

Re M (A Child) (2012)

[2012] 2 FLR 121; [2012] Fam Law 511; [2012] EWCA Civ 165

19/01/2012

Barristers

Joanne Brown KC

Court

Civil Division

Practice Areas

Public Children Law

Summary

The Court of Appeal emphasised that an applicant seeking permission to appeal, or an appellant who had been granted permission to appeal, in family cases needed the court's permission to instruct a fresh expert. When seeking to instruct a fresh expert from some other jurisdiction, the matters requiring explanation included why an United Kingdom expert had not been used, what efforts had been made to identify UK experts, and the financial implications of instructing an overseas expert.

Facts

The applicant mother (M) applied to adduce fresh evidence in the course of her renewed oral application for permission to appeal orders made in public law proceedings in respect of her child (X). X had been taken into care by the first respondent local authority when aged 10 weeks old after x-rays had revealed fractures of differing ages. The ensuing public law proceedings took a familiar course, and a fact-finding hearing took place in October 2010. The judge concluded that X's injuries were non-accidental and that M and X's father were the only possible perpetrators, and he dismissed their evidence of denial as untruthful or unreliable. The case proceeded to a welfare disposal before a different judge, and in March 2011, he granted the local authority, which was fully supported by the second respondent guardian, a contact order, placement order and terminated M's contact with X. Thereafter, X was placed with prospective adopters. In October 2011, M sought permission to appeal the order of March 2011, and by implication the fact-finding determination. In December 2011, she appeared as a litigant in person and the Court of Appeal adjourned her application for an oral hearing on notice to the local authority. M subsequently obtained funding for legal representation, and in January 2012, her solicitors approached a United States paediatrician (B), providing him with certain documents and asking him to report on specific questions. On the morning of the renewed application for permission, M supplied B's preliminary report to the local authority and guardian, and sought to have it admitted as fresh evidence. That was opposed by the local authority and the guardian.

Held

There were many reasons for refusing M's application. First, it did not even begin to satisfy the familiar

conditions in *Ladd v Marshall* (1954) 1 WLR 1489 CA, *Ladd* followed. B's report was deeply flawed in the manner of its production and the respondents had been given no notice of the intention to instruct another expert, and no permission had been sought from the Court of Appeal to instruct another expert or release documents to him. The documents that had been released to B were not comprehensive and were partisan. M had had every opportunity to seek the Court of Appeal's permission to instruct another expert, and even if that idea had not crossed her mind during the December 2011 hearing, it was open to her, or those representing her, to apply for permission later. The unilateral action of involving a US expert without direct authority from the Legal Services Commission was a questionable decision and action for which the actors might be called to account on some future occasion. In those circumstances, there could be no hesitation in refusing M's application to adduce fresh evidence. (2) (Per curiam) It had to be emphasised that there was an obligation on an applicant seeking permission to appeal, or on an appellant who had obtained permission, to seek the Court of Appeal's leave before instructing a fresh expert and releasing court papers to him for the hearing of an adjourned application for permission or an appeal. Although the guidelines for instructing medical experts from overseas in family cases endorsed by the President of the Family Division and the Family Justice Council had some application to appellate proceedings, they were written for first instance hearings in the course of a trial. However, where an applicant seeking permission to appeal or an appellant sought to instruct a fresh expert from some other jurisdiction, regard had to be had to those guidelines. In particular, the matters requiring explanation included (a) why an United Kingdom expert had not been used; (b) what efforts had been made to identify UK experts; (c) the financial implications of instructing an overseas expert.

Permission

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