Neutral Citation Number: [2008] EWHC 1996 (Fam)

Case No: FD 08 P00515

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Tuesday, 10th June, 2008

Before:

MR. JUSTICE COLERIDGE

IN PRIVATE

Re. B (Minor)

MISS A. STREET (instructed by **An NHS Trust**)
for the **Claimant**.
MISS K. BROWN for the **First Defendant Local Authority**.
MR. P. PRESSDEE for the **Second Defendant Mother**.
MR. L. MESSLING for the **Third Defendant Guardian**.

Approved Judgment

IN PRIVATE

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MR. JUSTICE COLERIDGE :

1. I am very much obliged to counsel for their help in this unusual and difficult application which relates to L, a severely ill child of twenty-two and a half months. She suffers from profound mental and physical disabilities, believed to be as a result of an inherited metabolic condition which has not been fully diagnosed. Such a condition is not amenable to treatment. She is living with foster parents under the aegis of a care order granted within days of her birth. The foster parents are not parties to this application, but they have been fully involved and consulted about it.

2. The application is by an NHS Trust for declaratory relief. The position put shortly is that the child, who lives with the foster parents, is likely within a period measured at the most in a few years to have a deteriorated to a state where the question as to whether or not she should be revived by way of ventilation or other cardio-pulmonary resuscitation becomes a real one. In particular, the treating doctor, who has looked after her, wishes the question to be decided now as to whether or not if she does deteriorate to the extent which it is anticipated that she may well do, the doctors are permitted not to carry out invasive resuscitation procedures. That is the position shortly stated.

3. The relief which the Trust seeks is now contained in a draft order which has been the subject of considerable further input over the course of this hearing, and indeed prior to the hearing. It has been the subject of discussion between the parties' lawyers, and, indeed, in particular the two doctors who attended to give evidence today. I can do no better by way of explanation of the application, or the terms of the declaration which are sought, than read now the draft order which it is proposed I should make:

> "Upon hearing Counsel for the Claimant, Counsel for the First Defendant, Counsel for the Second Defendant, and Counsel for the Third Defendant,
>
> Upon it being agreed between the parties to this application that:
>
> (1) LB's treating clinicians shall consult her foster parents, Mr. and Mrs. B., about her medical treatment and care, so far reasonably practicable.
>
> (2) This obligation does not affect the legal duty of the NHS Trust also to consult the local authority and Mother.
>
> (3) The obligations set out above may be overridden if the best interests of the child do not allow time for consultation.
>
> And upon the court approving that experts' joint report attached hereto, as being by way of further explanation of the declaratory relief granted below

IT IS DECLARED THAT

(1) It would be lawful, as being in the Third Defendant's best interests, for her not to receive intensive resuscitation, i.e. intubation for the purpose of ventilation or cardio-pulmonary resuscitation in the event that she:

(i) develops a deteriorating illness such as a severe pneumonia which has persisted despite less intrusive treatment such as antibiotics, oxygen and chest physiotherapy; or

(ii) has become severely unwell, due to e.g. deteriorating liver disease or a metabolic or other condition, which has not resolved with any less intrusive treatment available.

(2) The doctors and nurses, having responsibility for the Third Defendant's care and treatment shall at all times administer care and treatment in such a way as to cause her the least distress and pain, and retain the greatest dignity.

AND IT IS ORDERED THAT:

(1) All parties shall have liberty to apply in the event of a material change in circumstances."

The second substantive paragraph of the order relates to costs.

4. A perusal of that order shows that it contemplates the withholding of intensive resuscitation treatment in two particular circumstances - that the child is on a steep downward gradient because of a deteriorating illness or becomes severely unwell for other reasons. In those circumstances the treating doctors would be permitted to withhold this type of treatment. It is less specific than sometimes declarations of this kind are. Because it is less specific and because the doctors themselves in evidence candidly admitted that they could not necessarily foresee every situation in which the permission which they had obtained would be needed, I suggested that a short joint experts' report which is in the papers and to which I will make full reference in a moment, should be attached to the order itself so that any doctor coming new to this child and to a critical situation in the future would have further guidance to enable them to make what might be a very difficult sensitive and finely balanced clinical judgment. However, I am unaware that such a course has been adopted in other cases of this kind. It may be that this is a helpful way of guiding the medical team who have care for a sick child, or a sick patient, where the medical definitions and situations which may arise in emergencies are not necessarily capable of complete contemplation. So that is the declaration which is sought.

5. So far as the parties are concerned, the Applicant is the treating NHS Trust. The second Claimant is the local authority in whose care the child is by order. The Third Defendant is the child's mother. The Fourth Defendant is the child herself by her guardian. So far as the positions of the parties are concerned, the applicant NHS

authority and the guardian are fully in support of the declaration which is sought in its new and amended form. So far as the local authority and Mother are concerned, the local authority takes a neutral stance. So far as the Mother is concerned, she has indicated through her counsel that she will, in the end, by guided by the opinions of the medical team. Since the medical team are all **ad idem** that this is a declaration which should be sought, in effect I think it can be taken that the Mother is herself supportive of the relief.

6. It is, of course, noteworthy that the two extraordinarily caring foster parents, Mr. and Mrs. B, who have looked after this child since the first day of her life are not parties. However, they have filed evidence, and whilst not taking part in the sense of putting their positions forward, their evidence does show - and they wish it to be understood and emphasised - that this child does have a meaningful existence at the moment. She obviously has a life that is certainly worth living at the moment, and providing there is no further deterioration. So that is the position of the parties and the foster parents.

7. So far as the local authority is concerned, they have invited the NHS Trust to make this application because although they do in fact have, as a matter of statutory law, parental authority for this child arising from of the care order, they felt that that parental authority did not invest them with sufficient authority to consent to this declaration. That is a nice point. I think that they are probably right. Even if they are not right and they do have sufficient authority I think they are entirely right in this situation which has arisen in that they have taken the understandable line that they do not wish to consent to, or be seen to consent to, a declaration of this kind. I think in circumstances like this, where there is a child of this age in this kind of extreme situation, and where there is any uncertainty as to their position, the local authority is sensible to take the course that this one has.

8. It is important to note that the Mother herself is a minor. She is aged some fifteen and a half. She herself has some learning difficulties. It is apparent from a perusal of the papers that her involvement in these proceedings has been patchy. However, fortunately, in the last few days, as is apparent from her counsel's position statement, she has engaged with her lawyers under the aegis of public funding so that she has been able to give clear instructions to those who represent her. It is for that reason that Mr. Pressdee is able to be here today representing the Mother. That has been helpful and appropriate.

9. The evidence before the court is partly written and partly oral. So far as the written evidence is concerned, it is partly medical and partly lay evidence. The medical evidence is from no less than four extremely eminent consultants in the field of paediatrics of one kind or another - paediatrics and paediatric neurology. They have all filed statements which I have had the chance to read at length. They also had the opportunity of a meeting to discuss this case and its slightly unusual features. The meeting took place on 13th May of this year. It was a meeting between the four doctors concerned, Dr. Ward-Platt, Dr. Hendriksz, Dr. Brooke and Dr. Essex (Dr. Essex being the treating paediatrician). As a result of that discussion and prior therefore to this hearing they were able to draw up a short and, to my mind, very helpful agreed statement which I shall now read because I think it encapsulates better than any words of mine the medical condition that L. finds herself in. It is in the form of four questions which were put to them and which they answered. I shall read it in full. It is headed

"Re. L.

Date of Birth - 16.07.06.

Discussion between Dr. Ward-Platt, Dr. Hendriksz, Dr. Brooke, Dr. Essex.

(1) Does L. have a treatable condition or if not is one likely to be discovered?

We agree that L. does not at the moment have a diagnosis and is extremely unlikely to have a treatable condition. Further investigations are unlikely to be of benefit to L.. Some of the investigations will be uncomfortable and some may even be hazardous to her health (requiring general anaesthetic, etc.).

(2) What is the prognosis for L.?

We agree that L. has a severe global developmental disorder. We do not believe that L. will improve, but will deteriorate. This deterioration may happen intermittently in an unpredictable step-wise fashion or may happen rapidly and severely.

(3) Can we give any estimate of L.'s life expectancy?

We do not believe it is possible to quantify L.'s life expectancy. However, we believe it is very unlikely that L. will reach the age of five years of age. Her life expectancy may be considerably less than this.

(4) If L. deteriorates what measures should be undertaken?

We believe that each episode needs to be judged on its merits. We cannot be prescriptive in this document. L. will need appropriate immediate care which may involve one or more of increasing her cortisol; emergency medication if L. has a prolonged seizure; antibiotics if L. has an infection; oxygen; etc.

L. has shown that she may develop respiratory arrest with seizures and the emergency treatment given for these, and need ventilating. If this is anything other than a very short-term measure, then ventilation for children is not available in Coventry and L. will have to be transferred to paediatric intensive care unit.

As L. was able to come off the ventilator successfully following a seizure, then this would be a reasonable course of action if this happened again. If L. developed another deteriorating illness, such as a severe pneumonia which did not respond to first or second line of antibiotics, oxygen and chest

> physiotherapy, or to deteriorating liver disease or other metabolic conditions, then we do not believe it would be in L.'s best interests to proceed intensive resuscitation, and palliative care would be appropriate."

It is signed by all four doctors.

The core of this application is of course contained in the very last paragraph of the agreed document, but the preceding paragraphs seem to me to be of very helpful guidance and explanation to any doctor who has to deal with this child on the ground in an emergency without any prior knowledge of the history.

10. That is the sad condition in which the child finds herself. It is that which has led to this application.

11. Apart from that written evidence I have had the benefit of very careful and helpful, full skeleton arguments and summaries from counsel in the case. I have also been referred specifically to the Royal College of Paediatrics framework document, drawn up in May 2004, particularly at p.35 dealing with the categories of case where it is appropriate for the doctors not to resuscitate - particularly the paragraphs under the headings of 'No Chance' and 'No Purpose' were dealt with in the evidence of the doctors today.

12. So far as the evidence of witnesses is concerned, I have also had two poignant statements from the foster parents, Mr. and Mrs. B.. More importantly, they have provided me with a DVD running to some seven or eight minutes, which I have watched. This illustrates more powerfully than any words can the state in which this child currently is. If I may say so, it also shows the wonderful care that she is presently receiving from the Bradleys.

13. So far as oral evidence is concerned, I have also heard from two of the doctors who produced written reports - Dr. Essex and Dr. Ward-Platt. Both have further elucidated their reports without in any way departing from the conclusions set out by the four of them.

14. The full and detailed background - particularly medical background - and full discussion of this child's medical condition is best collected from the report of Dr. Hendriksz, which is to be found at E11. That is a remarkably detailed analysis of the child's condition; the lack of diagnosis, despite all options being investigated; and is as full a description of the situation in which this child now finds herself as could be produced. Dr. Hendriksz was described by Dr. Essex fulsomely as 'a specialist in his field of "world-renown"'. It is certainly a most careful exposition. I have it fully in mind.

15. So far as the law is concerned, those of us who deal with these cases are fully familiar with it. I have had it very helpfully summarised, however additionally, by both counsel for the NHS Trust and for the Guardian. I have been reminded, in particular of the very useful summation of the position set out by Mr. Justice Holman in the case which he dealt with in 2006 - *NHS Trust -v- MB (A Child) & Mr. and Mrs. B* [2006] EWHC (507). I have had a copy of that report included in my papers today, and I

have reminded myself of Mr. Justice Holman's ten-fold summation. I have that well in mind.

16. It is, of course, important to realise that whether or not this is a consensual approach to the court - which in this case it broadly speaking can be said to be - it is nevertheless the court's function to decide independently whether this is an appropriate declaration to be made. I have indicated that I am perfectly satisfied that this was a proper application for the local authority to have brought in the circumstances in which they found themselves.

17. In the end the law comes back to the simple proposition of what is in the best interests of this child. That is a question which is answered by reference to all possible circumstances which affect her. I have no doubt at all that the four doctors who have painstakingly considered this case have reached the right conclusion. The situation, as things are at present, may well pertain for some time. The child may well remain in a stable state. In a sense, one can only hope that she will.

18. However, there are two particular situations which may arise at any time. The first is an acute seizure. In that situation, as the doctors have made clear, they would expect to provide whatever treatment was necessary to restore the child to the condition that she was in prior to the seizure. That is a situation which has already arisen from time to time during the course of this child's short life and remarkably the child has pulled through such incidents, although perhaps not without some prejudice to her overall health. The foster parents have indicated that after each seizure she seems to get a little weaker and worse. However, that is not a situation which the treating clinicians are concerned about. The treating clinicians are concerned about the gradual deterioration of this child - a downward gradient as it was described in argument - and a situation being reached where the only way in which this child could be kept going would be by the sort of invasive resuscitation processes which are described in the draft declaration. It is in those circumstances that the clinicians want to be in a position to say enough is enough; that she should not be subjected to any further futile prolongation of her life in circumstances where the end is only being postponed by a short time.

19. There was considerable discussion during the course of the case as to whether or not it was possible to be more specific in the declaration that is being sought. I am quite sure that all the various descriptive definitions have now been carefully considered. I have no doubt at all that this poor child, if she gets to the situation where only the kind of invasive procedures which have been described would save her -- that it would not be in her best interests for them to be undertaken to ensure a short further prolongation of her life.

20. Accordingly, I think that this is a declaration which is properly sought and I shall grant it in the terms in which it is now put before the court to which the agreed experts report will be appended.