RE O (CARE PROCEEDINGS: EVIDENCE) [2003] EWHC 2011 (Fam)

Family Division

Johnson J

14 August 2003

Care proceedings – Child separately represented – Whether child should give oral evidence – Inferences to be drawn from mother's failure to give oral evidence

In care proceedings in March 2003 concerning two children, a boy and a girl in their early teens, the local authority based its case on three incidents of violence by the mother towards the younger child. While the first two incidents were relatively minor the third involved striking a severe blow with an electric flex on her outstretched hand. Four years earlier both children had been assaulted by their mother with an electric flex. On that occasion she had pleaded guilty to criminal charges and, after conceding the threshold criteria, supervision orders had been made. In the March 2003 proceedings, the mother filed statements denying the present allegations but, as she did not give oral evidence, the district judge attached no weight to her statements. During the proceedings, the elder child, the boy, supported the mother's denials and the district judge ordered that he be represented separately by a solicitor of his choice, be given leave to file a statement about the allegations and directed that the question of him giving oral evidence be considered by a court. The latter application was refused by a district judge and the matter was neither appealed nor the district judge hearing the care proceedings asked to reconsider it in March 2003. The district judge concluded that the mother had caused significant physical and emotional harm to the younger child, the girl, and significant emotional harm to the boy, resulting in him becoming cowed by her into over compliance and wrongful acceptance of blame for her actions. The mother appealed.

Held – dismissing the appeal –

(1) The judge's decision simply to attach no weight to the mother's statements was wrong. In the absence of some sensible reason to the contrary, the judge should have gone further and inferred from the mother's refusal to give oral evidence that the allegations against her were true (see paras [13], [16]).

(2) General practice was not to hear oral evidence from children in care proceedings. Given the background, and the child's personality and perspective, it was probable that little weight would be attached to his evidence if it were heard. Despite the child's maturity, on the facts of this case, the decisions of the district judges not to accept oral evidence from the elder child were decisions well within their discretion and not susceptible to challenge (see paras [38], [39]).

Statutory provisions considered

Children and Young Persons Act 1933, s 44
Children Act 1989, ss 31, 96(1)
Family Proceedings Rules 1991 (SI 1991/1247), rr 4.16(2), 9.2A

Cases referred to in judgment

A (Care: Discharge Application by Child), Re [1995] 1 FLR 599, FD
P (Witness Summons), Re [1997] 2 FLR 447, CA
R v B County Council ex parte P [1991] 1 WLR 221, [1991] 1 FLR 470, [1991] 2 All ER 65, CA
W (Minors) (Wardship: Evidence), Re [1990] 1 FLR 203, CA
W (Secure Accommodation Order: Attendance at Court), Re [1994] 2 FLR 1092, FD

Jane Hoyal for the appellant
Dermot Casey for the first and fourth respondents
Timur Hussein for the second respondent
Monica Ford for the third respondent

Cur adv vult

JOHNSON J:

[1] This is an appeal from a decision of District Judge Million sitting in the Principal Registry of the Family Division on 26 March 2003. In care proceedings relating to two children he held that the threshold criteria were made out under s 31 of the Children Act 1989. The children are M, born on 27 November 1988, and L, born on 20 August 1990.

[2] The local authority's case was based on three incidents of violence by the mother towards L.

[3] The first occurred in about November 2001 at L's school when the mother chased L, angrily brandishing a shoe. The incident was the subject of evidence from staff at the school. The finding of the district judge that the incident occurred as alleged is not one that is susceptible of appeal.

[4] The second incident occurred after a parent's evening at the school on 11 July 2002. On the way home, apparently because of her disappointment with L's school report, the mother had hit L with the rolled up school report and when they reached home had hit her again with an umbrella. Here the evidence consisted only of what L had said to a schoolteacher and to a doctor. There were inconsistencies in what L had said but having reviewed the evidence that was available the district judge found that these assaults had taken place in the way that L alleged and again it does not seem to me that those findings of fact are susceptible of challenge before me.

[5] Had these two incidents stood alone it might have been doubted that the threshold criteria were established. However, thirdly and importantly it was alleged that on the evening of 17 July 2002 the mother had struck L's outstretched hand a severe blow with a doubled up electric flex. Here again the evidence was principally of statements made by L to the schoolteacher and to the doctor, a specialist paediatric registrar. The doctor said that the injury was serious, as indeed could be seen from a photograph. The social work team manager and the police officer who had become involved decided not to conduct formal interviews of either L or M. In the case of L they considered that she would not have made a credible witness in a videoed interview because of her obvious uncertainty about talking to the police. Moreover both children had been involved in previous criminal proceedings involving allegations of violence against them by their mother and the social worker and the police officer felt that the possibility of another prosecution of their mother would place undue pressure on the children and would not be in their best interests.

[6] The mother denied having hit either of the children on this occasion. M had said that it was M who had been responsible for the injury to L's wrist.

[7] There was a significant background to this third allegation. On 23 May 1998 both children had been assaulted by the mother with an electric flex. M had been found to have over 40 whip marks on various parts of his body and L had a number of welts on her back and arm. Both children were found to have other and older scarring and M said that they had been

previously hit by their mother and also by their father. Criminal proceedings were taken and the mother pleaded guilty to charges of causing actual bodily harm. The mother was sentenced to 12 months' imprisonment suspended for 12 months.

[8] In May 1998 the children had been placed with foster parents and care proceedings begun by the local authority. Eventually on 27 April 2000, the mother conceding the threshold criteria, supervision orders were made and the children returned to the care of their mother. Since July 2002 the children have again been placed together in foster care.

[9] In his decision which is the subject of this appeal the judge held that the mother had caused significant physical harm to L and put her in fear for her physical safety and that as a result had caused L significant emotional harm. He also held that the mother was likely to cause further significant physical and emotional harm to L in future. As to M, the judge held that he had been caused significant emotional harm by living in a household where his mother was threatening and assaulting his sister, on one occasion causing her a significant injury, and also drawing M into what he described as 'a scheme of deception about those assaults', in particular in respect of the most serious assault being the one to L's wrist. In the result M had become cowed by the mother into over-compliance and wrongful acceptance of blame for her actions.

[10] Two points of law are said to arise and as seems to be so often the case, they arise before the applications judge sitting in the long vacation.

The mother's failure to give evidence

[11] The mother had filed two statements denying the matters alleged against her but had not given oral evidence so that her evidence had not been tested by cross-examination. The judge was concerned at this decision of the mother, made with the advice of experienced counsel. Accordingly he adjourned the hearing to enable the mother's decision to be reconsidered but when the hearing resumed Miss Hoyal, on behalf of the mother, told the judge that the mother had decided not to give oral evidence. Miss Hoyal emphasised that neither she nor her client had felt under any pressure in the matter and expressed her gratitude for the manner in which the judge had dealt with this situation.

[12] In giving judgment he said:

> 'The mother has filed two statements but has not been prepared to support them by sworn oral evidence. Nor has she been prepared to be challenged by being asked questions in court. Therefore, insofar as those statements consists of denials or exculpatory explanations, I attach no weight to them.'

[13] This decision, simply to attach no weight to the mother's statements, was in my view wrong. The judge could, and in my view should, have gone further. As a general rule, and clearly every case will depend in its own particular facts, where a parent declines to answer questions or, as here, give evidence, the court ought usually to draw the inference that the allegations are true.

[14] In cases concerning children there is, in my judgment, no room for the 'no comment' interview found in criminal cases. The failure of a parent to

give evidence in proceedings concerning their children is, in my experience, rare to the point of being unique. I can recall one case where I was told that a parent would not be giving evidence but I adjourned the case overnight and the parent in fact gave evidence the following day.

[15] Although I recognise that care proceedings can understandably be perceived as adversarial by parents who are at risk of losing their children, the objective is not to punish the parent but to seek to achieve what is best for the children.

[16] In the present case the district judge went on to consider a number of considerations supporting or discrediting what L had said and eventually concluded that what she had said was true. However, in my view, unless there was some sensible reason to the contrary, the mother's failure to give evidence should have been determinative of the allegations. This brings me to the further problem which I now seek to address.

Should M have been allowed to give evidence?

[17] The care proceedings began on 19 July 2002. As the case proceeded it became apparent that M supported the mother's denial of causing injury to L. In giving directions on 28 November 2002 District Judge Segal ordered that:

> 'If any party proposes to call the child M to give evidence … that party shall apply on notice for further directions.'

[18] Both children were of course parties to the care proceedings and represented by a guardian and solicitor. However, on 12 February 2003 District Judge Million ordered that M might be represented separately by a solicitor of his choice and he gave leave for M to file a statement limited to the issues arising from the allegations of assault. He directed that the question of M giving oral evidence be considered by the court on 7 March 2003.

[19] This important question was the subject of argument before District Judge Roberts on 7 March 2003 when M was represented by his own solicitor. The decision made was that:

> 'The application by M to give evidence at the hearing … is refused.'

[20] That decision was not the subject of an appeal nor at the hearing which began on 24 March 2003 was District Judge Million asked to reconsider the question.

[21] Before me it was submitted by Miss Hoyal, on behalf of the mother, that, in the words of her written submission.

> 'The decision to refuse to allow M to give oral evidence deprived the mother and M of a fair hearing in breach of Art 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950.'

[22] Miss Hoyal told me that in conducting the mother's case before District Judge Million she had thought that it was not open to her to challenge the ruling made by District Judge Roberts or to ask for it to be reconsidered. With respect I disagree. That position although understandable seems to me to be over technical and in a case where the future of children is at stake a purely

procedural matter such as this should not be the subject of concepts such as res judicata and the like.

[23] The question that has troubled me is whether despite my view that the failure of a parent to give evidence is usually determinative of relevant factual issues, it was possible that evidence given by M on oath and tested by cross-examination might have led the judge to conclude that the totality of the evidence available to him was not sufficiently cogent to tilt the balance of probabilities in favour of the local authority's allegations.

[24] The district judge was very conscious of this difficulty:

> 'This case raises in an acute form the difficult question of whether children should become directly involved as witnesses in a case which involves their own welfare. There are no video or audio tape recordings of what either child said or says about these incidents, in particular about the wrist incident. Neither L nor the guardian on her behalf has sought to call L to give evidence or to file a written statement from her. M is separately represented and, with the court's permission has filed a statement … As I have said, I was not asked to reconsider the question of M giving evidence but obvious difficulties would have arisen which no doubt informed the decision of District Judge Roberts in refusing permission. Would it be fair to L to hear from M but not from her? Would either or both children giving evidence have itself been abusive or harmful for either of both of them? Would the interests of fairness and justice have outweighed the potential harm of either child giving oral evidence and going through the ordeal of being asked questions and appearing in court in relation to their own future and circumstances? All of those are questions. The fact is that I have not heard directly from either child.'

The law

[25] The Children Act 1989 clearly envisaged that there might be circumstances in which children would give evidence on oath. Section 96(1) provides that where in civil proceedings a child is called as a witness who does *not* in the opinion of the court understand the nature of an oath then nonetheless the child's evidence may be heard by the court if in its opinion the child understands his duty to speak the truth and has sufficient understanding to justify his evidence being heard.

[26] The procedure for a child wishing to be represented independently of the guardian is governed by r 9.2A of the Family Proceedings Rules 1991:

> '(1) Where a person entitled to begin, prosecute or defend any proceedings to which this rule applies, is a minor to whom this Part applies, he may subject to paragraph (4), begin, prosecute or defend, as the case may be, such proceedings without a next friend or guardian ad litem—
>
> (a) where he has obtained the leave of the court for that purpose; or
> (b) where a solicitor—

(i) considers that the minor is able, having regard to his understanding, to give instructions in relation to the proceedings …

…

(6) Where the court is considering whether to—

(a) grant leave under paragraph (1)(a) …

…

it shall grant the leave sought … if it considers that the minor concerned has sufficient understanding to participate as a party in the proceedings concerned or proposes without a next friend or guardian ad litem.'

[27] The position of a child who has become separately represented has to be considered in the light of r 4.16(2):

'Proceedings or any part of them shall take place in the absence of any party, including the child, if—

(a) the court considers it in the interests of the child, having regard to the matters to be discussed or the evidence likely to be given, and

(b) the party is represented by a children's guardian or solicitor.'

[28] It would seem to follow, therefore, that M having been given leave to be represented separately from the guardian, the court had decided that he 'has sufficient understanding to participate as a party in the proceedings'. Why then, asked Miss Hoyal rhetorically, should M not have been afforded the right of any other party to litigation to go into the witness-box and give evidence? After all, the evidence which he would give might potentially lead to the court concluding that the threshold criteria were not made out so that he and his sister could not be the subject of care orders and would return home, which I was told is where M would like to be.

[29] At the end of counsel's submissions, time did not permit me to give judgment so I said I would put my reasons in writing. Counsel had based their submissions on the rules and on general principles but the opportunity to write this judgment has enabled me to refer to the authorities cited by textbook writers.

[30] I begin by referring to s 44 of the Children and Young Persons Act 1933:

'Every court in dealing with a child or young person who is brought before it, either as an offender or otherwise, shall have regard to the welfare of the child or young person.'

[31] In *Re W (Minors) (Wardship: Evidence)* [1990] 1 FLR 203, Neill LJ said, at 227:

'hearsay evidence … has to be handled with the greatest care and in such a way that, unless the interests of the child make it necessary,

the rules of natural justice and the rights of the parents are fully and properly observed.'

[32] In *R v B County Council ex parte P* [1991] 1 WLR 221, [1991] 1 FLR 470, Nicholls LJ said, at 230 and 478 respectively:

> '… I have a sense of grave disquiet in the present case. Perforce, the procedure for the taking of evidence has to be modified in the case of young children. Depending on his or her age, the formal questioning of a child may be neither practical nor sensible as a means of finding out what the child has to say, or as a means of testing the child's truthfulness. But in the present case, J is only a few months short of adult status. She is now 17 years and 3 months. In the normal course of events, I would have thought that fairness and the best interests of all these minors marched hand-in-hand in requiring the veracity if J's statements, and of her stepfather's vehement denials, to be probed by at least some questioning of J. As it is, I am concerned there is a real danger that, in deciding where the future of the three younger children lies, great weight may be attached to J's statements, without her stepfather or his counsel ever having had any opportunity at any stage so much as to ask her one question on any aspect of what she has said. I am alive to the danger of intimidation, and to the very real likelihood of J suffering distress of she has to go over these matters yet again. I would have hoped that these problems would not be insuperable. It ought to be possible to investigate such serious allegations or statements or disclosures, however they are to be described, in a more satisfactory manner than will now be possible, when the stipendiary magistrate will hear evidence from the stepfather and read J's statements, coupled with an expression of view on her credibility by the psychiatrist who has interviewed her.'

[33] In that same case Lord Donaldson of Lymington MR said at 234 and 482 respectively:

> 'I should like to echo and emphasise the cautionary words of Neill LJ in *Re W* … I have great sympathy for the appellant in his wish to clear his name. Unfortunately, care proceedings are not intended or designed for this purpose.'

[34] In *Re W (Secure Accommodation Order: Attendance at Court)* [1994] 2 FLR 1092, a case involving an application for a secure accommodation order in respect of a child aged 10, Ewbank J said, at 1096:

> 'It is said in behalf of the child that the liberty of the child is being curtailed, that this is equivalent to a custodial order in a criminal court, and natural justice demands that the child should be allowed to be in court before an order is made which will have an effect. For my part I cannot see any analogy between orders made in this Division and orders made by criminal court. The purpose of the criminal court is to deal with criminal offences committed by people or children, and one

> of the aims at any rate of the criminal court is to punish the perpetrators.
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> This jurisdiction is entirely different. It is, as the Official Solicitor said, a benign jurisdiction. It is to protect the child, sometimes from others and sometimes from itself, and in some cases it is necessary in order to protect the child and to act as a good parent would act to curtail the child's liberty for a time …
>
> In addition to the considerations of the interests of the child, which override any other considerations, there is also the inherent power of the court to control its own proceedings …
>
> … the court must always bear in mind that attendance in court is likely to be harmful to the child, and the court should only allow the child to attend if it is satisfied that attendance is in the interests of the child.'

[35] *Re A (Care: Discharge Application by Child)* [1995] 1 FLR 599 involved an application by a 14-year-old boy to discharge a care order. In the course of his judgment Thorpe J said at 600H–601B:

> 'Obviously in determining whether or not A should testify the judge will have regard to the fact that he is now an applicant for relief and ordinarily speaking in civil proceedings a party, and particularly an applicant party, has the right to put their point of view from the witness-box. If that should seem to suggest a conclusion or even an approach to the judge, let me say at once that I have no knowledge of the case, no knowledge of the issues, and no knowledge of the matters to be discussed or the evidence likely to be given that might prove harmful to A. The balance to be maintained between recognising and upholding the rights of children who are parties to Children Act litigation to participate and be heard, and the need to protect children from exposure to material that might be damaging is a delicate one, and one essentially to be performed by the trial judge with a full perspective of the issues and the statements and reports, and at a relatively early stage in the proceedings.'

[36] Finally, in *Re P (Witness Summons)* [1997] 2 FLR 447 the Court of Appeal gave guidance concerning the oral evidence by a 12-year-old girl who was not herself the subject of the care proceedings but who it was alleged had been sexually abused. One ground of appeal was that the trial judge had refused an application for the child to be called to give oral evidence. Wilson J said, at 454:

> 'It is unusual for a child complainant of sexual abuse to give oral evidence in proceedings under the 1989 Act. For example, it has never happened in my court; nor have I ever been asked to order the attendance of a child complainant. Clearly, when a court is asked to make such an order, it must approach the application on its merits without preconceptions. In principle, the older the child, the more arguable will be the application … courts are increasingly aware of the further grave damage which can be done to a child who has been sexually abused, or indeed a child who has not been sexually abused

> but for some reason has spoken of being sexually abused …, if she or he is subjected to the trauma of questioning by a stranger whose task is to attack her or his truthfulness in this supremely sensitive area. I would expect that in most cases where the child, whether or not a family member, is of N's age or younger, the court would favour the absence of oral evidence even though the concomitant were to be the weakening, sometimes perhaps the fatal weakening of the evidence against the adult.'

[37] In the same case the mother and stepfather also wished there to be oral evidence from their daughter who, according to N, had been sexually abused. The daughter had apparently denied the allegations of abuse, ie her evidence was supportive of the parent's case as was indeed the position of M in the case with which I am concerned. As to this Wilson J said, at 455:

> 'S had denied the allegations of abuse. I asked Miss Allerdice in argument what more she hoped that S might in evidence add to her denial. Miss Allerdice's answer was that, had S been asked to focus more specifically on N's allegations, she might have produced some little extra piece of evidence which would have made her denial more compelling. In my judgment it would have been gravely abusive for a court to have subjected S to the trauma of further questions and such trauma would have been quite out of proportion to the doubtful probative value of her answers.'

Conclusion

[38] Like Wilson J, I have never heard evidence from a child in court. I agree with him that the practice of not having evidence from children is followed even where it may weaken a local authority's case. Here, however, the child was 14 and the evidence that he would have given was said to be supportive of the parent's case and as I said earlier, might have resulted in the court refusing to make a care order. I bear in mind what is said about the character and personality of the boy, I bear in mind the savage assault to which he had been subjected by his mother several years earlier, the pressure possibly brought upon him and of course his wish to remain at home. All of those things suggest that the weight to be attached to his oral evidence might be very little. As in *Re P (Witness Summons)* [1997] 2 FLR 447 it might have proved to add nothing to his written statement and at best nothing to justify the disadvantages to him of having to give evidence which, as the district judge pointed out, would have been in conflict with the statements made by his sister with whom he is, and one hopes will continue, to live.

[39] Nonetheless I harbour the same concerns as were expressed by Nicholls LJ. The court has held that this boy is mature enough to justify his being separately represented and parents who are at risk of losing their children wished to call him and he, his counsel assured me, wished to be called. I do not intend to be giving any indication of general principle but to confine myself to the facts of this particular case. I do not decide this issue on the technical basis that the order of District Judge Roberts was not the subject of appeal and was not sought to be reopened before District Judge Million. I decide the issue on the limited basis that, whatever other judges might have done, the decisions of these two district judges not to have oral evidence from

M were decisions well within their discretion and not susceptible to challenge before me.

[40] In any event the inference to be drawn from the mother's failure to give evidence seems to me to have far outweighed any supposed extra benefit that would have been gained by M's written statements being confirmed by him in the witness-box.

[41] The findings made by District Judge Million were the result of an obviously careful analysis of not simply the generality but the detail of the evidence and seem to me to have been fully justified.

[42] I dismiss the appeal. I make no order as to costs save to provide for the usual assessment.

Order accordingly.

Solicitors: *Hornby & Levy* for the appellant
Local authority solicitor and *HCL Hanne & Co* for the first and fourth respondents
H E Thomas & Co for the second respondent
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ALISON PERRY
Law Reporter