W v HERTFORDSHIRE COUNTY COUNCIL

[1993] 1 FLR 118

Family Division

Booth J

31 July 1992

Care — Care proceedings — Children Act 1989 — Local authority applying for interim care orders for three children — Justices declining to make orders in respect of two children — Justices announcing decision without stating findings of fact or reasons — Whether decision vitiated — Whether matter should be remitted for rehearing — Family Proceedings Courts (Children Act 1989) rules 1991, r 21(5),(6)

Following allegations of non-accidental injury to one of a family of three young children, the local authority applied to the family proceedings court for interim care orders in respect of all three children with a view to assessing their situation and then, if appropriate, rehabilitating them with their mother. On 17 July 1992 the justices made the order sought for one child, but declined to make interim care orders in respect of the other two. A document purporting to contain the justices' reasons was signed by the clerk and made available to the parties on 28 July 1992. The local authority appealed on the ground that the justices had failed to give reasons when announcing their decision and that the conduct by the justices of the hearing was open to criticism in that they had interrupted the advocate for the local authority and thus deprived themselves of material information. The appeal was supported by the guardian ad litem and opposed by the mother and a great aunt who was caring for the youngest child.

Held – allowing the appeal –

(1) Rule 21(5) of the Family Proceedings Courts (Children Act 1989) Rules 1991 provided that before an order was made or any application or request was refused, the justices' clerk must make a written record of the reasons for the court's decision and any findings of fact. Under r 21(6) the court was required at the time of making an order or refusing the application to state any findings of fact and the reasons for the court's decision. There was no exception to that mandatory requirement and, accordingly, failure to observe it in the present case vitiated the decision of the justices. On that ground and also because some of the facts had not been explored fully at the hearing, the justices' decision must be set aside.

(2) Since in the absence of justices' reasons there were no findings on which the court could rely, and since there were contentious issues of fact which had not yet been investigated, and furthermore taking into account that arrangements had been agreed as to the placement of the children so as to reduce the immediate urgency of a decision, it would not be appropriate for the court to substitute its discretion for that of the justices, and therefore the matter would be remitted for a rehearing before a fresh bench of magistrates.

Statutory provisions considered top

Family Proceedings Courts (Children Act 1989) Rules 1991 (SI 1991/1395), r 21(5),(6)

Cases referred to in judgment top

Hillingdon London Borough Council v H [1992] 2 FLR 372, [1992] 3 WLR 521

Oxfordshire County Council v R [1992] 1 FLR 648, sub nom *R v Oxfordshire County Council (Secure Accommodation Order)* [1992] 3 WLR 88, sub nom *R (J) v Oxfordshire County Council* [1992] 3 All ER 660

W v P (Justices Reasons) [1988] 1 FLR 508

David Sharp for the local authority
Karoline Sutton for the mother
Cheryl Williams for the guardian ad litem
Alan Inglis for the great aunt

BOOTH J:

This is an appeal from decisions of the St Albans Family Proceedings Court given on 17 July 1992. It raises a matter of particular importance in relation to the reasons which justices are now required to give in accordance with the Family Proceedings Courts (Children Act 1989) Rules 1991.

The children with whom the justices were concerned are B aged 4, M aged 3 and R aged 2. Their mother is a single lady and a party in the proceedings. Neither the father of B and R nor the father of M has played any part in them. R has for some time lived with his maternal great-aunt, who was unrepresented as a party in the court below but who has been represented on this appeal.

The local authority, the Hertfordshire County Council, has had considerable concerns about the family for at least 2 years, but matters came to a head on 1 July 1992, when M was observed to have a large bump and bruise on his head. The next day he and B told the social worker that the mother had hit M and caused the injury. When the mother was asked about this she became very distressed and admitted that she had hit her son. The local authority then obtained emergency protection orders in respect of the two boys and placed them with emergency foster-parents. On 3 July 1992, M was examined by a consultant paediatrician, who expressed the view that the injury was non-accidental and was consistent with a punch to the head. On 6 July 1992 the mother changed her explanation as to what had happened and said that the man with whom she then had a relationship had struck M and had threatened her with a knife. The mother has maintained that explanation ever since, although the two boys have said from time to time that it was their mother who had hit M. The emergency protection orders were extended on 7 July 1992, and on 10 July 1992 the local authority filed applications seeking care orders in respect of all three children. The matter came before the justices on 15 and 17 July 1992, when the local authority sought interim care orders.

The local authority proposed that B and M should remain in foster care pending appropriate assessments, but that R should continue to live with his great-aunt. Nevertheless, the local authority sought an interim order in respect of him as well as his brothers in order to ensure that the mother did not attempt to remove him and asked that he, too, should be assessed. Following the assessments and all being well, the local authority hoped to rehabilitate all three children with the mother.

The local authority's case was supported by the guardian ad litem, who in the very short time that she had had to make inquiries had concluded that those plans best served the children's interests. The mother agreed that M should be placed in the interim care of the local authority and should in the short term remain away from home. She had considerable difficulty in controlling his behaviour and accepted that he had suffered a serious injury. But the mother opposed the interim care order in respect of B. There was a good deal of evidence that he was strongly attached to the mother, with whom, unlike M, he had a good relationship. It was also

common ground that he was missing his mother and found the separation from her distressing. The great-aunt opposed the interim care order in respect of R, although both she and the mother were agreed that he should continue to live with her.

I am told by counsel (none of whom appeared in the court below) that relatively little time was allotted to the case, which started at 12 noon on 15 July 1992 and continued after the luncheon

adjournment until 4 pm. It was resumed at 3 pm on 17 July 1992 and after hearing further evidence and submissions, the justices retired at 4 pm. They returned to court at 5.30 pm and gave their decisions. In respect of M they accepted the agreed position and made an interim care order. In respect of B and R they declined to make interim care orders. In B's case they made an interim supervision order so that he could return to the mother's home, but they also made a prohibited steps order prohibiting the mother from allowing her cohabitee, or former cohabitee, who she said had caused M's injury, into her house. In respect of R they made no order at all.

Despite the justices' order, B did not then return home. On that same evening the local authority obtained from Cazalet J, on an ex parte application, orders which effectively placed B and R in their interim care. I am told that those orders, or further orders to the same effect made inter partes on 21 July 1992, are the subject of an appeal to the Court of Appeal. On 22 July 1992 the local authority filed a notice of appeal in respect of the justices' decisions relating to B and R. That appeal is supported by the guardian ad litem and opposed by the mother and the great-aunt.

The notice of appeal raises two matters of substance. The first, and most crucial, is the failure of the justices to give reasons for their decisions. The second matter relates to certain aspects of the conduct of the case by the justices.

The procedure to be followed on applications in the family proceedings courts under the Children Act 1989 is governed by the Family Proceedings Courts (Children Act 1989) Rules 1991. Rule 21 deals with the conduct of the hearing, and those provisions in it which relate to the decision-making process are relevant to this appeal. Rule 21(5) provides:

‘Before the court makes an order or refuses an application or request, the justices' clerk shall record in writing –

(a)the names of the justice or justices constituting the court by which the decision is made, and

(b)in consultation with the justice or justices, the reasons for the court's decision and any finding of fact.'

Rule 21(6) goes on to provide:

‘When making an order or when refusing an application, the court or one of the justices constituting the court by which the decision is made shall state any findings of fact and the reasons for the court's decision.'

Thus the decision-making process is spelt out.

At the first stage, before the order is made or any application or request is refused, the justices' clerk must make a written record of the reasons for the court's decision and any findings of fact. In this case there is nothing to suggest that that step was taken and no such record contemporaneous with the hearing has been provided by the court. The second stage requires the

court at the time of making the order or refusing the application to state any findings of fact and the reasons for the court's decision. That certainly was not done in this case.

I am told by counsel that, although the court was asked by the solicitors representing the parties to give its reasons, the clerk was of the view that that was not necessary since it was a hearing only for interim relief. If that be so, it was clearly a grave misapprehension of what the rules require. Reasons and findings of fact must be recorded and stated when the court makes any order or refuses any application. There is no exception to this mandatory requirement. In this respect an interim order is no different from an order which is intended to be long term. The decision-making process is always the same. In each and every case the parties should be able to be confident that the court has followed the required steps and has reached its decisions in the proper manner, and the parties are entitled to know the justices' reasons and their findings.

It was not until 28 July 1992 that a document purporting to contain the justices' reasons was signed by the clerk and made available to the parties. It is a very full and detailed document. It carefully follows the guide-lines which are to be found in the judgment of Douglas Brown J in *Oxfordshire County Council v R* [1992] 1 FLR 648 at p 657. Had those reasons been produced in accordance with the relevant provisions of r 21, they could not have been criticised, but in view of the failure of the court to comply with those provisions, they are in my judgment fatally flawed and cannot be admitted in this court.

In reaching that conclusion I have derived assistance from the decision of Johnson J in *Hillingdon London Borough Council v H* [1992] 2 FLR 372. In that case the justices gave brief reasons at the time of making an order under the 1989 Act, which they subsequently sought to extend when there was an appeal. Johnson J held that the justices had not complied with the requirement of the rules that reasons had to be given when announcing the decision and that accordingly the High Court had to refuse to accept the extended reasons sent later. That decision follows earlier authority predating the implementation of the 1989 Act: see, for example, *W v P (Justices' Reasons)* [1988] 1 FLR 508.

Mr Sharp for the local authority has submitted that, as a result of what has occurred, it would be unsafe to rely on the decisions reached by the justices and that I should either remit the matter back for rehearing before a fresh bench or substitute my own discretion for that of the justices and make what I consider to be the appropriate orders in the light of the evidence. But were I to take that course, he would wish to adduce fresh evidence in the form of a further report from the social worker dealing in greater detail with the family history and the long-standing concerns of the local authority, as well as an up-to-date report of the guardian ad litem.

Miss Williams for the guardian ad litem, however, submitted that the only proper course was to remit the matter back for rehearing. In this context she referred to the second substantive matter arising on this appeal, that is the criticism made as to certain aspects of the conduct of the hearing. It is accepted as a matter of fact that the justices interrupted the advocate for the local authority in the course of his crossexamination of the mother, so that he could not pursue as fully as he would have wished the question of who caused the injury to M. Why this was and whether it

was due to pressure of time or for some other reason is not known. But it is argued that this was an important matter in assessing the measure of risk to B in returning home and that the justices deprived themselves of material information. Although it was accepted that the relationship between that child and his mother was much better than the relationship between her and M, there was evidence of some earlier ill-treatment of B, so that what had happened to M was a significance. Miss Williams also pointed to the fact that the justices had little information as to the earlier history of the family, and the report of the social worker which it was sought to adduce by way of fresh evidence showed the need for further examination of this aspect of the case, but that it was likely to be contentious.

Mr Inglis for the great-aunt sought to persuade me not to set aside the decisions of the justices. He submitted that, even if the procedures in relation to their reasons had not been observed, this did not vitiate the decisions themselves and that on the evidence it could not be said that they were plainly wrong. He drew attention to the inevitable delay that would occur were the matter to be remitted, which would be detrimental to the interests of the children.

I am unable to accept the submissions of Mr Inglis that the failure to observe the requirements of r 21(5) and (6) does not vitiate the justices' decisions. In my judgment it is fundamental that the justices should formulate their reasons before making their orders, and unless this can clearly be seen to have been done, those decisions are unsafe and cannot be relied on. Accordingly, I agree with Mr Sharp and Miss Williams that the justices' orders must be set aside. On that basis there are only two options open to the court: either to remit the matter for rehearing or to substitute my discretion for that of the justices.

In order to reach a conclusion as to which was the most appropriate course to take, particularly bearing in mind the delay which would arise from the first option, I read, de bene esse, the reports for the social worker and the guardian ad litem. Having done so, I agree with Miss Williams that in relation to past events there are some matters which may require further examination and which are likely to be contentious. But so far as the guardian ad litem's report is concerned, that discloses the fact that B has been returned to the care of the mother under the cover of the interim care order made by Cazalet J and on the basis of a contract between the mother and the local authority. There is, therefore, less immediate urgency in dealing with the legal aspects of the case than had hitherto appeared. All the parties are in agreement as to the placement of the children. It further appears that agreement is likely to be reached in relation to the appropriate orders in respect of R, and if this is so, the outstanding issues relate to B.

I have come to the conclusion that it would not be appropriate to substitute my discretion for that of the justices in the circumstances of the case. In the absence of the justices' reasons, there are no findings of fact on which the court could rely. I have not seen or heard the witnesses give their evidence and, in particular, I would be at a grave disadvantage in assessing the mother's ability to parent and protect B. There are contentious issues of fact arising from the past history which may be material, but which I would be in no position to resolve. It would,

therefore, be wholly unsatisfactory for me to attempt to assess whether the threshold criterion is satisfied in B's case to justify the making of an interim care order and whether in all the circumstances such an order should be made.

The appeal must be allowed and the outstanding matters in issue must be remitted for rehearing before a fresh bench of magistrates. I will make such orders as may be agreed in respect of R and will consider with counsel what, if any, orders are appropriate to make in respect of B pending the rehearing.

Solicitors:*Solicitorto the local authority*

Bretherton & Co for the mother

AF Barker & Co for the guardian ad litem

Conway, Wood & Co for the great aunt

PATRICIA HARGROVE

Barrister