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Re D (Children) (2009)

2009] EWCA Civ 472

04/06/2009

Court
Civil Division

Summary
Judges in care proceedings were not to strain to identify the perpetrator of non-accidental injuries to children or to start from the premise that it would only be in an exceptional case that it would not be possible to make such an identification. If it was not possible to identify a perpetrator it was a judge's duty to state that as his or her conclusion.

Facts
The appellant father (F) appealed against findings of fact made at the first part of a split hearing in care proceedings brought by the first respondent local authority against him and the second respondent mother (M) in respect of the third respondent children (R and S). R and S had lived with M and F. M stated that on one occasion she had seen bruising on R that had been caused by F. Evidence was given that M had shown her own mother bruising caused by F when he kicked her for slapping R hard. When S was approximately 10 weeks old, a medical examination revealed that she had sustained multiple fractures and a torn frenulum under her lip. It was not suggested that anyone other than M or F or both of them could have caused the children's injuries. It was accepted that the injuries were non-accidental and that the threshold criteria under the Children Act 1989 s.31 were satisfied. The judge found that F was the perpetrator of the injuries to both children. He left the matter of who had caused S's torn frenulum as a neutral finding and stated that he only felt able to find that M had conceded that she may have caused it. F submitted that the judge's findings should be reversed and that M should be held to be the sole perpetrator or there should be a retrial of the issue of who was responsible for the injuries. F and M argued that to allow the appeal without directing a rehearing before a different judge would make it more likely that R and S would be adopted by strangers outside of the family.

Held
HELD: (1) The standard of proof to be applied to all findings of fact in care proceedings was the balance of probabilities test, B (Children) (Sexual Abuse: Standard of Proof), Re (2008) UKHL 35, (2009) 1 AC 11 followed. However, Re B did not require the court to identify an individual as the perpetrator of non-accidental injuries to a child simply because that was the standard of proof. If such an identification was not possible it was a judge's duty to state that as his or her conclusion. Judges should not, as a result of Re B, strain to identify the perpetrator of non-accidental injuries to children. If an individual perpetrator could be properly identified on the balance of probabilities, it was a judge's duty to identify him or her but a judge should not start from the premise that it would only be in an exceptional case that it would not be possible to make such an identification. There would be cases, including the instant case, where

the only conclusion which the court could properly reach was that one of two parents, or both parents, must have inflicted the injuries and that neither could be excluded. (2) The judge who dealt with the fact-finding hearing should continue with the second part of the split hearing. The instant case was not an exception to the rule in Re B that split hearings should be conducted by the same judge. The judge would be able to continue with the case without difficulty and without prejudice to M and F's cases. If the outcome of the welfare hearing was that care orders were made and R and S were placed for adoption with non-family members, it would be because such a course fulfilled s.1 and was in R and S's best interests and neither child could safely be placed with M or F or within their wider families. That in turn would be because R and S would be at risk if placed in that way because one or both of F and M had inflicted very serious injuries and had lied to the judge about doing so. In any event, there was no doubt that the judge would conscientiously apply the welfare principle and reach a conclusion which he perceived to be in R and S's best interests. Furthermore, to direct a rehearing before a different judge or direct that a different judge take over the management and resolution of the case would be contrary to the principles in Re B and would be a waste of valuable and limited resources. (3) M had admitted that she had caused S's torn frenulum. The judge should have found, on the balance of probabilities, that M had caused S's torn frenulum, which was a non-accidental injury. It followed that his overall vindication of M and his attribution of the injuries to F was also unsound. Furthermore, the judge had failed to deal with M's admission to her own mother. He had reached an impermissible conclusion on the findings of fact hearing and the court reversed his primary finding and replaced it with one that neither F nor M could be excluded from the pool of perpetrators for either R or S's injuries. The case was remitted to the judge to continue with the split hearing.