

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

A

Appellant;

-and-

A HEALTH AND SOCIAL SERVICES TRUST
and

E

Respondents

IN THE MATTER OF M and T

Before: Coghlin LJ, Hart J and Sir John Sheil

HART J (giving the judgment of the court)

[1] This case concerns an appeal from a decision by Stephens J given on 16 October 2010 in which he made an order under Article 50 of the Children (Northern Ireland) Order 1995 placing two young children (whom we shall call M and T) in the care of the relevant Trust. As children are the subject of the application nothing must be published which would result in the disclosure of their identities or that would enable them to be identified. Therefore in this judgment we shall refer to the father and the mother of the children and to the children in that fashion rather than by initials.

[2] This case relates to twins who were born on 13 June 2009 and who are therefore now just over two years of age. On the application of the Trust, and after protracted proceedings during which various assessments and investigations were carried out, a hearing took place before Stephens J who found that the threshold criteria required to be satisfied before an order placing children in care can be made were met, and he made the order appealed against for that reason.

[3] The mother is now 31 and lives next door to the father, although they are not married. She is a vulnerable woman who was herself placed in foster care when her parents died when she was young. In 1997 she was first assessed as having intellectual and attainment deficiencies. She has two older children who have been taken into care, and who have been freed for adoption. She views her role as that of a supportive parent, but concedes that she is unable to care for the twins on her own. At the hearing before Stephens J she conceded that the vast majority of the threshold criteria relied upon by the Trust had been satisfied, although she supports the father's appeal and submits that he has the capacity to be a carer for the children. It is clear from the various reports that were before Stephens J that she has engaged positively with the Trust, has positive relations with the foster carers, and wants her relationship with the children to be promoted if this court affirms the care order.

[4] Following the hearing in the High Court, the father lodged a Notice of Appeal prepared and signed on his behalf by a different firm of solicitors to that which represented him during the proceedings in the High Court. It appears from what he has explained to us that they were willing to do so in order to assist him at that stage, but as he has not received legal aid he has not been professionally represented during the appeal. He therefore appeared before us in person and presented his case as a personal litigant. The substantive grounds of appeal that were lodged on his behalf sought an order that the matter be reheard on the following grounds.

- (1) The learned judge failed to give sufficient weight to the oral evidence given by the [father] at hearing.
- (2) The learned judge gave undue consideration and attached undue weight to the written evidence adduced at hearing in support of the [Trust's] case.

When the matter came on for hearing it transpired that the father had not complied with a direction given by the court on 4 April 2011 that he (a) file an amended Notice of Appeal, and (b) lodge a skeleton argument. However, he wrote a letter to the court dated 27 May 2011 in which he made the particular point that at the hearing his legal representatives did not call any of the Trust's witnesses despite his request that they be questioned.

[5] When the matter first came before the court for a substantive hearing on 13 June 2011 the father confirmed that the case he now wished to make was that at the hearing before Stephens J he was prevented from asking questions, and that his legal team did not follow his instructions. He confirmed that he had seen the transcript of the hearing during which he gave evidence to which we shall refer, and he accepted that in the High Court he

agreed that the documents in the form of the experts' reports and other documents could go before the court without formal proof. However he maintained that his legal team never explained to him at the High Court that he could require the social workers who had prepared reports on behalf of the Trust as witnesses to be called so that they could be cross-examined.

[6] In the light of this we felt it was essential that this matter be explored, and the court explained to the father that in order for that to be done it would be necessary for him to release the legal advisors, both solicitor and senior and junior counsel, who appeared for him in the High Court from their obligation to observe legal professional privilege in respect of the advice they had given to him during the course of the hearing. The father agreed to this being done. We therefore directed that the father's letter of 27 May 2011 should be sent to his solicitor and counsel, and that they be invited to provide whatever assistance they felt they could to the court in relation to the father's assertions. The father confirmed in the course of that hearing that this was the only point he wished to make in support of this appeal. Although the appeal therefore relates to what transpired at the hearing, it is necessary to make reference to the content of the experts' reports which were placed before Stephens J without objection. It is also appropriate that we should refer to the various steps which took place prior to the case being listed for trial before Stephens J.

[7] In his lengthy memorandum prepared in response to the court's invitation, senior counsel who appeared on behalf of the father before Stephens J referred to the period between February and September 2010 when the case was before Weir J on a number of occasions. He observed that Weir J was plainly anxious to see whether it was possible for the mother to be supported as the primary carer. He described Weir J's approach throughout this period as being:

“... that he would consider favourably any steps which could be taken to support [the mother] as the primary carer with help from a practical helpful adult and also support from [the father]. Despite this encouragement from the Judge, [the father] entirely rejected that approach - he asserted that the role of mother was entirely beyond [the mother] and that he himself should be the primary carer with support from members of his family. In the alternative, he would recommend members of his family, his adult daughters, to be the primary carer with him supporting them.”

[8] Reports were placed before Stephens J from Dr Philip Moore, a consultant clinical psychologist, and from Dr Manley, a consultant

psychiatrist. Dr Moore saw the father first, and in his report of 23 January 2010 made a number of observations which are of particular relevance to the way the case was pursued before Stephens J and before this court. Dr Moore expressed his opinion that:

“[The father] has an average intellectual ability with suggestions that he was a successful parent. He would also appear to have a good relationship with [the mother]. She has also commented upon his positive influence. He would certainly seem to have the ability to provide [the mother] with support if he decided that his role would be as a supporter to [the mother].

A stumbling block may be his attitude to any putative guidance from social services. He has effectively dismissed any role for social services, [which is] problematical, especially if [the mother] requires such support.”

Dr Moore expanded on what his concerns were on the next page of his report when he said:

“[The father] is antagonistic and dismissive towards social services with an opinion that his parenting ability should be self-evident and should not therefore require formal assessments.

My main concern about [the father] is that his animosity may hamper any attempts by social services to monitor the children’s welfare, should they be placed in his care. The potentially major role of [the mother] in a shared care arrangement may also necessitate a substantial social services involvement especially given her learning difficulties and negative parenting experiences when she was much younger.”

[9] In his report of 20 March 2010 Dr Manley gave his opinion as to the likely prognosis in relation to the father’s mental health difficulties as follows:

“Although [the father’s] mental state is generally stable he would, in my view, be prone to future episodes of depression and/or acute anxiety in reaction to life stressors. [The father] has gone through periods of alcohol misuse which have led on to a deterioration in his mood state and have also

played a part in [the father's] involvement in verbal and physical aggression towards others, [including his ex-wife] and may have also led [the father] into situations where he himself has become the victim of assault. Prognosis therefore with regard to his future mental health must remain somewhat guarded."

[10] Perhaps of most significance in the context of the issues now before the court is Dr Manley's conclusion about the possibility of the father taking on the role of primary carer of the twins with the mother in a supporting role. His opinion was as follows.

"In my view, [the father] would not be able to take on the role of primary carer of the twins without significant and ongoing support from (sic) childcare services and other agencies recommended by them. I am concerned that [the father] is not taking a full and active part in the parenting assessment to date and continues to have difficulty interacting with supervisory bodies. I do not believe that [the mother] could become the primary carer of the twins in view of her learning disability and her own vulnerabilities."

[11] At the hearing before Stephens J, although the mother supported the father's objection to the twins being taken into care on the basis that he could be the primary carer, the Guardian Ad Litem supported the application by the Trust. The Guardian's report described the father's attitude towards social workers as being hostile and negative, and sometimes "very hostile". Significantly, it also recorded that the father's family were noted to have said that they did not wish to be involved in any assessment process of their fitness to act as a carer towards the twins. The Guardian's conclusions were expressed at 12.8 and 12.9 of the report in the following terms.

"The information and assessments completed over the course of these proceedings in respect of [the father] highlight a number of concerns regarding [the father's] capacity to assume full-time parental responsibilities. These concerns include, his age and fitness to undertake the parenting task of two young children, his own parenting style; his limited appreciation of [the mother's] limitations; historical information regarding levels of aggression and violence and in particular his negative attitude and general hostility towards professional involvement.

I am satisfied that the Trust has made all possible attempts to assess and support the parents with a view to either and/or both of them assuming direct care of the children, and furthermore that the Trust has explored all the options with regard to identifying potential placements and/or support in the extended families.”

[12] In view of these opinions it is unsurprising that in his memorandum senior counsel drew attention to a passage in the report of a further parenting capacity assessment exercise which took place in April 2010 when the writers of the report observed the father during contact with his children on eight occasions, and observed him in the course of appointments during that month in his home. Senior counsel concluded that:

“A recurring theme of the report is [the father’s] reluctance to accept guidance and advice. To a degree this is understandable – he had played some part in raising his own children who were, by now, adults but it clearly creates an unhelpful impression if he so dismissive of the assessors.”

[13] We have referred to these matters at some length because of their relevance to the comments of senior counsel as to what took place during the course of the hearing before Stephens J. The father’s case before us is that, contrary to his instructions, senior counsel did not explain to him that he could cross-examine the social workers, and he maintains that this meant that his case was not properly put before the judge. However, the father’s case is difficult to reconcile with what actually happened before Stephens J as disclosed in the transcript of the exchanges and evidence before him. Senior counsel expressly stated that he was not challenging the contents of the reports from the doctors, and the father accepted before us that he had consented to the reports from the doctors being admitted without formal proof. It is clear from the transcript that the areas of agreement and disagreement were described to the judge by counsel for the various parties, and in particular for the mother and the father. It was suggested to the judge that it might be helpful if the parties had the opportunity to discuss the matter and the judge rose to allow them to do that. Immediately following the resumption of the court the course of events can be seen from the following extract from the transcript.

“[Senior Counsel for the father] – My Lord we have discussed a possible way forward and in view of the limitations on the disputes what we suggested that we might proceed by me calling [the father] for a few minutes and I do not anticipate that it will be

necessary for your Lordship to hear either from the social worker or from the Family Centre worker. They are here today. If that is acceptable to your Lordship.

Judge Stephens - That is on the basis obviously that their reports are in evidence.

[Senior Counsel for the father] - Yes my Lord. Could I also say that as your Lordship will be aware from my opening there are points of difference between the parties on them but I am not requiring those witnesses to give evidence and [the father] would like to make a number of points to your Lordship."

[14] [The father] then gave evidence before Stephens J at some length and was cross-examined. He made it abundantly clear in the course of his evidence that he was not happy with the manner in which he had been treated by social services, as can be seen from the following extract from his cross-examination by Ms Simpson on behalf of the Trust.

"Ms Simpson - Well I think it is safe to say that you do have a negative attitude towards social services and you have had the attitude throughout this case. Isn't that right?

[The father] - Towards such members of it, yes.

Ms Simpson - And that this case has been going on now for nearly 1½ years and there has been no improvement in the situation?

[The father] - Not with certain members of the social services.

Ms Simpson - So it is safe to say that there is not going to be an improvement in the short term?

[The father] - Well the person that's working with us now is no both[er] whatsoever. I wasn't agreeing with her at the start because they sprung her on top of me and I did not know who she was. I apologised to her for saying something to her at one of the meetings and I them (sic) that I would work with her. I have no problems working with her at all. She is a nice lady,

she is an elderly lady but she a nice lady, but she doesn't antagonise me.

Ms Simpson - My point is [] its difficult to see how you would accept social services into your home and it is difficult to rely upon the proposition that you would contact social services if there was a problem with the twins in your care based on history of this case in terms of your ability to engage with authority figures.

[The father] - If there was a problem involved with me rearing these children I would be the first one to go to social services.

Ms Simpson - My Lord unless there is anything further.

Judge Stephens - It is entirely a matter for yourself.

[Senior Counsel for the father] - That's the evidence for [the father]."

[15] It is therefore clear that at the time when the father came to give evidence before the judge there was an abundance of evidence which had been placed before the judge without objection which showed that various experts had concluded that the father was not capable of looking after the twins, and that the possibility of the twins being placed with adult members of his family was not a practical one because those members of his family who were suggested by the father as suitable for this purpose all refused to allow social services to assess their suitability for that role. It is therefore not surprising that senior counsel for the father felt it necessary to consult with the father in advance of the hearing, and to explain to him that the prospects of successfully resisting the application for a care order were remote. In particular, as appears from the passage from the memorandum which we set out below, it was made clear to the father that an aggressive cross-examination of the social workers from the Trust was unjustified and would not advance the father's case.

"10. The end result of all the work which was put into the case, with the strong encouragement of Mr Justice Weir, during 2010 was that the reports were at least guarded if not negative about [the father] and there was simply no practical or feasible option being advanced by him to explain how the children could possibly be raised with his involvement within an

extended family placement. In these circumstances, I felt it necessary to consult in advance of the hearing with [the father] for the purpose of advising him that the prospects of resisting the application for a care order were remote and to advise him that I could not cross-examine the social workers on the basis which he wanted, that basis being that they had behaved like Nazis and that they should be ashamed of their approach. [The father] accepted that the case could not be won and was specifically given the option by me of engaging alternative counsel if he wanted a more aggressive approach taken, an approach which I believed could not possibly be justified on the facts of the case. He chose not to seek alternative representation.

11. Accordingly, on the day of the final hearing, rather than have the social workers called one after each other to give evidence of their negative experiences with [the father] and explain their position by reference to the battery of experts' reports, I outlined [the father's] position to the Judge. I told him how strongly [the father] felt about the way in which he had been treated and I was allowed to call [the father] to give evidence. The Judge listened to his evidence, considered the position overnight and, inevitably, gave judgment on the following day making care orders in respect of each baby."

[16] If the father's case which he now advances is correct this means that the account which has been given by senior counsel, supported by his junior counsel and his then instructing solicitor, is incorrect. We have carefully considered everything that the father has said about what happened at the trial, but we are in no doubt that he is incorrect in his description of his position at that time. We do not accept that a responsible senior counsel of considerable experience in this field, supported by junior counsel and an experienced solicitor, would have behaved in the way the father alleges. In any event, it is clear from the excerpt from the transcript set out above that the course of events before Stephens J is wholly at variance with what would have happened if the father's account was the correct one. The father gave evidence before Stephens J, and he made it abundantly clear to the judge that he was very unhappy with the way that the social workers had behaved towards them. Had the father believed at that time that he was being prevented from putting his case before the court we have no doubt that he would have made clear to Stephens J that that was the case. It may well be that the father reluctantly accepted the advice he was given by senior counsel,

but we are satisfied that he did accept that advice, and that the advice he was given was entirely appropriate in the circumstances of this case. Whilst it is clear that the father had, and still has, a deep-seated sense of grievance towards those social workers who dealt with his case at an early stage because of the circumstances in which the twins were taken from their parents and taken into care, we are satisfied that the father's account of what was said to him, and his assertion that counsel acted in defiance of his instructions, is not borne out by the evidence placed before us, and is at variance with what happened.

[17] Whilst that is sufficient to dispose of the single ground upon which the father brings his appeal, given that he is a personal litigant, and in view of the importance of the case to both the father and the mother we consider it appropriate to also consider the grounds of appeal as they were originally framed. It is clear from his written judgment that Stephens J was fully alert to the attitude of the father towards social services when he observed at [13]:

"I also consider that [the father] has had plenty of opportunity to demonstrate his parenting ability and he has availed of none of them. To parent the twins [the father] and [the mother] need the support of social services and I find that they will not avail of that support. A vital component is therefore missing."

And at [20]:

"[The mother] is unable to care for the children on her own. This unfortunately will remain the position. [The father] and [the mother] are unable to care for the twins together without support from [the father's] family and from social services. [The mother] will not avail of support from social services unless [the father] does. [The father] will not in my estimation avail of that support."

[18] A key aspect of the father's case before Stephens J, and again before us, was that he would be able to look after the twins with the assistance of adult members of his family. However, the judge concluded at [20]:

"I do not consider that support is available from [the father's] family in either the short or the long term. None of his family have agreed to be assessed and none of them has chosen to give evidence. On that ground alone also [the father] and [the mother] would be unable to parent the twins."

[19] We have carefully considered the judgment of Stephens J and we are satisfied that he correctly directed himself in relation to the relevant principles to be applied in circumstances such as those which we have to consider. In particular, he had regard to the special contribution to the welfare of a child that a natural parent can make, as can be seen from the terms of [19] of his judgment where he observed:

“That in the vast majority of cases the natural carrying and giving birth of a child brings with it a very special relationship between mother and child. It is the totality of, together with the individual components of, the impact of the natural relationship on the twin’s welfare, to which I will have regard during the course of a consideration of the welfare component in this case.”

[20] We have also considered whether the provisions of Article 8 of the European Convention on Human Rights have been taken into account. The judge did not expressly refer to this, but we are satisfied that the Article 8 rights of the father, the mother and the twins have been adequately protected and fully considered throughout the proceedings. We can see no basis on the material before us that would justify any other conclusion. We are also satisfied that what the European Court of Human Rights referred to as the procedural requirements of Article 8 in R and H v The United Kingdom (35348/06) at [75] have been fully complied with. Throughout the proceedings leading up to and including the hearing before Stephens J both parents were legally represented, and the mother was legally represented in this court. It is clear that Weir J and Stephens J went to very great lengths to consider every possible basis upon which it might be possible to ensure that the welfare of the twins and their best interests could be safeguarded in a fashion which allowed them to remain with one or both of the natural parents. Sadly, for reasons which were fully explored, this has not proved to be possible.

[21] We recognise that the father genuinely believes that he has the abilities to bring up these very small children, even though he accepts that he cannot do so on his own. We also accept that his prime motivation is to do what he perceives to be in the best interests of the children. Unfortunately, for the reasons which Stephens J identified, all of the evidence available admits of only one conclusion, and that is the father cannot provide the necessary environment within which these children can be brought up on his own, that he requires assistance to do so, but he will not allow social services to assess those members of his family who he says would provide that assistance, nor will they agree to their fitness being assessed. That being the case we are satisfied that the conclusions at which Stephens J arrived cannot be criticised,

were plainly justified on the evidence, and were correct. We are also satisfied that it was not the case that the father was prevented from requiring the social workers to be cross-examined before Stephens J. On the contrary, we are satisfied that he agreed to the sensible, indeed inevitable, course adopted by his senior and junior counsel, and by his solicitor, and that his case was fully and properly explained and presented to the trial judge. The father had the opportunity to make his case to the judge and the judge did not accept his evidence, and the evidence before the judge was such that an outcome acceptable to the father was unachievable.

[22] For these reasons the appeal fails and it is dismissed.