Case No: B4/2010/0659
Neutral Citation Number: [2010] EWCA Civ 496

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM HIGH COURT OF JUSTICE, FAMILY DIVISION
PLYMOUTH DISTRICT REGISTRY
(MR JUSTICE COLERIDGE)

Royal Courts of Justice
Strand, London, WC2A 2LL
Date: Wednesday, 7th April 2010

Before:

LORD JUSTICE WALL
and
LORD JUSTICE AIKENS

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IN THE MATTER OF D (Children)

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Mr Robin Tolson QC (instructed by Sitters and Co) appeared on behalf of the Appellant Mother.

Mr Christopher Sharpe (instructed by Messrs Battrick Clark) appeared on behalf of the First Respondent Father.

Mr Peter Horricks QC (instructed by Messrs Hughes Paddison) appeared on behalf of the Second and Third Respondents, the Paternal Grandparents.

The Fourth and Fifth Respondents, the Children, did not appear and were not represented.

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Judgment

(As Approved by the Court)

Lord Justice Wall:

1. This is a very, very distressing case. The court is concerned with two boys who in the normal course of events would be normal, cheerful, happy boys, but as is so often in family cases the case, they have been messed up by their parents; and as is always the case in family law, however long one practices it, however many cases one does, it is the children who suffer.

2. I am not going to give a lengthy judgment in this case because I am going to start with the Court of Appeal's decision in late July last year.

3. We were dealing with two boys: T, who is just 12; and N, who will be 10 later this year. I make it quite clear that nothing must be published which in any way identifies the boys or their whereabouts or the schools they attend. Although I see the press benches are empty, this is an open court, this judgment is being given in public but reporting restrictions will apply. It is patently not in the interests of these two unhappy children that what is happening to them is given wider publicity.

4. In July we were dealing with a very difficult case resulting in a decision by an experienced Family Division judge, Coleridge J. He had to decide what should happen about these two boys and the position he was faced with was stark. On the one side their father had been found by a circuit judge seriously to have sexually abused his stepdaughter, the boys' half-sister, over a period of time, conduct which I described, and I repeat, is disgraceful. The consequence of that very largely was that the mother became convinced that any contact between the boys and their paternal family was to be avoided. That included not just their father, who she said was a paedophile, who should be locked up and not allowed out, but included his parents.

5. Prior to the case coming before Coleridge J it had been before an experienced circuit judge HHJ Wassall. HHJ Wassall had found as a fact that the father had sexually abused his stepdaughter. He also expressed some concerns which have been reiterated to us today by Mr Tolson, who appears on behalf of the mother, about the paternal family's view of that finding. The father has never accepted it and has throughout spoken of his innocence. HHJ Wassall was concerned that the father's family, particularly his parents, although intellectually capable of accepting that the finding had been made, did not themselves agree with it or agree with their mother's extreme reaction to it. But the point had been reached, after the circuit judge had effectively thrown up his hands and transferred the case to the High Court, the point had been reached between Coleridge J when he was faced with this very difficult decision. Here are boys, being brought up by a mother who, in every other respect, was admirable, looked after them well, fed them, clothed them, cared for them, loved them but who had this complete obsession that not only had they been sexually abused, the boys, by their father, but their father was a confirmed paedophile and that they should have no contact with him or with members of his family.

6. The judge found on advice from perhaps the most distinguished experts in the country when it comes to child and adolescent psychiatry, one of them certainly Dr Hamish Cameron, and a first rate NYAS guardian, Mrs Val Proven, that the children were effectively living a lie. They were being forced by their mother's obsessional beliefs to satisfy her, to please her and to accept what she believed even though they did not believe it themselves. The consequence was that when Dr Cameron, who is a very moderate man, came to consider all the evidence he concluded, without hesitation, and he used the phrase and I have queried it

because I was surprised that a man of Dr Cameron's moderation would use it, but when he had a conversation with Mrs Proven about the case on 31 October 2008 he used these words:

"Dr Cameron and Mrs Proven consider that abandoning [T] to the pressures of his mother's belief system would run a real risk of distorting and warping his psychological development so profoundly that in his adult years, he could be emotionally crippled and unable to form trusting relationships with others."

A psychiatrist of Dr Cameron's distinction does not say those words lightly and everyone in this court should listen to them carefully and reflect.

7. And so the judge was faced with a situation that if the children remained living with their mother, living the lie that she passionately believed, the consequence would be enormous emotional harm to the children; and so the judge was urged by father and the paternal grandparents to take the children away from her, to put them with the paternal grandparents who, although in the father's camp, to use a loose expression, nonetheless on the judge's findings plainly had the best interests of the boys at heart and plainly were concerned to do what was best for them. But the judge drew back in July from that. He said he would give the mother one more chance to reflect. What he would do would be: leave the boys with their mother, whom they love and she loves them, and they would stay with her provided they had regular contact with their grandparents, and the question of contact with their father, which would be indirect initially, could be reconsidered at a later point.

8. And so that was the order which the judge effectively made. It is very nicely drafted, it is full of useful phrases, but that is the essence of it. He drew back and he gave the mother what this court described as a lifeline. The mother appealed. The appeal came to the constitution comprising Thorpe LJ, Scott Baker LJ and myself, and we dismissed her appeal, emphasising that the mother had been given a lifeline and that provided that she could overcome this obsession, she could keep the boys and the boys would enjoy their contact with their grandparents. There was evidence before the judge that the children, left to their own devices, did enjoy their contact with their grandparents. They had a healthy, normal relationship with their grandparents, enjoyed contact with them, enjoyed activities which the grandparents arranged for them, and the mother therefore obeyed the letter of the order.

9. In December the judge tried to move things on. He had seen the grandparents give evidence and he was confident that they would protect the children. They would not allow them -- even if the mother's beliefs had a vestige of truth behind them -- they would not dream of exposing their grandsons to risk, and so the judge made a contact order in favour of the father but it did not work. The mother refused to implement. And so back came the case in February to the judge and the judge made the order which the mother now seeks permission to appeal:

"In default of the Mother fulfilling the terms of [parts of the previous order] the Children shall reside with the 2nd and 3rd respondents ('the Grandparents') from 27th March 2010."

10. So what the judge had to balance was on the one hand the enormous harm, real genuine psychological harm which these children would suffer if they continued to grow up in a false belief system, against the love which their mother undoubtedly bore them and the fact that they had lived with her for all their lives. The judge went about that task in my view conscientiously. He made it absolutely clear that the welfare of the children was his first and

paramount consideration. Everything else had to pale into insignificance. That was what he was about, and he recognised that of course this was not a perfect situation. The ideal situation would of course be not ideal, but the better situation would have been if the children could have lived with their mother and had free and healthy contact with their paternal family. That is all that the paternal family wanted. That is all the grandparents, certainly, wanted in the first instant. The judge recognised that the situation which he was seeking to impose would be likely to cause severe emotional distress in the short term, but he trusted the grandparents and he thought on balance, having made the findings of fact for which there was overwhelming evidence, that if he placed the children with their grandparents, the mother was incapable of contemplating contact with the father and incapable of contemplating residence with the grandparents, then that represented the best hope for the children growing up with any degree of normality.

11. That was in my judgment a classic welfare balancing exercise. The judge put into the equation everything that had to be put into the equation. He put in the mother's clear devotion to the children. He put in the fact that she was in many respects a good and competent mother. He put in her legitimate anxiety about the father's refusal to recognise the serious damage he had done to his stepdaughter. In characteristic, robust language, the judge said Mr Tolson, who appears for the mother, continually castigated him for failing to have in mind the father's conduct towards his stepdaughter. The judge said:

"If I may say so these castigations are completely misguided. I am acutely aware of the genesis of these problems and I have never ever been anything other than entirely sympathetic towards the mother so far as that is concerned. But it is not and cannot be in the end a determinative factor in these applications."

12. And so ultimately what it comes down to is on the basis of legitimate findings of fact, that the judge conducts a welfare balancing exercise and comes to a conclusion. The conclusion is a stark one. It is not one the judge came to lightly. The judge plainly thought very carefully about it. He had not done it in July when he had the opportunity to do it. He had not done it even in December. But he decided that he would do it in February. And in my judgment, when one looks at the case in that light, then one sees the legitimate findings which the judge makes as to damage caused by the mother's conduct towards the two boys. The real risk of emotional harm, of these boys being emotionally crippled, if one balances that against a normal relationship with paternal grandparents who have the interests of their grandsons at heart, one can see why the judge came to the conclusion that he did. And in my judgment, as an exercise of discretion, it is was open to the judge to reach that conclusion and this court, in a difficult case, should not seek to part from the judge's exercise of discretion unless there is some factor which makes the decision so clearly flawed that this court feels bound to intervene. There must be some element in the equation which takes the case outside the ambit of reasonable disagreement.

13. Mr Tolson says, well, you can say that because, really, what is the judge doing? Is he not just substituting one form of torture for another? Of course the children are being harmed. I have to accept, he says, the children are being harmed by their mother's intransigence in her false belief systems about them being abused and their grandparents being willing aiders and abetters to abuse, but really, if you take that out of the equation and look at everything else, then you really should leave these children where they are because you are simply substituting one evil for another, ie the distress which will be occasioned by the change of residence.

14. That is his first and principal argument. I do not think the argument that the judge failed to take into account the father's behaviour gets off the ground in the light of the quotation I have given from the judgment, but having considered Mr Tolson's arguments with some care, expanded as they are into five or six grounds of appeal, I have come to the very clear view that when one strikes the balance which the judge struck, which on the facts he was entitled to strike, the exercise of discretion simply cannot be faulted.

15. It horrifies me, and it should horrify the mother, that the children may behave towards their grandparents in an aggressive unpleasant way, that they may deliberately try and sabotage the grandparents' love for them by misbehaviour in the false belief that the grandparents are abusive, and if any proof was really needed of the fact that the judge was right, paradoxically it seems to me to come in the correspondence which Mr Tolson has produced to us this afternoon and which we have looked at. Because following the hearing and the judge's order, the mother went to ground. She took the children out of school, or certainly one of them out of school. And she is out of time in seeking permission to appeal. And she took the children along to the GP. The GP is no doubt acting in perfectly good faith, I make no criticism of him for that, he did not give evidence to the judge, he plainly had not been treating the children, but I am deeply concerned when I read what is said to the GP. It appears throughout the correspondence. I am just going to quote one paragraph in the final letter, which is T talking:

"[T] was completely distraught [he says], in tears, begging me to do something to help the family. I asked him what his concerns were about seeing his Father whilst he was staying at his Grandparents and he clearly stated that he was worried for his safety and that of his brother and that he had witnessed his younger brother being abused by their Father and that this might happen again. I asked him if he didn't feel that the other family members would potentially protect them and he told me that they have never believed his story or [N's] subsequent disclosures, and that whenever any mention of the reason why they don't see their Father was brought up, or why they wouldn't want to see their Father, his Grandparents call him a liar or his uncles call him an evil little liar, etc. etc. He was extremely distressed about this and was really quite inconsolable during the consultation."

Of course Mr Horricks who appears for the grandparents had not had the opportunity to take instructions on that paragraph. In the light of the judge's findings about the grandparents I find it incredible. The idea that these children should regard their grandparents as effectively ogres who are likely to facilitate and connive them being abused by their father is fanciful and absurd and I do not give it credence for one moment; nor, plainly, did the judge because the judge trusted the grandparents. And so, as I say, when the judge came to strike the balance between, on the one hand, an abusive false belief system inculcated by the mother, and the possibility that against that, on the other side, free from her false belief systems, the children might be able to regain at least a fraction of their childhood and be normal children again enjoying a normal relationship with grandparents, the judge's balance in my view comes down only one way and certainly I cannot say on any view that he was plainly wrong. I do not underestimate the short term distress which the children may feel but I ask their parents to think very carefully about why they are feeling that distress, and if their parents are honest people they will recognise, and their mother in particular will recognise, that they are feeling it because she feels it and she has inflicted on these children a belief system which, in the words of the consultant psychiatrist, might well involve them becoming emotional cripples.

16. Against that background it seems to me that this application stands no prospect of success whatsoever. The judge was perfectly entitled in a careful and thoughtful judgment to do what he did and, speaking for myself, I would refuse permission to appeal.

Lord Justice Aikens:
17. I agree. This is a most distressing case. It is these young boys who are the losers because of their parents' failings. The case is living proof of the poet Philip Larkin's statement about the effect of parents on their children. Given the state of affairs that had arisen by the time that the judge made his decision and his order in February 2010, it seems to me that he had little or no option but to make the order that he did in the best interests of the children's welfare.

18. Therefore I would refuse this application.

Order: Application refused