St John's
CHAMBERS

Family Law in the Supreme Court

Abigail Bond highlights the key points of the two most recent Family Law judgments of the Supreme Court.

Last month (February) saw the publication of two Supreme Court family law decisions, in both of which the lead judgment was given by Lady Hale. In the same month Lady Hale gave the 8th Kuttan Menon Memorial Lecture http://www.supremecourt.gov.uk/docs/speech-130221.pdf, in which she called for positive discrimination in the appointment of senior judiciary in the light of the latest and disappointing figures (only 22.5% of Judges in the ordinary courts being women and only 4.2% BME). Those interested in that issue are referred to the text of her speech for greater detail, but in summary she argued that women (and other groups) can bring a different set of life experiences to the decision-making process and that "*there is still a benefit in having someone there to voice the minority view, perhaps to lay down a marker for the future, and perhaps to reassure that part of the human race that holds up half the sky that someone up there is listening.*"

It would perhaps have been too much of a coincidence if, being published just four days after her Ladyship's lecture, either Re J (Children) [2013] UKSC 9 http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2012_0128_Judgment.pdf or Re L and B (Children) [2013] UKSC 8 http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2012_0263_Judgment.pdf had provided a vehicle for illustrating her point that women (or courts with women on them) might decide things differently. Indeed, save for a minor difference of opinion in Re J between Lord Wilson and Lord Sumption on the one hand, and Lady Hale, Lord Hope and Lord Reed (with whom Lord Clarke and Lord Carnwath agreed) on the other, the Supreme Court in each case was unanimous.

What follows is – in an attempt to avoid the TL;DR effect – intended to encapsulate the key points in each case rather than provide a full analysis of the issues.

Re J (Children) [2013] UKSC 9

The three children who were the subject of the proceedings were HJ, TJ and IJ aged 7, 6 and 3 respectively. The two oldest children were the children of the 2nd Respondent (DJ) and his former partner and had been looked after by their father for the whole of the lives. IJ was the child of the 1st Respondent (JJ) and her former partner (SW), but had been brought up in a family unit with JJ, DJ, HJ and TJ since her birth. Proceedings were issued in April 2011 after the Local Authority became aware of findings which had made by HHJ Masterman in care proceedings brought by a different Local Authority in relation to JJ's second child, born on 13.8.2005. Those proceedings had themselves

been brought because of the death of JJ's first-born child T-L. HHJ Masterman had found that T-L had suffered non-accidental injuries and that she had died from asphyxia caused either by a deliberate act or by SW taking her to bed with him and JJ leaving her in SW's care. Importantly, neither JJ nor SW was excluded from the pool of perpetrators, and the Judge made findings in relation to each of them of gross and substantial collusion and failure to protect T-L.

The Local Authority concerned with HJ, TJ and IJ argued that the three children were "likely to suffer significant harm" as a result solely of JJ's inclusion in the pool of perpetrators in those previous proceedings, and confirmed that they did not seek to bring failure to protect into the equation in order to establish threshold. HHJ Hallam found that the Local Authority could not establish threshold on that basis and dismissed the proceedings. The Local Authority's appeals to the Court of Appeal and thereafter to the Supreme Court were dismissed.

- The case is the 7th Supreme Court case on the "apparently simple" wording of section 31(2) of the Children Act 1989. The closest the court had come to considering the issue in the past was in In re S-B [2010] 1 AC 563 where it was suggested (*obiter*) that the fact that neither parent could be ruled out for non-accidental injuries to their oldest child did not establish a real possibility that the Mother would injure the youngest child, whom she sought to care for alone.

- The starting point for considering whether a child is likely to suffer significant harm is the case of Re H [1996] AC 563, which establishes that a prediction of future harm must be based upon facts which have been proved on the balance of probabilities and that mere possibility, unresolved judicial doubts and suspicions are not enough.

- The fact that a person is in the pool of perpetrators for harm sustained to a different child in the past means only that there is a real possibility that that person was the perpetrator and does not establish on the balance of probabilities that that person was in fact the perpetrator. The inclusion of a person within the pool of perpetrators may be (is likely to be) sufficient to cross the threshold where the perpetrators are still together and are putting themselves forward as joint carers of a subsequent child. However, where the parties have separated, and one of them seeks to care for a subsequent child, the inclusion of that person within the pool of perpetrators is not a finding of fact sufficient to establish likelihood.

- This is simply a logical extension of the Re H principle. See Lady Hale at para. 49: "*A finding of a real possibility that this parent harmed a child does not establish that she did. Only a finding that…she did…can be sufficient to found a prediction that because it has happened in the past the same is likely to happen in the future. Care courts need to hear this message loud and clear.*"

- The Supreme Court were divided however, on whether the finding that a person is one of the potential perpetrators must be "totally ignored" in establishing threshold in the subsequent proceedings:

    - Per Lady Hale at para. 54: "*a real possibility that this parent has harmed a child in the past is not, **by itself**,* [my emphasis] *sufficient to establish the likelihood that she will cause harm to another child in the future*." See also Lord Hope at para. 87 and Lord Reed at para.98.

    - Cf Lord Wilson at paras. 78 and 79 (with whom Lord Sumption at para. 92 agreed): "*if X's consignment to a pool of perpetrators has a value of zero on its own, it can, for this purpose, have no greater value in company*."

    - The differences between the justices here are more apparent than real: Lady Hale and Lord Hope on one interpretation simply making the point that in circumstances where a previous child has been injured or even killed whilst in the same household as the parent who now seeks to care for a subsequent child, there are usually innumerable other associated facts relevant to the prediction of future harm (ie was there a delay in seeking medical attention? Was there concealment from the authorities? Was there drink/drugs/violence in the household circumstances at the time and if so, how have things changed?). Notably, Lord Wilson in fact agreed (at para. 70) that a finding as to a failure to protect in the earlier proceedings may well enable the Local Authority to meet the threshold in relation to the subsequent child.

    - For thought - did the Supreme Court deal satisfactorily with the *reductio ad absurdum* raised in the Court of Appeal in Re J and previously in Re F (Interim Care Order) [2011] EWCA Civ 258: "*take the case of two parents who are consigned to a pool of possible perpetrators of non-accidental injuries to their child; and who then separate; and who each, with other partners, produce a further child, who together become the subject of conjoined care proceedings. Are both those applications for care orders required to be dismissed even though before the court is, on any view, a perpetrator of injuries to that older child?"* Has logic and legalism prevailed over child protection, or does the Supreme Court decision rightly uphold the bulwark against too ready an interference with family life on behalf of the state?

Re L and B (Children) [2013] UKSC 8

A judge wishing to avoid the consequences of a failure to identify a perpetrator should not, however, strain to establish a perpetrator if the facts and evidence do not make it possible. Arguably, that is what had happened initially in Re L & B where the first instance Judge in December 2011 gave a "preliminary outline judgment" identifying the father as the perpetrator of non-accidental injuries to the parties' child, but at a further hearing on 15.2.2012 concluded in a "perfected judgment" that neither parent could be excluded from the pool. The case reached the Supreme Court following the mother's successful appeal to the Court of Appeal, which restored the findings against the father. Crucial to the history of the case was the fact that the order drawn up at the December hearing was not formally sealed by the Court until 28.2.2012. In a nutshell:

- A judge has jurisdiction to change his or her mind up until the time when the order is drawn up and perfected.

- There was no "exceptionality" test as to whether the jurisdiction should be exercised in any particular case.

- The Judge had been entitled to exercise that jurisdiction in this case: noone had irretrievably changed their position as a result of the December judgment; the final welfare decision had yet to be decided; and it was of the utmost importance that no judge should be required to decide the future placement of a child upon what he or she believes to be a false basis.

- Had the order been sealed and perfected before the hearing on 15.2.2013, the Judge would still have had jurisdiction in the light of a later change of circumstances to alter her findings prior to the welfare stage of the split-hearing.

- However, the Supreme Court declined to rule on the finely balanced arguments as to whether the Judge would have had jurisdiction, after the sealing and perfecting of the Order, to simply change her mind: "*In our view the preferable solution would be to avoid the situation arising in the first place*."

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