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Re L (A Child) (2009)

[2010] 2 FLR 188 : [2010] Fam Law 132 : (2009) 106(34) LSG 16 : [2009] EWCA Civ 1239

20/08/2009

Barristers
Kate Branigan KC

Court
Civil Division

Practice Areas
Private Children Law

Summary
Following the refusal of a father to submit to paternity testing in regard to his son, a judge had been wrong to order another child to submit to testing to determine the true paternity of her brother without considering the psychological effect it might have on her. In any event, the appropriate time to consider testing was at a second-stage enquiry, as the outcome was not relevant to the instant fact-finding hearing, which was concerned with establishing how the children had sustained injuries.

Facts
The appellant child (D) by her guardian appealed against an order of a judge requiring her to submit to testing to assist in determining the paternity of her respondent younger brother (G). D, a 13-year-old girl, and G, a nine-year-old boy, had joined their parents in the United Kingdom from the Ivory Coast. Following injuries sustained by D and G whilst in the care of their parents, the local authority placed both children in care. A fact-finding hearing was scheduled so that enquiries could be made about the injuries suffered. However, an issue as to G's paternity arose. G's father (F) and G's biological mother, who had lived in the Ivory Coast, were not in a relationship. Following a brief sexual encounter, G's biological mother told F that he was G's father. The court doubted G's true paternity and ordered that it was in G's best interests for samples to be taken from G and F. Implementation of the order was lawfully frustrated by F's refusal. At a case management hearing the court ordered, under the Family Law Reform Act 1969 s.20(1), that D was to submit samples instead, so that a sibling link could be used to determine G's paternity. D's guardian indicated in D's position statement that he wished to give oral evidence at the hearing about the impact that testing would have on D at the hearing, but as G's guardian was not present the judge only considered written submissions. By her guardian, D sought to appeal against the decision. D's guardian submitted that the judge had failed to undertake a full and reasoned analysis of D's best interests.

Held
It was questionable whether the judge had taken the correct approach. He had stated that under s.21 of

the Act he could only order a sample to be taken where it was in the best interests of the child from whom the sample was being taken. The judge might have fallen into error in not sufficiently distinguishing between s.20 and s.21 of the Act. The power under s.20 allowed the court to determine the matter of blood testing when it considered in its discretion that it was appropriate to do so; the question was what test was to be applied in the exercise of its discretion. That was very different from s.21, which dealt with what happened after an order for blood testing had been made, S (An Infant) v S (1972) AC 24 HL, H (A Minor) (Blood Tests: Parental Rights), Re (1997) Fam 89 CA (Civ Div), H and A (Children) (Paternity: Blood Tests), Re (2002) EWCA Civ 383, (2002) 1 FLR 1145 considered. The judge had asked himself the wrong question. It was not a question of whether submitting a sample would be in D's best interests but whether it would be adverse to her best interests, S (An Infant) considered. Although the judge had applied the wrong test, his error was in stating it too high. Judicial discretion was not to be interfered with unless a judge was plainly wrong. However, the circumstances of the instant case warranted interference, as D was vulnerable and it was not clear whether she was aware that the test had been ordered, or what the circumstances were that surrounded it. There was no evidence before the judge allowing him to deal with the impact the testing would have on D. The local authority had accepted that it could not give consent under s.21 to override D's refusal to submit to testing but had failed to address whether D would be told the reason for the test and whether she was happy for samples to be taken without any explanation. Whilst it was not for the Court of Appeal to say what D should or should not be told about the reasons for testing, it would contradict the entire process, which in essence was to discover the truth, not to be candid with D as to why she was being tested. Further, no expert evidence had been put forward as to the psychological effect the testing would have on D. Given that her father refused testing, it was clear that an expert's opinion was required to determine if D should be told why the test was necessary, why her father had refused and why she had been asked to do it instead. In any event, the correct time to consider that issue was at a second-stage enquiry when welfare was being assessed; it was not a relevant consideration at a fact-finding hearing, and testing at that stage was premature. Accordingly, the order would be discharged, the application resisting the test would be adjourned to await the outcome of the fact-finding hearing, and expert evidence would have to be filed to determine whether D's best interests precluded her from taking the test.

Permission
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