C v BERKSHIRE COUNTY COUNCIL

Family Division

Heilbron and Butler-Sloss JJ

16 December 1986

Child in care – Local authority terminating parental access – Complaint by parent for access to the juvenile court – Subsequent application by local authority to the county court to free for adoption – Imminent hearing for directions at county court – Application by local authority to adjourn juvenile court proceedings – Justices agreeing to adjourn juvenile court proceedings pending outcome of application before county court – Appeal by parent against decision to adjourn – Whether decision to adjourn justified.

Two young children were in the care of the local authority as the result of care orders made under s. 1 of the Children and Young Persons Act 1969. Following the making of the care orders the mother had some access to them in the foster home where the children resided. However, within a year of the making of the care orders, the local authority decided to terminate access and gave formal notice to that effect. Shortly afterwards, the local authority approved a decision to apply for the children to be freed for adoption. The mother made a complaint for access to the juvenile court under s. 12C of the Child Care Act 1980. About a month later the local authority applied to the county court for an order to free the children for adoption. When the complaint came before the juvenile court the local authority applied for an adjournment on the ground that, as the application to free for adoption was pending and a hearing for directions in those proceedings was imminent, the question of access should be deferred. This application was supported by the solicitor appointed by the guardian ad litem, but was opposed by the mother. The justices did not hear any evidence but decided the application to adjourn on submissions made to them. The justices in their reasons said that their paramount consideration was the children's welfare and that they felt unable to come to a proper decision as to access until the correctness of the local authority's view as to the impossibility of rehabilitation of the children with the mother and the appropriateness of adoption had been determined by the county court. They considered that it was imperative that all future steps should be taken as expeditiously as possible. For those reasons they did not consider it in the children's best interests to proceed with the complaint and they accordingly adjourned the proceedings *sine die* pending the outcome of the application before the county court. The mother appealed against the juvenile court's decision to adjourn.

Held – dismissing the appeal – the justices, who gave detailed and carefully considered reasons, exercised their discretion judicially and on relevant and ample material and did not in any way err in deciding to adjourn the hearing of the complaint.

Per Heilbron J: The manner of the exercise of the magistrates' discretion must necessarily vary from case to case. It must, of course, be exercised judicially and be based on sufficient and relevant material. Each case turns on its own facts and there is no general proposition that it is incumbent on the juvenile court to hear this type of application prior to an application for freeing.

Per Butler-Sloss J: I would like to stress the importance of speed in dealing with matters concerning young children and the desirability of one tribunal, where possible, hearing all the relevant matters affecting children. There are real disadvantages to the children, as indeed to everybody else, in having two hearings in two courts within a short space of time in respect of the same family.

Cases referred to in judgment
M (Minors) (Adoption: Parent's Agreement), Re [1985] FLR 921
PB (A Minor) (Application To Free For Adoption), Re [1985] FLR 394
R v Bolton Metropolitan Borough ex parte B [1985] FLR 343
R v Slough Justices and Others ex parte B [1985] FLR 384
Southwark London Borough v H [1985] FLR 989; [1985] 1 WLR 861; [1985] 2 All ER 657

Miss Alyson Halkyard for the appellant;
Miss Barbara Slomnicka for the respondents;
Andrew Tidbury for the guardian ad litem.

HEILBRON J:
This is an appeal brought under the terms of s. 12C(5) of the Child Care Act 1980, regarding two children, M, born on 27 July 1983 – now aged 3 years and 4 months –and C, born on 25 December 1984 – 2 years old on Christmas Day. Miss C, the appellant, is their mother.

On 22 April 1985, an interim care order was made by the justices in care proceedings followed on 19 August 1985 by a full care order based on the ground contained in s. 1(2)(*a*) of the Children and Young Persons Act 1969, namely that the child's proper development is being avoidably prevented or neglected, or his or her health is being avoidably impaired or neglected.

Some access has taken place at the foster home where the children resided, details of which are not before the court, but on 16 April 1986 the local authority decided to terminate access, and on 16 May 1986 formal notice of termination was given to the appellant by the local authority, under s. 12B of the Child Care Act 1980. There was one further period of supervised access to the mother on 19 May 1986.

On 29 July 1986 the local authority's fostering and adoption panel approved the decision for an application to be made to free both children for adoption.

Concern as to the exercise of the local authority powers with regard to termination of access led to the enactment of ss. 12A to 12G of the Child Care Act 1980, added, by way of amendment, by the Health and Social Services and Social Security Adjudications Act 1983, s. 6 and Sch. 1. Those provisions apply, *inter alia*, to children in care by virtue of a care order under the Children and Young Persons Act 1969. In such cases the local authority now serves a notice of termination of (or of refusal to make arrangements for) access under s. 12B(1) of the 1980 Act. On service of such notice a parent may apply to the juvenile court for an 'access order' (s. 12C(1)), the court being required to regard the welfare of the child as the first and paramount consideration (s. 12F(1)), and it may attach such conditions as it considers necessary to any order it might make (s. 12C(3)) and the court may also make the child a party to the proceedings (s. 12F(2)) when it must appoint a guardian ad litem (except in certain circumstances) who will safeguard the child's interests (s. 12F(3) and (4)).

Application is by way of complaint, and the Magistrates' Courts Act 1980, s. 51 and ss. 53-57, will apply. Section 54 is the section material to this appeal.

On 11 September 1986 the appellant sought access under s. 12C of the Child Care Act 1980. On 23 September 1986 the hearing was adjourned, a

guardian ad litem was appointed by the court and a report was ready by 17 November 1986.

On 20 October 1986 the local authority issued an application in the Reading County Court for an order to free the children for adoption, under s. 14 of the Children Act 1975, where it is enacted that:

> '(1) Where, on an application by an adoption agency [here the local authority], an authorised court is satisfied in the case of each parent or guardian of the child that –
>
> (*a*) he freely, and with full understanding of what is involved, agrees generally and unconditionally to making an adoption order, or
> (*b*) his agreement to the making of an adoption order should be dispensed with on a ground specified in section 12(2),
>
> the court shall, subject to subsection (5), make an order declaring the child free for adoption.
> (2) No application shall be made under subsection (1) unless –
>
> (*a*) it is made with the consent of a parent or guardian . . .; or
> (*b*) the adoption agency is applying for dispensation . . . of the agreement of each parent or guardian of the child, and the child is in the care of the adoption agency. . .'

which, of course, both children are.

The appellant now seeks an order from this court, following a hearing fixed for 17 November 1986, which was adjourned, in these terms:

> '. . . that the decision of the magistrates at the petty sessional division of Reading on 17 November 1986, to adjourn the hearing of the appellant's application under s. 12C of the Child Care Act 1980, for access to her children M and C, pending the outcome of an application by the first respondent to the Reading County Court for orders freeing the said children for adoption be quashed and that the matter be remitted to the magistrates at the petty sessional division of Reading with the opinion or directions of the court.
> 2. Further, and in the alternative, that the appellants' application under s. 12C of the Child Care Act 1980 be heard by the court.'

The magistrates heard submissions from Miss Halkyard, counsel for the mother, and from the solicitor to the local authority, who applied for the matter to be adjourned for reasons which he put forward. Miss Halkyard objected to an adjournment and asked that the case be heard on that day. It is not suggested that the magistrates, on 17 November 1986, knew the exact date when the children were going to be placed with prospective adopters, but it is clear that they knew that placement with prospective adopters would be fairly soon. That placement occurred on 18 November 1986. They did know, however, having been so informed on 17 November 1986, that there would be a hearing for directions in the freeing application at the Reading County Court on 17 December 1986, in a few days from today. A date has also now been fixed for the full hearing of the freeing for adoption application (that date was not known to the magistrates on 17

November 1986). It is known now, and that will be on 5 March 1987, not a very long time ahead.

The solicitor for the Berkshire County Council had submitted to the magistrates the reasons why he suggested they should adjourn. He put forward the point that the proceedings to free the children for adoption were pending, the imminent date of the hearing for directions (more imminent now than it was then), but even then a date fairly soon after 17 November 1986, and that any question of access should be deferred. It is important to point out, and the magistrates were no doubt, as they said, influenced by this fact, that the solicitor appointed by the guardian ad litem to represent the children, supported the local authority's application to adjourn. Miss Halkyard, in her most careful and forceful submissions to this court, indicated the course she said the matter took before the justices, that she had submitted to them that they should hear the application and the evidence supporting it, and that they should not adjourn. She did not, however, suggest to the magistrates that they should have, not necessarily any evidence, but any facts or circumstances which would go to support her submission that they should not adjourn, nor did she suggest that they should read the guardian ad litem's report before coming to a decision as to whether or not to adjourn. Yet in this court Miss Halkyard took the point that the magistrates' court came to a decision to adjourn, without having the full facts before them. Miss Slomnicka, for the respondents, opposed that contention and argues, on the contrary, that the justices, having heard submissions, did have substantial material facts and circumstances, and the historical and other background, which enabled them to exercise their discretion judicially and decide to adjourn.

Having so decided, the justices set out their detailed reasons. I think that it would be helpful if I were to read them. Having set out the facts that I have already indicated, that this was a complaint by the mother for access, and the names of the children, they continued:

> 'The children are committed to the care of the Berkshire County Council, who have terminated arrangements for access to the children by the complainant. We did not hear any evidence. The solicitor for the county council applied for the case to be adjourned.
> 2. We accepted that access to the children is a right which the mother has under the Child Care Act 1980.'

That was putting it too high in favour of the mother, as everybody agrees. What they obviously meant to say was, 'We accept that an application for access to the children was a right which the mother has under the Child Care Act 1980, and they added:

> '. . . but that our paramount consideration was the children's welfare. We were told that an application to free the children for adoption was pending before the Reading County Court and that a direction hearing had been fixed for 17 December 1986 at the county court.
> 4. The solicitor appointed by the guardian ad litem to represent the children supported the application to adjourn the access hearing but counsel for the complainant opposed it.'

They mentioned two authorities to which they had been referred, *Southwark London Borough v H* [1985] FLR 989, but stated that they did not find that decision helpful, though they did find the decision of *Re PB (A Minor) (Application to Free for Adoption)* [1985] FLR 394 of more assistance. They said:

> 'That was a case where parents commenced proceedings to discharge a care order which they later withdrew and proceeded with an application for access to the child, when on the same day the local authority issued originating process under s. 14 of the Children Act 1975 for an order freeing the children for adoption.
> 6. We concluded from the fact that the local authority had made the application, that it had decided that rehabilitation of the children with their mother was not possible and that adoption was the proper alternative.'

There they set out, quite correctly, that that was the view of the local authority. Then they stated:

> 'We felt that we were unable to come to a proper decision as to access until the correctness of the local authority's view had been determined by the appropriate tribunal, and it was therefore imperative that all future steps should be taken as expeditiously as possible. Accordingly, we felt that to deal with the complaint for access today was not in the children's best interests. We felt that a bench of justices, if the matter is eventually disposed of in the juvenile court, would be in a better position to determine the issues involved when the outcome of the application at the Reading County Court is known. We adjourned the hearing of the complaint *sine die*.'

They implied that, if the case was returned to the justices, that would be after the adoption hearing.

By s. 54 of the Magistrates Courts Act 1980, headed 'Adjournment':

> '(1) A magistrates' court may at any time whether before or after beginning to hear a complaint, adjourn the hearing, and may do so, notwithstanding anything in this Act when composed of a single justice . . .'

and, by subs. (2):

> 'The court may when adjourning either fix the time and place at which the hearing is to be resumed or, unless it remands the defendant under section 55 below' [which does not apply to this case] 'leave the time and place to be determined later by the court. . . .'

So it is quite clear, and it is not contested, that no limit is imposed on the period of adjournment and no fetter on the power of the justices save, of course, that they must act judicially in the exercise of their discretion. Miss Halkyard eventually conceded that the magistrates were entitled, in general terms, to adjourn, but she submitted that it was wrong for them to

do so in this case as a matter of law. She further complains that the local authority, by dint of issuing the freeing for adoption proceedings when they did, which, however, she did not suggest were manipulative, in effect frustrated the appellant's application to the juvenile court.

As I have already indicated the mother's last access visit had been on 19 May 1986, and the court was informed that that followed twice weekly, then weekly access, not all of which has been taken up.

Miss Halkyard, having accepted that the justices were entitled to adjourn and, in so doing, to exercise their discretion, submitted that they could only do so after having heard at least some of the evidence which should have included the guardian ad litem's report, evidence of the mother, evidence of the local authority as to its reasons for terminating access, and so on and so forth. The fact is, that there was nothing to prevent Miss Halkyard, as far as I can ascertain –there is nothing in the magistrates' reasons and nothing which I have heard in this court which indicates the contrary – in attempting to support her submission opposing this application to adjourn, from indicating to the magistrates some of the facts which she would hope to produce in evidence, which she felt would support her contention, that an adjournment was not the right way of dealing with this case on 17 November 1986. However, that may not matter very much in view of the conclusion to which I have come in regard to the facts and circumstances which were, indeed, before the court, prior to their coming to a decision as to whether or not to adjourn.

Miss Slomnicka submitted that the magistrates' decision to adjourn was a proper and reasonable one in the circumstances, and that there was nothing to indicate that they were doing other than exercising a discretion; I am satisfied that that is in fact what they were doing –exercising their discretion to adjourn. She further submits that there was ample material in the facts and circumstances before them from which they could decide and, if necessary, draw inferences, as to whether it was in the best interests of the children for them to hear the application there and then or to adjourn it. The justices had explained in their reasons why they decided it was not in the children's best interests to deal with the complaint for access on that day. Miss Slomnicka pointed out, and it is correct, that the magistrates knew all the relevant dates, including, for instance that the children first came into care on 22 April 1985, when M was not yet 2 years old and C only 4 months old; that they had been in care since then and were now 3 years, 4 months old, and nearly 2, respectively. She also pointed out that the justices could reasonably draw the inference that a move to prospective adopters, which was envisaged, was in itself a disruption; they would be aware that access to these young children would be after a lapse of 6 months when, possibly before, but certainly after they had been moved to prospective adopters and were in another place of residence. The justices further were aware, and said so, that the local authority rightly or wrongly took the view that rehabilitation was not possible, but it was not a matter that they were deciding. They knew, however, that that was a point of view that would be put forward, and therefore that there would be a serious issue to be considered as to the effect of access, its desirability or otherwise, in the short and long term, and that there would be a substantial issue, before they could decide the question of access, as to the viability or otherwise wise of rehabilitation to the mother. They also were aware that the hearing

of the application for freeing for adoption would take place very soon – they use the word 'pending'. Miss Halkyard agreed, in answer to a question by Butler-Sloss J, that the county court judge would have to consider (1) the welfare of the children, and (2) whether the mother was unreasonable in withholding her agreement to the freeing for adoption, and that an integral part of both aspects would be whether or not the mother has a future with the children, and whether or not access was in either child's best interests.

In an adoption appeal (not a freeing for adoption, but the principles are the same), *Re M (Minors) (Adoption: Parent's Agreement)* [1985] FLR 921, where the county court judge refused the local authority's application, it was stated in the headnote:

> '. . . since the judge had first resolved the crucial question of access and had made a positive finding that continued contact with the mother was likely to be beneficial to the children, he had been entitled to conclude, on that finding, that the mother was not unreasonably withholding her agreement. . . .'

At p. 925H, Sir Roger Ormrod said:

> 'The question of access is therefore the crucial issue',

that is to say the crucial issue in the adoption proceedings. He added [at pp. 925H-926A]:

> 'In the reported cases to which we have been referred and in which the court dispensed with the mother's consent, the question of access was resolved first'.

It is quite clear that whether or not the question of access were to be resolved at the first stage of the adoption hearing, the adoption court, or the freeing for adoption court in reaching its decision about freeing, must consider not only the question of access, but the other matters to which I have been referring, including the future relationship of the mother and the children, which of course includes the question of access.

Further, if the justices in the instant case had not adjourned, there was the possibility of their saying no access, or vice versa, and the county court judge, in a very short space of time thereafter, coming to a different conclusion.

It is important to note that such a decision, whether in the magistrates' or in the county court, could not be achieved without a full hearing in each case, each occupying the court probably for several days; it would require each court investigating in depth very similar, though not identical, problems, including rehabilitation or no, access or no. Whilst it is clear that where there is a danger of unnecessary delay as well as duplication of evidence or issues in two courts, though it is not for the local authority to decide which court should be seized of those issues (see *R v Bolton Metropolitan Borough ex parte B* [1985] FLR 343) the court is not thereby precluded from adjourning if, in the exercise of its discretion, it decides on the facts and circumstances before it, it is proper so to do.

Furthermore, if the magistrates decided not to adjourn and came to a decision on the merits, it would be open to either side to appeal and, in any event, the mother might apply to defer the freeing hearing, which is now so very near and, in this case, being so very important for these two children that that matter should be speedily resolved one way or the other.

The magistrates stated they were not helped by *Southwark London Borough v H* (above), and Miss Slomnicka, in her most persuasive submissions, pointed out that that case concerned two older children (aged 13 and 11) – very different ages from the children here – they had been in care since 1978, residing with foster-parents, there had been no parental access since 1982, and in May 1984 the mother sought access. In October 1984 she was served with notice refusing it, in November 1984 adoption proceedings were started, and in January 1985 there was an access application to the juvenile court. The magistrates refused the local authority's application for an adjournment until after the adoption hearing. Their appeal against that decision was dismissed, but the magistrates had heard no evidence and found no facts as to whether there should be an adjournment or not. It was submitted that the justices here did have sufficient facts to come to a decision regarding adjournment, that the adoption proceedings in *Southwark London Borough v H* (above) were found to be some considerable way off from the hearing stage, and not as here. Miss Slomnicka distinguished the *Southwark* case on the facts – which were very different – and she pointed out quite rightly that that decision was largely, though not entirely, based on the rival contentions as to the desirability or otherwise of more than one guardian ad litem being appointed, with a consequent dual set of enquiries and their effect on the children. As the President pointed out, evidence was required to resolve those, amongst other, issues.

There is another important point, it seems to me, concerning the children's well-being, namely where, as here, there will be a hearing very soon, there could arise, from the point of view of these young children, a most undesirable and uncertain situation: if, for example, the justices heard the application and awarded access after a long break; if the county court judge then, very soon thereafter, decided to free for adoption, the renewed access would cease and the children might well be left in a destabilized condition, if not worse. They would certainly have been needlessly confused; they would have been reintroduced to their mother and possibly would suffer, at the least, distress. That is a feature of the children's well-being that must follow from the facts of this case, which the magistrates knew and to which they referred, not necessarily in as much detail as I have done, but they were entitled to draw those inferences, and they clearly had the children's welfare very much in mind.

In *Re PB (A Minor) (Application to Free for Adoption)* (above), Sheldon J heard an application to free for adoption, and explained the manner in which these somewhat new freeing for adoption hearing should take place. At p. 405A-D he stated:

> 'When, on 17 July 1984, the matter came before the juvenile court, as the child's guardian ad litem appointed for the purpose of the proceedings to revoke the care order had made it clear that she could not support the application for revocation, that application was withdrawn

> and the only matter left for the justices to decide was that raised by the summons for access. In the event, in all the circumstances, the juvenile court taking the view that the question of access was so bound up with the matters that the High Court had to determine on the present application under s. 14, understandably (and in my view rightly) considered that it would "not be right" for them to proceed and adjourned the application for access pending the outcome of the High Court proceedings. The parents thereupon applied to the Divisional Court of the Queen's Bench Division for judicial review of that decision – an application which was heard on 13 December 1984 by Wood J, sitting as an additional judge of that Division, and dismissed by him upon the basis that the matter should more appropriately have been pursued by way of an appeal to the Divisional Court of the Family Division under what is now s. 12C(5) of the 1980 Act. In the event, however, far from that resulting in any further delay, when on 17 December 1984 that Divisional Court sat to hear that appeal, although they adjourned it pending the hearing of the present application under s. 14, they also gave such directions as ensured that this was heard as soon as possible. In the result, it came on before me for hearing on 28 January 1985.'

I find myself in total agreement with Sheldon J's approach and that of the President and Ewbank J, who directed the case to the freeing for adoption court.

The justices, as I have already pointed out, found that case and its linked predecessor, *R v Slough Justices and others, ex parte B* [1985] FLR 384 – where the application was for judicial review – helpful, and Miss Slomnicka submitted that that case is helpful in as much as the facts and the children's ages are very similar to those in this case.

The manner of the exercise of the magistrates' discretion must necessarily vary from case to case. It must, of course, be exercised judicially and be based on sufficient and relevant material. In both the *Southwark* and *Slough Justices* cases, the magistrates' decisions to adjourn, and the refusal to adjourn, were not impugned. Each case turns on its own facts, and there is no general proposition that it is incumbent on the juvenile court to hear this type of application prior to an application for freeing.

We also had the advantage of hearing counsel representing the guardian ad litem, and he told us of the support that had been given by the guardian ad litem to the magistrates, and that he supports the case of the local authority here too. He submitted that it was in the interests of the children that this case should be speeded on its way as quickly as possible to what is the only satisfactory solution, namely a freeing for adoption hearing.

We have very carefully considered all the submissions, and in our view the magistrates, who gave detailed and carefully considered reasons, exercised their discretion judicially, and on relevant and ample material, and in my view they in no way erred in coming to the conclusion to adjourn which they did, and I would dismiss the appeal.

BUTLER-SLOSS J:

I agree, but in deference to the arguments of counsel, would add one or two matters very shortly. I would like to stress the importance of speed in dealing with matters concerning young children and the desirability of one tribunal, where possible, hearing all the relevant

matters affecting the children. There are real disadvantages to the children, as indeed to everybody else, in having two hearings in two courts within a short space of time in respect of the same family. In this case, as counsel on behalf of the guardian ad litem pointed out, the freeing for adoption application in the county court is to be the main hearing concerning these two little children. The justices had sufficient information before them upon which they could come to a decision and exercise their discretion to adjourn: such a decision must always be based upon facts before them at any particular time. No valid reason has been advanced to us to cause us to interfere with the exercise of that discretion and I agree that the appeal should be dismissed.

Solicitors: *Ellis and Fairbairn* for the appellant;
I. Robertson, county council solicitor, for the local authority;
Rowberry Morris & Co. for the guardian ad litem.

C.R.S.