



Neutral Citation Number: [2019] EWCA Civ 126

Case No: B4/2019/0217

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE FAMILY COURT AT SHEFFIELD
Her Honour Judge Carr QC
SE19C000145

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 7 February 2019

Before :

LORD JUSTICE PETER JACKSON
and
MR JUSTICE MOOR

Between :

G (Children: Fair Hearing)

Helen Compton (instructed by **Sills & Betteridge LLP**) for the **Appellant Mother**
Caroline Ford (instructed by **Doncaster Metropolitan Borough Council**) for the **Respondent**
Local Authority
Ruth Richards (instructed by **Malcolm C Foy & Co**) for the **Respondent Father** (written
submissions only)
Sarah Peart (**Howells LLP**) for the **Respondent Children** (written submissions only)

Hearing date: 7 February 2019

Approved Judgment

Lord Justice Peter Jackson:

Introduction

1. This is an appeal by a mother from interim care orders made in respect of two young children on 24 January 2019, for which I granted permission on 30 January. The mother states that she was subject to improper judicial pressure at the hearing that led to the orders being made without opposition on her part.
2. The parents separated in 2017, with the children remaining with their mother. In 2018, the family came to the attention of the police and the local authority as a result of incidents in which both parents accused the other of assaults. The local authority assessed and took no further action.
3. The events that led to the proceedings arose from a dispute that erupted between the parents and their respective families after the father, for whatever reason, did not return the older child, M aged 4, to the mother at the end of a week's holiday abroad. The mother and others went to the father's home on 21 January at around 10 p.m., causing a fracas and taking M away. The police were called, the mother and other members of her family were arrested, and both children were taken into police protection at 3.45 a.m. and placed in foster care, where they remain. The police protection order was to remain in effect until 24 January.
4. On 22 January, the local authority held a strategy meeting. On 23 January, both parents consented to the children's accommodation under s.20, but later that day the mother withdrew her consent and on 24 January care proceedings were urgently issued and listed for an immediate interim hearing. The interim threshold statement referred to the incident on 21 January, the children having been taken into police protection, the reports of past violence between the parents, the father's lack of cooperation with previous assessments, alleged violence between the mother and her present partner, and a school referral to social services arising from M's poor attendance. The papers consisted of a statement from the social worker, who had no previous knowledge of the family, and the police protection authorisation record, which described the events of 21 January. There was inevitably no written evidence from the parents.

The hearing

5. The hearing was listed before Her Honour Judge Carr QC with a marking of 'not before noon'. The mother had her first meeting with her counsel (C, year of call 2016) at court, accompanied by her solicitor.
6. The hearing began sometime after 14.00 and lasted for twelve minutes, excluding a break in the middle. It began with introductions by Ms Ford, counsel for the local authority, and continued in this way:

Ms F: Your Honour, these – this is an urgent interim care order application.

JUDGE: Yes, well I think I – I called it on at 20 to 1 when it was apparent that the parents were attending.

Ms F: Yes.

JUDGE: I stood it down till 2. At that stage, I confirmed I'd read the papers. I took the file with me and I've looked at it again.

Ms F: Right, so your Honour is aware of the up-to-date position. The children are placed together.

JUDGE: Ah, well I'm relieved about that.

Ms F: Yes, and that remains the local authority's plan if the court endorses the making of the interim care order. [The father] supports the local authority's application, [the mother] does not and she seeks to contest it. Perhaps if I could pass you to Mr [C].

JUDGE: Yes. Mr [C], what evidence do you what to hear?

Mr C: Certainly the – the social worker as a – is a starting-point, depending if the application is to be heard today or on a – on a different day.

JUDGE: Oh, it's got to be heard today. As you know, the PPO runs out.

Mr C: Well ---

JUDGE: --- and if it is heard today I shall certainly make findings that your client will be stuck with.

Mr C: Well, my instructions are to contest the ---

JUDGE: Well, quite, but does she realise the impact, that if she chooses to go ahead with this I shall be forced to make findings?

Mr C: Well, I can – I can make sure that's explained ---

JUDGE: Well, yes, you've had an hour and 15 minutes.

Mr C: --- again.

JUDGE: In fact, you've had an hour and a half. It's very important at the beginning and commencement of proceedings, that – where this application is bound to be supported by the Guardian – yes ---

Ms PEART: Your Honour, it is, yes.

JUDGE: I should ask, but it's bound to be supported by the Guardian. If I go ahead and make findings - which inevitably I will, because

something happened at the house on the 21st of January – she is stuck with those, and it could impact on how the police look at it and everything. Potentially, the situation is – is very risky for her and I – I say that so that no-one's left in any doubt that if I hear the evidence, which I'm more than willing to do – my list is empty for this afternoon - I shall make findings and she'll be stuck with them.

Mr C: Well, in light of that indication, your Honour, I will probably have a further word.

JUDGE: Well, you can turn your back and just check if she wants to. She is in a very very precarious position because she undoubtedly went to the house that belongs to the father, she undoubtedly retrieved, late at night, her daughter. It may well be that [he] kept the child when he shouldn't have done. but I don't know about that yet. It may be something I have to make a finding about – that – what caused her to act in this manner, but this is a case where, inevitably, I'm going to make findings, and it doesn't take rocket science to realise that if you grab a child in the – late at night when that child should have been in bed asleep - that that is significant harm. I don't think there's any question about it.

Mr C: Well, your Honour, mother's position would be that it was a – a choice between two difficult decisions that evening ---

JUDGE: Oh, nonsense.

Mr C: --- and that she had to take steps to safeguard the welfare of her daughter.

JUDGE: No, that's not the way that you go around it, Mr [C], If that is the preposterous proposition you're putting to me, it'll fall on deaf ears.

Ms F: Can I just say, your Honour, for the avoidance of doubt, [the social worker] only became involved in this – in this case, I think it was yesterday or the day before, so she's not going to be able to give evidence as to the facts of what happened on that night.

JUDGE: I'm just very concerned with this mother.

Ms F: It's the documents of - the PPO is really the essential document, and that shows that actually mother had made the complaint to the police the day before, so why it took her then almost 36 hours to decide to do what she did ---

JUDGE: Yes.

Ms F: --- is one of the questions that I would be putting.

JUDGE: Yes. Mr [C], I'm doing this to try and assist your client, not for any other reason, so it's up to her.

Mr C: Well, I do ask your Honour for the matter to be stood down so that I can take proper instructions rather than rushing the mother into a - into a decision on that.

JUDGE: Yes. Well, I must say, father's taken the only decision, in my view, that he should take, particularly now I know the girls are placed together. I would have had quite a lot to say if they weren't and it would have impacted on my decision, but father's taken the only standpoint – obviously I'm not making any findings against him because he's accepted the inevitable.

It's quarter-past now. I'm very willing to hear this but I want your client to be very much aware that I shall probably send my findings, if I make any, to the police and require it goes to CPS and – and see what happens. This is not the sort of situation that it seems to me, Mr [C], should be permitted to happen without some consequences.

MR [C]: Yes, your Honour.

JUDGE: Right, it's quarter-past now, I'll give you – no later than 25 past.

MR [C]: Thank you.

7. The court then adjourned for 13 minutes. When it reconvened, the transcript continues as follows:

JUDGE: Now, Mr [C], what's happened?

Mr C: I'm grateful for the time, your Honour. Having spoken to [the mother] about the – the potential implications of today further, [she] is going to consent to the interim care order ---

JUDGE: Well, I think she's very wise.

Mr C: --- today.

JUDGE CARR: I think she's very wise indeed. I don't like separating children from their parents, no – no judge does, but this has got to be looked at and see what on earth is happening.

Mr C: Yes, your Honour.

JUDGE: In that case I shall simply adopt the threshold as drafted, unless anybody wants amendments or what have you. It seems to me to reflect the situation.

Further discussions then took place about case management and contact. The care plan provided for each parent to have contact twice a week for 90 minutes.

8. The order records that neither parent actively opposed the making of the interim care orders. It provides for the parents to file statements and for the Guardian to file a position statement. A further case management hearing was listed before the judge on 8 February.

The appeal

9. No sooner had the hearing finished than the mother and her family became distressed at what had occurred, and on 29 January this appeal was lodged.
10. There are eleven wide-ranging grounds of appeal, but it seems to me that the nub of the matter is expressed in these grounds:

“2. The learned Judge had subjected the mother to extreme pressure amounting to duress and undue influence through her comments in court and impacted on the advice given to her. As a victim of duress she did not freely consent to the ICO. This resulted in serious procedural irregularity.

3. The learned Judge’s comments gave a strong indication she had prejudged the application and prejudiced a fair hearing, breaching the Mother’s Article 6 and 8 rights.”

It is said in other grounds that the judge did not allow sufficient time for the mother to consider the evidence and receive advice, that the test for immediate separation was not applied or met in this case where the court did not hear oral evidence, that the judge should have given a judgment, and that she should not have sanctioned a care plan with such infrequent contact.

11. I granted permission to appeal for these reasons:

“The argument that there was a serious procedural error in the conduct of the hearing has a real prospect of success, as least to the extent of securing a rehearing of the application for an interim care order.

The evidence would probably have justified a short-term interim care order, but it is questionable whether the process that led to the making of a longer-term order was fair.”

12. In support of her appeal, the mother has provided statements from herself and from her solicitor, exhibiting attendance notes from the solicitor and from counsel. Now that the transcript is available, it seems to me that there is no need for reliance on these documents and I would not grant leave for them to be filed.
13. Since permission to appeal was granted, a consensus has emerged between the parties that there should be an early contested hearing of the application for interim care orders

before a different judge. Contact has also been increased to daily. What is not agreed upon is the justice of the mother's complaint about the hearing on 24 January. It is therefore necessary to consider the submissions of the parties on that matter.

14. Ms Helen Compton's distilled submission to us is that the mother was deprived of a meaningful opportunity to oppose the making of the orders. The judge gave the impression of having prejudged the threshold and the outcome and she exerted undue influence on the mother in a number of ways, including by repeatedly warning her that she would be 'stuck' with adverse findings and by threatening to refer the matter to the police and the CPS, something that was bound to place the mother under extreme pressure. Overall, the judge's approach overbore the mother's will.
15. The local authority resists the appeal. It maintains that both the interim threshold and test for interim removal were satisfied and opposes a return to either parent. It argues that the proper course for the mother to take would have been to apply to discharge Judge Carr's order instead of taking what it describes as the 'nuclear' option of an appeal. However, it would not oppose the listing of a contested hearing before a different judge.
16. On the central issues, Ms Caroline Ford puts its case in this way:

“Following her discretionary case management powers and with a clear view on the Overriding Objective the learned judge informed the Mother and her Counsel that there was time for the Court to hear the matter as a contested hearing that afternoon and of the possibility of threshold findings being made against her.

However firm the learned judge may have been, it did not amount to duress and it was incumbent upon the Mother's legal representatives to raise these issues with the judge. In the event that judge refused to hear the case at all a judgment should have been requested. In the event that there had been a contested hearing, the Court would have provided a judgment (probably *ex tempore*) and clarification could and hopefully would have been requested. This matter was agreed and no judgment requested.

The learned Judge did state a view on the initial application but this was within her discretion to do. The Learned Judge also provided the Mother with time over lunch to take instructions, further time when Mr C asked for it and stressed that she was willing to hear the case that afternoon. No application was made by the Appellant Mother to seek an adjournment or agree an Interim Order pending listing this matter for a contested interim hearing. This exercising of the Judge's case management powers did not amount to a breach of the Mother's Article 6 and 8 Rights.

Both parents attended at court represented, the Mother by both Counsel and instructing solicitor. It is perhaps surprising that neither of the Mother's fully qualified legal team sought to challenge the Judge in the event that they felt the Judge was being intimidating or exerting duress and express their views to that effect at the time.”

17. In her submissions to us, Ms Ford accepts that the transcript shows the judge to have been bullish, but distinguishes this from bullying. She does not accept that the mother was under duress. Professionals are used to judges expressing firm views and they should be able to deal with it, and where necessary stand up to pressure from the bench. There is nothing improper in a judge advising a party of the consequences for them of adverse findings being made at an interim hearing. Ms Ford accepted that one interpretation of the transcript supported the complaints now made; in the end she was not able to suggest any other possible interpretation.
18. I can immediately dispose of the argument that the matter should have been approached by way of an application to discharge rather than an appeal. That argument was been rejected by this court in *Re R (Contact: Consent Order)* [1995] 1 FLR 123 at 129, where it was said that where it was alleged that a judge had brought improper pressure to bear upon a party to reach a settlement by appearing to have made up his mind finally before hearing the evidence, or by some threat or unjustifiable warning (in that case as to costs), it is appropriate for this court to consider the matter and not the judge himself or a judge of co-ordinate jurisdiction.
19. Written submissions on behalf of the father support the case put by the local authority:

“... the judge confirmed her availability to hear the matter as an urgent hearing and attempted to assist the mother in reminding her of the potential of a finding being made against her.”
20. Written submissions on behalf of the Guardian merely observe that the mother consented to the order. They do not attempt to address the criticisms of the conduct of the hearing. I find that surprising, as one of the functions of a Children’s Guardian is to take an interest in whether the process that leads to orders affecting the children is a fair and valid one.

Conclusions

21. This is a procedural appeal, concerned with a party’s right to put her case and to have it fairly judged. It is about the process, not the outcome. Given that there is to be a fresh hearing of the local authority’s application, I say nothing about the underlying merits and focus exclusively on the conduct of the hearing under appeal.
22. The overriding objective in family proceedings is to deal with cases justly, having regard to any welfare issues involved. The court is under a duty to deal with cases expeditiously and fairly and to manage them actively in ways that include “helping the parties to settle the whole or part of a case”. See FPR 2010 1.1(1), 1.1(2)(a) and 1.4(2)(g).
23. Judges can, and frequently do, indicate a provisional view to the parties. This is entirely proper and may lead to parties changing their positions. Provided they do so freely

(even if reluctantly), there is nothing objectionable about this. However, judges must not place unreasonable pressure on a party to change position or appear to have prejudged the matter. As Stuart-Smith LJ said in *Re R* (above) at 130:

“A judge may often have a laudable desire that the parties should resolve disputes, particularly family disputes, by agreement. I would not wish to say anything to discourage a court from doing so, but great care must be taken not to exert improper or undue pressure on a party to settle when they are unwilling to do so.”

24. Measured against these principles, and making every allowance for the realities of practice in a busy family court, I regret that what occurred in this case fell well outside the proper exercise of the court’s powers.
25. This was an urgent application, which the judge rightly appreciated had to be decided that day. As she said, she had time available. It was a matter for her, given the practical constraints, as to whether to hear oral evidence: if she had been considering making a short-term holding order I would not have criticised her for not doing so, with any evidence needed to justify a longer-term order being taken on a later date.
26. However, that is not what happened. The judge was hearing an application issued that day, with the parents arriving at court for the first time, the social worker and the Guardian knowing little of the fraught family history, and the mother being represented by inexperienced counsel. Before Mr C could even manage to tell the judge that his instructions were to contest the order she told him that “... *if it is heard today I shall certainly make findings that your client will be stuck with.*” The only conclusion that the mother and her advisers could draw from this and similar statements (“*very risky for her*”; “*a very very precarious position*”; “*inevitably, I’m going to make findings... – that that is significant harm. I don’t think there’s any question about it.*”; “*not... without some consequences.*”) is that the judge had made up her mind and was sure to make adverse findings that would be damaging to her in the long run. The judge then isolated the mother by saying, before learning the position of the Guardian, that “*this application is bound to be supported by the Guardian*”. When Mr C attempted to put a small part of his client’s factual case, he was met with derision: “*Oh, nonsense*”; “*preposterous proposition you’re putting to me, it’ll fall on deaf ears.*” Counsel for the local authority then intervened to say that her social worker couldn’t be questioned about events before she was allocated and that she would question the mother about why she waited until 36 hours after reporting matters to the police before going to the father’s house. Before adjourning at Mr C’s request, the judge further isolated the mother by saying that “*the father’s taken the only decision, in my view, that he should take, ... obviously I’m not making any findings against him because he’s accepted the inevitable.*” Finally, she made an entirely gratuitous statement that “*I shall probably send my findings, if I make any, to the police and require it goes to CPS and – see what happens.*” Whether or not that was an empty threat is beside the point.
27. This material amply substantiates the appellant’s case that her consent or non-opposition to the interim care order was not freely given, but was secured by oppressive

behaviour on the part of the judge in the form of inappropriate warnings and inducements. Regardless of the fact that the mother was legally represented, she did not get a fair hearing. There has been a serious procedural irregularity. This ground of appeal succeeds. It is unnecessary to go on to consider the other grounds.

28. I also regret that the submissions made by the local authority, either supported or not challenged by the other respondents, show a failure to understand the nature of the overriding objective or the requirements of a fair hearing. The judge's approach went far beyond "firmness" and cannot possibly be described as "assisting" the mother. Similarly, I would reject the suggestion that the fundamental unfairness of the hearing could have been cured by a more assertive response by the mother's legal representatives. After what happened in the first part of the hearing, it is difficult to see how a fair hearing could have taken place even if the mother had maintained her opposition. The submissions we have received from the respondents show why the appeal needed to be heard. The consequence will be that the local authority's application for interim care orders will be heard afresh, and not as an application by the mother for the discharge of existing orders.
29. A further matter, which arose during submissions, requires comment. The judge's repeated references to the mother being 'stuck' with findings is to my mind one of the causes of concern. However, both Ms Compton and Ms Ford told us that this was a warning that in their experience is often given by judges at interim hearings. Neither sought to argue that there is anything improper about this. I do not share that view and I agree with the observations of Moor J on this point.
30. As to the orders that this court should make, the interim care orders will be set aside and replaced by short-term interim care orders made by this court, to last until an early contested hearing before another judge. Ms Compton urged us not to make replacement orders, but to allow the children to return immediately to their mother's care. Considering the background and the opposition of all other parties to this course, that is not a realistic submission. We have instead established that there can be a case management conference tomorrow, 8 February, before a circuit judge sitting as a section 9 judge of the High Court. At that hearing, directions can be given to ensure an early hearing of the local authority's application for interim care orders, which will be heard without any preconceptions arising from the hearing on 24 January or the hearing today. My only additional observation is that the court is likely to be able to determine that application in a matter of hours and not, as the mother has so far argued, days. But that will be a matter for the allocated judge.

Mr Justice Moor:

31. I agree, and add the following in relation to one aspect of the matter.
32. During the course of the hearing, we were told that it was commonplace in certain courts to warn parents that, if the application for an interim care order was opposed, the court may have to make findings as to facts in dispute. The implication was that these

findings would then stand for all time. Indeed, Ms Ford, on behalf of the Local Authority told us that this would be done “to prevent the need to go over the same ground again” later in the proceedings.

33. It is important to remember that there is a fundamental difference between sections 31 and 38 of the Children Act 1989. Section 31 sets out what needs to be established before a court can make a full care order. Section 38(2) is in very different terms:-

“A court shall not make an interim care order or supervision order under this section unless it is satisfied that there are reasonable grounds for believing that the circumstances with respect to the child are as mentioned in section 31(2)”.

34. Section 38(2) does not require the court to make findings of fact to the civil standard, nor to be satisfied that the main threshold document is proved. Instead, the section requires the court to be satisfied that “*there are reasonable grounds*” for believing that the threshold in section 31 is made out. It follows that, at an interim hearing, rarely, if ever, will findings of fact be made that will have the effect of establishing the threshold at a final hearing. Accordingly, we consider that courts, if they do it at all, should be very cautious before making reference to the significance of conclusions drawn at the interim stage as such comments may appear to the parents to be a form of pressure.
35. If the court is satisfied that there are “reasonable grounds” for believing the threshold is made out, it will say so, but, in doing so, the court is not making final findings pursuant to section 31 on matters that must be proved to the requisite standard in due course.
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