Neutral Citation Number : [2018] EWCA Civ 3049

Case No: B4/2018/1329

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM CANTERBURY COMBINED COURT CENTRE
HHJ GLENN BRASSE
ME17C01892

The Royal Courts of Justice
Strand, London, WC2A 2LL

Tuesday, 14 August 2018

Before:

LORD JUSTICE IRWIN
LORD JUSTICE MOYLAN
and
LORD JUSTICE HOLROYDE

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Between:

IN THE MATTER OF B (CHILDREN)

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Miss Gemma Farrington (instructed by Davis Simmonds and Donaghey, High Street, GILLINGHAM, ME71BE) appeared on behalf of the **Appellant** guardian**.**

Mr Nigel Taylor (instructed by Invicta Law Ltd, Union Street, MAIDSTONE ME14 1PT) appeared on behalf of the **First Respondent** local authority.

Mr Simon Sandford (instructed by Patrick Lawrence Solicitors, Railway Pl, GRAVESEND DA12 1AP) appeared on behalf of the **Second Respondent** mother.

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Judgment

Lord Justice Moylan:

1. On 5 June 2018, on the first day of the final hearing of care proceedings concerning six children, His Honour Judge Glenn Brasse, sitting as a Deputy Circuit Judge, decided that one of the children, who was then aged 13 and who I will call C, should be separately represented. This was based on C having expressed views as to her future care which differed from those of the guardian. The judge gave permission to appeal from this decision.

2. However, at the same time, the judge refused to adjourn the determination of the care proceedings. Further, on 6 June 2018, King LJ refused an application to stay the care proceedings pending the hearing of the appeal because, in her judgment, any further delay in determining those proceedings could not be justified. As a result, the care proceedings have now concluded.

3. In those circumstances, when reading the papers, I questioned what issue required determination by this court. An appeal from the judge's decision, as a freestanding appeal, is now clearly academic. During the course of yesterday, an email was sent to the parties to enquire what issue they considered required determination and inviting them also to consider whether the costs of this hearing were justified. During the course of this morning we have, briefly, sought clarification from counsel who appear on behalf of the guardian, the local authority and the mother what issue requires determination.

4. Miss Farrington, on behalf of the guardian, has made it clear that she does not pursue the appeal on behalf of the guardian. Mr Taylor, on behalf of the local authority, also does not seek to have any issue determined by this court.

5. Mr Sandford, on behalf of the mother, has sought to persuade us that the effect of the judge's ruling was that C's Article 6 rights were breached in that she should have been represented during the course of the final hearing by a different solicitor from that appointed by the guardian. He also, somewhat speculatively, suggested that we would be in a position to set aside the care order which had been made in respect of C. As was made clear during the course of the court's questioning of Mr Sandford, it was difficult

to understand how that submission could succeed. No party has sought to appeal from the final care orders made by the judge at the conclusion of the 7 day hearing. The guardian has not sought to appeal. The local authority has not sought to appeal. And the mother has made no application for permission to appeal. So, simply stated, the final care orders made by the judge are not before this court and it would not be open to this court to set aside the order made in respect of C.

6. Having regard to the fact that this appeal is, therefore, entirely academic it is clear that it must be dismissed. But before doing so, I propose to add a few additional observations.

7. In my view, it was regrettable that some other means of resolving this perceived difficulty was not identified. It was frankly, if not inevitable, certainly very likely that no solicitor would be found who could, on one day's or less notice, act for C at a 7 day hearing. Apart from the question of legal aid, it is difficult to see how anyone else would be in a position properly to represent C at such short notice. Alternatively, it was equally unlikely that a new advocate could be found who would have been able properly to represent the guardian and the other five children.

8. I do not see why the issue of C's views as to her future care could not have been properly and sufficiently addressed during the hearing by questions being asked by her solicitor, as appointed by the guardian, in combination with the other advocates, each of the parties being separately represented, and if required by the judge. It is not unusual for a child's views to differ from that of a guardian, and in my experience, such difference rarely requires separate representation.

9. I suspect that the issue as to C's representation developed in the way that it did significantly because it was initially addressed informally by email from the solicitor for the child to the judge about a week before the hearing. With hindsight, this was an unwise approach to have taken. I do not set out the detail of the exchanges, but they led to the issue being raised by the judge at the commencement of the hearing and to his conclusion that, pursuant to section 41(3) of the Children Act 1989, the child was not represented.

10. Although we have not heard full argument on the issue, in my view section 41(3) did not mean that the child was not represented. It applies where the child is not represented by a solicitor. C was undoubtedly represented by a solicitor because there was a solicitor appointed for her by the guardian. Until that representation had been terminated, perhaps by an application under rule 16.29(7) of the Family Procedure Rules 2010, the solicitor remained instructed on C's behalf, and therefore she remained represented by that solicitor.

11. With those, brief, observations, I propose that the appeal be dismissed.

Lord Justice Holroyde:

12. I agree.

Lord Justice Irwin:

13. I also agree

Order: Appeal dismissed.