This judgment is being handed down in private on 4 October 2013. The judge hereby gives leave for it to be reported. The judgment is being distributed on the strict understanding that in any report no person other than the advocates or the solicitors instructing them (and any other person identified by name in the judgment itself) may be identified by name or location and that in particular the anonymity of the child and the adult members of the family must be strictly preserved.

Case number SG12C00045

Neutral Citation Number: [2013] EWCC 6 (Fam)
In the Principal Registry of the Family Division
Sitting at Kingston upon Thames County Court

Date: 4 October 2013

Before:
Her Honour Judge Williams

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Between:

X local authority

Applicant

And

Trimega Laboratories and Others

Respondents

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Counsel for the local authority: Miss Jenna Shaw
Counsel for the mother: Mr Ronan O'Donovan
Counsel for the father: Miss Laura Bayley
Solicitor for the child: Miss Charlotte Burns
Counsel for Trimega Laboratories Ltd: Mr Roger Hillman

Hearing date 30 September 2013

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JUDGMENT

1. This judgment is given in relation to applications by 4 parties to care proceedings for wasted costs orders against Trimega Laboratories Ltd., ("Trimega"). The applications arise out of an error made by Trimega in a report following blood alcohol testing.

2. The parties to the care proceedings were the applicant local authority, mother, father and the child through her children's guardian. The child is now aged one year and 11 months old and was rehabilitated to the care of her mother following a hearing on 21 August 2013. The care proceedings were brought for a number of reasons but central to these proceedings was the mother's now acknowledged excessive drinking. In March 2013 the mother said she had been abstinent from alcohol since August 2012. A final hearing was set down on 22 July 2013 with a time estimate of 5 days and the local authority's care plan up until almost the last minute was for placement of the child for adoption. This care plan was supported by the child's guardian.

3. At the final hearing on 22 July 2013 I was told that the mother had tested negative for alcohol for some months. There were reports from Trimega showing her CDT (carbohydrate deficient transferrin) level was below the cut-off level of 1.6%, in fact 0.4% on 26 March 2013, 0.4% on 12 April 2013 and 0.3% on 13 June 2013. Further Dr Cosmo Hallstrom, a consultant adult psychiatrist, had produced a report dated 17 July 2013 in which he changed his former opinion and supported rehabilitation of the child to her mother's care on the basis that the mother had made dramatic progress in the previous 6 months, now had good insight into her difficulties and had addressed many of her deficiencies. The risk of relapse was described as low and acceptable and it was said that the child was likely to be safe in her mother's care. The hearing was adjourned to 25 July 2013 for a new care plan to be written and a programme formulated for a staged rehabilitation to mother's care.

4. Between 22 and 25 July 2013 a further blood alcohol test report on the mother was received from Trimega. It was dated 17 July 2013 and the result for the mother's CDT level was 1.6% -- just on the cut-off point between negative and positive results and an obvious increase on previous results. It was of great concern in that it indicated that the mother appeared to have been drinking when she was adamant that she had been abstinent from alcohol for many months. Her abstinence was a crucial factor in the plan for rehabilitation of the child to her care. The local authority therefore no longer supported such a plan. On 25 July 2013 I gave directions, having found it was necessary to have further expert evidence in accordance with Part 25 Family Procedure Rules 2010, for further blood alcohol testing by a different expert and for Trimega to report in respect of the interpretation of mother's alcohol testing results and for a new final hearing date. An updated opinion had been sought urgently from Dr Hallstrom who said he no longer felt able to support the rehabilitation plan. On 25 July 2013 by email he said that "the fact that [the CDT] result was low a few weeks ago and now raised, raises the strong suggestion that there has been heavy drinking in the last week or two…." It is right to say that if it had not been for this new test result of 1.6% a final order would have been made on 25 July 2013 and the child returned to her mother's care.

5. In Trimega's report on the father of 7 December 2012 the interpretation section says that "CDT values below 1.6% cannot be used to distinguish between social drinking and abstinence but when the value is elevated above 1.6% this marker does reliably identify someone with excessive alcohol consumption".

6. In Trimega's reports on the mother dated 18 June 2013 and 17 July 2013 it said that:

> "The CDT screening test has been found to be one of the most accurate blood biomarkers for alcohol abuse because individuals with a daily intake of more than 60 grams of alcohol over more than two weeks have elevated levels of CDT. In regular drinkers their level of CDT continues to be elevated for between two to four weeks after abstaining, depending on the original increase in the level that existed for that individual. That means that for most people who are dependent their elevated CDT level will be detected even if they find themselves able to abstain for a short period before a test is performed."

7. Trimega, in considering the significance of the raised CDT level as instructed after 25 July 2013, found that it had made a mistake and the CDT figure should have been 0.2% and not 1.6%. Trimega admitted the error and apologised then to the mother's solicitors by email dated 9 August 2013. An interim hearing was listed and on 21 August 2013 the child was returned to her mother's care under an interim supervision order in accordance with a new rehabilitation plan. The following orders were made, among others:

   - The solicitor for the mother shall serve this order upon Trimega Labs inviting it to attend at 2pm on 3 September 2013 to explain the error made in the blood test result dated 17 July 2013 and to address the issue of wasted costs should any party make an application for a wasted costs order.
   - Any application for wasted costs shall be filed and served on the parties and Trimega Labs by 4pm 28 August 2013.

8. On 3 September 2013 the care proceedings were finally disposed of by a supervision order being granted to the local authority and a residence order to the mother, together with other orders relating to the child.

9. Also on 3 September 2013, during the second part of the hearing, Marcus Donohue, a principal forensic scientist employed by Trimega, attended court. Trimega had no legal representation. Mr Donohue said that the error made was clerical and that the certificate of analysis would have been the same whether 0.2% or 1.6%, that is, interpreted as a negative result. He said that 1.7% and above would be classed as indicative of excessive alcohol consumption. He agreed he could not deal with the costs applications and the hearing was adjourned to 30 September 2013 and Trimega was joined as a party in relation to the issue of costs.

10. On 30 September 2013 I was told that the mother had been present outside court and an apology made to her by Trimega's representatives. All parties had filed position statements including their submissions. The court's power to award costs against an expert witness was not disputed by Trimega and it agreed to pay costs in the total sum of £17,167 which related to 3 otherwise unnecessary court hearings. The only issue remaining was whether judgment should be published. All parties save Trimega sought publication. I heard oral submissions on that issue.

Law

11. I am satisfied that this court has the power to award costs in these circumstances against an expert and I was referred to section 51 Senior Courts Act 1981, the Civil Procedure Rules 1998 Part 46.2 and the Family Procedure Rules 2010 Part 28.

12. I was also referred to case law and in particular:

> Phillips v Symes [2004] EWHC 2330 (Ch) in which Peter Smith J at paragraph 95 said "it seems to me that in the administration of justice, especially, in spite of the clearly defined duties now enshrined in CPR 35 and PD35, it would be quite wrong of the court to remove from itself the power to make a costs order in appropriate circumstances against an expert who, by his evidence, causes significant expense to be incurred and does so in a flagrant reckless disregard of his duties to the court".
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> Bristol City Council v A & A & Others [2012] EWHC 2548 (Fam), a case concerning Trimega but on different facts, in which Baker J said at paragraph 30 "…a high degree of responsibility is entrusted to expert witnesses in family cases. Erroneous expert evidence may lead to the gravest miscarriage of justice imaginable – the wrongful removal of children from their families".

13. I do not say that the error made by Trimega amounted to a "flagrant reckless disregard" of its duties to the court and I accept it was a human error. I am reassured that the discovery of this error has lead Trimega to add a new procedure whereby a further specific check is made back to source material before a report is finalised and its staff understands the importance of the new measure. Trimega accepts that the mistake should not have occurred and is keen to make sure it does not happen again and it accepts that it was in breach of its duty to the court. Trimega accepts that the direct consequences were considerable upset and distress for the parents in this case, additional costs and not least a delay of four weeks for the child in being placed in her mother's care. Trimega has made its apology.

14. I have decided to publish this judgment because I consider that it is in the public interest to do so. The family courts should be as open and transparent as possible to improve public confidence and understanding. In this case expert evidence was relied upon and if the mistake had remained undiscovered it is probable, given the history in this case, that it would have led to the adoption of the child instead of rehabilitation to care of her parent. Close scrutiny of expert evidence is needed and all the surrounding circumstances have to be considered in a situation such as this where the interpretation of test results was so important and influential.

4.10.13