

**RE H (ILLEGITIMATE CHILDREN: FATHER: PARENTAL RIGHTS)**

Court of Appeal

Lord Donaldson MR, Balcombe and Nicholls L JJ

11 April 1989 and 21 July 1989

*Parental rights – Children whose parents were not married to each other at the time of the births of the children – Local authority intervention – Effect of an order under Family Law Reform Act 1987, s. 4.*

The parents of two children cohabited but never married. The father left home. The mother then left the children in the care of her parents. Eventually the local authority took over their care and passed a parental rights resolution. The father did not have any parental rights and duties under existing legislation. The children were placed with foster-parents but were visited regularly by both parents. The local authority decided that the children should be adopted and terminated the parents' access to them. The local authority applied to free both children for adoption and to dispense with the mother's consent. The father applied under s. 9 of the Guardianship of Minors Act 1971 for legal custody and access. The judge, following *Re M and H (Minors) (Parental Rights; Access)* [1988] 2 FLR 431, dismissed the father's application but gave leave to appeal. He also adjourned the local authority's application. The local authority and the father appealed. The father intended to apply for an order under s. 4 of the Family Law Reform Act 1987, following the coming into force of that section on 1 April 1989.

**Held** – dismissing the father's appeal but making no order on the appeal by the local authority – a 'parental rights order' under s. 4 of the Family Law Reform Act 1987 granted to a father of an illegitimate child would not interfere with the exercise by a local authority of its statutory rights over a child in its care but would merely place the father in the same position as the parent of a legitimate child and give him *locus standi* to be heard and to make applications to court, e.g. to apply to discharge a parental rights resolution or to oppose an adoption order or an application to free a child for adoption or to be heard on an application for access to a child in care under Part IA of the Child Care Act 1980. The amendment by the 1987 Act to s. 18(7) of the Adoption Act 1976 meant that a court hearing an application to free a child for adoption had to give consideration to the question of a father of an illegitimate child applying for, *inter alia*, an order under s. 4 of the 1987 Act. Since this father intended to make such an application, the case would be remitted to the court of first instance to be dealt with on its merits under s. 18(7) of the 1976 Act as amended by the 1987 Act. To this order of remittal the court added that the case should be heard by a Family Division judge as soon as possible.

*Per* Balcombe LJ: *Seemle*, such a father, if granted a 'parental rights order', will not share those rights with the local authority so long as the parental rights resolution remains in force unless the order gives him actual custody of the children (p. 221E-G below).

**Note**

The application to free for adoption was made prior to the changes made by the Family Law Reform Act 1987 to the Adoption Act 1976 coming into force on 1 April 1989. At that time, as the Court of Appeal acknowledged, this father could not obtain an order for legal custody because of the decision in *Re M and H (Minors) (Parental Rights; Access)* [1988] 2 FLR 431. Section 18(7) of the 1976 Act in the form it was then did not assist him. By the time the case came on for appeal the law

had changed in that the amended s. 18(7) took account of s. 4 of the 1987 Act, a novel provision enabling a father of an illegitimate child to apply for a 'parental rights order'. The Court of Appeal relied on this new avenue for the father and remitted the case to the lower court. However, in doing so, the court appears to have overlooked Sch. 3, para. 1 to the 1987 Act which makes transitional provisions for cases which were started prior to the coming into force of changes made by the 1987 Act. This provides that changes made by the 1987 Act to earlier enactments do not affect applications made prior to the changes coming into force. Therefore, the court to which the case was remitted, will be obliged to consider s. 18(7) in its unamended form with the result that no account whatsoever can be taken of the possibility of an order under s. 4 of the 1987 Act.

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The Court of Appeal, having taken cognizance of the above note, re-opened this case and indicated that at the earlier hearing its attention had not been drawn to sch. 3, para. 1 of the 1987 Act. The Court held that its previous decision was authority in relation to its interpretation of the 1987 Act but that it should not be treated as any authority in relation to cases to which the transitional provisions applied. The local authority indicated that it would be withdrawing the application it had made, thus giving the father the right to make representations on any further applications.

#### **Statutory provisions considered**

Guardianship of Minors Act 1971, s. 9

Adoption Act 1976, ss. 16, 18 and 72

Child Care Act 1980, ss. 2, 3, 5 and 8

Family Law Reform Act 1987, ss. 2, 4 and 7

#### **Cases referred to in judgment**

*M and H (Minors) (Parental Rights; Access)*, Re [1988] 2 FLR 431; *sub nom. M and H (Minors) (Local Authority; Parental Rights)*, Re [1988] 3 WLR 485; [1988] 3 All ER 5, HL

*N (Minors) (Parental Rights; Access)*, Re [1989] 2 FLR 106

APPEAL from a decision of Judge Marder in the Slough County Court.

*Robert Seabrook QC* and *Sally Smith* for the father;

*Anita Ryan QC* and *Mhairi McNab* for the local authority;

*Brian Jubb* for the mother.

#### **BALCOMBE LJ:**

This is an appeal with the leave of the judge from a decision of Judge Marder given in the Slough County Court on 25 October 1988 on a preliminary point of law on an application by a local authority to free two young children for adoption. There is also before us, by amendment, an appeal by the putative father of these children against a refusal by the judge to grant him custody of those children under the Guardianship of Minors Act 1971.

The facts are these. In the spring of 1981 the parents of these two children met and began to live together but they never married. On 18 October 1982 a boy was born and on 27 December 1983 a girl was born, so the boy is now 6½ years old and the girl is a little over 5. They lived together as a family unit until February 1985 when the father left the home, and on 24 March 1985 the mother left the children in the care of her parents, who contacted the local authority's social services department. On 25 March 1985 a place of safety order was made in respect of both children.

On 23 May 1985 the local authority's application to the juvenile court for a care order was refused, but then the children were received into voluntary care at the request of the mother under s. 2 of the Child Care Act 1980. In December 1985 the mother gave a 28-day notice for the return of the children to her but she withdrew that notice on 6 January 1986. On 27 August 1987 the local authority passed a parental rights resolution in respect of the mother's rights under s. 3 of the Child Care Act 1980. It will, of course, be appreciated that at that time the father had no parental rights as such because he and the mother had not married.

In the meantime, the children, who have been in the care of foster-parents, were visited regularly by the father, with rather less regularity by the mother, and, indeed, by other relatives as well. But the local authority, for reasons which no doubt seemed good to them, decided that these children needed a more permanent base and, therefore, as a preliminary to that, gave notice to the father on 4 November 1987 that his access to the children would be terminated as from January 1988. Similarly, in December 1987 the mother's access was also terminated.

In February 1988, the children were introduced to prospective adopters, but that particular introduction broke down and the children went back to the original foster-parents. On 17 March 1988, the local authority made an application to the local county court to free both children for adoption. On 24 May 1988 the father made an application under the Guardianship of Minors Act 1971 for custody and access to both children. The significance of that application will become apparent in a moment. Then, in September 1988 introductions began for the children to a new adoptive family and on 1 October 1988 the children were placed with that new adoptive family. As far as I am aware, they are still there.

The local authority's application to free the children for adoption and the father's application under the Guardianship of Minors Act for custody and access came before Judge Marder at the Slough County Court on 25 October 1988.

With those introductory facts I turn now to consider the relevant statutory provision, which is s. 18 of the Adoption Act 1976. Subsection (1) of that section is to the following effect:

'Where, on an application by an adoption agency, ' [a local authority is included in that phrase] '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 the making of an adoption order, or
- (b) his agreement to the making of an adoption order should be dispensed with on a ground specified in section 16(2),

the court shall make an order declaring the child free for adoption.'

As far as the mother is concerned – who is the only person who can be called a parent – the local authority is applying that her agreement shall be dispensed with.

Then I turn to s. 18(7) as it was originally drafted:

'Before making an order under this section in the case of an illegitimate child whose father is not its guardian, the court shall satisfy itself in

relation to any person claiming to be the father that either –

- (a) he has no intention of applying for custody of the child under section 9 of the Guardianship of Minors Act 1971, or
- (b) if he did apply for custody under that section, the application would be likely to be refused.’

One needs to consider that subsection in conjunction with the definition section of the Adoption Act 1976, namely s. 72, and the definition of the word ‘guardian’, which under para. (b) of the definition as it was originally drafted read:

“‘guardian” means –

- ...
  - (b) in the case of an illegitimate child, includes the father where he has custody of the child by virtue of an order under section 9 of the Guardianship of Minors Act 1971, or under section 2 of the Illegitimate Children (Scotland) Act 1930.’

So it can be seen how the provisions of s. 18 dovetailed. If the father had a custody order under the Guardianship of Minors Act, he was deemed to be the guardian and, therefore, his consent to the order freeing the child for adoption was either needed or had to be dispensed with under s. 16(2). But if, at the time of the application, the matter had not proceeded that far because he had no order under s. 9 of the Guardianship of Minors Act, s. 18(7) provided that the court must first satisfy itself that he either had no intention of applying for custody or, if he did apply for custody, it would have been likely to be refused. That was how the section stood as at the date of the hearing before Judge Marder.

He was also referred to a recent decision of the House of Lords in *Re M and H (Minors) (Local Authority: Parental Rights)* [1988] 3 WLR 485. I think I need refer only to the relevant part of the headnote:

‘*Held*, dismissing the appeals, that the jurisdiction of the court under s. 9 of the Guardianship of Minors Act 1971, to entertain applications by the mother or the father of a minor for the legal custody of, or access to, such minor, was not limited to applications by one parent against the other but extended to applications by one parent against a third party, including a local authority having the care of the minor pursuant to a resolution made under s. 3(1) of the Child Care Act 1980; but that, though the court had jurisdiction to entertain the father’s applications for access and custody, it could not exercise that jurisdiction to review the merits of decisions made by the local authority in pursuance of their statutory powers to make decisions about the welfare of children in their care; . . .’

The effect of that case – and that actually was also a case of a father of illegitimate children – was that, where the children are in the care of a local authority – in that case they happened to be in care pursuant to a parental rights resolution but it would be equally applicable if they had been in care under a care order – even though there is jurisdiction to entertain an

application by the father for custody under the Guardianship of Minors Act 1971, that jurisdiction may never be exercised, because its effect would be, by granting the father custody – namely, actual physical possession of the child – to interfere with the rights and duties which Parliament has entrusted to the local authority in the case of children in its care.

So, when this particular application came before Judge Marder, he took the view, which I must say seems to me inevitable, that in this case s. 18(7) of the Adoption Act 1976 did not help this father because his application for custody under the Guardianship of Minors Act must inevitably be refused because of the way the House of Lords had decided that that jurisdiction must be exercised. So he dismissed the father's application for custody, ruled on his position under the freeing for adoption provisions as a preliminary point of law and gave leave to appeal. He also adjourned the freeing application for other matters to be dealt with so that the position is that there has not, as yet, been any order freeing these children for adoption.

Mr Seabrook for the father before us in this court has kept the custody point under the Guardianship of Minors Act open. He did not concede that the judge's decision was incorrect although he accepted there were great difficulties in his way. So it is technically still open should he wish to take this matter further; but, for my part, I would say at once that I think the judge was quite right to deal with the matter in the way in which he did in the then state of the law.

However, as from 1 April 1989, namely 10 days ago, the law has been changed because the Family Law Reform Act 1987 (Commencement No.2) Order 1989 (SI 1989 No. 382) brought into force on 1 April a number of the provisions of the Family Law Reform Act 1987 which were not previously in force, and to that Act I now address myself.

Section 1(1) of the Family Law Reform Act 1987, which actually was one of the provisions already in force, is in the following terms:

'In this Act and enactments passed and instruments made after the coming into force of this section, references (however expressed) to any relationship between two persons shall, unless the contrary intention appears, be construed without regard to whether or not the father and mother of either of them, or the father and mother of any person through whom the relationship is deduced, have or had been married to each other at any time.'

The preamble to the Act indicates that it is an Act to reform the law relating to the consequences of birth outside marriage, and the subsection which I have just read makes that point clear; but it does, as I have said, refer only to that Act and enactments passed and instruments made after the coming into force of the section.

However, s. 2 deals with the construction of enactments relating to parental rights and duties already in force at the time of the passing of the Family Law Reform Act 1987 and that section was one of those brought into force on 1 April. Subsection (1)(f) of that section is to the following effect:

'In the following enactments, namely –

- (f). the Child Care Act 1980 except Part I and sections 13, 24, 64 and 65;

references (however expressed) to any relationship between two persons shall be construed in accordance with section 1 above.’

Section 4 of the Family Law Reform Act 1987, also brought into force on 1 April, is headed ‘Parental rights and duties of father’:

‘(1) Where the father and mother of a child were not married to each other at the time of his birth, the court may, on the application of the father, order that he shall have all the parental rights and duties with respect to the child.

(2) Where the father of a child is given all the parental rights and duties by an order under this section, he shall, subject to any order made by the court otherwise than under this section, have those rights and duties jointly with the mother of the child or, if the mother is dead, jointly with any guardian of the child appointed under the 1971 Act.’

Then one comes to s. 7 of the Family Law Reform Act 1987, also brought into force on 1 April:

‘(1) In section 18 of the Adoption Act 1976 (which relates to orders declaring a child free for adoption), for subsection (7) there shall be substituted the following subsection –

“(7) Before making an order under this section in the case of a child whose father and mother were not married to each other at the time of his birth and whose father is not his guardian, the court shall satisfy itself in relation to any person claiming to be the father that either –

- (a) he has no intention of making –
- (i) an application under section 4 of the Family Law Reform Act 1987 for an order giving him all the parental rights and duties with respect to the child; or
  - (ii) an application under any enactment for an order giving him a right to custody, legal or actual custody or care and control of the child; or
- (b) if he did make such an application, the application would be likely to be refused.”

(2) In section 72(1) of that Act (interpretation), in the definition of “guardian” for paragraph (b) there shall be substituted the following paragraph –

- “(b) in the case of a child whose father and mother were not married to each other at the time of his birth, includes the father where –
- (i) an order is in force under section 4 of the Family Law Reform Act 1987 giving him all the parental rights and duties with respect to the child; or
  - (ii) he has a right to custody, legal or actual custody or care and control of the child by virtue of an order made under any enactment.” ’

So it will be seen that the effect of the amendment which came into force on 1 April was to provide that, before the court can make an order freeing a child for adoption, in the case of a father of an illegitimate child, the court now has to be satisfied that he has no intention of making an application for parental rights and duties under s. 4 of the Family Law Reform Act 1987 or, if he did make such an application, the application would be likely to be refused. We were told by Mr Seabrook for the father, as indeed would appear to be obvious from the course the father has pursued so far, that it is indeed his intention now to make such an application. *Prima facie*, therefore, since as yet there has been no order freeing the children for adoption, when the case goes back to first instance it will be necessary for the judge who then considers it to consider the father's new position.

However, Miss Ryan for the local authority sought to persuade us that the change in the law to which I have already referred made no difference because, she submitted, the effect of *Re M and H (Minors) (Parental Rights; Access)* (above) still applied. In my judgment, that submission was mistaken because, in my view, a parental rights order under s. 4 of the Family Law Reform Act 1987 will not interfere with the local authority's exercise of their statutory rights over the children, but will merely give the father a *locus standi* and place him in the same position as the parent of a legitimate child to make the necessary applications to court. That, it seems to me, is the difference between a parental rights order (giving *locus standi*) and a custody order (under the Guardianship of Minors Act 1971) which would, if given effect to, interfere with the council's rights in relation to children in their care.

If I follow that position through for a moment, it seems to me, though I do not think it is necessary for the purposes of this case to decide it, that the father, if granted a parental rights order, would not share those rights with the local authority so long as the parental rights resolution remains in force unless the order gives him, as well as parental rights, actual custody of the children. I reach that conclusion because of s. 8(3) of the Child Care Act 1980 which took effect from 1 April:

'Where, in the case of a child whose father and mother were not married to each other at the time of his birth, an order is in force under section 4 of the Family Law Reform Act 1987 by virtue of which actual custody is shared between the mother and the father, both the mother and the father shall be treated as parents of the child for the purposes of the provisions of this Part.'

It will be recalled that s. 2(1)(f) of the 1987 Act otherwise excepted Part I of the Child Care Act 1980.

So, as I say, at the moment it seems to me, without necessarily deciding it, that, even if the father were successful in his application for a parental rights order under s. 4 of the 1987 Act, that would not of itself without more – 'more' being actual custody – give him shared parental rights with the local authority. But what it will do is give him a *locus standi* to be heard, e.g. on an application to discharge the parental rights resolution under s. 5(4)(b) of the Child Care Act 1980. It will also, so it seems to me, and for the purposes of this appeal I so hold, give him the right to oppose an

adoption order or an order freeing the children for adoption. Of course, he would have to make out his case on the merits, but at least he would have a *locus standi*. Finally, it would seem to me also to give him rights to be heard on access to a child in care under Part IA of the Child Care Act 1980.

It seems to me that this construction of the Act will remove the anomaly to which the courts have so often referred and, most recently, this court in *Re N (Minors) (Parental Rights: Access)* [1989] 2 FLR 106 where the father of children – the parents not having been married – who may have played a full part in their lives but, as I say, never married, is denied even the opportunity to be heard on matters vital to the future of those children.

In the result, so far as the appeal by the father against the refusal to grant him a custody order under the Guardianship of Minors Act 1971 is concerned, I, for my part, would dismiss the appeal. So far as the appeal on the preliminary point of law is concerned, since the point has become academic for the reasons I have endeavoured to give, I would make no order on that appeal, but would direct that the case should go back to the court of first instance to be dealt with on its merits under the new s. 18(7). Since it would be the first time on which such an application would be dealt with by a court of first instance, and also to ensure that the application should be dealt with as speedily as possible, I would propose that the matter be brought up into the Principal Registry and then direct that the application should be heard by a judge of the Family Division of the High Court as soon as possible.

**NICHOLLS LJ:**

I agree

**LORD DONALDSON MR:**

I also agree.

*Appeal by the father against the refusal to grant custody under the Guardianship of Minors Act 1971 dismissed. No order on the appeal on the preliminary point of law. Case to go back to the court of first instance to be dealt with on its merits under s. 18(7) of the Adoption Act 1976. Matter to be heard by a High Court judge of the Family Division as soon as possible. No order for costs save legal aid taxation.*

Solicitors: *Winter-Taylor*s, High Wycombe, for the father;  
*Kidd Rapinet*, Maidenhead, for the mother;  
*Griffiths Robertson*, Reading, for the local authority solicitor.

**V.H.**