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Re U (Re-opening Appeal)

[2005] 2 FLR 444

24/02/2005

Barristers
Catherine Wood QC

Court
Court of Appeal

Facts
The child had been removed from the mother on the basis that the mother posed a risk to the child. The child was placed with the paternal grandmother on the understanding that the paternal family accepted the court's findings of abuse and would co-operate in excluding the mother from playing any unsupervised role in the child's life. The family in fact deliberately misled the local authority as to the involvement of both the mother and the father in the care of the child and breached clear provisions designed to ensure that the mother did not have unsupervised contact with the child. When the local authority confronted the mother with evidence of this, the father disappeared with the child for a few days, after which the child was removed and placed with a foster family. The father then disclosed that he did not accept and never had genuinely accepted that the mother had harmed the child, and that he had remained in a relationship with her throughout. A care order was made on the basis that the child be placed for adoption. The mother was refused permission to appeal (Re U (A Child) (Serious Injury: Standard of Proof); Re B (A Child) (Serious Injury: Standard of Proof) [2004] EWCA Civ 567), but made a further application subject to the principles in Taylor v Lawrence [2002] EWCA Civ 90 and the provisions of CPR r 52.17, on the basis of a challenge to the medical evidence relied upon in the care proceedings. Permission was granted to the mother to disclose documents in the case to a medical expert, who eventually provided three reports, one submitted only one day before the hearing. The mother refused to agree that the meeting of experts be chaired by the guardian, or minuted by the solicitor for the child (although this had happened at an earlier experts' meeting) because, she claimed, the guardian was biased against her, and the solicitor would, therefore, not be impartial. The court directed that the guardian attend the meeting, but agreed that a retired judge could chair the meeting. The mother obtained further reports from experts, which, although no permission had been sought from the court, were admitted in evidence, together with some very late evidence from other sources.

Held
Held – dismissing the application –

(1) The Taylor v Lawrence jurisdiction, permitting the re-opening of an appeal on the basis of fresh evidence, could only be properly invoked where it was demonstrated that the integrity of the earlier litigation process, whether at trial or at first appeal, had been critically undermined. The jurisdiction was, therefore, not concerned solely with the case where the earlier process had or might have produced a

wrong result, but primarily with special circumstances where the process itself had been corrupted. It was the corruption of justice that as a matter of policy was most likely to validate the exceptional recourse of re-opening an appeal, a recourse which relegated the high importance of finality in litigation to second place. While fresh evidence might justify a Taylor v Lawrence application in the absence of some other factor which had corrupted the litigation process, that could only happen if, as with the instances of a corrupted process, the injustice that would be perpetrated if the appeal were not re-opened would be so grave as to overbear the pressing claims of finality in litigation (see paras [18], [20], [21]).

(2) The Ladd v Marshall grounds used to justify a first-time appeal based on new evidence would not suffice to justify a second appeal under Taylor v Lawrence . It was a necessary, but by no means sufficient, condition for a successful application under CPR r 52.17(1) that, not merely did the fresh evidence demonstrate a real possibility that an erroneous result had been arrived at in earlier proceedings, but that there existed a powerful probability that such a result had in fact been perpetrated (see para [22]).

(3) Insufficient doubts had been cast on the evidence of the three medical witnesses at the original hearing to justify a re-opening of the medical issues. Given the concerns about the parents' credibility, reliance upon medical opinions based on the parents' unsubstantiated account of the child's medical history, inconsistent as it was with contemporaneous medical records, did not begin to surmount the high hurdle required by CPR r 52.17. Evidence as to a possible alternative cause for the child's symptoms was, it had been conceded, still lacking, but the needs of this child could not be postponed nor subordinated to future scientific research and debate (see paras [78], [79], [95]).

(4) There were no grounds revealed in the papers to justify the removal of the guardian from her traditional role, nor any good reason to exclude her or her solicitor from their normal role in the experts' meeting. A party in a public law case was not entitled to attempt to dispense with the guardian or to sideline or marginalise the guardian on the ground that in an earlier part of the case the guardian's recommendation had been adverse to that party. Other than in exceptional circumstances of specific bias or impropriety, the independence of the guardian might not be impugned as a result of the decision of the guardian to support the proposed care plan of the local authority. The invitation to a retired judge to chair the meeting of experts had been an expensive and unnecessary alternative to the use of the guardian or her solicitor as chairman. It was a matter of concern that the local authority should have remained relatively neutral on this point, and that the guardian did not appear to have made a strong objection to the mother's attack upon her impartiality (see paras [96], [99], [100]).