

**Judgment 11/2006 Baby A v Health and Social Services Department – Royal Court (Child Care File 50) – 7<sup>th</sup> March 2006**

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**Child care – Children and Young Persons (Guernsey) Law, 1967 – decision by the Department to move the baby to a new set of foster carers – guardian ad litem’s application for Judicial Review – limitations of Judicial Review in such a case – application refused**

**IN THE ROYAL COURT OF GUERNSEY**

**The** 7th day of March, 2006 before Richard John Collas, Esquire, Deputy Bailiff.

In the action of BABY A of c/o Collas Day, Manor Place in the parish of St. Peter Port (hereinafter called “the Applicant”) against THE DIRECTOR OF THE HEALTH AND SOCIAL SERVICES DEPARTMENT of c/o St. James’ Chambers in the said parish of St. Peter Port (hereinafter called “the Respondent”) to see the Applicant apply to the Court for permission to apply for a Judicial Review of the Respondent’s decision to remove Baby A from his current placement in foster care to an alternative placement;

WHEREAS on the 3<sup>rd</sup> day of March, 2006, THE COURT, having heard Advocate S. Mallett, Counsel for the Applicant, and Advocate R.T. Swards, Counsel for the Respondent, and Advocate P.A. Allen, Counsel for the Mother, ADJOURNED the matter to Monday the 6<sup>th</sup> day of March, 2006;

AND WHEREAS on the 6<sup>th</sup> day of March, 2006, THE COURT, having heard Advocate S. Mallett, Counsel for the Applicant, and Advocate R.T. Swards, Counsel for the Respondent, and having also

heard Richard Burrows, Senior Manager for accommodation and long term services and Greta Souter, Senior Practitioner, home finding team, RESERVED JUDGMENT;

THE COURT, this day, gave judgment in the terms attached hereto and REFUSED the application for Judicial Review.

A. WOODINGTON

Her Majesty's Deputy Greffier.

Approved text  
7 March 2006

**IN THE ROYAL COURT OF  
GUERNSEY  
(Ordinary Division)**

**Application for leave for  
Judicial Review**

**Between**

**BABY A (a minor)**

**Applicant**

**-v-**

**THE DIRECTOR OF THE HEALTH  
AND SOCIAL SERVICES  
DEPARTMENT**

**Respondent**

**Judgment handed down: 7 March 2006**

**Before: Richard John COLLAS Esq., Deputy-Bailiff**

Counsel for the Applicant: Advocate S Mallett  
Counsel for the Respondent: Advocate R T Swards

1. This application was made on behalf of a minor referred to as Baby A for leave to apply for Judicial Review of the Respondent's decision to remove Baby A from one placement with a foster carer to an alternative placement with another foster carer and to seek an Order:-
  - i) quashing the decision of the Respondent on the grounds that the decision was an unreasonable and/or irrational exercise of its powers; and
  - ii) directing the Respondent, should the decision be quashed, to reconsider placing Baby A with his original foster carer, taking into account all relevant considerations, as a matter of urgency given that the application concerns the well-being and best interests of Baby A.

**Factual Background**

2. Baby A's full name, date of birth and the name of his mother were disclosed to the Court. He is not yet 5 months old. Before the baby was born, his mother

was told by staff of the Health and Social Services Department (“the Department”), that they did not consider that she would be able to parent the child properly and they suggested the baby should be given up for adoption. The baby’s mother wished to parent him herself, but despite her best hopes, I am told that care proceedings were commenced within a week of his birth and since then the baby has been the subject of interim Fit Person Orders under the provisions of the Children and Young Person Law 1967. Since then, the baby has been placed with a number of carers including a maternal Aunt. On 30 December 2005 the baby was placed with a short-term foster carer to whom he was not related and he remained there until Friday 3 March.

3. In accordance with normal practice in Care Proceedings, a guardian ad litem was appointed who is an employee of the NSPCC in England. On 24 February 2006, the Guardian became aware that it was proposed that the baby would be moved to a new set of foster carers. The Guardian contacted the Department and spoke to one of its officers who confirmed that it was planned to move the baby.
4. The Guardian was concerned about him being moved as she believed it was not in his best interests for the following reasons set out in Advocate Mallett’s affidavit:-
  - i) The Guardian was not consulted in relation to the decision.
  - ii) The baby has formed an attachment with the foster carer which the Guardian has witnessed and believes they have started to form a bond, they have a good relationship and she had observed good eye contact between the baby and the foster carer.
  - iii) All of the baby’s needs are met in his current foster placement where he has spent half of his life.
  - iv) The baby’s family have got an attachment with the foster carer and the baby is able to have as much contact as is deemed appropriate with his natural family and his natural family are able to communicate effectively with all concerned in his life.
  - v) The consequences of a move at this time are that, in the opinion of the Guardian, he is likely to become distressed and very agitated, he will become difficult to settle and very anxious. The Guardian has stated it is well established that this type of trauma may have a long lasting effect on the baby.
5. The Guardian was told there was a complaints procedure she could follow if she wishes to complain about this decision and was given the name of a person to whom the complaint should be addressed.
6. The day on which she was informed of the decision was the Guardian’s last day at work before going on holiday. Advocate Mallett has been able to speak to the Guardian on holiday in the Canary Islands but there was no time or opportunity to obtain an affidavit from the Guardian in relation to these

proceedings and Advocate Mallett may not have been as fully briefed as would have been the case if the Guardian had been immediately available.

7. Before going on holiday and as soon as the Guardian was made aware of the proposed move, she contacted Advocate Mallett who made efforts to arrange a court hearing in the care proceedings on the same day, but unfortunately there was no court hearing available. Advocate Mallett wrote to the court in connection with the care proceedings (a letter which was not disclosed to me in these proceedings). The letter was received at the Greffe on 1 March. Advocate Mallett was informed on Thursday 2 March that the matter would be listed for hearing before the Juvenile Panel dealing with the care proceedings at 10.15 am on Friday 3 March. At that hearing all parties accepted that the Juvenile Panel has no power to act as a supervisor to the Department and hence had no power to intervene in the decision to move Baby A from one short-term carer to another.
8. Consequently, the only remedy available to Advocate Mallett was to issue an application for Judicial Review which came before me at 3.30 pm on Friday 3 March.
9. When I sat to hear the application, the baby had already been moved to his new foster carers and introduction visits were taking place involving two children who were to move to that carer in place of the baby.
10. During the hearing on Friday there was a suggestion from Advocate Mallett that the timing of the move was no coincidence and may have been done to frustrate this application. That assertion was denied by Advocate Swards who assured me that the decision as to the timing of the move was taken by a member of staff who would have been unaware of the court proceedings. That may be so, but it does not alter the fact that the family believe that the Department was aware that an application was being made to the court to review the decision and the Department could have issued an instruction to delay the move, pending the outcome of the court proceedings. Advocate Swards indicated that there may have been operational reasons which would not have permitted any delay, but as the Department are reluctant to give much information as to the background for the decision that was taken, they should not be surprised if the family continue to harbour their suspicions.
11. On Friday 3 March, Advocate Mallett argued strenuously that I should there and then grant leave for judicial review, hear the application for judicial review and order that the baby be returned to its original foster carer as any time spent away could be damaging. I did not consider that it would be appropriate to rush these proceedings to that extent. I therefore adjourned the matter to Monday and encouraged the Department to disclose to Advocate Mallett more information concerning both the decision making process and the reasons for the decision.
12. I sat again at 11.30 am on Monday 6 March to hear the application for leave. Advocate Mallett informed me that shortly before the hearing she had received

some written information from the Department (which was not disclosed to me), but which Advocate Mallett said did not take matters any further forward.

13. The explanation that the Guardian and the baby's mother had been given as to the reasons for moving the baby was that a number of children in placements needed to be moved in order to accommodate other children who needed placement.

### **Procedural Issues**

14. The proceedings were brought in the name of "Baby A" on the instructions of the guardian ad litem appointed on behalf of the baby in the Child Care Proceedings. Advocate Swards, on behalf of the Department, accepted that the Guardian had the *locus standi* to bring the application.
15. Advocate Allen was also present in court on behalf of the baby's mother. She indicated that the mother wished to be joined as a party to the proceedings, either as an applicant or as a respondent, but did not know at that stage whether legal aid would be available. She also had not resolved the question as to who would be instructing her as the baby's mother is herself a minor. Advocate Allen conceded that she was not in a position to pursue an application for the mother to be joined to the proceedings at this stage. I was therefore not required to decide the legal question as to whether the mother of a child who is subject of an Interim Fit Person Order has sufficient standing to bring an application of this nature. I was satisfied that there was no injustice to the baby as Advocate Allen remained in court to assist Advocate Mallett who was able to put to me all the issues she wishes to argue.
16. Due to the urgency of the matter, the only two affidavits before me were from the baby's mother and from Advocate Mallett. As I have mentioned, there was no affidavit and no firsthand evidence from the Guardian.
17. Advocate Mallett indicated at the start of the resumed hearing on Monday 6 March that she did not require an adjournment to enable her to take the Guardian's instructions on the information that had only recently been provided to her by the Department.
18. Practice Direction No.3 of 2004 envisages that an application for leave for judicial review may be made *ex-parte*. In this matter Advocate Swards appeared on behalf of the Department and was able to clarify certain factual issues, although no affidavit and no formal evidence was received from the Department. He resisted the application for leave.

### **Grounds for seeking Judicial Review**

19. Advocate Mallett relied upon the decision of Ewbank J. in the Queens Bench Division on a parent's application for judicial review and an order of certiorari to quash a Local Authority's decision to place a child with proposed adopters in *R v North Yorkshire County Council, ex-parte M [1989] QB 411* in which he said the following at page 418:

*“in my judgment, there is a reciprocal duty on the part of the local authority, not only to disclose the proposals for change in relation to the child, but also to listen to the views of the guardian ad litem. I am not in any way suggesting that the guardian ad litem makes the decisions or in any way is a party to the decisions, but the guardian ad litem is appointed, in accordance with the statute, to safeguard the interests of the child. While a case is in train, the local authority ought not to take any major decisions without informing the guardian ad litem before the decision is made of the proposal and listening to her views. That the local authority have failed to do in this case. They failed to do it on 20 May 1988 when the initial decision was made. They failed to do it on 5 August 1988 when the decision to implement the proposal was made. In my view, the failure to do this flaws the decision making of the local authority.”*

20. Advocate Swards distinguishes that case on the grounds that in Guernsey there is no statutory requirement to have a guardian ad litem, no statutory definition of the duties of a guardian ad litem and hence no equivalent of Rule 14 A (6) of the Magistrates Courts (Children and Young Persons) Rules 1970 pursuant to which the guardian ad litem has a duty to investigate all the circumstances and to interview such persons as he or she considers appropriate. Ewbank J. said that duty implied, in his judgment, *“a corresponding and reciprocal duty on the part of the local authority to disclose to the guardian ad litem any major changes in the circumstances of the child which are proposed.”*
21. I am inclined to agree with Advocate Mallett’s submissions that having borrowed the concept of a guardian ad litem from English Law, it must be assumed that Guernsey intends the guardian ad litem to have the same responsibilities and duties and the same right to be consulted as an English guardian ad litem, unless the Court appointing the guardian has expressly directed otherwise.
22. One of the reasons Advocate Mallett urged me to allow the application for leave was to enable this important issue to be decided, as a matter of public policy. I do not consider that to be necessary. It is the Juvenile Panel that orders the appointment of a guardian ad litem and that Court has the power to specify, and if necessary clarify, what are the duties, responsibilities and rights of a guardian ad litem. Indeed it is preferable that, in the first instance at least, such issues should be decided in that Court as they have the greatest experience of child care matters. Any decision of the Juvenile Panel is of course subject to review by the Royal Court in any event.
23. The failure to consult with the guardian ad litem in this case means there is therefore a very strong arguable case that this decision is flawed which might be reason enough to grant leave.

### **The remedy**

24. Advocate Swards urged me to take account of what is the remedy available and this is the issue which has concerned me the most.
25. If I grant leave for Judicial Review, hear the substantive application and then if I conclude the decision is flawed because of a failure to consult the guardian ad litem I will have to remit the decision to the Department for reconsideration after consulting with Baby A's guardian ad litem and also with the guardians of any other children affected by this series of moves. They may or may not have been consulted to date, I do not know who was or was not consulted prior to the original decision.
26. I could not substitute my decision for that of the Department, I would have to remit it to the Department for a fresh decision. If I did so, the decision the Department would then have to take is not whether to move Baby A and any other children but whether to return Baby A to its original carer and what to do with the other children who may then be displaced, some of whom may by that time have moved, or be in the process of moving, or have commenced introductory meetings to prepare them for a move. That fresh decision would have to take account of the views not only of the guardians of all the children but also of their carers and of anyone else who may need to be consulted as well as the circumstances and best interests of all of the children as they are perceived to be at that time.
27. The Department has to take account of not only the best interests of Baby A but also the best interests of all the other children affected and sometimes the views of their carers.
28. A further difficulty faced by Advocate Mallett is that, in the guardian ad litem's absence on holiday, she is unable to take instructions as to whether the guardian ad litem will recommend that Baby A be moved yet again in order to return him to the original carer.
29. What it seems to me is required is that when Baby A's guardian ad litem returns from holiday she should, as soon as possible, make an assessment of Baby A's current needs and circumstances in his new environment. If she concludes it is not in Baby A's best interests to remain where he is, she should make representations to the Department to move him and, move him back to the original carer, if that is her recommendation.
30. The Department will then have to decide whether to leave Baby A where he is or move him. If the Department refuses to consider the guardian's views or unreasonably decides to leave him where he is, the guardian will be able to seek advice from Advocate Mallett as to whether she should seek Judicial Review of that new decision.
31. She will then be in no better position if I grant this application for leave for Judicial Review of the original decision to move Baby A.
32. I express no view as to what would be the outcome of any application for Judicial Review. Advocate Swards has urged upon me the fact that day to

day decisions as to the placement of children in the Department's care involve matters of detail with which the court should not be concerned. It would be wrong for me to form a view on that argument without having the opportunity to consider full argued submissions from counsel.

33. Another matter that has concerned me since I first became aware of these proceedings is the inevitable limitations of Judicial Review as a remedy in a matter such as this. Baby A's guardian ad litem and Advocate are both concerned only with the best interests and welfare of the baby. Those matters are the subject of the care proceedings.
34. The Department has to balance the interests of all the children in its care.
35. On a Judicial Review I would merely be considering the propriety and reasonableness or otherwise of the Department's decision. That decision may not be in the best interests of Baby A but it may nonetheless be a reasonable decision when the interests of all the children and carers concerned are weighed in the balance.
36. The appropriate forum for considering Baby A's best interests is in the care proceedings before the Juvenile Panel. I hope all parties will pursue those proceedings as vigorously as they pursued the application before me so that a long term plan can be identified and implemented for Baby A as soon as possible and involving his mother to whatever extent it is decided she should be involved if it is considered appropriate that she be involved at all.
37. I should perhaps add that if this application had been made before Baby A had been moved my decision may well have been different. In my opinion, the fact that he had been moved and that arrangements were in hand to move or place the other children affected was significant but I do not dismiss the application on the grounds of delay as such. Advocate Mallett has acted promptly in bringing the application. Also, I do not criticise the guardian for failing to make a formal complaint to the Department which she considered would not have been sufficiently speedy to affect the move.
38. In the circumstances as they now are, I am not persuaded that the remedies available through Judicial Review will achieve anything that cannot be achieved in other ways.
39. Accordingly I refuse the permission for Judicial Review. I will ask HM Deputy Greffier to pass a copy of this judgment to the Juvenile Panel so that they are aware of what I have said.