UNEDITED (Tea with Sir Godfray)

COURT OF APPEAL

1986/2 3

MB et Uxor - v - The Education Committee

6th January, 1986

JUDGMENT OF THE COURT

Sir Godfray Le Quesne:

These proceedings began with a representation made to the Royal Court by the Attorney General on the 22nd March, 1985. This was a representation that the Attorney General was of the opinion that a child named MB was a child in need of care, protection or control within the meaning of Article 27 of the Children (Jersey) Law, 1969. The representation came before the Court on the 16th April, 1985. After hearing evidence and argument, the Court declared itself satisfied that the child was in need of care, protection or control within the meaning of Article 27 of the Law, and committed the child, by virtue of Articles 28 and 31 of the Law, to the care of the Education Committee. Against that order the parents of the child, Mr. and Mrs. B , appealed. They appealed originially on two grounds, first that the child was not in law a person to whom Article 27 of the Children's Law applied, and secondly that in fact the Court was wrong in holding that they, the natural parents, were not capable of giving the necessary care and protection to the child. The second ground was subsequently abandoned by the appellants and the matter therefore comes before us now simply as a question of construction of the Children (Jersey) Law, and it is on that point that the appeal now turns.

It is necessary to say something of the provisions of the Law, and in particular of three Articles. The first is Article 10. This Article, as subsequently amended by the Children (Amendment) (Jersey) Law, 1972, Article 2, provides as follows:-

> "If it appears to the Bailiff on information on oath laid by any person who, in the opinion of the Bailiff, is acting in the interests of a child under the age of seventeen years, that there is reasonable cause to suspect -
>
> (a) that the child has been, is being or is likely to be assaulted, ill-treated or neglected in a manner likely to cause him unnecessary suffering, or injury to health; or
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> (b) that any offence mentioned in the First Schedule to this Law has been or is being committed in respect of the child;
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> the Bailiff may issue a warrant authorising any police officer or officer of the Committee named therein to search for the child, and, if it is found that he has been, is being or is likely to be assaulted, ill-treated or neglected in manner aforesaid, or that any such offence as

aforesaid has been or is being committed in respect of him, to take him to a place of safety..." And I then omit some words and pass to the concluding lines of the paragraph which say "and a child taken to a place of safety in pursuance of such a warrant may be detained there until he can be brought before a court".

It seems to me plain that the closing words of that paragraph 'until he can be brought before a court' look forward to the provisions of Article 27 and 28 of the Law. Article 27 is headed "Meaning of "In Need of Care, Protection or Control"." Paragraph (1) of the Article provides:

> "A child is in need of care, protection or control within the meaning of this Law if he is under the age of seventeen years and -
>
> (a) any of the conditions mentioned in paragraph (2) of this Article is satisfied with respect to him and he is not receiving such care, protection and guidance as a good parent may reasonably be expected to give; or
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> (b) he is beyond control of his parent or guardian."

Paragraph (2), so far as it is necessary to go into it, provides thus:

> "The conditions referred to in sub-paragraph (a) of paragraph (1) of this Article are that -
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> (a) he is falling into bad associations or is exposed to moral danger or
>
> (b) the lack of care, protection or guidance is likely to cause him unnecessary suffering or seriously to affect his health or proper development."

Article 28 provides that if the Royal Court is satisfied that any person brought before the Court is a child in need of care, protection or control, the Court may make various orders, including an order committing that person to the care of any fit person, whether a relative or not, who is willing to undertake the care of him. The Article also provides the machinery by which a matter can come before the Court, because paragraph (2) provides that the Attorney General may bring before the Royal Court any child who in his opinion is in need of care, protection or control. That is the statutory machinery which has been used in this case and is now necessary to say something of the facts which have given rise to these proceedings.

Mr. and Mrs. B, the parents of the child who is the subject of these proceedings, have had five children. The eldest of these children, SB , was born in January, 1978. A Place of Safety Order under Article 10 of the Law was made in respect of SB on the 23rd November, 1979. She was then brought before the Court under Article 28 as a person in need of care, protection or guidance, and interim orders were made, as the Article provides, on the 30th November and the 5th December, and again on the 28th December, 1979. Those orders applied not only to the eldest

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child SB , whom I have mentioned, but also to the second child, AB who was born in January, 1979. In December, 1979, the third child, WB , was born and an interim order under Article 28 was made in respect of her on the 4th January, 1980. Thereafter, these three little girls were dealt with by the Court together. There were three further interim orders under Article 28, all of them referring to all three children, and finally, a Care Order under Article 28, in respect of all three children, was made by the Royal Court on the 2nd April, 1980. That Order still remains in force. The fourth child MCB , was born in August, 1981, and a Care Order under Article 28 was made in respect of her on the 18th September, 1981. It is interesting to observe that the facts in the case of MCB were similar to the facts of the present case in this respect, that MCB had not left the maternity hospital at the time when the Order under Article 28 was made; in other words, she had never been in the care of her parents, but had been in the hospital from the day of her birth up to the day on which the Care Order was made. MCB unhappily died on the 22nd February, 1982.

In respect of the first three children, as I have said, the Care Order remains in force. Mr. and Mrs. B did apply to the Royal Court in 1983 for that Order to be rescinded. The Royal Court, having heard evidence, dismissed this application on the 7th April, 1983. Before I go further, it is right to say that at no stage of the proceedings has there been any suggestion of any deliberate neglect, far less any deliberate cruelty, on the part of Mr. and Mrs. B , nor has it ever been suggested that they are in any way lacking in affection for their children. The applications which have been made to the Court have always been simply on the ground that Mr. and Mrs. B were incapable of giving to their children the care which the children required.

The child who is the subject matter of these proceedings, MB (the name, I may say, is the same as the name which was borne by the deceased child), was born in January, 1985, in the maternity hospital. On the following day, , a Place of Safety Order was made under Article 10 of the Law. Thereafter, the child remained in the maternity hospital until eventually she was placed with foster parents. She never went to her parents' home and was never at any stage in the care of her parents. As I have said, the Attorney General made a representation bringing the child before the Court on the 22nd March. When this matter came before the Court on the 16th April, the Court heard evidence from a number of witnesses of the proceedings which had taken place in respect of the other children of the family. It also heard, and it is important to remember this, it also heard the evidence of the father and of the mother. It also heard legal submissions, and it was submitted to the Court that there was no power to make any order under Article 28, because, so it was argued, Article 27(1)(a)

requires that a child should actually be in the care of its parents before an application can be made under Article 28. The Court rejected this argument, holding that when the Article is read together with other provisions of the Law, this interpretation would lead to a result which the Court described as patently absurd and the Court therefore, as I have already said, made the Care Order under Article 28.

Mr. Robinson, in presenting the case to this Court - and I should add that Mr. Robinson did not appear for the parents in the Royal Court - Mr. Robinson in presenting the case here, has developed and refined the argument on the interpretation of Article 27. He takes as his starting point the contention that it is a serious matter to take a child out of its parents' care, and even more serious to remove from the care of parents a child who had never in fact been in their care at all. Therefore, he says, we should apply strict construction to Article 27 of the Law. Article 27 provides, as I have already said, that a child is in need of care protection or control if he is not receiving such care, protection and guidance as a good parent may reasonably be expected to give, and Mr. Robinson contends that those words must mean that the child has been in the care of his parents and they have failed to provide ~ him with such care, protection and guidance.

Mr. Robinson concedes that that present tense must be interpreted as including a past tense, or, which comes to the same thing, must by implication be supplemented by reading in words "or was not receiving". He is obliged to say this because paragraph (4) of the Article provides that when a person is brought before the Court, the Court may make an interim order providing for the detention of the person, or his continued detention, in a place of safety until the Court feels in a position to make a final order, and it is therefore obvious that when a final order is made in respect of the child it is likely that the child will not be in the care of its parents but will already have been removed to some place of safety. Therefore, as I say, Mr. Robinson concedes that Article 27(1) must be read as though it said "and he is not receiving or has not received such care, protection and guidance". But, Mr. Robinson says, we should not go further and read that provision as though it included not only a past tense but also some provision for the future, and Mr. Robinson says that the reason for this is that a finding that parents cannot provide such care, protection and guidance as they should ought not to be made unless there is evidence that they have had the child in their care, have had the opportunity to provide care, protection or guidance and have failed to provide it.

I have already referred to the provisions of Article 28 about interim orders which make it necessary to read the definition in Article 27 as applying to the past as well as to the present. Miss Nicolle, who appeared for the respondent, has submitted that a further difficulty on Mr. Robinson's

interpretation of Article 27 arises in connection with Article 10. Article 10, as amended, provides, as I have said, that an order may be made if the child has been, is being or is likely to be assaulted, ill-treated or neglected. If the order under Article 10 is made, not on the ground that the child has been or is being assaulted, ill-treated or neglected, but on the ground that it is likely to be assaulted, ill-treated or neglected, then, Miss Nicolle submits, on Mr. Robinsons's interpretation of Article 27, when the child is brought before the Court, as Article 10 clearly contemplates that it will be, the Court will find itself unable to make any order unless the child has been in the care of its parents. Now it is clear that an Article 10 order on the grounds that neglect is likely may well be made in a case in which the child is not in the care of the parents, and in such a case, Miss Nicolle submits, the Royal Court will find itself, on Mr. Robinsons's interpretation, unable to make any order under Article 27. The child, therefore, would presumably have to be delivered into the care of the parents, and, if the facts so required, proceedings would have to start again with another application for a Place of Safety Order under Article 10.

It seems to me important in interpreting Article 27 to start by noticing that the purpose of the Article is to define the phase "in need of care and protection or control". A child may be in need of care, protection or control because of something which has already happened to it. Equally, a child may be in need of care, protection or control because of what some evidence shows is likely to happen to it in the future. Now it remains of course to interpret the language which the legislature has used in its definition, but in my view, it is right to approach that task, recognising what I have said about the two ways in which a child may be shown to be in need of care, protection or control, and to approach the statutory language in the expectation that it will be wide enough to provide for both. It is conceded in this case that the language of Article 27(1)(a) cannot be read exactly according to its tenor. That is to say, as I have already recounted, it is conceded that "he is not receiving such care, protection and guidance" must be read as though it included the state of affairs that the child has not received or was not receiving such care, protection and guidance. In my judgment, the language must also be read as applying to a case in which the child, if in the care of its parents, would not be receiving such care, protection and guidance.

It is helpful to consider the question of interpretation by reference to facts which would be covered by the Article, though I say at once, that these are not the facts of the case before us. One may imagine the case of parents who have already had three children and have subjected each of them in turn very shortly after birth to serious physical abuse. If a fourth child is born to those parents in the maternity hospital, then according to Mr. Robinson's argument, although a Place of Safety Order may at once be sought under Article 10, when the child is brought before the Court, the

Court has no option but to say that it has no power to make an order under Article 27, with the result that the child would have to go into the care of its parents and be exposed to the risk of the same suffering that had been experienced by three brothers or sisters before any care order could be made under Article 27. In my judgment the Royal Court did not go too far in describing such a result as patently absurd and I do not accept the suggestion that this can have been the intention of the legislature. In adopting Article 27, the States, in my judgment, must have meant to provide for the case in which the child is not receiving such care, protection and guidance, the case in which the child in the past did not receive such care, protection and guidance and also the case in which the child, if it goes to the home of its parents, is likely not to receive such care, protection and guidance.

This view of the matter seems to me to be supported by one other feature of the legislation. As I have said, Article 10 of the Law, as originally enacted, provided only for the making of a Place of Safety Order where there was reasonable cause to suspect that the child has been or is being assaulted, ill-treated or neglected. In 1972, the States amended this Article so that it provided for cases in which they had reasonable cause to suspect that the child has been, is being or is likely to be assaulted, ill-treated or neglected. What is significant is that although the 1972 Law did provide for an amendment in some other particular of Article 28, so that the States clearly had proceedings under Article 28 in mind, it was not thought necessary to make any amendment of Article 27, and to my mind, this suggests strongly that the States thought in 1972 that the language of Article 27 was already apt to cover not only a case in which a child has been or is being assaulted, ill-treated or neglected but also the case of a child likely to be assaulted, ill-treated or neglected.

I make one other observation upon the terms of the law. Mr. Robinson urged upon us that it was very unlikely that the States could have intended that so serious a step as the removal of a child from the care of its parents should be taken when the child had never been in the care of the parents, and the parents had therefore never had any opportunity to demonstrate their fitness or unfitness to care for the child. The answer to this seems to me to be, as Miss Nicolle submitted to us, found in Article 83 of the Law. That is the Article which provides for an order to be made of a much more drastic nature than an order under Article 28, for the order under Article 83 is an order terminating the parental rights of the parents and transferring them to somebody else. This order the Royal Court is empowered to make, if satisfied, and I quote from paragraph (4) of Article 83,

> "that the parent or legal guardian suffers from some disability of mind or body rendering him incapable of caring for the child or is of such habits or mode of life as to be unfit to have the care of the child".

These words seem to make it plain that it is not essential for an order under Article 83 that the child should have been in the care of the parents, and that the unfitness of the parents to have the care of the child may be demonstrated to the Court, not by evidence of the way in which they have treated the child, but by quite different evidence of their disability of mind or body of their habits or mode of life. If the legislature contemplated that an order under Article 83 might be made, even in a case in which the child had not been in the care of the parents, it is not surprising that they should have contemplated the same thing in the case of the less drastic order which can be made under Article 28.

The making of an order under Article 28 is certainly a serious step and one would not expect that the power to make the order would frequently be used in cases in which the child has never been in the care of its parents. It is clear that hitherto the power has been exercised with discretion; indeed, Miss Nicolle informed us that she was not aware of any case, other than those in connection with this family, in which such an order had been made in respect of a child who had never been in the care of its parents. In this case the Royal Court was satisfied that the evidence was such as to require it to make the order even though the child had never been in the care of its parents. In my judgment the Royal Court was right in taking the view that it had in those circumstances the power to make the order under Article 28. In other words, there was jurisdiction to make the order, and since the order is no longer challenged on the facts it follows in my judgment that this appeal must be dismissed.

Sir Patrick Neill: I agree, and there is nothing that I can usefully add.

Mr. Pownall: I too agree, and have nothing to add.