

In the Matter of N (a Child)

Case No: B4/2007/1557

Court of Appeal (Civil Division)

25 July 2007

[2007] EWCA Civ 1053

2007 WL 2041943

Before: Lord Justice Thorpe Lord Justice Lloyd and Lord Justice Toulson

Date: Thursday, 25th July 2007

On Appeal from Exeter District Registry (Mr Justice Coleridge)

Representation

- Mr Wildblood QC (instructed by John Hodge Solicitors) appeared on behalf of the Appellant.
- Miss Hamilton QC (instructed by Messrs Marsden Rawsthorn) appeared on behalf of the Respondent.

Judgment

Lord Justice Thorpe:

1 On 10 July Coleridge J handed down judgment in Exeter following some four and a half days of evidence and submissions which he had heard in Plymouth in the second half of June. The case was highly unusual on its facts but, in the end, involved a straightforward choice between two families contending for the responsibility to bring up N for the remainder of his childhood. N is approximately 18 months of age and he was born to Mrs P who, with her husband, were what might be said to be the first contenders, since they had cared for N over the first 18 months of his life and had clearly given him high standards of care. The rival contenders were Mr SJ, the biological father, together with his wife, TR. For convenience the judge throughout referred to one camp as the P's and the other camp as the J's.

2 There were other issues in the case for which the judge made preparations, he having had case management from the outset, and principally they related to another child of Mrs P, C, for whom there was again contention between the P's and C's biological father, Mr R. That consolidated case settled shortly before the fixture, and accordingly all the concentration was upon N.

3 The unusual feature of the case, and the feature that caused the judge much anxious consideration, is that N was born as a result of a surrogacy agreement between Mrs P and Mr J. The circumstances surrounding the failure of that agreement, and its plain breach by Mrs P, were closely investigated by the judge, and were the subject of findings, forming part of the judge's conclusions on a schedule that had been directed at an earlier stage in the litigation, when it was contemplated that there would be split hearings: a preliminary fact-finding hearing in December to establish the factual foundation, which would in due course have been followed by what is sometime known as the disposal hearing. In the event the two stages were consolidated into one, and the June hearing was marshalled to enable the judge to address the contested factual issues within the schedule, and then to exercise his discretionary judgment to settle N's future.

4 The judge's findings in relation to the history are perhaps largely superfluous for this afternoon's disposal of the appeal, but in very broad terms he rejected the evidence of the P's and commended the responsibility of the J's. In particular, and crucially, he found that the P's had deliberately embarked on a path of deception, driven by Mrs P's compulsive desire to bear a child or further children, and that she had never had any other objective than to obtain insemination by surrogacy, with the single purpose of acquiring for herself, and her family, another child. This was crucially important, since it informed the review of the experts and the review of the judge of the medium and long-term future of N, if the responsibility for his future care were left with the P's.

5 The judge had the considerable advantage of two reports from Dr Eia Asen of the Marlborough Day Clinic. His expertise in this field forensic child and adolescent psychiatry, is second to none, and the judge was clearly guided by him to his ultimate conclusion. Dr Arsen had been instructed by the guardian *ad litem*, and the guardian *ad litem* fully supported Dr Arsen's conclusions, as well as expressing her independent expert view that, of the two options that the judge surveyed, the better for N was the future offered by the J's. So, given those ingredients, the judge's ultimate conclusion could not have been surprising to any of the professionals in the case, even if it was unexpected by the P's.

6 Mr Stephen Wildblood QC, who has conducted a difficult case on behalf of the P's with conspicuous commitment and ability, applied immediately at the conclusion of the case for permission to appeal. The judge, in response, as Mr Wildblood puts it in his skeleton:

"Recognising that 1) the P's would wish to appeal in any event if the decision went against them and 2) the long vacation is approaching, he gave permission to appeal, with the expressed intention that there should be an expeditious and final resolution of the issues that arise in these proceedings. He stayed the order for transfer of residence but reduced the time for the filing of a Notice of Appeal under part 52.4(2) CPR 1998 to 4 pm on Friday 13 July 2007."

7 I would wish to emphasise the approach adopted by the judge. There are cases in which it is perfectly plain that, whatever may be the prospects, as professionals might assess them, the litigants cannot rest until they have exhausted their legal remedies. Obviously, if there is an application for permission refused by the judge, on the ground that no reasonable prospects of success have been demonstrated, there is then an interval which may be of up to 21 days duration before anything is received in the office here, and then the case worker has to put the papers together, and there may be a delay in getting a skeleton or a transcript, and then the papers have to be submitted to a single judge, and there may be delay in his consideration of the papers, particularly with a long vacation approaching. The net consequence of which may be that the ultimate future of the child is not settled by the delivery of judgment, but left in suspense for what may be six or nine months thereafter, until such time as it can be demonstrated that the application for permission has failed. So the judge's mechanism for achieving rapid finality by saying, in effect, Mr Wildblood, you have got three days in which to submit your application, and then ringing the office here and asking for a listing before the end of term, has enabled us to achieve finality some 15 days after judgment was handed down.

8 Whilst considering good management and good practice, I would also particularly commend Mr Wildblood's preparation of the points that he wished to advance on the appeal that the judge had sanctioned: he has been in regular collaborative communication with the office to ensure that whatever was needed was safely received; he has reduced the papers to a manageable core bundle; he has prepared an additional bundle of papers unlikely to be required; and he has guided the court by a suggested reading list, which is rare in its excellence in that it is truly a reduction, a distillation of a mass to the essential heart.

9 There were, it seems to me, no legal questions of any difficulty confronting the judge. Mr Wildblood has helpfully drawn attention to the relevant provisions of the Human Fertilisation and Embryology Act 1990, which apply, given that N's birth stems from a surrogacy agreement. He has pointed out the application of its various sections to the facts of this case.

10 What is notable is that Mr J was alive to the extent to which he had been deceived at a very early stage, and issued proceedings within ten days of N's birth. It could be said to be unfortunate that the resolution of those proceedings has occupied the first 18 months of N's life, but I suppose it has to be recognised that that is not unusual or surprising. The case is very unusual on its facts, and it is well known that there are considerable pressures on listing in most areas, particularly if the case is reserved at an early stage to the liaison judge.

11 So that is sufficient of the background, and I come to the judgment, which Miss Anna Hamilton QC, in her excellent skeleton, analyses in this way. She points out that the judge was charged with a classic discretionary balancing exercise. He carried it out by identifying the nature of the exercise, regulated as it was by Section 1 of the Children Act 1989, welfare and the statutory checklist. He went on to review the evidence, and the manner in which each party advanced their case. He made detailed findings of fact by reference to the schedule that had been prepared,

according to the prior directions orders. He summarised the precise nature of the balancing exercise in the light of the findings he had made. He considered the only expert evidence before him, within the context of his own conclusions on the disputed areas of fact, and finally he expressed his welfare conclusion. Miss Hamilton submits that this constitutes an unimpeachable, text book approach to the judicial task. With that submission I am in complete agreement.

12 So Mr Wildblood has had a very difficult task in making practical gain from the permission granted by the judge. With his characteristic professionalism, he has restricted his criticisms of the judgment to three separate grounds, and he has frankly conceded that there is nothing more that he could say in support of the appeal. His first ground is that the judge gave insufficient weight to the adverse effect on N of severance, and he seeks to draw that submission from paragraph 21 of the judgment, in which the judge said:

“So the test here is a simpler one to formulate though not necessarily to answer; namely as between the two competing residential care regimes on offer from the two parents (with their respective spouses) and available for his upbringing which, after considering all aspects of the two options, is the one most likely to deliver the best outcome for him over the course of his childhood and in the end be most beneficial. Put very simply, in which home is he most likely to mature into a happy and balanced adult and to achieve his fullest potential as a human?”

13 I pause there to say that that seems to me an impeccable statement of the issue that the judge had to decide. It is his final sentence that Mr Wildblood criticised, for he added:

“The fact that both families constitute one of the child's natural parents means that both sides start from the same position, neither side being able to claim that the blood tie should favour their claim.”

Says Mr Wildblood, that manifestly leaves out of account the very important consideration of N's secure early life attachment to the P's.

14 I do not think that that submission is sustainable. It is quite plain to me that, in this final sentence, all that the judge was doing was distinguishing the case before him from a case such as a contest between a mother and a grandmother, in which the court has to give particular weight to the biological attachment. It is manifest from later passages in the judgment, paragraph 71 and paragraph 98, in which the judge reviewed the advice of Dr Arsen. It is manifest from these paragraphs that the judge had that important consideration firmly in his mind throughout the analysis.

15 Mr Wildblood's second ground is that, in contemplating future contact, the judge overestimated the likelihood of satisfactory contact between N and the P's if placed with the J's, because no sufficient consideration was given to the distance between the two homes; the inability of the P's to finance journeys over that distance; the responsibility that they hold to their other children; and the emotional turmoil that is predictable, in the event that N is taken from them. I see no force in this submission. The judge clearly weighed these respective scenarios carefully, as had Dr Arsen, who attached great importance to maintaining future contact with the biological parent, not the carer. Really, the judge, in the summer of 2007, may speculate as to the prospects of future contact, may aspire to achieve it, but it would be very bold to forecast with any confidence what are N's prospects of future contact, with the biological parent not having care, whichever option the judge had gone for.

16 Mr Wildblood's third ground is that the judge, in resting himself on an appraisal of the medium and long term prospects for N, gave insufficient consideration to the P's capacity as parents; he overplayed the history in relation to the child S; he underplayed the history in relation to P, another child; and he failed to recognise that the P's past capacity for deceit was curtailed by the arrival of the court as a controlling force. I see no force in any of those criticisms. It is possible to demonstrate that the judge had all those factors in mind. It is impossible to say that he exaggerated, or underestimated, the worth of any of them.

17 So the value of this appeal has been, quite simply, to bring to a final conclusion the contest between the rival options. On any other basis, this would not be a case in which the grant of permission would have been either justified or contemplated. Nor is it a case in which permission

would have been granted, had the papers been placed before a single judge for determination on the papers. It is, with all due respect to Mr Wildblood's professionalism, an appeal almost impossible to advance, and it is only salvaged in terms of the consumption of all sorts of resources: the highly skilled advocates; the solicitors; the guardian; the judges of this court, by its result, namely, introducing complete finality, and enabling the result preferred by the judge to come into immediate effect.

18 I would dismiss the appeal.

Lord Justice Lloyd:

19 I agree that the appeal should be dismissed for the reasons given by my Lord, Lord Justice Thorpe. I wish to add only one brief footnote and that is this: as he has described, the dispute is between on the one hand the biological mother of the child together with her husband, and on the other hand the biological father of the child and his wife. Mr Wildblood caused to be put before us some of the relevant provisions of the Human Fertilisation and Embryology Act 1990, to which my Lord has referred, but did not find it necessary to take us through those provisions. The effect of Section 27 of that Act is that Mrs P is to be treated as the mother of the child, and the effect of Section 29(1) is that she is to be treated as the mother of that child for all purposes, and Section 29(2) says that any other person is to be treated as *not* being the mother. Correspondingly, Section 28 deals with the meaning of father. My Lord said that the biological father was to be treated as the father, but I think that that may not be the correct reading of the Act in relation to the circumstances of this case. I rather think that, because the insemination was conducted with the consent of the husband of the biological mother, then her husband is to be treated under the Act as the father, and no other person is to be treated as the father, in law. That produces the situation that the biological father is to be treated as *not* the father, and therefore, incidentally, requires permission to apply for orders in relation to the child; it being impossible for several reasons, not least a) the passage of time, but b) more conclusively, the absence of consent, for the biological father and his wife to have applied for a parental order under Section 30 of the 1990 Act.

20 That makes no difference at all to the substance of the case, but it does demonstrate that the effect of the Act, pursuant to which of course the surrogacy arrangement was put in place, is somewhat more radical than my Lord may have thought. It makes no difference to the result, although it may make it necessary for consequential orders to be granted in favour of the J's; but, as I say, in substance, for the reasons given by my Lord, I agree that the appeal should be dismissed.

Lord Justice Toulson:

21 I agree that the grounds of appeal ably advanced by Mr Wildblood cannot be sustained, for the reasons given by my Lord, Lord Justice Thorpe.

Order: Appeal dismissed.