

Neutral Citation Number: [2010] EWCA Civ 1363
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM MANCHESTER COUNTY COURT
(HER HONOUR JUDGE PENNA)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Tuesday, 19th October 2010

Before:

LADY JUSTICE BLACK

IN THE MATTER OF H (a Child)

(DAR Transcript of
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Official Shorthand Writers to the Court)

Ms Sharon Love (instructed by SFN Solicitors) appeared on behalf of the **Applicant** mother.
The **Respondent** father did not appear and was not represented.

Judgment

Lady Justice Black:

1. The child at the heart of this proposed appeal I will call only Z. He was born on 6 October 2009 and so he is one year old. There is a shared residence order in relation to him and his mother, who is appearing in front of me seeking permission to appeal, is his main carer. Her application is for permission to appeal an order of HHJ Penna made on 26 July of this year. She sought a stay of the contact provision in that order, but that was refused in August by Hughes LJ.
2. HHJ Penna's order followed three days of hearing, the days having been effective to a greater or lesser extent.
3. The order included provisions that the child should reside with his father on alternate weekends, from 11am on Saturday morning until 5pm on the following Tuesday. The design of the order was that the father would come from Ilford, where he lives, on the train to collect Z and would meet him and his mother at Manchester station. The journey was then to involve the use of a train from Manchester to London, which is something over two hours in duration, and then tube of about an hour to Ilford. That would then be reversed on the following Tuesday.
4. Z is self-evidently a young child. He suffers from a club foot which has received surgical attention and is now being treated by a boot and a splint which has to be worn for a significant part of the day, approximately 14 hours. He will go on wearing that until he is four years old and the prognosis for him is good.
5. The parents lived in Ilford following a religious marriage until November 2009 and the father and his family continue to live there, hence the arrangements that HHJ Penna imposed with regard to contact. There have been proceedings since their separation to sort out issues over contact to Z.
6. The mother now argues that the arrangements that HHJ Penna imposed in relation to contact are deficient and that the judge ignored factors which were relevant and arrived at the wrong decision as to what should happen for contact. Of course I have been calling it "contact". That is a shorthand because the way in which the judge drafted the order was by way of a shared residence provision, but I think my meaning will be well understood.
7. The mother says firstly that the travelling involved in this contact is tiring and is too much for a child of Z's age and is particularly too tiring for a child with Z's disability. She says that it has an impact on his treatment. Her argument is that he has to wear his corrective appliance for 14 hours in the day. That has to be in his own bed where he normally sleeps at night time or during his daytime nap. He gets about 11 hours of that time in at night and then he has a nap for, she says, about three hours during the day and that is when he makes up the rest of the time needed for his treatment. She says he cannot wear his brace except in his own bed, by which I am sure she includes his own bed at his father's house as well as at hers, because that would disrupt his routine and his acceptance of his treatment and therefore she says he cannot wear his brace

for the required amount of time on the two days every fortnight when he is travelling to London and back.

8. She says that she fears that his deformity is at increased risk of continuing or recurring as a result of his inability to wear the corrective appliance on those days. She says that the judge ignored those factors and therefore came to a wrong decision about the travelling and contact arrangements.
9. She has also raised in the papers other arguments, for example that a Cafcass report should have been obtained and the Cafcass officer should have looked at the implications of travelling at Z's age, and she complains about the way in which the judge concluded that it was better to have contact in London than in Manchester. Those matters have not in fact been pursued today and in any event I am quite satisfied that there is no arguable appeal in relation to them.
10. The order the mother would like substituting, if she were to appeal successfully from HHJ Penna's order, is an arrangement for alternate weekend contact in Manchester with daytime contact on the Saturday and Sunday of those weekends.
11. HHJ Penna gave a very careful, thoughtful and thorough judgment in this case. She identifies the importance of Z having a relationship with both of his parents who she concluded are both capable of caring for him in an acceptable way. She assessed the parties, and I have no doubt that her assessment of them entered into the determination she made of a number of the matters that arose in the case. She found the father to be reasonable and balanced and she had overall a favourable impression of him though she found him a little dismissive of the mother's concerns for Z. She had no doubt that he was a capable father. The mother she found to be much more voluble in her evidence, presenting as anxious, and in the judge's view that anxiety led the mother to exaggerate and the judge gave examples of that exaggeration.
12. The question of Z's disability was not overlooked by HHJ Penna. She mentions it expressly at paragraph 4 of her judgment in relation to which she said this:

"I mention that [Z] has a medical condition, which is club foot; it is treated by the use of boots. That is an accepted conventional treatment and although it involves a certain amount of work on the part of those caring for him, I have no doubt that the parents are both committed to see that [Z] receives appropriate care in that respect."
13. It is plain therefore that HHJ Penna had the question of Z's disability well in mind when she was considering what she should do with the case and also that she had the question of his treatment in mind because she refers to it expressly in that paragraph.
14. The judge dealt in turn with the various issues that the mother had raised through her counsel, and no doubt in her own evidence, as well as concerns in relation to contact, giving cogent reasons for her view in relation to each of

them. One of the anxieties raised by the mother was the question of routine and the judge dealt with the whole question of routine expressly in her judgment. She agreed that routine was important for Z so it could not be said that she was ignoring that aspect of matters, but she considered that what she was going to impose would not disrupt Z's routine in an unacceptable way and that the changes that would be brought about by the contact would be changes to which he would adapt. It is fair to say that in the passage in her judgment in which she deals with routine she does not expressly deal in terms with the question of the brace and the implications of the journey for that treatment, but she was plainly giving consideration to the whole question of Z's routine and was doing so against the background of her knowledge of Z's disability and his treatment. She considered the train journey and its likely impact on Z expressly. In paragraph 14 she said this:

"I assume that the father will travel by train. That will be, in my view, least disruptive for [Z], who may sleep for part of the journey but certainly can be attended to appropriately on the train."

And she provided also for a review in December to see how matters were working.

15. In order to evaluate the mother's proposed appeal against HHJ Penna's order I have reviewed the material that has been provided in terms of information from the doctors who have been treating Z. At page 12 in the bundle there is a letter from his paediatric orthopaedic surgeon. She says:

"...we discussed today again the protocol for his boots and bars. He should wear these if possible for around about twelve hours overnight and for naps when he goes down into his cot or bed. A routine should be kept for him so that he understands that it is an immovable part of his day."

On page 13 of the bundle writing on 24 June of this year she says:

"We expect him to wear his boots and bars for twelve to fourteen hours over the night-time period at least until the age of four years."

On page 14 of the bundle writing in July of this year she says:

"It is entirely satisfactory for [Z] to wear his boots and bar brace between the hours of 1-4pm and 7pm-6am if this is the regime the mother and [Z] are comfortable with."

And on page 16 of the bundle writing on 24 August of this year she said:

"In general we find that if a consistent night time routine is set up for children regarding the application of the boots and bars that they respond

well to this and accept the routine. It is important to maintain the use of boots and bars for fourteen hours at night and if they are put down into their normal 'sleep place' for a nap to wear them then. This maintained consistency may help with the long term outcome for his feet. Without the boots and bars the recurrence of the deformity at [Z's] present age is expected to be at the 70-80% mark."

16. I note that last letter in particular says that it is important to maintain boot wearing if the child is put down during the day to sleep in their normal sleeping place. It does not say that the child has to be put down in their normal sleeping place and wear the boots during the day every day and nor do the other letters. There is a reference in one of the early ones to trying to achieve that if possible. Indeed it would seem to me, reading this correspondence, that it may well be that the important thing is that each time they go into their bed at home a child in this position should wear their boots and brace so that they are not to become resistant to doing so at other times, simply because they have been allowed to get into bed without the appliance on an occasion from time to time. Certainly the thrust of the letter and the preceding letters in this chain to which I have referred is not to suggest that missing two days a fortnight during the nap period will be a major problem either for Z's routine or for the effectiveness of his treatment.
17. I have no doubt that that sort of information (the later letters would not have been available to the judge, but that sort of information would have been) played its part in the judge determining quite reasonably that such disruption to Z's routine as the train journey was going to represent would be acceptable disruption without an undue impact upon his welfare. Indeed I also observe that with increasing age it is unlikely that Z is going to be prepared to sleep for three hours by way of a nap for very much longer or indeed whether it would be in his interests that he should do so in developmental terms.
18. I am not persuaded that the mother has identified anything in the judge's treatment of the issue of the journey, therefore, that would provide a viable ground of appeal with any real prospect of success. The decisions that the judge took were within her wide discretion with regard to that matter. Naturally if problems are in fact encountered then the review will be in place and that is the moment to raise them.
19. The contact has, I am very pleased to record, been progressing as HHJ Penna has outlined between her order and now and that is for some months now and so I hope that things will continue to move on smoothly. I do not grant permission to appeal her order.

Order: Application refused