Re P-B (Placement Order) [2006] EWCA Civ 1016

[2007] 1 FLR 1106

Court of Appeal

Thorpe, Arden and Wilson LJJ

15 June 2006

Adoption — Placement order application — Local authority acting as adoption agency — Approval by appointed officer to precede application for placement order

The mother suffered from Asperger's Syndrome, or from a similar condition, which, compounded by post-natal depression, affected her ability to care for the child. The local authority addressed these concerns by providing the mother with support, which continued when a younger sister was born. However, before the elder child was 2 years old, he was diagnosed with an acute form of leukaemia, requiring very high standards of care and, shortly after the diagnosis, the local authority placed the child with foster parents under an emergency protection order, and applied for a care order. The child's younger sister, who had no particular difficulties or illnesses, remained with the mother. Although the local authority at first proposed eventual rehabilitation to the mother, their eighth care plan proposed adoption. At the pre-trial review, the local authority indicated to the other parties that the child's case was due to be considered by the adoption panel on the day scheduled as the first day of the final care hearing. The panel duly met on that day, and approved the adoption proposal; 2 days later the local authority issued the application for a placement order. The judge agreed to list the application immediately, to be disposed of as part of the continuing care hearing, and went on to grant the care order and the placement order. The parents appealed, arguing primarily that the listing of the application for a placement order at the very latest stage of the trial had been procedurally unfair.

Held – dismissing the appeal –

(1) A local authority making a placement application because they were satisfied that the child ought to be placed for adoption under s 22 of the Adoption and Children Act 2002 (the 2002 Act) was not acting under the auspices of Parts III and IV of the Children Act 1989 but as an adoption agency under the 2002 Act. The local authority could not apply for a placement order until it was satisfied that the child ought to be placed for adoption, and it could only be satisfied of this after the appointed officer had carefully considered the recommendation of the panel, and taken the positive decision to endorse it. Only after complete compliance with the requirements of the Adoption Agencies Regulations 2005 could the local authority issue a placement application. Accordingly it had not been open to the local authority to issue the placement order application any earlier than it did (see paras [18]–[20], [39], [41]).

(2) The conclusion of the judge that the application for a placement order should be considered at the same time as the application for a care order was within the wide ambit of his discretion. The local authority had clearly signalled their intention to pursue adoption and that a placement order application would be made if and as soon as the panel approved placement for adoption. It was hard to identify what benefit would have resulted to the mother from the adjournment of the application, and correspondingly hard to identify a prejudice to her in hearing it immediately (see paras [20], [21], [23]).

Per Arden LJ: reg 19 of the Adoption Agencies Regulations 2005 placed the local authority under a duty to take account of the recommendations of the adoption panel. While paying lip service to the recommendation of the panel would be insufficient, the duty was only to take account. It must be open in theory at least for an adoption agency

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to reach a different view from the recommendation of the adoption panel, but it seemed likely that the local authority would have to have strong grounds for doing so (see para [38]).

Statutory provisions considered top

Adoption Act 1976

Children Act 1989, Parts III, IV, s 31(2)

Adoption and Children Act 2002, ss 3, 7, 21, 22, 24, 26, 52

Adoption Agencies Regulations 2005 (SI 2005/389), regs 11–19

Michael Keehan QC and *Ronan O'Donovan* for the appellant
Nicholas O'Brien for the respondent

Cur adv vult

THORPE LJ:

[1] The parties to these proceedings are the local authority, the mother and father of the child, and the child, R, via his guardian. R is nearly 4 years of age. His parents are not married. They commenced a relationship in 2001 and in addition to R, who was born in July 2002, they also have E, who was born in August 2003. During the course of their relationship they have cohabited, but now live separately.

[2] Very sadly the mother of the appellant in this court suffers from something that is either Asperger's Syndrome or an Asperger's-type presentation. That has undoubtedly impeded her capacity to provide for R the standards of care immediately after his birth which would have been sufficient to relieve professionals involved with the family of anxiety. Her problems were compounded by post-natal depression, suffered after R's birth.

[3] This potentially serious situation was dramatically compounded by the discovery in April 2004 that R was suffering from an acute form of leukaemia. Inevitably as a result of that, he has required very high standards of care and high standards of ongoing medical treatment. The local authority endeavoured to support the mother through the resulting stresses and strains, but very sadly in July 2004 it considered that a continuation of the process would put R at unacceptable risk. It applied for an emergency protection order on 9 July and for a care order on the 15 July. Since the month of July, R has been in foster care under a series of interim care orders during the preparation towards trial. I emphasise that E has had no particular difficulties or illnesses in her early life and she is sufficiently cared for by her mother and remains in her mother's charge.

[4] Following the initiation of the proceedings there were a number of directions appointments, many of them before His Honour Judge Connor. There was a directions appointment before that judge on 11 November 2005, to which I will return, and on 27 January His Honour Judge Connor made an order reducing the level of the mother's contact to R. At that stage, there had been seven care plans prepared and submitted, all of which provided for ultimate rehabilitation. However, on 1 February 2006 the local authority filed its eighth care plan and that abandoned the goal of rehabilitation and substituted the route to adoption. No doubt influential on that change was the

report filed by Dr Yates, a child and adolescent consultant psychiatrist, who had been introduced into the proceedings by the directions order of 11 November.

[5] The case was timetabled for a final hearing to commence on 6 March 2006, and at a pre-trial review on 9 February the local authority indicated to the other parties that, pursuant to its eighth care plan, it was placing R's case before the adoption panel, which was due to meet next on 6 March. It was plainly indicated that if the panel favoured the adoption proposal, then the local authority would immediately issue an application for a placement order under the current legislation. The local authority's position was that the requirements of the Adoption and Children

Act 2002 and the Adoption Agencies Regulations 2005 had to be complied with before the placement order application could be issued.

[6] The trial commenced on 6 March. The panel approved the adoption proposal on the same day and on 8 March the application for a placement order was issued. It was before the judge on the following day, 9 March, when the local authority sought a direction that it be immediately listed to be disposed of as part and parcel of the continuing trial of the care order application, and that all the evidence in the care proceedings should stand as evidence in the adoption proceedings. His Honour Judge Connor acceded to that application and gave a short judgment explaining his reasons for so doing. The judgment has not been transcribed, but we have an agreed note of what he said.

[7] During the course of the trial the judge heard extensive evidence from the parties, from the foster parents and from a number of professionals who had been involved with either the parents or with R, either delivering clinical services or making professional assessments. At the conclusion of the evidence the judge, I think, reserved for a period of about 10 days and then handed down an exceptionally full and thorough judgment running to some 120 pages. The effect of the judgment was to grant the local authority's applications for the care order and for the placement order. The local authority had throughout been supported by the guardian ad litem, who fully adopted and endorsed the local authority's professional judgments and submissions.

[8] The rival case had been very skilfully presented by Mr Michael Keehan QC leading Mr O'Donovan for the mother. The realistic target for which Mr Keehan strove was the rejection of the path to adoption at this early stage in R's life, in favour of a sort of moratorium during which he would remain with the foster parents and remain in medical treatment. That would provide the opportunity for a full review at the conclusion of the current medical treatment towards the end of 2007. Mr Keehan's alternative case had received support from a consultant paediatrician, Dr Raffles, and also from a clinical psychologist, Mrs Braier, who had carried out assessments of both parents.

[9] The outcome, the judge rightly recognised at the conclusion of his judgment, was, as he put it, a great disappointment to the parents. Very naturally, an application for permission to appeal was mounted to the judge and he refused it, giving unusually full reasons for so doing. The application was renewed in this court and Hughes LJ on paper directed that the permission application be listed for oral hearing, with appeal to follow if permission granted. That has been the listing today and the hearing has

throughout been treated as the hearing of appeal; although we have not formally, as yet, granted permission, we have plainly inferentially done so by listening with care to very skilful submissions from Mr Keehan and from Mr O'Brien in response. We have also heard briefly from the father, who has not been represented, but who made a statement to the court at the conclusion of counsel's submissions.

[10] With that introduction, I turn to the two grounds which Mr Keehan has advanced on his client's behalf. He prefaced his submissions by making it quite plain that if the mother were in person, she would present a wholesale attack on the judicial conclusion and strive for the immediate rehabilitation of her son. Mr Keehan has inevitably superimposed a realistic assessment of what could plausibly be argued in this court, and he has abstracted from the range of possibilities these two grounds which require separate consideration.

[11] The first ground is essentially a complaint of procedural unfairness, in that a litigant who not only faced the huge emotional turmoil of contested care proceedings, with the high risk of losing her child at the termination, was then forced to respond to and adjust to the application for a placement order at the very latest stage in the trial, with no opportunity for reflection and no opportunity to advance a carefully considered case in relation to the placement order application or in relation to consequential issues of contact.

[12] In advancing that submission, Mr Keehan introduces a point of statutory construction which can be confined to s 22 of the Adoption and Children Act 2002 (the 2002 Act). This is the Act which introduces the current statutory scheme for the adoption of children in replacement of the Adoption Act 1976. Its operation is supplemented by rules, namely the Adoption Agencies Regulations 2005, and also by departmental guidance issued under s 7 of the 2002 Act. There is, first in time, the National Adoption Standards, and more recently the guidance, both of which have the same foundation and force. The narrow point is as to what is meant by the phrase:

> 'The appropriate local authority must apply to the court for a placement order if they are satisfied that the child ought to be placed for adoption.'

[13] That quotation comes within the provisions of ss 21 and 22. Section 21, *Placement orders*, provides:

> '(1) A placement order is an order made by the court authorising a local authority to place a child for adoption with any prospective adopters who may be chosen by the authority.
> (2) The court may not make a placement order in respect of a child unless—
>
> (a) the child is subject to a care order,
>
> (b) the court is satisfied that the conditions in section 31(2) of the 1989 Act (conditions for making a care order) are met, or
>
> (c) the child has no parent or guardian.
>
> (3) The court may only make a placement order if, in the case of each parent or guardian of the child, the court is satisfied—
>
> (a) that the parent or guardian has consented to the child

> being placed for adoption with any prospective adopters who may be chosen by the local authority and has not withdrawn the consent, or
>
> (b) that the parent's or guardian's consent should be dispensed with.
>
> This subsection is subject to section 52 (parental etc. consent).
> (4) A placement order continues in force until—
>
> (a) it is revoked under section 24,
>
> (b) an adoption order is made in respect of the child, or
>
> (c) the child marries or attains the age of 18 years.
>
> "Adoption order" includes a Scottish or Northern Irish adoption order.'

[14] Section 22, *Applications for placement orders*, provides:

> '(1) A local authority must apply to the court for a placement order in respect of a child if—
>
> (a) the child is placed for adoption by them or is being provided with accommodation by them,
>
> (b) no adoption agency is authorised to place the child for adoption,
>
> (c) the child has no parent or guardian or the authority consider that the conditions in section 31(2) of the 1989 Act are met, and

(d) the authority are satisfied that the child ought to be placed for adoption.

(2) If—

(a) an application has been made (and has not been disposed of) on which a care order might be made in respect of a child, or

(b) a child is subject to a care order and the appropriate local authority are not authorised to place the child for adoption,

the appropriate local authority must apply to the court for a placement order if they are satisfied that the child ought to be placed for adoption.'

[15] So Mr Keehan's clear submission is that the local authority, as a statutory authority in pursuit of a care order, and in pursuit of a care plan that provides for adoption, must have been satisfied that the child ought to be placed for adoption from the date of the submission of the eighth care plan, and accordingly could and should have issued the application for a placement order on that date. Had that been done, all the resultant unfairness would have been avoided. To delay the issue of the placement order application until the fourth day of the trial was simply to invite unfairness. It was the consequence of an erroneous construction of these sections in reading them as precluding the issue of the placement order application until the requirements of the

Adoption Agencies Regulations 2005 (the 2005 Regulations) to place before the adoption panel, and to ratify the decision of the adoption panel, had been satisfied.

[16] The contrary argument has been skilfully developed by Mr Nicholas O'Brien in his skeleton argument. He submits that the proper construction of s 22 of the 2002 Act must be taken in the context of the statutory scheme as a whole, including the requirements of the regulations. He stresses that adoption panels are a crucial component of the decision making process and that that process is set out in regs 11–17 of the 2005 Regulations. The process culminates in the laying of the case before the adoption panel and in the conclusion of that panel. He stresses that the panel members must be at least five in number present and they must have a wide range of experience and knowledge of the adoption process. They are independent of the local authority and the decision of the panel is clearly entirely independent of any decision taken by the local authority.

[17] Mr O'Brien stresses that he local authority essentially have two quite separate functions in this field. Its first and, perhaps for us, most familiar function is in the protection, support and assistance of children under Parts III and IV of the Children Act 1989 (the 1989 Act). However, it is, under the terms of the 2002 Act, also an adoption agency and its function as an adoption service is distinct under s 3 of the 2002 Act. Thus, says Mr O'Brien, there are these interlinked duties. The local authority in pursuance of their responsibilities and duties under the Children Act 1989 may reach a decision that adoption is the right future for the child and so declare in the care plan. The case must then be presented to the panel, which must reach its recommendation under the terms of the 2005 Regulations. If the decision of the panel supports the provisional decision of the local authority acting under Part IV of the 1989 Act, then the decision of the panel must be considered independently by the local authority as an adoption agency under the provisions of reg 19 of the 2005 Regulations. Effectively, that means that a senior officer in the local authority must take a decision to endorse the positive recommendation of the panel to complete the statutory process. Once that is done, says Mr O'Brien, the way is clear for the issue of an application for a placement order. Prior thereto, the issue of an application would be plainly premature.

[18] So, in the very shortest summary, the dispute is as to what is meant by the requirement in s 22 that a local authority are to apply for a placement order if they are satisfied that the child ought to be placed for adoption; are the local authority acting under the provisions of Parts III and IV of

the 1989 Act, or are the local authority acting as an adoption agency under the terms of the 2002 Act?

[19] I am in no doubt in my mind that Mr O'Brien is right in his construction. It is in their role as an adoption agency that the local authority must be satisfied, and that process cannot be achieved until there has been complete compliance with the requirements of the 2005 Regulations, namely that the appointed officer has taken the positive decision to endorse the recommendation of the panel.

[20] Accordingly, on the facts of this case it was not open to the local authority to issue the placement order application any earlier than they did, and the question for the judge then was whether to permit the consolidation

and contemporaneous conclusion of the two applications. Mr Keehan has not made any specific criticism of the short judgment given by His Honour Judge Connor, which was noted but not transcribed, and the question must be: was his discretionary conclusion within the wide ambit of his discretion? I am in no doubt that it was.

[21] The theoretical case for unfairness is easily understood. All this came at a very late stage, a further threat and burden to a litigant already threatened and burdened, a litigant who has particular disability which must excite the sympathy of all: but looked at perhaps more realistically and in the context of the circumstances in the round, it does not seem to me that that was the consequence for the mother. After all, it had been made perfectly plain from the filing of the eighth care plan that the support of the local authority had evaporated and that they were now seeking legal sanction to separate her from her son permanently. Furthermore, at the pre-trial review it had been made absolutely plain that the moment there was panel approval the placement order application would be issued.

[22] I find it very hard to see what would have been the gain for the mother had Mr Keehan succeeded in persuading the judge simply to give directions on 9 March 2006 and to fix for some later date the trial of the placement order application. She, it could be said, would have the opportunity to file further evidence, but I find it hard to see what that evidence would be, beyond that which was already filed in resistance to the care order application. It cannot be said that the mother's rights to apply for contact were prejudiced since, by virtue of s 26 of the 2002 Act, she can apply after the grant of the placement order and certainly up to, and probably beyond, placement.

[23] So if it is hard to identify what benefit would have resulted from the adjournment of the application, it must be hard to discern a prejudice to her, other than the general sense that risk was being heaped on risk. So on this point, my ultimate conclusion is that the judge was perfectly entitled to order the consolidation and to rule on the placement order application in the single reserved judgment.

[24] Mr Keehan's second ground is directed to the judge's conclusions on the evidence. His main concentration is an attack on the judge's acceptance of the evidence of Dr Yates. As I have already indicated, Dr Yates was brought into the case by a direction given by this judge on 11 November. What seems to have happened on that day was that the parties attended (certainly the local authority, guardian and mother's solicitors) and suggested to the judge an instruction to Dr Yates, which would involve the release to him of the papers in the case to enable him to prepare a written report by mid-January.

[25] Given the time frame, it was understood that Dr Yates would not be able additionally to see or meet R in relationship with his parents. The judge drew an order to that effect, that is to say releasing the papers; there was an understanding that the subsequent letter of instruction was to be agreed between solicitors for the local authority and guardian, after consultation with the mother's solicitors. The letter of instruction which was signed by the solicitor for the guardian at two passages clearly conveys to Dr Yates the opportunity to come back if, having considered

his instructions, he felt it necessary for him to see the child or the parents before arriving at a recommendation. Dr Yates did not seek to take advantage of that opportunity, and it was not suggested to him by any party that he should do so.

Accordingly, his report as delivered was founded on the papers alone and it culminated in a recommendation that R should be placed for adoption.

[26] Of course that influential opinion was likely to impact adversely on the mother's case and there was an obvious forensic need to diminish its impact. That no doubt influenced Mr Keehan's opening position statement, in which he stressed that the opinion had been reached without any sight of the child or the parents, and he sought at that stage the adjournment of the proceedings for fuller investigation by Dr Yates, a position that he maintained in his final written submissions.

[27] Dr Yates was inevitably asked about all this in the course of his oral evidence, for which we do not have a transcript, although again we have an agreed note, and during the course of answers which he gave (at C125 in our bundle, and again at C134 and C136) there are passages that were undoubtedly helpful to Mr Keehan. For instance, there is an answer at C134:

> 'That is correct I have been hampered by not seeing the relationship.'

[28] At C136 there is an answer:

> 'I took the view that the court had taken the view that I did not need to see the child hence I did not make any objection.'

[29] At C125, in the course of a long answer, Dr Yates said:

> 'I never conduct a paper exercise if I do not feel it helpful and I understood that the court must have had very good reasons only to allow a paper exercise. It was my understanding only a paper assessment was allowed. I accepted there are reasons for this. On reading the papers I would have alerted instructing solicitors if I needed to see the family. I felt all the way through that I could prepare an assessment for the court.'

[30] Now that was dealt with by the judge in para 79 of his judgment, when he said of Dr Yates's report:

> 'His report had been based upon reading the papers only. He had not met the child or any of his carers. Nevertheless, said Dr Yates, he would not embark on a paper exercise if he did not think it would be helpful to the court, and he understood that the court must have had good reasons for only allowing a paper exercise in this case. That, it seems to me, is an unfortunate misinterpretation of the position by Dr Yates. I have seen his instructions and it could not have been made clearer that if he thought it necessary to see the people involved he should say so. He did not do so. The court had not "only allowed" a paper exercise. In fairness to him he did go on to say that he would have alerted the solicitors if he had thought it necessary to carry out interviews, but had felt all the way through he could be helpful to the court just with a paper exercise.'

[31] Now that seems to me to be a passage that is not open to criticism on the facts as they have been established at this hearing. I also conclude that the judge was perfectly entitled to rely on the opinion of Dr Yates, despite the

limitations. He had Dr Yates's assurance that he would not have proceeded if he felt that a paper-only exercise was inappropriate and that had not been his view at any stage. Accordingly, the judge was entitled to place the reliance which he did on the evidence of Dr Yates. Although there were contrary views from the consultant paediatrician and from Mrs Braier, it was the function of

the judge to balance those differing opinions, and in preferring the opinion of Dr Yates he had also of course the full support of the guardian who is, himself, in his own sphere an expert.

[32] Mr Keehan's third attack is on the paucity of information as to what placement of R would be achieved following the grant of the local authority's applications. He says that he required the attendance of the appropriate officer to be cross-examined, and the judge deals with her evidence at paras 97– 99 of his judgment. Mrs Baldrance was the officer. She was an adoption manager. She had no knowledge of the particular case, since the person with that knowledge was at that time away, but she gave general evidence as to what in her view was achievable in the case and the judge balanced all that in paras 116 and 117 of his judgment.

[33] It seems to me that the approach he adopted in para 117 is not open to any substantial criticism. He first of all noted the local authority's acceptance that R would be more difficult to place because of his illness and because of what might be a genetic predisposition to inherited personality disorder. However, on the other hand he noted the evidence of Mrs Baldrance that the search for adopters was likely to be successful. He additionally noted that R was assessed, or perhaps that is too impersonal an expression, for both Dr Nandury and R's foster mother clearly regarded R as a very attractive child. Finally, the judge relied on his extensive knowledge of that local authority, gained during the course of his long judicial specialisation in family work in that court. He said that they had a good reputation and that he knew from his own experience that they had systems in place to enable them to find a suitable family. I accordingly see little force in that criticism.

[34] Having thus reviewed the specific heads advanced by Mr Keehan in support of his appeal, I reach the unhesitating conclusion that it should be dismissed. Nobody could have said more for the mother than has been said on her behalf today by Mr Keehan, nor could anybody have said it more attractively, but in the end it does not seem to me that there is sufficient ground for this court to allow this appeal.

ARDEN LJ:

[35] I agree. I would like to add some observations on the first issue, the question of construction arising on s 22(1) of the Adoption and Children Act 2002.

[36] In the present case the local authority intended to comply with their obligation under reg 19 of the Adoption Agency Regulations 2005. Regulation 19 required them to:

> '… take into account the recommendation of the adoption panel in coming to a decision about whether the child should be placed for adoption.'

[37] I say nothing about the case where the local authority commences proceedings without, for whatever reason, fulfilling or properly fulfilling their statutory obligation under this regulation. Indeed, the position about that might not come to light for some time and the court might have proceeded to make an order. The resolution of that situation will have to await until it arises. Hopefully it never will. On the point that arises in this case I agree with what Thorpe LJ has said and his analysis.

[38] There is a separate issue as to what reg 19 means. It clearly imposes a substantive duty to take account of the recommendation of the adoption panel. It is not enough to pay lip service to the recommendation of the adoption panel. On the other hand the duty is only one to take account. Thus it must be open in theory at least for an adoption agency to reach a different view from the recommendation of the adoption panel, but I anticipate that the local authority would have to have strong grounds for doing so.

[39] The fact that this substantive duty requires careful consideration by the local authority of the recommendation of the adoption panel, in my judgment, supports the conclusion on construction which Thorpe LJ has already expressed.

[40] For these reasons and for those given by Thorpe LJ, I too would dismiss this appeal.

WILSON LJ:

[41] I agree with the analysis of Thorpe LJ. Arden LJ has added reference to reg 19 of the Adoption Agencies Regulations 2005. I, for my part, would add reference to reg 18(3) of those same regulations. It provides:

> '(3) Where the adoption panel makes a recommendation to the adoption agency that the child should be placed for adoption, it must consider and may at the same time give advice to the agency about—
>
> (a) …; and
>
> (b) where the agency is a local authority, whether an application should be made by the authority for a placement order in respect of the child.'

That seems to me clearly to suggest that recommendation and consequential decision precede an application for a placement order.

Appeal dismissed.

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PHILIPPA JOHNSON

Law Reporter