved in the proceedings and further prosecution would only have served to prolong what had already been an unduly extended judicial involvement.

11. In my judgment, HHJ Meston was entirely correct to hold that there was nothing within that report that obstructed his part to a conclusion that the court had the necessary jurisdiction. Plainly, the later case of J v C carried the matter no further.

12. Miss Butler has endeavoured to attack his conclusion on this pure question of law. In the course of her eloquence submissions, she has time and time again lapsed into advancing a case founded on the merits. The merits are way forward down the line. First of all, the judge has provided for an investigation to establish what was the historic relationship between the parties. Second, he has provided that once the facts have been sufficiently found he will tackle the ultimately more difficult discretionary bounds as to when and how the children should be told the truth.

13. I fail to discern within Miss Butler's submissions any effective invasion of the judge's reasoning on this question of law. It seems to me with the huge advantage of hindsight that the effect of the publication of the two decisions in J v C was extremely unfortunate for this litigation, in which we are told by Miss Butler that she is privately funded. There has now been a trial of the question of law in the Country Court, and now an appeal to this court, in order to resolve what was seen to be an open and difficult question.

14. Speaking as one whose working life over the last twenty or more years has been confined to family law, I do not understand how the issue has been magnified to these proportions. It is perfectly obvious to me that in the course of its protective function the family justice system has since time and memorial taken difficult decisions to promote the welfare of children. In the context of history of origins sometimes the discretionary outcome is that children should be protected from knowledge; sometimes the discretionary outcome has been that the children should be told the truth that the court's responsibility to take those decisions in the event of adult dispute has never, in my experience, been in doubt of in question. I do not think that Wall LJ intended to put them in doubt or question.

15. I say that because he and I both sat as members of a constitution on 28 November 2006 that decided the appeal of Re C [2006] EWCA Civ 1765. In that case we allowed an appeal from a decision of Coleridge J, which imposed a two-year moratorium on any

progress in a biological father's campaign to ensure that children should be informed of the truth of their paternity and that consequently he should have contact. The only basis on which we allowed the appeal was that the two issues before Coleridge J had been conflated and nobody had invited him to separate out the issue of whether the children should be told from the issues as to whether the father should have contact.

16. Accordingly, intervening as we did, we approved and directed the immediate commencement of work by the National Youth Advocacy Service to impart the crucial information and to assist the children in adjustment to it. So, if Wall LJ had any reservations, which I doubt he did, in May 2006, he certainly had none by late November.

17. I only finally mention one aspect of Miss Butler's presentation, namely the question of enforceability. She says that since plainly any such order would not be enforceable then it follows that there is no jurisdiction to make it or a submission to like effect. It seems to me that any argument in relation to the enforceability of a section 8 order, that a parent tell the child the truth about paternity, is completely theoretical and to that extent unreal. In almost all these cases where children have been brought up to a certainty, which is for their own protection to be destroyed by the imparting of a different truth, it is likely that mental health professionals will need to be involved to help the children through the process and indeed the whole family including the parents. In a case such as J v C where Mrs C was open to receiving advice from an expert and following that advice, then enforceability does not arise.

18. Assuming a parent who, out of obstinacy or emotional disturbance, was challenging the judicial discretionary decision by a threat to ignore the order, it is manifest that such a parent only magnifies the difficulty and with it the need for professional intervention. So, in a case such as that it would be quite pointless to order the reluctant parent to do the job. Such a parent is the worst possible person to carry out the delicate task and in reality the court would meet the challenge by simply putting in place alternative mechanisms for the imparting of the sensitive information.

19. So, for all those reasons I would grant permission only in recognition of the need for some clarification, but dismiss the resulting appeal.

Lord Justice Lloyd:

20. I agree that the appeal should be dismissed. Miss Butler's submissions to us in support of the appeal came down ultimately to the proposition that it could not be in the best interests of these children that the court should make such an order as is ultimately sought, and that the court ought to leave it to the mother to decide when and how the children should be told about their parentage. It seemed to me that that confused the question of jurisdiction as a matter of law, which is the point to which this appeal is confined, with the issue of merits, which as Lord Justice Thorpe says is some way down the line.

21. It also seemed to me, and I think Miss Butler accepted this, that her proposition that it was for the mother to decide made it plain that the question of whether the children should be told, and if so, how and when, was plainly a point arising in connection with an aspect of parental responsibility for a child. Miss Butler's submission was: yes indeed,

it was the mother's responsibility and the court ought to refrain from interfering with the mother's exercise of that responsibility. That seemed to me to make it plain, as I say, that her arguments are related to the merits, and I dare say that when it comes to the hearing on the merits she will be able to make powerful and eloquent submissions and there may indeed be a very great deal to be said either way and in favour of the mother's contentions.

22. On the narrower question of jurisdiction, I am at one with my Lord and I note that in the case of C (Children), to which he has referred, at paragraph 11, he said in terms that there was separate relief that 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. What form of order should be made, if the court comes to the conclusion that an order should be made, is a matter for careful consideration. The authorities to which Miss Butler has referred us show that there may very well be good reasons for not making an order, but it seems to me plain that the court has jurisdiction under the Children Act, as it would have had jurisdiction from time in memorial under the Wardship jurisdiction, to give directions of an appropriate kind on this issue.

23. For that reason and for those given by my Lord, I would dismiss this appeal.

Mr Justice Bennett:

24. I also agree that the appeal should be dismissed for the reasons given by my Lord, Lord Justice Thorpe and Lord Justice Lloyd.

Order: Application granted. Appeal dismissed.