B4/2006/2541

Neutral Citation Number: [2006] EWCA Civ 1898
IN THE SUPREME COURT OF JUDICATURE
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM MILTON KEYNES COUNTY COURT
(HIS HONOUR JUDGE SEROTA QC)

Royal Courts of Justice
Strand
London, WC2

Wednesday, 20th December 2006

B E F O R E:
LORD JUSTICE THORPE

LORD JUSTICE CARNWATH

LORD JUSTICE WALL

- -

IN THE MATTER OF K & H (Children)

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MR P HEPHER (instructed by Messrs Tilley and Co) appeared on behalf of the Appellant.

MR D SHARP (instructed by Hertfordshire CC) appeared on behalf of the Local Authority (First Respondent).

MS L RASUL (instructed by Messrs David Barney) appeared on behalf of the Guardian (Third Respondent).

THE SECOND RESPONDENT DID NOT APPEAR AND WAS NOT REPRESENTED.

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J U D G M E N T

1. LORD JUSTICE THORPE: On 13 September 2006 the Hertfordshire County Council sought care orders in respect of two children: J, who is 13 years of age and M, who is 11. Their plan for the children as stated in their application was to this effect:

> "We will invite the court to grant an Interim Care Order in respect of [the children] to ensure that they are not risk of significant harm while their father, [Mr K] applies for residence.
>
> "The Local Authority also need to undertake an assessment of Mr [K's] ability to safely parent [M and J]. It was agreed, with reservations, that the children stay with [Mr K]."

2. It seems that there was an Interim Care Order made by the Justices and that its continuation called for a listing on the 17 November. On 10 November, the social worker in the case filed a statement in which she expressed complete satisfaction with the arrangements that Mr K was making for his two sons. The statement records that the boys are thriving in that household. The previous history is not relevant to this judgment but effectively previous care with their mother had proved unsatisfactory and it was therefore a settling in experience for them in their father's household.

3. It seems that there was a serious episode on 1 September when the police were involved with the father in relation to his use and possession of drugs. The local authority received the information on 25 October to the effect that the father was on bail facing serious criminal charges for money laundering, evasion of excise duty and serious drug offences. That information was confirmed to the local authority by the guardian, who had been brought into the case following the issue of the care order application.

4. That, however, did not deflect the local authority from filing the social worker's statement to which I have already referred. On 17 November, the matter was simply adjourned over by the Justices to the 23 November.

5. However, seemingly spurred by the impending hearing, on 16 November, the local authority had taken a management decision to remove the children from their father's household. On the morning of 17 November whilst the father was at court, the local authority removed the younger boy from his school. The Justices on 17 November in adjourning over to 23 November declined to make any holding order and accordingly, at the end of the day, M was returned to his father since the local authority had no lawful basis for his continuing removal.

6. On 22 November, the local authority filed a further statement in preparation for the hearing on the following day, and in that further statement the deponent, not the maker of the statement of 10 November, stated:

> "On 16 November, the manager Jackie Whates informed me that after discussions with the guardian police and our CSM it was decided that [J and M] needed to be urgently removed and placed in foster care until plans for

> long term care was established. This decision was reached because there were major concerns at this time that [Mr K] was using and selling class A drugs."

7. On 23 November it seems that there was a stand-off between the court and the local authority. The court was minded to make an Interim Care Order but did not wish to see the children removed. The local authority was not prepared to accept an Interim Care Order on that basis. The Justices simply transferred the case to the County Court in the knowledge that it could be listed on 28 November before HHJ Serota in Milton Keynes. Again, the Justices made no holding order and accordingly the children remained with their father, the local authority having no lawful basis for their removal.

8. On 28 November, the local authority's evidential case had not been augmented but a Police Constable had been asked to attend in order to contribute evidence of the police interview of the father on or following the episode on 1 September. Whilst chatting with the local authority, the officer informed them of some conversation he had had with the father outside the formal interview. That conversation aroused the local authority's concern and accordingly a statement was taken from the police officer.

9. The first oral evidence came from the local authority manager, Mrs Whates, and after her cross-examination the judge made it perfectly plain that he was opposed to the children's removal and believed that the proper management was an Interim Care Order which would leave the status undisturbed. He adjourned so that Mrs Whates could consult with a more senior officer. At the end of that consultation she returned to court and maintained the local authority's stand-off. Mr Hepher, who appeared for the father, sought a direction that the senior official should attend but the judge refused that application and proceeded to hear oral evidence from the police constable and from the guardian.

10. Now all that evidence was one way. It was directed to persuading the judge that the children's removal was necessary for their protection. Clearly, the judge had been against the local authority at the conclusion of Mrs Whates' evidence but the evidence of the police constable introduced a solid basis for concern and the judge indicated to Mr Hepher that there was material now before him that required response.

11. However, Mr Hepher elected not to call his client and the final oral evidence from the guardian was subsequently to prove decisive in persuading the judge to accept the local authority's application, supported as it was by the guardian, although he expressed very strong criticism of the local authority, although he further expressed despair at their attitude, and litigation stance, and although he recorded more than once that it had been for him a knife-edge decision.

12. However, although refusing permission to appeal, he granted a stay to enable Mr Hepher to come to this court and Mr Hepher's application for permission and a stay was dealt with by My Lord, Lord Justice Wall, on 5 December when he ordered this emergency hearing and effectively continued the stay.

13. Mr Hepher this morning has criticised the judge in a number of respects. He criticises the judge for applying the wrong test in law and he criticises the judge for having reached a conclusion adverse to the father without hearing the oral evidence that would have supported the contrary conclusion. The social worker who had filed the statement of 10 November was not called. There was no oral evidence from the school and the father himself did not give oral evidence. Although, as I have indicated, that was a matter of election. The election has to be seen in the context of what was a pressurised hearing. The judge had had to take other cases on the morning of 28 November and this significant application did not get under way until mid-morning and by 4.30pm in the afternoon the evidence for the local authority had been completed and the evidence of the guardian taken and there was no time for more. The judge had to juggle his lists to free himself up to commence again on the following day. Mr Hepher was in a difficult position because he had to be elsewhere to conduct a part-heard care case at 2.00pm on 29 November. So, it is perhaps not entirely surprising that the judge found himself giving a judgment in an interim application on the basis of incomplete oral evidence and without having heard the witnesses who were available to be deployed on the father's part.

14. The concerns and misgivings that I have about this whole process are already sufficiently indicated by the litigation history which I have recited. It is a matter of considerable relief to me that the local authority have, for the purposes of this hearing, shifted their position very significantly and now accept that if the judgment below cannot withstand Mr Hepher's criticisms then they accept that the appropriate order for this court to make in substitution is an interim care order, on the basis that the boys will remain where they are, on the basis of safeguard undertakings proffered by the father in the court below and repeated in this court, and on the basis that save in emergency they will not seek to remove the two boys from the father's household without notice and application to the court.

15. That seems to me to be an obviously appropriate disposal and it is open to us, given the procedural flaws in the process almost from the outset, and particularly because it is apparent from paragraphs 63 and 65 that the judge inadvertently applied the wrong test to the disposal of the local authority's application. He said:

> "I am not prepared to accept that it is necessary for me to find that there is a real and immediate risk of significant harm before I approve the Local Authority's application. It seems to me that that sets the test too high. I ask myself: are there reasonable grounds for believing that significant harm is likely? And 'likely', as explained by the House of Lords in Re H, does not mean on the balance of probabilities, it means that there is a real as opposed to a fanciful possibility of significant harm occurring."

16. Decisions in this court have emphasised that at an interim stage the removal of children from their parents is not to be sanctioned unless the child's safety requires interim protection. The cases to this effect already reported are H (A Child) (Interim Care Order)

[2003] 1 FCR 350 and M (Interim Care Order: Removal) [2006] 1 FLR 1043. Mr Hepher also draws attention to a similar approach in the European case of Haase v Germany [2004] 2 FLR 39.

17. The approach suggested by those authorities was rejected by the judge. He applied the test set by the House of Lords in the determination of a different question. Once it is demonstrated that a discretionary decision rests on the application of an incorrect test in law manifestly it cannot stand. The important thing surely today is to try and inject into this case a bit of progress to what is obviously required, namely a full and fair trial at the earliest opportunity of the concerns which have an undeniable evidential basis and which have moved both the local authority and the guardian.

18. It seems that on 29 November nothing was done beyond setting up a case management hearing in the Watford County Court on 8 January. There was an opportunity then, obviously, for a direction from the court to enable testing of the father for drugs to commence under the ambit of the public funding certificate. There was an opportunity then for the assessment processes involving a consultant child and adolescent psychiatrist and an adult psychiatrist to be got underway. Those opportunities were not taken and they should clearly be taken today.

19. I say a final word about the representation of the children and J in particular. There is no doubt at all that these boys are firmly allied with their father and they certainly do not wish to be removed and placed with strangers. It seems that M had an upsetting experience on 16 November to which he should never have been exposed. It is very important that the court heeds their wishes and feelings. It is difficult for the court to do that if their professional representatives are urging removal. It is impossible for them to feel that their views are being properly and eloquently put to the court if that is their only representation. M has been taken to meet a suitably experienced solicitor, who has formed a provisional view that he has capacity to instruct her. She, for reasons that I do not understand, instead of applying to the court for a direction for his separate representation, simply returned the issue to the solicitor instructed by the guardian, who has maintained his stance that M lacks capacity. That must be sorted out in the county court, certainly by the 8 January at the latest. Clearly, M's position is different and I can well understand that he will continue to be represented by the experienced guardian and his chosen solicitor. But I do not readily comprehend how this case can go to conclusion unless J's independent wishes and feelings are put to the court for consideration by at the least some experienced solicitor.

20. So I would simply allow the appeal and substitute for the order below, the order now proposed. It is not radically different in terms. I think all that needs to be added is the safeguard to prevent lawful removal without application to the court save in case of emergency and to add such directions as can be agreed today at the Bar.

21. LORD JUSTICE CARNWATH: I agree.

22. LORD JUSTICE WALL: I also agree. I add just a few words. I would wish in

particular to associate myself with my Lord, Lord Justice Thorpe's observations about J's representation and if nothing else that should be the subject of an application to the judge on 7 January if it cannot otherwise be agreed.

23. It is I find deeply dispiriting that 15 years after the implementation of the Children Act and after much handing down of good practice, including of course the public law protocol, that this sort of muddle appears. One of the reasons why, speaking for myself, I find it deeply frustrating is that it tends to obscure rather than reveal the truth. I know nothing about the ultimate outcome of this case or its merits. I make no decision and cannot do so about the father's conduct and his involvement with drugs. But it is quite clear to me that the way the matter was presented to the judge on 29 November was wholly unsatisfactory and had the effect of obscuring rather than promoting the needs and welfare of the children. For that reason I associate myself entirely with my Lord's view that what this case needs now is what it should already have had, which is rigorous case management and movement towards an early determination on the best possible evidence.

24. In those circumstances, it seems to me that we are taking a moderate course in giving Mr Hepher today effectively the best that he can hope for which is the retention of the children in the father's care pending proper assessments. But I do make it very clear to the father, having sat for 11 years at first instance as a judge of the Family Division dealing with cases of this nature day-in and day-out, that parents who deal in drugs or dabble in drugs or take drugs have great difficulty retaining the care of their children.

25. Equally, parents who do not fully co-operate and are not frank and open both with the court and with the local authorities have difficulty in obtaining the sympathy of the court. The welfare of these children will depend very much both on the competence of those who now advise the court pursuant to any directions that we give; and the openness and frankness of the father about his current position.

26. As I say, the decision made by the judge on 29 November was an extremely difficult one, made more difficult by the manner in which the case was presented to him, but I am in no doubt, like my Lord, that he applied the wrong test. We are able to hold the ring until the case can be heard. What it needs, as I have already said, at this stage is rigorous and clear case management. We can do a little of that but the rest remains with the parties and I hope very much that senior management in the local authority will reflect very carefully on the local authority's decision-making processes in this case; and the need for this authority to have proper channels of communication between itself and the local police; and to the need to present its case in a coherent and structured way which the court can readily understand. That is what the interests of these children require. So far, in my view, it has been singularly lacking.

27. Having said all that, I associate myself entirely with the order my Lord has proposed and I would allow the appeal on the terms he has put forward.

Order: Appeal allowed.