



PRESS SUMMARY

S-B (Children) [2009] UKSC 17

On appeal from [2009] EWCA Civ 1048

JUSTICES: Lord Hope, Lord Rodger, Lady Hale, Lord Brown, Lord Collins, Lord Kerr, Lord Clarke

BACKGROUND TO THE APPEAL

The case concerns the proper approach to deciding who has been responsible for harming a child in proceedings taken to protect that child, and others in the family, from harm and the consequences of such a decision. At a fact-finding hearing, the judge decided that either the mother or the father had injured their baby boy. He had therefore suffered significant harm attributable to a lack of reasonable parental care, as required by section 31(2) of the Children Act 1989. The judge did not ask herself which parent was responsible, although she expressed the view that it was 60% likely that the father had injured the child and 40% likely that the mother had. The mother and father were separated and the father played no part in the proceedings. At the later welfare hearing, the judge approved the placement of the child for adoption, together with his younger brother, who had been born during the proceedings and placed with foster parents soon after birth. The mother, who had maintained contact and developed a good relationship with the children, appealed.

JUDGMENT

The Supreme Court unanimously allows the appeal and remits the case for a complete rehearing before a different judge. The judgment of the Court was given by Lady Hale. [48]-[50]

REASONS FOR THE JUDGMENT

- It is now settled law that the standard of proof in care proceedings is the balance of probabilities, as set out in *Re H (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563 and confirmed in *Re B (Children) (Care Proceedings: Standard of Proof)* [2008] UKHL 35, [2009] AC 11. [8]-[13] It is clear from the observations of Lord Hoffman and Lady Hale in *Re B* that the same approach is to be applied to the identification of perpetrators as to any other factual issue in the case. It was incorrect to apply a heightened standard consistent with the gravity of the allegations. [34]
- There is no obligation for a judge to decide who has caused the harm to the child, as long as that harm is attributable to someone having care of the child, although he should do so if the evidence warrants this. In a split hearing, there may be particular benefits of making such a finding, mainly because it will promote clarity in identifying the future risks to the child and the strategies necessary to protect him from them. [35]-[38] Where a specific perpetrator cannot be identified, a judge should still, where possible, identify a pool of possible perpetrators. The test for doing so is the “likelihood or real possibility” that a particular person was involved. A person does not have to prove their innocence to be left out of account [40]-[43]
- Where a judge has been unable to identify a perpetrator, it is positively unhelpful to have the sort of indication of percentages that the judge gave in this case. [44]
- If the judge is able to identify a perpetrator on the balance of probabilities, all the evidence accepted by the judge which is relevant to identifying the risks to the child remains relevant to deciding where his

best interests will lie. The court must also be alive to the possibility that the finding who the perpetrator was is wrong and be prepared to revise it in the light of later evidence. [46]-[47]

- In the circumstances of this case the judge had misdirected herself on the standard of proof in the fact-finding hearing. In those circumstances the case ought to be remitted in whole to a different judge who can decide the matter on the right basis. [48]
- The decision to remove the second child, who had never been harmed, must also be remitted for rehearing. The judge had held that there was a risk of future harm to him because there was a real possibility that the mother had injured the older child. It was held in *Re H* that this is not the correct approach: predictions of future harm must be based on proven findings of fact. [49]

NOTE

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for that decision. The full opinion of the Court is the only authoritative document. Judgments are public documents and are available at: www.supremecourt.gov.uk/decided-cases/index.html