RE H (ILLEGITIMATE CHILDREN: FATHER: PARENTAL RIGHTS) (NO. 2)

Court of Appeal

Neill, Balcombe and Mann LJJ

20 November 1990

Parental rights – Illegitimate children – Local authority receiving children into care and passing parental rights resolution – Local authority applying to free children for adoption – Father applying for parental rights order – Family Law Reform Act 1987, s. 4

The parents of two children lived together but never married. The father left home and the mother left the children in the care of her parents. Eventually the local authority received them into care and passed a parental rights resolution. The father did not have any parental rights and duties under the existing legislation. The children were placed with foster-parents but were visited by the mother and grandparents and also by the father who formed a close relationship with them. The local authority, having decided that the children should be adopted, terminated the parents' access to them and applied to free both children for adoption. The father applied under the Guardianship of Minors Act 1971, s. 9 for legal custody and access. The judge dismissed the father's application and adjourned the application by the local authority. The father and the local authority appealed. The court, dismissing the father's appeal but making no order on the appeal by the local authority, remitted the freeing application to the court of first instance for the father to make an application under the new s. 18(7) of the Adoption Act 1976, as amended, and the Family Law Reform Act 1987, s. 4, which came into force on 1 April 1989. If granted, the order would have given him parental rights and duties in respect of the two children and would have thus placed him in the same position as the parent of a legitimate child, giving him locus standi to be heard and to make applications to the court. Subsequently, the court's attention was drawn to Sch. 3, para. 1 to the 1987 Act which provided that changes made by the Act did not affect applications made prior to the changes coming into force, and, accordingly, the local authority indicated that it would withdraw its current application to free the children for adoption and would make fresh applications under which the father would be able to take advantage of his rights under the Act. At the hearing, the judge refused the father's application for an order under s. 4 on the grounds that the purpose of the Act was to confer all parental rights on a deserving father of an illegitimate child, and could not apply to the father in the present case where he had acknowledged that he did not want custody and merely wished to be a party to the adoption proceedings on the limited question of access; and furthermore, since a s. 4 order would enable the father to share with the local authority the parental rights and duties in respect of the children, that the making of an order would risk prejudice to them. The judge made orders freeing the children for adoption. The father appealed.

Held –

(1) The judge had been wrong to hold that s. 4 of the 1987 Act was only intended to operate if all the parental rights which were to be granted to the father were immediately capable of being exercised by him. So restricted an interpretation would be contrary to the purpose of the Act, which was to reform the law relating to the consequences of birth outside marriage and, in appropriate cases, to equate the position of a father of a child born out of wedlock with that of the father of a legitimate child. Matters to be taken into account in deciding whether an order under s. 4 was appropriate were, inter alia, the degree of commitment shown by the

father to the child, the degree of attachment between them, and the father's reasons for applying for the order. The fact that the making of a s. 4 order would in theory enable the father to share parental rights and duties with the local authority was a possibility expressly recognised by the Child Care Act 1980, s. 3(1). Any problem which might arise could be dealt with by the local authority, and in any event would cease to exist when the provisions of the Children Act 1989, removing the ability of the local authority to assume parental rights by resolution, came into force. Furthermore, if the parental rights and duties conferred on the father were removed from him immediately thereafter by the court's decision to dispense with his consent to adoption, the parental rights order could nevertheless be justified because the provisions of ss. 19 and 20 of the Adoption Act 1976 gave to a former parent certain residual rights, i.e. to receive progress reports until the adoption order was made and to apply to revoke the freeing order if the child was not placed for adoption within 12 months. Accordingly, and in view of the evidence of the attachment between the father and the children, the father's appeal against the judge's refusal to make an order under s. 4 would be allowed.

(2) However, the judge, having heard all the evidence, could have come to no other finding than that the father's agreement to an adoption order was being unreasonably withheld, and, accordingly, to avoid further delay and uncertainty, the court under Ord. 59, r. 10(3) would so declare and on that basis would dismiss the father's appeal against the making of the freeing orders and confirm those orders.

Statutory provisions considered
Adoption Act 1976, ss. 18(7) (as amended), 19, 20
Family Law Reform Act 1987, s. 4

Cases referred to in judgment
D v Hereford and Worcester County Council [1991] 1 FLR 205
H (Illegitimate Children: Father: Parental Rights) (No. 1), Re [1989] 2 FLR 215; [1989] 1 WLR 551; [1989] 2 All ER 353
H (Minors) (Local Authority: Parental Rights) (No. 2) [1989] 1 WLR 1025; [1989] 2 All ER 906
M (An Infant), Re [1955] 2 QB 479; [1955] 3 WLR 320; [1955] 2 All ER 911
M and H (Minors) (Local Authority: Parental Rights), Re [1988] 2 FLR 431; [1990] 1 AC 686; [1988] 3 WLR 485; [1988] 3 All ER 5, HL
N (Minors) (Parental Rights: Access), Re [1989] 2 FLR 106
W (An Infant), Re [1971] AC 682; [1971] 2 WLR 1011; [1971] 2 All ER 49, HL
APPEAL from Judge Morton Jack in the Slough County Court

Philip Vallance QC and *Sally Smith* for the appellant
Helen Grindrod QC and *Mhairi McNab* for the first respondent
Allan Levy QC and *David Turner* for the guardian ad litem

BALCOMBE LJ:
This is the judgment of the court. This is an appeal from three orders made by Judge Morton Jack in the Slough County Court on 19 January 1990:

(1) refusing the appellant's application for an order under s. 4 of the Family Law Reform Act 1987 giving him parental rights and duties with respect to two children, J, born on 18 October 1982, and S, born on 27 December 1983;

(2) freeing J for adoption and vesting the parental rights and duties relating to him in the Berkshire County Council;
(3) freeing S for adoption and vesting the parental rights and duties relating to her in the Council.

The appellant met the mother of J and S in the spring of 1981. They then started living together but they never married. However, it is common ground that the appellant is the father of these two children. They lived together as a family unit until February 1985, except for a brief period in August 1984 when the father left the home, but returned shortly thereafter. The judge found that during this period the father had little to do with the care of the children: he felt that he was the bread-winner and that while the mother was at home she should care for them. In February 1985, when J was 2 years and 4 months and S was little over 13 months old, the father left home for good. On 24 March 1985 the mother left the children in the care of her parents. They were unable to look after the children and contacted the Council's social services department. On 25 March 1985 a place of safety order was made in respect of both children and they were placed with a Mr and Mrs L as short-term foster-parents.

On 23 May 1985 the Council's application to the juvenile court for a care order was refused, on the basis that there should be an opportunity to rehabilitate the children with the mother, but on the same day she placed the children in the voluntary care of the Council under s. 2 of the Child Care Act 1980 and they remained with the L's. Subsequent attempts to rehabilitate the children with the mother failed, and on 27 August 1987 the Council passed a parental rights resolution in respect of the mother's rights under s. 3 of the Child Care Act 1980. It will be appreciated that at that time the father had no parental rights because he and the mother had not married.

The children remained in the care of the L's and were visited regularly by the father, with rather less regularity by the mother, and also by their grandparents. The judge described the father's position at this time in the following passage from his judgment:

> 'What had happened was that while the children were very small and the father was living with them under stress he paid very little attention to them. When they were being very well cared for by Mr and Mrs L and they were becoming older, and what was involved was visits of an hour or two or so, perhaps weekly, he became much more, and I am quite satisfied, genuinely found of them. One could say that the circumstances in which he was seeing the children at the L's were much easier for him, and of course, with all the present-giving and spreetaking, the occasional visitor who comes to play has none of the stress and difficulties of the day-to-day care of small children; of course it is easy for him and the children to get on well together. But that does not really matter, because the plain fact is that I am quite satisfied that he has become, over the course of his access, fond and concerned for the children and that, particularly, J has returned his fondness.'

Until May 1986 the father had regular access twice a week. The frequency of access was then much reduced by the Council and at the end of 1987 all access by the natural family was stopped, the Council having

decided that the children needed a permanent home. The father last saw the children on 28 December 1987.

In February 1988 the children were introduced to prospective adopters, but that introduction broke down and they remained with Mr and Mrs L. On 17 March 1988 the Council made an application to free both children for adoption and on 24 May 1988 the father made an application under the Guardianship of Minors Act 1971 for custody and access to both children. The judge described the father's application for custody as unrealistic – he had no home to offer the children – and said that this application was simply an attempt to secure continuing access. In September 1988 the Council started to introduce the children to a new adoptive family. On 1 October 1988 the children left the L's and were placed with the new adoptive family: they are still there.

The Council's application to free the children for adoption, and the father's application for custody and access, came before Judge Marder sitting in the Slough County Court on 25 October 1988. The judge dismissed the father's application for custody and access, ruled as a preliminary point of law under the Adoption Act 1976, s. 18(7) that, as the father's application for custody must be refused, the only consent to the freeing of the children for adoption with which the court was concerned was that of the mother, and adjourned the further hearing of the Council's application to free the children for adoption.

The father and the mother both appealed against the judge's ruling on the preliminary point: the father appealed against the judge's refusal to grant him custody of the children. These appeals came before another division of this court on 11 April 1989, when the father's appeal against the refusal to grant him custody was dismissed, but no order was made on the appeal on the preliminary point of law, since the court was of the view that the point had become academic upon the coming into force, on 1 April 1989, of s. 4 of the Family Law Reform Act 1987 and a new s. 18(7) of the Adoption Act 1976, and directed that the freeing application should go back to the court of first instance to be dealt with on its merits under the new provisions. The judgment of this court is reported in *Re H (Illegitimate Children: Father: Parental Rights) (No. 1)* [1989] 2 FLR 215. However, at the hearing of the appeal, the court's attention had not been drawn to the transitional provisions of the 1987 Act, which provided that the Act should not have effect in relation to applications pending at the time when the provision in question came into force. When this point was brought to the attention of the court – *Re H (Minors) (Local Authority: Parental Rights) (No. 2)* [1989] 1 WLR 1025 – the Council indicated that it would withdraw its then current application to free the children for adoption, and would make fresh applications under which the father would be able to take advantage of his rights under the 1987 Act and under s. 18(7) of the 1976 Act as amended.

On 6 September 1989 the Council made its fresh applications to free the children for adoption, and on 16 October 1989 the father made his application for a 'parental rights order' under s. 4 of the 1987 Act. These applications came before Judge Morton Jack on 19 January 1990, with the results we have indicated above.

Until the recent changes in the law, the father of a child born out of wedlock had only very limited rights in relation to the child. He was not a

parent of the child within the meaning of the Child Care Act 1980 (although he was a relative) – see s. 87(1); he had no parental rights and duties under the Children Act 1975 – see s. 85(7); he was not a parent of the child for the purposes of the Adoption Act 1976 – see *Re M (An Infant)* [1955] 2 QB 479 – although he might be its guardian if so appointed or if he had custody under the Guardianship of Minors Act 1971, s. 9 – see s. 72(1) of the 1976 Act. Although as against the mother he could obtain an order for custody of the child under s. 9 of the 1971 Act, he could not obtain such an order if the child was in the care of a local authority – see *Re M and H (Minors) (Local Authority: Parental Rights)* [1988] 1 AC 686. Nor was he a parent of the child for the purpose of applying under Part 1A of the 1980 Act for access to the child if in care – see *Re N (Minors) (Parental Rights: Access)* [1989] 2 FLR 106.

That position has now been changed by the Family Law Reform Act 1987 and, more recently, by the Children Act 1989, although some of the relevant provisions of the latter Act are not yet in force. The method adopted was not to equate the father of a child born out of wedlock with the father of a legitimate child: it was to give the putative (or natural) father the right to apply for an order giving him all the parental rights and duties with respect to the child. (When s. 4 of the 1989 Act is brought into force he will be able to acquire parental responsibility by agreement with the mother.) The reason why this method was adopted was because the position of the natural father can be infinitely variable; at one end of the spectrum his connection with the child may be only the single act of intercourse (possibly even rape) which led to conception: at the other end of the spectrum he may have played a full part in the child's life from birth onwards, only the formality of marriage to the mother being absent. Considerable social evils might have resulted if the father at the bottom end of the spectrum had been automatically granted full parental rights and duties, and so Parliament adopted the scheme to which we have referred above.

In considering whether to make an order under s. 4 of the 1987 Act, the court will have to take into account a number of factors, of which the following will undoubtedly be material (although there may well be others, as the list is not intended to be exhaustive):

(1) the degree of commitment which the father has shown towards the child;
(2) the degree of attachment which exists between the father and the child;
(3) the reasons of the father for applying for the order.

In the present case, the two applications – the father's application for a parental rights order and the Council's application for an order freeing the children for adoption – came on together before Judge Morton Jack and he heard all the evidence on both applications before giving judgment in either. In the course of that evidence it became clear that the father was in no position to offer the children a home, and that what he wanted was continued access. It is also clear that the judge formed a very unfavourable view of the father. He described him as 'unintelligent', 'self-regarding' and as having 'no understanding of how his desire for continued access to these children may affect their stability and security in the years to come'.

The judge added: 'I have to say that it seems to me that he has not very much to offer as a parent'.

At the end of the evidence, and after hearing submissions from counsel, the judge gave a judgment dismissing the father's application for a parental rights order. His reasons appear from the following passages from his judgment:

> 'Well now, having taken a view of him one must next consider what he has to offer these children upon the assumption of all the rights and duties of a parent over them. I have been helpfully directed to a list with seventeen headings of the matters which Professor Bevan thinks are covered by the phrase "parental rights and duties". The crucial ones, the absolute crucial ones, of a parent's rights and duties must be these. First, the care and control of the child or children. Secondly, the protection and discipline of them. Thirdly, the maintenance of them. Fourthly, the education and religious upbringing of them.
> [The father] has no proposals whatever to put before the court for those basic headings of a parent's rights and duties, and it has to be said that he has today nothing to offer these children under those fundamental headings. The sole ground upon which he asks for a s. 4 order is in relation to access. He wants the rights to argue as a party for access in adoption proceedings. In my view the purpose of the Act was the conferring of all, and I stress all, the parental rights and duties to the deserving father of an illegitimate child. It can never have been contemplated that s. 4 was intended by a sidewind to enable a father in circumstances such as these to be a party in adoption proceedings on the very limited question of access. The reality is that the father's argument on access will have been very fully put, very fully argued and very fully considered, whether or not the s. 4 order is made. I have heard all the evidence upon the question of access to the children in adoption proceedings . . .
> Now I have also to look at the realities of access after adoption. The plain fact is that unless it is consented to fully by all parties, including the prospective adopters, it does not start as an argument. If they do not agree to it, that effectively is the end of it. If they do agree to it, or they feel that the possibility of it should be explored, then it is still open for the matter to be dealt with fully and carefully.
> Lastly, one has to look at the effect of suddenly awarding this, as I find, undeserving father, all the parental rights and duties over these children which he has never had and never exercised for 5 years or so. It would risk prejudice to the children to make an order. One cannot tell what applications may be made in the future, but if today I were to grant [the father] all parental rights and duties it would immediately give him scope to interfere in many different ways with the present arrangements for the children. It would be liable to increase the proceedings about them and to unsettle them. Whether it would do so or not I cannot tell. It seems to me, whatever was said in the Court of Appeal, that the effect of making a s. 4 order today would be immediately to enable [the father] to share with the Council the parental rights and duties over these children. Now that is not a prospect which one can view with anything other than alarm. Taking it all in all I am wholly

> satisfied that it could not be in the children's interests suddenly at this very late stage to constitute [the father] in the position of a parent with rights and duties, and this application must be refused.'

Then, after hearing further submissions from counsel for the mother, he gave judgment on the Council's application, held that the mother was unreasonably withholding her consent to the children being freed for adoption (because she wanted the father and the grandfather to continue to have access to them) and ordered that the children be freed for adoption.

In our judgment, the judge was wrong in holding that s. 4 of the 1987 Act was only intended to operate if *all* the parental rights which were to be granted to the father were immediately capable of being exercised by him. As Ward J pointed out in a careful judgment in *D v Hereford and Worcester County Council* [1991] 1 FLR 205 (and of which we were provided with a full copy), 'parental rights and duties' under s. 4 includes both legal custody and a right of access – see the Children Act 1975, ss. 85 and 86 and the Interpretation Act 1978, Sch. 1 – yet a parent who has custody will not need a right of access. If the judge's construction were right, the father of an illegitimate child who was in care under a care order would only be entitled to apply for access under the Child Care Act 1980, Part 1A if he already had a parental rights order made before the child was taken into care, because ex hypothesi he would not be entitled to custody so long as the care order subsisted. Yet up to the moment the care order was made, the father may have played a full part in the child's life. There is nothing in the 1987 Act to suggest that so restricted an interpretation of s. 4 was intended by Parliament; it is contrary to the views expressed by this court (admittedly obiter) in *Re N (Minors)* [1989] 2 FLR 106 and *Re H (Illegitimate Children: Father: Parental Rights) (No. 1)* [1989] 2 FLR 215 and by Ward J in his recent judgment in *D v Hereford and Worcester County Council*; and it would be contrary to the whole purpose of the 1987 Act which, as is stated in its preamble, was to reform the law relating to the consequences of birth outside marriage and whose undoubted aim in an *appropriate* case was to equate the position of the father of a child born out of wedlock to that of the father of a legitimate child.

The judge was right in his view that the effect of making a s. 4 order would in theory immediately enable the father to share with the Council the parental rights and duties with respect to these children. However, the possibility that the parental rights which a local authority has assumed by resolution may be exercised jointly with another is expressly recognised by s. 3(1) of the Child Care Act 1980, and s. 85(3) of the Children Act 1975 covers this situation. In practice, the local authority would be able to take appropriate steps to deal with any conflict that might arise; in any event the problem (if it be such) will cease to exist when the provisions of the Children Act 1989, which remove the ability of a local authority to assume parental rights by resolution, are brought into force.

There did seem to us to be some force in the argument that if the judge, having heard all the evidence, had decided on the merits that, even if the father had a locus standi to oppose the order freeing the children for adoption, his consent to that order would be unreasonably withheld, there would be little point in making an order giving him parental rights and

duties which would instantly thereafter be taken from him. However, the judge's attention was not drawn to the provisions of ss. 19 and 20 of the Adoption Act 1976, which give to a former parent of the child certain limited rights after the making of a s. 18 order freeing the child for adoption. These rights are to receive certain progress reports until an adoption order is made in respect of the child, and to apply to the court to revoke the freeing order if no adoption order has been made, and the child is not placed for adoption, within 12 months of the freeing order. These sections were drawn to our attention by the father's counsel, and in our judgment they justify making a parental rights order in favour of the father, notwithstanding a decision immediately thereafter to dispense with his consent to the making of an order freeing the children for adoption, since he could then be left with the residual rights under ss. 19 and 20 which may become of some benefit to him.

Accordingly, in our judgment the judge was wrong to refuse the father's application for a parental rights order on the grounds which he gave. Further, the facts as found by the judge demonstrated a degree of commitment by the father to the children, and an attachment between him and them, amply sufficient to justify his being given a locus stand on the hearing of the Council's application for an order freeing the children for adoption. Accordingly, we allow this part of the father's appeal and make an order granting him all parental rights and duties in respect of J and S.

However, on the evidence before him, the judge could have come to no other finding than that the father's consent to an adoption order in respect of J and S was being unreasonably withheld under s. 18(1)(b) of the Adoption Act 1976. The classic test is that set out by Lord Hailsham of St Marylebone LC in *Re W (An Infant)* [1971] AC 682 at p. 699:

> 'From this it is clear that the test is reasonableness and not anything else. It is not culpability. It is not indifference. It is not failure to discharge parental duties. It is reasonableness, and reasonableness in the context of the totality of the circumstances. But, although welfare per se is not the test, the fact that a reasonable parent does pay regard to the welfare of his child must enter into the question of reasonableness as a relevant factor. It is relevant in all cases if and to the extent that a reasonable parent would take it into account. It is decisive in those cases where a reasonable parent must so regard it.'

Here the judge found – and in this respect we refer also to his second judgment, when he made the freeing order and dispensed with the mother's consent – that these children urgently needed a settled home, and this they had found with the prospective adopters with whom they were placed. Neither parent was willing or able to offer them such a home, and all that either wanted was to secure continued access by the father and the grandparents which, if enforced against the wishes of the prospective adopters, could prejudice the stability of the home which they offered, and which the children so urgently required. In those circumstances it seems to us inevitable – and the judge so found in the case of the mother – that even if the father had been granted a parental rights order, his consent to the freeing order would have been unreasonably withheld on the appli-

cation of the test set out above. We stress that the judge had heard *all* the evidence before he gave any judgment, so that there was no question of the father being denied the opportunity to adduce further evidence to support his opposition to the freeing order; it was also the case, as the judge pointed out, that any argument which the father could have put to oppose the freeing order would be, and in fact was, put by the mother. If we were to send the father's appeal against the freeing orders back to the judge with a direction to hear him on the issue whether his consent (which, in the light of the order which we make granting him parental rights, would then be requisite) was being unreasonably withheld, there could be only one answer. The further delay and uncertainty in a case which has already lasted for a considerable time would be most unsettling for the prospective adopters, and thereby detrimental to the children's welfare.

Under Ord. 59, r. 10(3) we have power to give any judgment and make any order which ought to have been given or made, and to make such further or other order as the case may require. The only objection to our making an order dispensing with the father's consent to the order freeing the children for adoption might be that he will not have been given the opportunity, under s. 18(6) of the Adoption Act 1976, of making a declaration that he prefers not to be involved in future questions (under ss. 19 and 20) concerning the adoption of the children. However, since the father's counsel relied on the father's position under ss. 19 and 20 as a ground for our allowing the first part of his appeal and granting him a parental rights order, it is clear that, had he been given this opportunity, he would not have made such a declaration.

Accordingly, we see no reason why we should not (as we do) declare that the father's consent to the orders freeing the children for adoption was unreasonably withheld, and on that basis dismiss his appeals against the making of the freeing orders and confirm those orders.

Appeal allowed in part. Appeal against declaration that the children be freed for adoption dismissed and orders confirmed. Legal aid taxation of the appellant's costs.

Solicitors: *Winter-Taylors* for the appellant
Griffiths Robertson for the first respondent
Anthony T. Evans for the guardian ad litem

PATRICIA HARGROVE
Barrister