Case No: B4/2010/0569
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IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM COVENTRY COUNTY COURT
(HIS HONOUR JUDGE BELLAMY)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Wednesday, 17th March 2010

Before:
LORD JUSTICE THORPE
LADY JUSTICE SMITH
and
MRS JUSTICE BARON

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**IN THE MATTER OF S (a Child)**

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Ms Wendy Outhwaite QC and Ms June Rodgers (instructed by Penmans) appeared on behalf of the Applicant, by his Guardian.

Ms Lorna Meyer QC (instructed by Moore & Tibbits) appeared on behalf of the Mother.

Mr John Vater (instructed by Warwickshire County Council) appeared on behalf of the local authority.

Ms Alison Ball QC and Mr Oliver Peirson (instructed by Morrisons) appeared on behalf of the Respondent, the Father.

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Judgment
(As Approved by the Court)

**Lord Justice Thorpe:**

1. The principal parties to this application married on 12 May 1996 and separated in September 1997. Their only child, A, was born after the separation on 5 March 1998. Proceedings in the family justice system commenced with the father's application for contact of 28 June 1999. Thereafter ensued a decade of litigation which occupies five pages of detailed entries on a chronology helpfully compiled by Lorna Meyer QC. I note only that on 16 April 2007 HHJ Bellamy took over the management of the case. So the last three years has had consistent judicial control and management.

2. The issue throughout has been the impossibility of establishing what might be called normal contact between a growing boy and his absent father. HHJ Bellamy has wrestled with this problem and has sought always to achieve solutions that will advance the welfare of the child, having regard to the detriment to the child of having no relationship with his absent but loving father. The culmination was a judgment delivered by HHJ Bellamy on 4 January 2010, when he was driven to an order of last resort transferring the residence of A from mother to father. Perhaps not surprisingly, that resulted in an application to this court on the following day, when Smith LJ granted a stay and listed the permission application for hearing on notice with appeal to follow if permission granted on 20 January. This court (myself and Wall and Rimer LJJ) refused the application for permission on 21 January.

3. That left only the implementation of the transfer of residence order, which remained the responsibility of HHJ Bellamy. Thereafter between the conclusion of the appellate proceedings and 3 March, HHJ Bellamy conducted some seven hearings which it is unnecessary to record in detail. I simply draw attention to the fact that on 26 January the local authority appointed a Mrs K to act as a social worker. Mrs K was particularly well-qualified to look after A, since she is herself of the same religion. There is no doubt at all that the judge, wrestling with this hugely difficult problem of implementing the transfer order, received outstanding assistance from the local authority, who only invited, without much statutory obligation, took every possible step to assist.

4. Another important recent change occurred on 16 February, when the judge discharged the NYAS guardian for A and re-appointed a CAFCASS guardian who had previously acted, Mrs J. She became the guardian appointed under Rule 9.5 of the Family Proceedings Rules 1991. As things progressed from difficulty to difficulty, on 22 February the local authority issued an application for an interim care order. The rationality of that was that one way of achieving the transfer was to use a short-term foster placement as a stepping stone from mother's house to father's house.

5. The final hearing and order of HHJ Bellamy is that of 3 March, when he rejected the option of a short-term foster placement in favour of the alternative, more immediate route, of a transfer effected by the Tipstaff on 12 March if the mother failed in the last opportunity the judge gave her to herself effect the transfer on 11 March. So the judge's ultimate management was clear: the transfer will be effected by an officer of the court if the mother cannot bring herself to do the job for A.

6. Again, an application was lodged for permission to appeal and a stay on 10 March, and it was Wilson LJ who that day directed an oral hearing on notice, with the appeal to follow if

permission granted, and said that it should be on 16 March before a two-judge constitution, with a time estimate of one and-a-half hours. The skeleton arguments subsequently filed by mother, the guardian, the local authority and the father, revealed that there were to be difficult arguments addressed to the court that had not been addressed to the judge below and, accordingly, Smith LJ kindly agreed to join the constitution, and the one and-a-half hour time estimate was entirely consumed by Ms Outhwaite QC, acting for the guardian, who was the appellant in the proceedings, albeit supported by both the mother and the local authority. Accordingly, we were unable to complete the case yesterday, despite having commenced at noon, and deliver judgment this morning on 17 March.

7. That introduction explains the essential background, and I turn straightaway to acknowledge the very great care that HHJ Bellamy brought to the writing of his judgment of 3 March. It is a judgment that he took time to write, and it extends to some 135 paragraphs. It considers with care the oral evidence that he had heard, the submissions which counsel had addressed, the issues that that section commences under the heading "Discussion" at paragraph 110 and then conclusions which are expressed from paragraph 128 onwards. As is his custom, HHJ Bellamy wrote into his judgment the very carefully considered detailed directions that he was going to incorporate in his order, and the order itself is two full pages long and, in addition to the fundamental provision for delivery up on either 11 or 12 March, it continues to deal with contact between A and his mother following delivery up; it deals with a review scheduled for 25 March before HHJ Bellamy; it requires the father to file a statement by a given date and the mother to respond; it provides for the father to put forward his schooling proposals; and it allows the continuing involvement of Dr Weir, the consultant child and adolescent psychiatrist, who had been closely involved with these proceedings for a long time, albeit he had not seen A for a period of some two years prior to the decisive hearing of January and March this year.

8. There were then firm orders preventing any publicity of the facts and circumstances. That was particularly necessary since earlier standard directions for anonymity had been ignored by certain newspapers and specific injunctions had been sought and granted by Macur J to try and stop that unauthorised leak. So, at the outset of this case, we confirmed that reporting restrictions continue to apply.

9. The attack on HHJ Bellamy's discretionary choice of immediate transfer, as opposed to stepping-stone transfer, was launched by Ms Outhwaite QC for the appellant guardian. She, at the outset, abandoned her second ground of appeal, leaving on foot her first, which was to this effect: that it was impermissible for the judge to have ordered any part of his judgment or order to be withheld from A, since that withholding prevented A from launching a challenge independent of the guardian representing him and assuming that he would obtain separate representation himself.

10. In my judgment, there is very little, if any, merit in that ground of appeal. First of all, the order in my judgment fully recognises A's entitlement to know what was happening to his life. The judge, in paragraph 12, only prohibited A from knowing the date upon which the transfer would take place pending the exhaustion of appellate proceedings or the possibility of appellate proceedings. The order specifically allowed for A to be told that, subject to appeal, he would not be going to foster parents, but that his mother was holding the option to take him to father, failing which the Tipstaff would be used. So in reality A was fully informed of the outcome. Even if a more restrictive order had been made, I still would not understand Ms Outhwaite's submission, since A was extremely effectively represented by his

Rule 9.5 guardian, who had assembled a suitable legal team. There was no evidence at all of divergence.

11. There are circumstances in public law proceedings in which a child may have a litigation team running beside the guardian's litigation team, but that is not so in private law proceedings, where Rule 9.5 provides for the appointment of a guardian in exceptional circumstances. It can be said that once the local authority had issued their application for an interim care order, these became hybrid proceedings. But even if that be so, there is still provision within the Family Proceedings Rules, 4.10 to 4.12, which provide for the exceptional circumstances in which a child will have independent representation in addition to representation for the guardian. There has to be proportion in a family justice system which is already threatened by resource problems, both human and cash, and where every effort is being made to find economies and nothing could be less economic than to sanction two separate teams, essentially carrying out the same responsibility, in a case such as this.

12. If that were not enough to answer Ms Outhwaite's submission, we have been helpfully reminded by Ms Alison Ball QC that, in fact, there was an investigation on 23 February as to whether A should have separate representation; at the end of which, it was decided that no more should be done to pursue that avenue. I would only doubt whether that exploration on 23 February was ever appropriate. So that is all that I would say about her first ground.

13. Her second ground is based on the court's obligation to safeguard A from life-threatening self-harm. Well, what was the evidence of life-threatening self-harm? There was no evidence prior to the core judgment of 4 January. Some evidence had emerged when A was reacting to the enforcement of the judge's order. He had said that he might stop eating at his father's, he might run away, he might jump out of his father's car. Simply on the facts, that is a huge shortfall on the sort of evidential case that would be necessary to engage Article 2 of the Convention. So, in this court, the guardian's submissions were all advanced on a human rights footing. It became a human rights attack on the judge, reliant on Articles 6 and 2.

14. That was not the basis on which the guardian's case had been presented below. The guardian presented a very sensible case below. Her halfway house between Tipstaff transfer and the local authority's three-month interim care order was to say that one month should be perfectly sufficient and any interim care order and stepping-stone route should be more limited in duration. I find it disappointing that Ms Outhwaite in this court presented no positive case, given the guardian's responsibility to contribute whatever she may to the enforcement process. All that Ms Outhwaite invited us to do was to allow the appeal and remit the case to the judge to consider ordering some assessment of the risk to A from life-threatening self-harm. I wonder why the positive case that the guardian had advanced to the judge had been abandoned by the time it reached this court.

15. I turn to the submissions of Ms Meyer, who had below, in her closing submissions, drawn the judge's attention to Article 5 of the Human Rights Convention and its impact upon the use of the powers of the Tipstaff to arrest and/or detain. The judge had dealt with that submission in paragraph 125 of his judgment, when he had simply said:

"I noted the submission by Miss Meyer based on Article 5. This is not the place for a learned discourse on the interpretation on Article 5. I only have Miss Meyer's written submissions on the point. It is a point not taken either by the guardian or the local authority. It is, though, appropriate to make the point, though not acknowledged in Ms Meyer's submissions, that [A]

also has rights under Article 8 and it is those rights that lie at the heart of the order I made on 4 January."

16. In fairness to the judge, submissions at the end of evidence were all submitted in writing by e-mail to the judge at the conclusion of the hearing. There was no oral exchange and no discussion that might have brought out a reaction from other parties to Ms Meyer's point, and, albeit I understand how the judge treated it in the circumstances, I conclude that he did not give sufficient weight to a point that has some foundation. The powers of the Tipstaff to arrest and detain are derived from section 34 of the Family Law Act 1986, and it can be said, as Ms Mayer did, that those statutory powers are incompatible with the safeguards contained in Article 5.

17. However, I would make three observations on the submission. The first is that it is not necessary for us to rule on the point to dispose of the proceedings before us. The second is that the invocation of the article arises out of circumstances in which the Tipstaff, an officer of the court, was being asked to do no more than a transport job from one home to another. The degree of arrest and detention in that exercise, given the very specialist skills of the Tipstaff and experience of the Tipstaff, is highly questionable. The third point is that, in any event, it seems to me strongly arguable that the Tipstaff's intervention, even if forceful, is covered by the exception contained in paragraph (b) to the article.

18. I go on to consider Ms Meyer's positive case, which is a perfectly sensible submission that the stepping-stone route is clearly preferable in this case. It would be supported by her client, and would be plainly preferable for A himself. Mr Vater for the local authority took a different line in submission. Rather than relying on Convention points, he addressed a well-constructed argument that the judge had erred in the exercise of his discretion by choosing the route advocated by Dr Weir in preference to the route advocated by Ms K and Mrs J. Mr Vater makes the powerful point that Dr Weir was essentially advising the judge from generalisations, drawn either from his experience or from literature. By contrast, both Ms K and Mrs J had come into the case at a later stage and had established an excellent rapport with A, something that, apparently, Dr Weir had failed to achieve when seeing A on the last occasion, some two years earlier.

19. So the emphasis by Mr Vater was on the judge's failure to give sufficient weight to the evidence of A's upset, threats that he was issuing, the calm deliberation with which he was issuing the threats and his devout adherence to his religion, which in their opinion heightened the likelihood that he would find the resolution to carry out his resistance. All these factors, says Mr Vater, were insufficiently reflected by the judge.

20. At one stage, it seemed that Mr Vater was accepting the criticism advanced by the guardian below, and seeking only a 28-day interim care order. But, in his submissions in reply, it emerged that his instructing solicitor, his client, had not changed the management plan in any way and he was still advocating what the judge had rejected, largely on the basis of Dr Weir's criticisms of the care plan, the latitude that it seemed to give to the matter of intervention and the absence of any exit plan if at the end of three months there had been no change.

21. Ms Ball, for the father, sought to uphold the judge in all respects and answered convincingly, to my mind, the human rights points that were taken against her. Less convincing was her response to Mr Vater's attack on the exercising of judicial discretion.

22. So, all that said, where do I stand on these submissions? I have reached the clear conclusion that the judge's choice has been demonstrated to be the wrong choice. I say that for the reasons that have been advanced by Mr Vater, his criticism of the foundation of Dr Weir's generalised advice; but also because I think that it is so important in the present case to hold on to anything that is less confrontational than the immediate. It is important that mother is supportive of A's move to the identified foster home and it is important that A himself is much less resistant to that than to the arrival of the Tipstaff. It seems to me that this court has an opportunity, which it should take, to steer a middle path between immediate intervention by the judge's officer and the -- rightly criticised -- proposal of the local authority within its care plan.

23. Ordinarily speaking, the judge defers to the local authority in future management once a care order or an interim care order is made. We are not so circumscribed, because we can place a time limit on the interim care order and, under section 34 of the Children Act 1989, we can give very specific directions as to what contact there is to be to each parent during the duration of the interim care order.

24. So the practical conclusion that we have reached is that, first of all, the stepping-stone of foster parent placement should be of a 21-day duration, at the end of which, come what may, the transfer is to be completed. We have the advantage of a note from the local authority's position, as stated on 23 February, when the solicitor for the authority said:

"If … A fails to cooperate, and he needs to go to his father, we would stand back and allow the Tipstaff to do that. We have made it clear that we are prepared to use force to take him to foster carers."

So those statements indicate the local authority's clear commitment to the implementation of this order, using the Tipstaff if necessary.

25. So what is to happen in the interim? We conclude that A should move to the foster home after school tomorrow and that he should of course attend school the following day, leaving from and returning to the foster parent home. The father should have prolonged contact, together with the stepmother, on the following days, Saturday, 20 March and Sunday, 21 March. Dr Weir, in the attendance note of 23 February, emphasised the importance of the father's persistence at the initial stages. Nothing would be less helpful, in the view of Dr Weir, than the father to, as it were, withdraw, despairing and defeated, at the initial stage. Thereafter the school term continues until its completion on Friday week, 26 March, and that gives the ideal opportunity for the transfer to the father's home, to be effected on the first day of the school Easter holiday.

26. The mother's contact to A, following the move to foster parents, will be limited to telephone communication by landline only, supervised, and of duration not more than five minutes. The mother must understand that her continuing communication with A during this transition has to be supportive of the transfer order. Any negativity, either expressed or implied, would call for the immediate cessation of this limited opportunity for her communication with A.

27. There may, of course, be all sorts of slips within the transfer which we envisage. Fortunately there is the listing before HHJ Bellamy on 25 March. That should not

be vacated, and we can remit to him any application or difficulty that any party wishes to raise.

28. The judgment which we deliver this morning must, obviously, be rapidly transcribed and made available to HHJ Bellamy before that hearing.

29. I am reminded by Smith LJ that I neglected to say that, in the last week of the school term, the father be at liberty to have contact with A in the home of the foster parents or without that home in company with stepmother if that is convenient or possible. Essentially, every opportunity must be taken to achieve the restoration, or some restoration, of relationship between child and father during the last week of the school term.

**Order:** Appeal allowed.