Re K (Care Proceedings: Fact Finding) [2010] EWHC 3342 (Fam)

[2011] 2 FLR 199

Family Division

Hedley J

21 December 2010

Care proceedings — Fact-finding hearing — Whether necessary for risk assessment purposes — Extent to which risk assessment could be undertaken in relation to 'uncertain perpetrator'

The father had been acquitted of the murder or manslaughter of his 10-month-old daughter. His former partner, the child's mother, who had separated from the father following the death, had been a prosecution witness. The daughter had suffered non-accidental rib fractures, followed, 8 weeks later, by a fatal injury to the liver. The case had been left to the jury on the basis that the injuries had been caused by either or both parents. Even after the father's acquittal, the authorities chose not to bring care proceedings, taking the view that the two surviving children of the family would not be at risk in the sole care of the father's former partner. The father then became involved with another woman, the mother. They had two children together, and the father took on a parenting role in respect of the mother's two elder children. The local authority issued care proceedings after one of the children suffered severe burns while in the mother's care, having been left alone in the bath. The mother pleaded guilty to neglect. The local authority case was that the mother had also emotionally abused the children. All four children were now living with the maternal grandmother. The father and mother had separated: the father was not seeking to become the children's sole carer, but was seeking unsupervised contact; the mother was asking to be assessed as sole carer. The local authority sought a fact-finding hearing in relation to the father's alleged involvement in his daughter's death; the mother and father argued that such an enquiry was neither necessary or proportionate to the issues in the care proceedings.

Held – refusing to hold a fact-finding hearing in respect of the father's alleged involvement in the death of his daughter –

(1) *Re B, O and N* [2003] UKHL 18, [2003] 1 FLR 1169, was authority for the proposition that where significant harm and attribution had been established and the threshold criteria had been made out, then an 'uncertain perpetrator' might be the subject of a risk assessment in respect of other children with whom he might come into contact; this authority had survived the decision in *Re S-B* [2009] UKSC 17, [2010] 1 FLR 1161. *Re S-B* did not require proof of identity of the perpetrator of harm when considering likelihood of future harm, but provided a reminder that in care cases the threshold must be established by proof of facts, and that in private law cases the evaluation of risk was to be founded in proven facts. Where, as in this case, the threshold would have been established if there had been care proceedings, that was a sufficient factual basis on which to undertake a risk assessment, albeit on the basis of an 'uncertain perpetrator'. It could not be right that in a case in which a parent was one of only two who had inflicted non-accidental fatal injury to a baby, that fact was irrelevant to any future assessment of risk because the court could not decide between the two (see paras [18], [20]).

(2) Having considered the factors generally relevant to the court's discretion whether to order a fact-finding hearing, as set out in *A County Council v DP* [2005] EWHC 1593 (Fam), [2005] 2 FLR 1031, the court identified four primary factors in this case: (a) the view the court would have to take of the father if there was no fact-finding hearing; (b) the identified benefits of such a hearing; (c) the identified disadvantages of such a hearing; and (d) the prospects of the hearing delivering the clarity sought. Benefits included the fact that the risk assessment could be much more

focused, and no doubt more reliable, if there were a finding of perpetration or failure to protect, while disadvantages included the fact that a fact-finding hearing would be substantial, expensive and would lead to delay (see paras [21], [24], [25]).

(3) A fact-finding hearing would not be directed in this case because: (i) in law there existed a sufficient basis in the evidence for saying that there was a real possibility of harm to the children by the father arising out of the daughter's death, the risk of which should be assessed before any final decision as to contact was made; (ii) given the nature of the father's contact application and the possible extent of his future involvement with the children, a fact-finding hearing on this issue would be disproportionate to the benefits to be obtained, particularly given the increasingly scarce resources in the family justice system; (iii) and there was a real risk that such a hearing would not result in a clear finding on the one really significant issue (see para [26]).

Statutory provisions considered top

Children Act 1989, ss 1(3)(e), 31(2)

Cases referred to in judgment top

A County Council v DP, RS, PS (By the Children's Guardian) [2005] EWHC 1593, [2005] 2 FLR 1031, FD

North Yorkshire County Council v SA [2003] EWCA Civ 839, [2003] 2 FLR 849, CA

O and Another (Minors) (Care: Preliminary Hearing), Re B (A Minor) Re [2003] UKHL 18, [2008] 1 AC 523, [2003] 2 WLR 1075, sub nom *O and N, Re; Re B* [2003] 1 FLR 1169, [2003] 2 All ER 305, HL

S-B (Children) (Care Proceedings: Standard of Proof), Re [2009] UKSC 17, [2010] 1 AC 678, [2010] 2 WLR 238, [2010] 1 FLR 1161, [2010] 1 All ER 705, SC

Ronan O'Donovan for the applicant
Ian Bugg for the first respondent
Jane Probyn for the second respondent
Gemma Farrington for the guardian

Cur adv vult

HEDLEY J:

[1] The issue that I have to determine is whether to order a fact-finding hearing in respect of the father's alleged involvement in the death of a child, K, (who was never part of the family group, the subject of this application) following his acquittal of her murder or manslaughter. The child concerned had died on 29 November 2005; the criminal trial concluded in January 2007. These proceedings began in May 2010.

[2] The current proceedings have a wholly different origin. Ms W is the mother of all four children in this case; Mr D is the father of the two younger children (L and M) but has acted in a paternal role towards the two older children whose natural father has not featured in these proceedings. The local authority became involved on 29 April 2010 at which time the family were all living together. Since then the parents have separated.

[3] At that time the local authority received information that the father had volunteered to the health visitor his involvement in the criminal trial. That was the first that this local authority knew of K or of the circumstances of her death or the father's alleged involvement in it. I heard this case on a day of seriously adverse weather conditions. Accordingly, I invited supplementary written submissions which I have received on behalf of the guardian.

[4] It is necessary to say something about the current proceedings but necessarily briefly since they remain outstanding. They were precipitated by an incident in which L suffered severe burns when left alone in the bath. The mother has since admitted neglect and pleaded guilty to a charge to that effect. It should be added, however, that this is not the sole basis of the local authority's case. There are also allegations of what may generically be called emotional abuse by the mother. At present all the children live with the maternal grandmother and have (or will have) supervised contact separately to both their parents.

[5] Accordingly, there are clearly reasonable grounds for believing that the threshold criteria required by s 31(2) of the Children Act 1989 (the Act) will be met both in terms of significant harm and attribution to want of parental care. The mother is to be assessed as sole carer; the father supports that and seeks unsupervised contact for himself. It is, however, to be noted that there is little direct evidence against the father in this case.

[6] That then, in brief and necessarily incomplete, is the factual context in which the local authority (supported by the guardian) seek a fact-finding hearing in relation to the father's alleged involvement in the death of K. The parents contend that such an inquiry is neither necessary for nor proportionate to the issues to be determined in this case, ie whether the father should have unsupervised contact to the children. Of course, the issue is not quite as simple as that as it is by no means impossible that the father over the years may become involved in the lives of other children and to a greater extent.

[7] Moreover, the mother was rightly concerned that such an inquiry, if undertaken, would seriously delay the assessment of her and the resolution of the question as to whether the children could be returned to her sole care. In fact the parties accepted a suggestion that procedurally these issues (were a fact-finding hearing to be ordered) could be uncoupled. The care proceedings (and thus the assessment of the mother) should continue and the fact finding be linked to an application for contact deemed to have been made by the father.

[8] It is now necessary to turn to the criminal proceedings. That produced, as one would have expected, a very large quantity of paper. Leading counsel for the local authority, Miss Pamela Scriven QC, has considered the whole set of criminal papers. It is her view, and agreed by all other parties, that an understanding of that case sufficient for all purposes within these proceedings, can be gleaned from a perusal of the closing speeches of counsel and the summing-up of His Honour Judge Rook QC at the Old Bailey.

[9] K was aged 10 months when she died. She was the daughter of the father and Ms B. Two other children (then aged 8 and 4) lived in the same home; Ms B was the mother of both children whilst the father was also the natural father of the older child but not the younger. It was not a family in which the local authority had been closely involved.

[10] The expert medical evidence comprised that of Professor Risdon, the distinguished paediatric pathologist, and Professor Hall, an equally distinguished paediatric radiologist. Other experts of like discipline were instructed but not called because they agreed with the evidence of those two experts. No expert of any other discipline was called or even instructed so far as I have been able to ascertain. It was apparent by the end of the trial that all parties accepted the conclusions of Professors Risdon and Hall.

[11] There were two groups of injuries separated by a period of some 8 weeks. Initially K suffered rib fractures which were unexplained and which had the hallmarks of non-accidental origin. In the end no one sought to contend that these fractures were other than non-accidental. The fatal injuries involved damage to the liver which in Professor Risdon's view was explicable only by substantial impact. Again no explanation was forthcoming. Again in the end no one sought to deny that this was non-accidental and no one was able to maintain a suggestion that the impact could have been caused by one of the other children.

[12] Accordingly, the case was left to the jury on the basis that each injury was non-accidental in origin and that each injury had been caused by one or both of the parents. There was some inevitable latitude over the timing of the rib fractures but within that latitude lay opportunity for either or both to have caused them. In respect of the last injury the timings suggested again that either or both could have caused it. As there was no neglect charge on the indictment, the question of failure to protect did not arise for the court's consideration.

[13] The father alone was charged; the mother was a prosecution witness. The views of the police and local social services may be deduced from the fact that the surviving children remain living with Ms B and in March 2006 (ie before the trial) their names were removed from the register. Ms B has been given notice of this application and has made submissions to me through counsel which were necessarily limited because she has had no access to the papers in the current care case.

[14] His Honour Judge Rook QC accordingly left to the jury questions which represented two sides of the same coin: were the jury sure that the father had inflicted (or joined in) the fatal injury and were the jury sure that the injury had not been inflicted by the mother? Although there was no count on the indictment, the same questions were posed in relation to the rib fractures. It was in those circumstances that the jury acquitted. It is to be observed that the local authority responsible for the two surviving children have not thought it necessary to change their plans in the light of that verdict.

[15] It seemed to me in considering these matters that the evidence adduced in the criminal proceedings pointed towards the following conclusions in family proceedings: first, that K died as a result of non-accidental injury; secondly, that the perpetrator(s) of that injury must be the parents (either or both) and no one else; thirdly, that insofar as a parent was not a perpetrator, there was an available inference of failure to protect; and fourthly, that it was not possible to identify a perpetrator as between the parents. Had there been care proceedings, it is reasonable to conclude that the threshold would have been met both in terms of harm and attribution and in terms of a serious possibility of future harm to other children. In the end no party in these proceedings sought to contend otherwise. If the evidence was regarded as complete, this was a case of uncertain ‘perpetrators' but in an identified pool of two.

[16] The local authority accepted that the evidence did indeed extend thus far. However, their anxiety, one shared by the guardian, related to the use that could be made of that in these proceedings and in respect of risk to these children. They founded their anxiety in the judgment of Baroness Hale of Richmond (giving the judgment of the Supreme Court) in *Re S-B (Children)*

(Care Proceedings: Standard of Proof) [2009] UKSC 17, [2010] 1 AC 678, [2010] 2 WLR 238, [2010] 1 FLR 1161. In particular they were concerned by a suggestion that if there were not a finding either that the father was the perpetrator or had been guilty of failing to protect then there was no sufficient finding on which to assess risk. This seemed to me to raise the question of the relationship of the decision in *Re O and Another (Minors) (Care: Preliminary Hearing), Re B (A Minor)* [2003] UKHL 18, [2008] 1 AC 523, [2003] 2 WLR 1075, sub nom *O and N, Re; Re B* [2003] 1 FLR 1169 to that in *Re S-B* (above) in which *Re B, O & N* was considered.

[17] The essence of the decision (so far as is material to this point) in *Re B, O & N* is to be found in para [31] of the speech of Lord Nicholls of Birkenhead where he says this:

> ‘In “uncertain perpetrator” cases the correct approach must be that the judge conducting the disposal hearing will have regard, to whatever extent is appropriate, to the facts found by the judge at the preliminary hearing. Nowadays the same judge usually conducts both hearings, but this is not always so. When the facts found at the preliminary hearing leave open the possibility that a parent or other carer was a perpetrator of proved harm, it would not be right for that conclusion to be excluded from consideration at the disposal hearing as one of the matters to be taken into account. The importance to be attached to that possibility, as to every

feature of the case, necessarily depends on the circumstances. But to exclude that possibility altogether from the matters the judge may consider would risk distorting the court's assessment of where, having regards to all the circumstances, the best interests of the child lie.'

[18] That seems to me plainly to establish that where significant harm and attribution have been established, that the threshold criteria have been made out, then the 'uncertain perpetrator' may be the subject of a risk assessment in respect of other children with whom he may come into contact. Difficult as that task can sometimes be, it is one that is regularly undertaken in Children Act proceedings consequent on a fact-finding hearing. The tenor of Baroness Hale of Richmond's judgment in *Re S-B* does not appear to contain any suggestion of doubt as to the correctness of the views expressed in *Re B, O & N*. Indeed the learned justice's acceptance of the test propounded by Dame Elizabeth Butler Sloss in *North Yorkshire County Council v SA* [2003] EWCA Civ 839, [2003] 2 FLR 849 of a 'likelihood or real possibility of harm' would seem to involve express approval of *Re B, O & N*.

[19] What concerns both the local authority and the guardian (and has generated some academic scrutiny) is the language of Baroness Hale of Richmond at para [49] of her judgment where she says this:

'There is a further reason to remit the case. The judge found the threshold crossed in relation to William on the basis that there was a real possibility that the mother had injured Jason. That, as already explained, is not a permissible approach to a finding of likelihood of future harm. It was established in *Re H* and confirmed in *Re O*, that a prediction of future harm has to be based upon findings of actual fact made on the

balance of probabilities. It is only once those facts have been found that the degree of likelihood of future events becomes the real possibility test adopted in *Re H*. It might have been open to the judge to find the threshold crossed in relation to William on a different basis, but she did not do so.'

It is argued that that is not consistent with the conclusion in *Re B, O & N* and that in this paragraph the learned justice is requiring proof of identity of the perpetrator.

[20] That outcome would be surprising in the context of the judgment as a whole. It would seem to import the very consequence (described as 'grotesque') that Lord Nicholls was at pains to avoid. I have understood these words as simply a reminder that in care cases the threshold must be established by proof of facts or that in a private law case (where no threshold is required) the evaluation of risk in s 1(3)(e) of the Act is founded in proven facts. In my judgment where, as here, the threshold would have been established, that is a sufficient factual basis on which to undertake a risk assessment albeit on the basis of 'uncertain perpetrator'. It cannot be right that in a case where a parent was one of only two who inflicted non-accidental fatal injury to a baby that fact is irrelevant to any future assessment of risk because the court cannot go the final step and decide as between the two.

[21] That does not, however, dispose of the issue for the risk assessment can be much more focused (and no doubt more reliable) if there were a finding of perpetration or failure to protect. Thus there remain reasons why a fact-finding hearing should be required in this case. It is to that, that I must now turn. In doing so I acknowledge my gratitude to the judgment of MacFarlane J in *A County Council v DP, RS, PS (By the Children's Guardian)* [2005] EWHC 1593, [2005] 2 FLR 1031. Recognising (as is also the case here) that the court has a discretion whether to order such a finding, he says this at para [24]:

'The authorities make it plain that, amongst other factors, the following are likely to be relevant and need to be borne in mind before deciding whether or not to conduct a particular fact finding exercise:

(a) The interests of the child (which are relevant but not paramount);

(b) The time that the investigation will take;

(c) The likely cost to public funds;

(d) The evidential result;

(e) The necessity or otherwise of the investigation;

(f) The relevance of the potential result of the investigation to the future care plans for the child;

(g) The impact of any fact finding process upon the other parties;

(h) The prospects of a fair trial on the issue;

(i) The justice of the case.'

I find myself in entire agreement. Nevertheless so widely can circumstances of cases differ (as a comparison between this case and DP vividly

demonstrates), that it is difficult to lay down principles in anything other than the most general terms and certainly courts should be astute to avoid anything in the nature of a checklist.

[22] Here the local authority say that the interests of these children will be better protected if the father's role is clarified, that all the essential evidence is available and the expert evidence was effectively unchallenged, that a fair trial can take place and it is accordingly in the interests of justice to do so. Although the father disputes that it is in the interests of justice, he does not dispute the other matters. What is said on his behalf is that such an exercise will take time, will be a considerable demand on public funds, is unlikely to lead to any clearer conclusion and is accordingly disproportionate and not in the interests of justice. The first two of these factors is not disputed by the local authority.

[23] In order fairly to evaluate these submissions, it is necessary to have regard to the nature of the fact-finding exercise that the court is being required to undertake. Ms B must, of course, be permitted to intervene as any finding in this context could have serious repercussions for her and her children. She was only a witness in the criminal proceedings. It is difficult to see how she could be prevented from obtaining her own expert evidence or advice as she could never have been a party to the instruction of any involved in the criminal proceedings. Moreover, although the father could be prevented from challenging the radiological and pathology evidence, he might well be allowed to obtain specialist evidence not of causation of death but causation of the fatal injury to the liver. There was a lot of lay witness evidence, some of it as to timings which may be important. Counsel for the father estimated that a trial should be estimated for 15 days.

[24] Whatever the actual estimate may be, it is undoubtedly the fact that it would be substantial, expensive and would lead to delay. Those are important factors to balance against the undoubted benefits of holding such a hearing. Finally, into the balance there should go some estimation, if possible, of the prospects of such a trial leading to the greater clarity desired. Of course, new expert evidence or a fresh evaluation of the lay evidence, of timings and opportunities may point decisively one way or the other. In the end, however, where two parents are involved in injuries committed within the privacy of their home and with no other adult present, the case, for all its complexities, comes down to one word against another. Moreover, this is not a case in which either parent asserts that they saw the other causing injury. The nature of their case is: first, a recognition that it must be one or the other; secondly, it was not them; thirdly, the other had opportunity to inflict the injuries; and fourthly, therefore, they must have done so. In my

judgment, I have to recognise in those circumstances the real risk of not being able to distinguish between the parents even at the end of a long hearing.

[25] Thus I must weigh up four factors: first, the view that the court must start from in respect of the father in the event that there is no fact-finding hearing; secondly, the identified benefits of such a hearing; thirdly, the identified disadvantages of such a hearing; and fourthly, the prospects of the hearing delivering the clarity sought. I have excluded (though I am not sure that I should do so entirely) the strain and anguish on the father and Ms B of having to participate in such a hearing so long after the criminal trial.

[26] I have reflected with care and anxiety on these matters. In the end I have come to a clear conclusion that I should not direct such a fact finding to take place. Whilst I acknowledge the undoubted benefits of a clear finding in this case, three factors have persuaded that I should not so order. First, I am satisfied that in law there exists a sufficient basis in the evidence for saying that there is a real possibility of harm to these children by the father arising out of the death of K, the risk of which should be assessed before any final decision as to his contact is made. Secondly, given the nature of his contact application and recognising the possibility of future (and perhaps greater) involvement with children, I take the view that the exercise proposed is disproportionate (and significantly so) to the benefits to be obtained; it would be wrong in the current climate not to recognise the need for careful husbandry of increasingly scarce resources in the family justice system. Thirdly, from all that I have read and heard in this case, I am seriously concerned that on the one issue that really matters (ie can the father be found to be the perpetrator of fatal injury?) there is a real risk that at the conclusion of the evidence the court may still be left with a case of 'uncertain perpetrator'. For those reasons, therefore, I decline to order a fact-finding hearing.

[27] I indicated that I would hand down this judgment without the need for attendance of any party. This I now do. I have already approved an order for the further management of this case. It seems to me that what is now required is an assessment as to whether this is a neglectful or deliberate burning injury; a clarification as to what other material facts need to be explored in evidence as to emotional abuse; a parenting (and perhaps psychological) assessment of the mother; and a specialist psychological risk assessment of the father (in particular in relation to unsupervised contact) based on the inferences from the criminal proceedings indicated by me and acknowledged by the father. The case should then be listed for a further case management hearing.

Order accordingly.

Solicitors:*A local authority solicitor*

Atkins Hope for the first respondent

Blackfords for the second respondent

Morris Sutherland for the guardian

PHILIPPA JOHNSON

Law Reporter