Neutral Citation Number: [2013] EWCA Civ 655

Case No: B4/2013/0669&0668

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM NEWCASTLE-UPON-TYNE COUNTY COURT
HIS HONOUR JUDGE SIMON WOOD
UP12C00140

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13 June 2013

Before :

THE PRESIDENT OF THE FAMILY DIVISION
LORD JUSTICE MCFARLANE
and
LORD JUSTICE TREACY

- -

Re H-L (A child)

Miss Janet Bazley QC and **Miss Carly Henley** (instructed by **Hardings Solicitors**) for the **Appellant**
Miss Angela Giovannini (instructed by **Sunderland City Council**) for the **Respondent**

Hearing date : 10 April 2013

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Approved Judgment

Sir James Munby, President of the Family Division:

1. In this appeal we have to decide the point left open in *Re TG (Care Proceedings: Case Management: Expert Evidence)* [2013] EWCA Civ 5, [2013] 1 FLR 1250.

2. In *Re TG*, in which judgment was handed down on 22 January 2013, I drew attention to the important change to rule 25.1 of the Family Procedure Rules 2010 due to be implemented with effect from 31 January 2013. Whereas previously the test for permitting expert evidence to be adduced was whether it was "reasonably required to resolve the proceedings", the test now is whether it is "necessary to assist the court to resolve the proceedings." I said (para [30]):

> "It is a matter for another day to determine what exactly is meant in this context by the word 'necessary', but clearly the new test is intended to be significantly more stringent than the old. The text of what is 'necessary' sets a hurdle which is, on any view, significantly higher that the old test of what is 'reasonably required'."

We now have to decide what is meant by 'necessary.'

3. The short answer is that 'necessary' means necessary. It is, after all, an ordinary English word. It is a familiar expression nowadays in family law, not least because of the central role it plays, for example, in Article 8 of the European Convention and the wider Strasbourg jurisprudence. If elaboration is required, what precisely does it mean? That was a question considered, albeit in a rather different context, in *Re P (Placement Orders: Parental Consent)* [2008] EWCA Civ 535, [2008] 2 FLR 625, paras [120], [125]. This court said it "has a meaning lying somewhere between 'indispensable' on the one hand and 'useful', 'reasonable' or 'desirable' on the other hand", having "the connotation of the imperative, what is demanded rather than what is merely optional or reasonable or desirable." In my judgment, that is the meaning, the connotation, the word 'necessary' has in rule 25.1.

4. McFarlane LJ, whose judgment I have read in draft, has set out the facts giving rise to this appeal and explained why it was that, at the end of the hearing, we concluded that the appeal should, in part, be allowed, though only to the very limited extent he has indicated. I agree entirely with his conclusions and reasoning and therefore need add nothing to what he has said.

5. There are, however, some more general points that merit brief discussion. In *Re TG* I encouraged case management judges to apply appropriately vigorous and robust case management in family cases; I emphasised the very limited grounds upon which this court – indeed, I should add, any appellate court – can properly interfere with case management decisions; and I sought to reassure judges by pointing out how this court has recently re-emphasised the importance of supporting first-instance judges who make robust but fair case management decisions. I take the opportunity to reiterate these important messages.

6. Inevitably there will be occasions when this court does nonetheless have to interfere with a case management decision. Such cases are few in number, not least when contrasted with the very large number of case management decisions being made, day

in day out, by judges in family cases. This is as it ought to be. It shows the system working as it should. Recent examples include *Re B (A Child)* [2012] EWCA Civ 1742 and *Re G-C (A Child)* [2013] EWCA Civ 301. Neither of these cases lays down any new principles. Each is simply an application of well-established principles to the facts of the particular case. So too was *Re F (A Child)* [2013] EWCA Civ 656, where this court refused permission to appeal from a case management decision of a judge who had refused to direct the appointment of an expert in circumstances where all the parties were agreed that there should be an expert report. The principles to be applied are those set out in *Re TG*.

7. Returning to the facts of the present case, McFarlane LJ has referred to the fact that the only medical evidence that had been filed came from various treating clinicians and that no outside expert had been formally instructed in the proceedings. This is not a matter that featured large in argument, but it is worth reminding practitioners of the vital need to avoid blurring the important distinction between treating clinicians and experts: *Oxfordshire County Council v DP, RS & BS* [2005] EWHC 2156 (Fam), [2008] 2 FLR 1708, and *Oldham Metropolitan Borough Council v GW and PW* [2007] EWHC 136 (Fam), [2007] 2 FLR 597.

8. McFarlane LJ has also referred to the circumstances in which, very late in the day, a critically important document was disclosed to the local authority. It is disturbing that this document, which had the effect that one aspect of the appeal fell away, came to light only during the hearing before us. There are perhaps two lessons here for the future. The first is that, when disclosure of medical records is being sought from a third party, an appropriate order of the court directed to the third party should be obtained at the earliest opportunity, rather than one of the parties (here, the local authority) being left to seek voluntary disclosure. The second is that more thought needs to be given than is often the case to an appropriately focused application for disclosure. Too often, applications for the disclosure of medical or police records seek the disclosure of everything, without any adequate thought being given to identifying the particular class or classes of documents – here, indeed, a particular document – whose disclosure is really needed.

9. The final matter relates to the imperative need for everyone, the Court of Appeal included, to deal with appeals from interlocutory case management decisions in family cases with the utmost despatch: see *Re C (A Child)* [2013] EWCA Civ 431, para [49]. In the present case the decision under challenge was on 27 February 2013. The fact-finding hearing was fixed for 16 April 2013. The appellant's notice was not filed until 11 March 2013. Permission to appeal was given on 19 March 2013. It was possible to list the appeal for hearing, just in time, on 10 April 2013. Justice was done. The timetable fixed by the case management judge was not disturbed. But one cannot help recalling the well-known words of the Duke of Wellington.

Lord Justice McFarlane:

10. On 27 February 2013 His Honour Judge Simon Wood, sitting at Newcastle County Court, refused an application made on behalf of a mother in care proceedings for permission to instruct three expert medical witnesses. Permission to appeal was granted by Black LJ on 19 March 2013. We heard the appeal on 10 April 2013 and at the conclusion of the hearing announced our decision which was to allow the appeal, but only to a very limited extent. In preparing the judgments which are now being

handed down I have had the benefit of reading in draft the judgment of Sir James Munby P in which he sets out general guidance upon the interpretation of Family Procedure Rules 2010, rule 25.1 which restricts expert evidence "to that which in the opinion of the court is necessary to assist the court to resolve the proceedings". I would wish to associate myself, word for word, with the guidance contained within the President's judgment in this case. The judgment which I now give seeks to apply the approach described in the President's judgment to the facts of the present case.

11. The young child who is at the centre of these proceedings is H-L, a girl, who was born on 17 June 2010 and who is therefore now some 2¾ years of age. Tragically H-L was born with a rare genetic disorder, spondylocostal dysostosis, which is a condition affecting the development of the bones of the back and ribs, resulting in the vertebrae being misshapen and fused. In consequence H-L has a short neck, with marked in-drawing of the chest which in turn causes significant respiratory problems with inter-current infections and a possible reduction in the efficiency of her immune system. H-L's mother, EM, is herself only 19 years of age. EM, who is separated from the child's father, has faced the not insignificant challenge of caring for her disabled child since birth; a task which we were told by common acclaim she has discharged very effectively, at least until November 2012 when events led to the immediate commencement of child protection proceedings. As might be imagined, H-L's condition has required continuous medical monitoring by a team of local specialists with whom the mother has fully co-operated in all that has been required of her.

12. The circumstances which triggered the issue of care proceedings arose in mid-November 2012. On 12 November H-L was observed by staff at her nursery to have a number of significant bruises to her face and body. The following day H-L was presented to her GP by the mother so that these bruises might be examined. On the GP's advice H-L was taken to the local Accident and Emergency department where, following an initial examination, a child protection investigation was commenced. The nature and the range of the bruising, and the absence of any suggested explanation for it, led to a working diagnosis of non accidental injury. By agreement H-L was placed in foster care on 16 November and care proceedings were commenced on 21 November. Since that time H-L has remained in foster care under a series of interim care orders.

13. The application before HHJ Wood on 27 February 2013 by counsel for the mother was for permission to instruct the following experts:

    a) A geneticist;

    b) A haematologist;

    c) A paediatrician to provide a general overview.

14. The hearing on 27 February had been listed as an Issue Resolution Hearing. The only medical evidence filed in the case had come from the local authority and consisted of various clinicians based at the local hospital who either had had direct contact with H-L on the day of her referral in November and the immediate days following or were more generally part of the clinical team responsible for her case. No outside "expert" had been formally instructed in the proceedings.

15. Counsel for the mother supported her application with the following central points:

a) On the medical notes that had been disclosed the treating clinicians were proceeding on the basis of a diagnosis of spondylocostal dysostosis. Such a diagnosis could only be formally confirmed following molecular analysis, yet the medical notes did not contain any record of molecular testing. Counsel therefore questioned whether H-L in fact suffered from this specific genetic condition;

b) The question of whether or not a child suffering from spondylocostal dysostosis, or any related genetic condition, might be more susceptible to bruising than might otherwise be the case was covered in the local authority medical evidence in a superficial and unsatisfactory manner in a short letter from Dr Michael Wright, the local consultant clinical geneticist in the following terms:

> "[I was asked] whether spontaneous or easy bruising was a recognised feature of spondylocostal dysostosis. I replied that in my experience this was not the case. However, I have a limited experience of this very rare condition and so sought the opinion of Dr Peter Turnpenny, consultant clinical geneticist in Exeter.
>
> Dr Turnpenny did a lot of the original work defining this condition. He replied that he had not come across easy bruising in children with this condition before, nor was there any reason to expect that this would be the case."

c) Counsel argued that the letter from Dr Wright was unsatisfactory, in a forensic sense, for the following reasons:

i) It assumed a clear diagnosis of spondylocostal dysostosis, yet no molecular testing had been disclosed that would confirm such a diagnosis;

ii) Dr Wright, who was to be called to give evidence in the proceedings, plainly had no relevant and specific experience on the key issue of whether this condition rendered a child more susceptible to spontaneous or easy bruising. He could not therefore sensibly be cross-examined on the point;

iii) Dr Turnpenny was the true source of the evidence on this part of the local authority case and he should therefore be formally drawn into the procedure as an instructed expert witness;

d) Whilst the blood testing that had been carried out at the hospital indicated readings which were, with one exception, within the normal range, an independent haematologist should be instructed to advise whether any additional blood testing should be undertaken in view of H-L's genetic condition which, in part, may affect the collagen level in

her system and therefore, potentially, the "normality" of any blood readings;

e) Finally, on the questions of the aging of bruising, the position of bruising and, more specifically, the mechanics of bruising with a child who has these deformities, an independent paediatric overview was justified. The latter point arises because, as might be expected, H-L's condition renders her physically inhibited in using her arms to break her fall when she, in common with all other toddlers, loses her balance. This in turn may render parts of her body more prone to injury in the course of a domestic fall than would be the case for a toddler who could stick her hand out in a normal protective manner.

16. The application for the instruction of these three experts was resisted by the local authority and the children's guardian, but supported by the father, although the father largely plays a neutral role in the fact finding process because, on any basis, he could not possibly be regarded as a potential perpetrator of any injuries.

17. I turn now to the judgment of HHJ Simon Wood on 27 February. Despite the fact that this is an ex tempore judgment, which was no doubt delivered in the course of a busy county court list, it is, if I may say so, an impressive model of structure and clarity. Moreover, the judge was plainly aware of the significance of the recent change to the wording of Rule 25.1 and he expressly refers to such guidance as was then available, in particular from the President in *Re TG* and from Black LJ in *Re B*.

18. The following reasons were relied upon by the judge in refusing permission to instruct any of the three experts:

a) Unusual bruising had not been noted on H-L at any time prior to November 2012 and no such bruising has been observed since her reception into foster care;

b) There is no medical evidence to suggest that spontaneous or easy bruising is a feature of her medical condition;

c) Dr Turnpenny's view, as recorded in the letter from Dr Wright, is one that does not admit to any possibility of a causal link between the genetic condition and bruising.

d) There is no positive evidence to suggest that any blood clotting disorder and any outstanding issue as to the significance of the testing can be dealt with by the local paediatric haematologist;

e) Any submissions about bruising and the ordinary potential for toddlers to bruise can be dealt with within the evidence and it is difficult to see how a paediatric overview from a different paediatrician could add to the evidence that already exists.

19. Accordingly the judge concluded that the factual parameters of this case did not reach the test of necessity which is now embodied in Rule 25.1. He therefore refused the application.

20. The application was renewed before the same judge on 4 March 2013 together with an application for permission to appeal his earlier decision. On that occasion the mother was represented by leading counsel, Miss Janet Bazley QC, who has led the presentation of the mother's appeal before us. On 4 March the judge effectively confirmed his previous decision and refused permission to appeal.

21. The timing of this appeal, coming relatively soon after the introduction of the new rule and the facts of this case, provides a useful vehicle to examine the wider implications of Rule 25.1 in the overall context of the wider reforms to the Family Justice system which, in particular, focus upon a target of achieving the resolution of child care proceedings within 26 weeks. The court is very grateful to Miss Bazley, leading Miss Henley for the mother and to Miss Giovannini on behalf of the local authority for the helpful way in which they have assisted the court in teasing out both the detail of this case and the wider implications of the new rule.

22. The appeal hearing occurred some six days prior to the start of the four day fact finding hearing listed before HHJ Wood in Newcastle County Court. During the appeal hearing two significant developments took place. First, seemingly by coincidence, further medical records were disclosed to the local authority and then to the parties. The disclosed material included a record of the molecular test confirming the precise diagnosis of spondylocostal dysostosis. One aspect of the application for the instruction of a geneticist therefore fell away. Second, Dr Turnpenny, who, sensibly, is the geneticist chosen by the mother for instruction, was contacted by telephone at the request of the court to see if he might be available to answer two or three targeted questions based on matters of principle, without a need to consider the papers in this case, on a tight deadline, so that his answers might be available before the start of the fact finding hearing in six days time. The court is extremely grateful to Dr Turnpenny for his immediate acceptance of instruction on that basis.

23. In the event our decision was to allow the appeal with respect to the instruction of Dr Turnpenny on the limited basis that that instruction would be restricted at this stage to the targeted paper exercise that I have just described. If, as might reasonably be expected, Dr Turnpenny's answers are in accordance with the opinion attributed to him in Dr Wright's letter to the effect that there is no reason to anticipate that H-L is more prone to spontaneous or easy bruising as a result of her condition, then one anticipates his involvement in the case may go no further. If, however, his answers are to the contrary, or at least are more sophisticated and require further elaboration, then that is a matter that can be dealt with by the trial judge in the ordinary way. Insofar as the appeal related to the instruction of a haematologist and a paediatrician, our conclusion was that the appeal should be dismissed.

24. Given the overall context within which these decisions now fall to be taken as described in the judgment of the President, it is not necessary for me to do more than state in short terms the reasons for our decision.

25. Whether or not H-L is more prone to manifest bruising than a child whose system is uncomplicated by this genetic disorder would seem to be the central, if not the only, significant medical issue in the case. In the circumstances, it is unsatisfactory that the answer to that question is provided through the channel of Dr Wright, who quite properly and candidly, explains that it is a topic which is outside his own knowledge and experience. If the mother and those acting for her wish to challenge or seek

elaboration upon that opinion during the course of the trial Dr Wright is in no position to take the matter any further. That is, in my view, a situation which potentially falls short of the requirements of ECHR, Art. 6 and the overriding objective in Rule 1.1 of FPR 2010.

26. The application, as it stood before HHJ Wood, sought leave to disclose the papers in the case to Dr Turnpenny and instruct him to provide a full report as an expert witness in the proceedings. Dr Turnpenny had indicated that, if so instructed, he was unable to provide a full report within the timescale which had previously been set for the hearing of the case. On that basis, and on the basis that the indication of Dr Turnpenny's view as it appear in Dr Wright's report appeared to be unequivocal, the judge held that the instruction sought was not necessary.

27. As a result of the developments that occurred during the hearing of this appeal, with Dr Turnpenny being able to provide short answers on the key matters of principle, without the need for full instruction and within a very tight timetable which does not cut across the court listing, it is plain to me that that instruction, on those terms, is proportionate to the need to provide some authoritative clarity from a witness who is in a position to give such answers and is therefore "necessary" in the manner that is described more fully in the President's judgment. I therefore was in favour of allowing the appeal on that limited basis.

28. So far as the instruction of a haematologist and a paediatrician are concerned, I do not consider that the appeal even begins to get off the ground, despite the attractive and clear submissions that Miss Bazley has made to the court. For the reasons that he gave, the judge was entitled to conclude that the need for the instruction of an expert from either of those disciplines was not established on the facts of this case. The assessment of the necessity for the instruction of an expert in order to assist the court to resolve the proceedings is very much a matter for the trial judge at first instance. The Court of Appeal, certainly at a stage prior to the full hearing, should be very slow to interfere with the judge's assessment of the necessity or otherwise of an expert witness. In this case, however, with respect to the haematologist and the paediatrician, I consider that the conclusion of the judge was entirely justified and is not one that falls for re-consideration on appeal.

29. For the reasons I have given, supported by the more general approach that the President has described, I would allow the appeal on the very limited basis that I have indicated, but, save for that, dismiss the appeal insofar as it relates to the haematologist and the paediatrician.

Lord Justice Treacy:

30. I agree with both judgments. There is nothing I can usefully add.