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HB v A Local Authority and Anor (Wardship – Costs Funding Order)

[2017] EWHC 524 (Fam)

21/03/2017

Barristers
Charles Hale KC
Teertha Gupta KC
Private: Oliver Jones
Chris Barnes

Court
Family Division

Practice Areas
Public Children Law
Judgment of MacDonald J determining whether the High Court has power, under its inherent jurisdiction, to make a costs funding order against a local authority requiring it to fund legal advice and representation for a parent in wardship proceedings brought by the local authority where that parent had lawfully been refused legal aid.

The local authority chose to issue wardship proceedings rather than care proceedings, on the basis that it was following what it considered to be guidance given by Hayden J in Re Y (A Minor: Wardship) [2015] EWHC 2099 (Fam) and LB Tower Hamlets v M and Others [2015] EWHC 869 and endorsed, the local authority submitted, by the President in Re M [2015] EWHC 1433 (Fam).

As a result, the mother was not eligible for non-means non-merits tested legal aid, and her income took her slightly beyond the £733 monthly income threshold for means and merits tested legal aid. The mother's leading and junior counsel, and solicitor, all acted pro bono. The mother's counsel accepted the costs funding order they sought was without precedent but contended that it was possible for the court to find a power to make such an order in proceedings of this nature.

The local authority opposed the application, and instead invited the court to reconsider the guidance in Re Y so that cases where a parent is alleged to have caused significant harm are brought under Part IV Children Act 1989. The Local Government Association was invited to, and did intervene and opposed the application. [6] The Legal Aid Agency and the Lord Chancellor were also invited to intervene but declined to do so but did contribute in writing.

The local authority confirmed at the conclusion of the hearing that if the court declined to make a costs funding order, and considered the Re Y guidance should be revisited, they would issue care proceedings.

HB is the mother of ML, aged 6, and BL aged 3. Their father is MB, and he had been in Syria since the end of 2013. There was some evidence the father had died. There was further evidence said to establish links between members of the extended maternal family and extremism and terrorism. The local authority sought a finding that the mother took the children to a town close to the Syrian border, that she was twice stopped leaving the UK with large sums of money, that she sought to provide funds to so-called Islamic State associates and that she sympathised with extremist views and places the children at risk of significant harm. There were also issues about what material ML may have been exposed to at home, and whether the mother supports so-called Islamic State.

The local authority applied for permission to invoke the inherent jurisdiction, then for orders making the children wards of court, preventing them leaving the jurisdiction and authorising the retention of the children and mother's passports.

Mr Justice MacDonald considered the arguments and considered the distinctions between Part IV CA 1989 and the inherent jurisdiction [§45-57]. He examined what the local authority had considered as guidance from Hayden J in Re Y and in LB Tower Hamlets v M and endorsed, the local authority submitted, by the President in Re M.

LB Tower Hamlets v M concerned two without notice applications for orders under the inherent jurisdiction to prevent older children from travelling to Syria. In explaining the use of wardship Hayden J said that the "status of a Ward of the High Court of England and Wales has achieved international recognition" made it particularly appropriate in such circumstances, and he was able to make orders to retrieve their passports [§9-11]. Macdonald J noted that Hayden J did not seek to lay down a general rule or purport to give general guidance that the inherent jurisdiction should be used in preference to care proceedings in all cases of alleged radicalization. Hayden J described how "the conventional safeguarding principles will still afford the best protection" [§58] referring to provisions under Part IV CA 1989.

In Re Y the local authority brought inherent jurisdiction proceedings in respect of a 16 year old boy who might seek to travel to Syria. Hayden J again considered it was the appropriate jurisdiction for those issues, but reiterated he did not seek to "set out a paradigm approach for applications of this kind. I am quite sure that there will be cases, particularly with younger children perhaps when they are of necessity separated from their family, where only care proceedings under the Children Act will be appropriate" [§28]. MacDonald J was satisfied the President in Re M did not endorse any general guidance.

Mr Justice MacDonald concluded that the mother's application for costs funding order against the local authority must be dismissed for the following reasons:

The inherent jurisdiction does not give the court the power to require a local authority to incur expenditure for a litigant who has been lawfully refused legal aid in accordance with the statutory legal aid scheme.

The costs funding orders pursuant to s.22 MCA 1973 or Schedule 1 Children Act 1989 are not equivalent, as they are orders against another party, rather than specifically a public authority funded from central and local taxation and subject to strict controls on expenditure.

Whilst "superficially attractive legally and has a greater moral attraction" [§96], the argument that the court can fund a parent under the inherent jurisdiction to protect the child's welfare by ensuring the arguments are put properly, cannot be sustained against established legal principles. The "court cannot simply make any order under the inherent jurisdiction that is required to ensure that justice is done" [Wicks v Wicks [1995] Fam 65]. See also London Borough of Redbridge v SA [2015] 3 WLR 1617 at [36].

Authority of public expenditure requires clear statutory authority which must be in clear, express and unambiguous language. A general power or duty (such as under the inherent jurisdiction) cannot be used to circumvent a clear statutory code.

There is no provision in civil courts, as there is in the Legal Aid, Sentencing and Punishment of Offenders Act 2012 which enables courts in criminal proceedings to determine whether an individual qualifies for legal representation at public expense.

Art 6 and Art 8 do not prevent a State party imposing a means test to decide which cases the State must fund to meet the imperatives of Art 6 and Art 8. If an applicant's rights are breached through this process the remedy is found in the Administrative Court.

There are public policy reasons against granting such an order. It would apply to a wide range of other proceedings in which local authorities are involved where legal aid is not available. Further the local authority would not have the detailed information needed to ensure any decisions would be consistent.

MacDonald J concluded that it was undesirable to set up detailed typologies as to which proceedings should be brought under the inherent jurisdiction or Part IV Children Act 1989. However, he highlighted that cases involving older children leaving the jurisdiction to dangerous war zones, or where children have been removed for this purpose and must be recovered the inherent jurisdiction will be apposite. Equally, there will be cases where the Children Act is most appropriate. The child is an automatic respondent, there is detailed and comprehensive guidance and safeguarding procedures covering welfare issues together with a significant body of authority. In addition, alleged radicalization is a new type of harm and may touch on controversial arguments that it would be appropriate to evaluate against the statutory framework put in place by Parliament. The fact that parents would also be entitled to non-means, non-merits tested funding is a factor to take into account in making that decision.

To read the judgment, please click here.

Permission