Re M (Assessment: Official Solicitor) [2009] EWCA Civ 315

[2009] 2 FLR 950

Court of Appeal

Thorpe and Wall LJJ

28 January 2009

Care proceedings — Residential assessment — Mother a minor lacking capacity — Official Solicitor seeking viability assessment to determine whether further residential assessment appropriate — Whether refusal justified

The mother was herself a minor who had been in care for the majority of her life. When the local authority brought care proceedings in respect of the child, the mother, who lacked the capacity to instruct lawyers, was represented by the Official Solicitor. The local authority funded a residential assessment of the mother, but this failed. The local authority also instructed a consultant psychologist, whose report stated that the mother effectively had a zero chance of providing adequate parenting unless she received 2 years of intensive psychotherapy. The Official Solicitor applied to the court, seeking (i) a fresh psychiatric report from a child and adolescent psychiatrist, at an estimated cost of £6,902, and (ii) a viability assessment by a different centre to determine whether or not the case was suitable for a further residential assessment. The judge refused these applications, on the basis that these additional reports were unnecessary, would be disproportionately costly, and might unfairly raise the mother's hopes. The Official Solicitor appealed.

Held – allowing the appeal –

(1) The Official Solicitor had a duty to explore avenues to find out if the mother could parent the child, to investigate the case on the mother's behalf and to obtain whatever evidence he thought appropriate. If the Official Solicitor, with his responsibilities within the litigation, required a medical assessment, a judge should be slow to refuse it, especially if, as in this case, the immediately foreseeable consequence of such a refusal was to deprive the incapacitated litigant of any prospect of averting care and placement orders in respect of his or her child. *RP v Nottingham City Council* [2008] EWCA Civ 462, concerning the role of the Official Solicitor in such cases, should have been brought to the judge's attention (see paras [8], [14]–[15], [18]).

(2) A judgment on the proportionality of costs had to recognise that one possible consequence of the reports requested by the Official Solicitor would be curtailment of future costs, because if the new reports were in agreement with the existing reports, that would seem to be the end of the forensic road for the mother (see para [9]).

(3) Referring the papers to another assessment centre would involve a delay of only 14 days. The court had the impression that the application for a viability assessment had been presented to the judge as an application under s 38(6) of the Children Act 1989 whereas in fact it had been only an attempt to prepare the way for a s 38(6) application (see paras [12], [21]).

(4) The judge had clearly been right to consider fairness to the mother, but the relevant question was not so much ‘was it fair to raise the applicant's hopes?', as ‘was it fair, given the mother's right under European Convention on Human Rights, Art 6, effectively to deprive her of a positive case to present at final hearing?' (see para [12]).

Per Wall LJ: it was not true that the court was merely a rubber stamp that approved the activities of social workers who were only too willing and anxious to remove children from their parents' care, nor that experts were ‘the hired guns' of those who instructed them. The forensic process must be fair, and there must be no pre-judgment

or any sense that adoption, which was at the limit of the court's powers, was ever a foregone conclusion (see paras [16], [19], [21]).

Statutory provisions considered top

Children Act 1989, s 38(6)

European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, Art 6

Cases referred to in judgment top

LandH (Residential Assessment), Re [2007] EWCA Civ 213, [2007] 1 FLR 1370, CA

RP v Nottingham City Council and the Official Solicitor (Mental Capacity of Parent) [2008] EWCA Civ 462, [2008] 2 FLR 1516, CA

Allison Munroe for the appellant
Monica Ford for the respondent

THORPE LJ:

[1] On 10 October 2008 His Honour Judge Hughes QC refused applications for the instruction of Dr Shaw to make a general assessment and report in an issue joined between the appellant, T, and the local authority, and T's child, S, represented in the public law proceedings by her guardian. The judge also refused the application for the papers to be referred to Crown Lodge to assess whether this was a case suitable for residential assessment.

[2] Now, a point of great importance is that T is an extremely damaged mother. She is still herself a minor and she is, as it were, a client of the local authority as a minor who has been in care for the majority of her life. She is represented by the Official Solicitor because she is not only a minor but a minor lacking capacity to instruct solicitors and a legal team in these care proceedings.

[3] The judge's refusal of these applications would have, and was seen to have, devastating consequences, because there were already on the file the reports of a failed residential assessment at Beacon Lodge and a very stark report from a consultant psychologist, Dr Bichard, to the effect that T had really zero chance of providing adequate parenting for S without 2 years of intensive psychotherapy, an uncertain process for the outcome of which, obviously, S could not wait.

[4] So it is perhaps not surprising that on 30 October an appellant's notice was filed with this court, and it is unfortunate that the papers were not referred to the single Lord Justice until 1 December, which was the date on which the trial judge was due to sit again to progress the care application. It was Ward LJ who on 1 December directed an oral hearing on notice with appeal to follow, and he did note that it was desirable for the hearing to take place as soon as possible. It seems to me that it is regrettable that it is only today on 28 January that we consider the oral submissions of Ms Monroe, for the appellant, and Ms Ford, for the local authority.

[5] The guardian ad litem, S's guardian, is not represented by counsel for the excellent reasons that the guardian adopts the submission of the local authority and is concerned to avoid waste of public money. She has very helpfully submitted a short position statement in which she expresses those considerations.

[6] The rival submissions have been very skilfully put by Ms Monroe and Ms Ford, and I have great sympathy for the forensic position adopted by the

local authority. They – quite understandably – think that they have done everything possible for T. They have engaged Dr Bichard, a psychologist in whom they have confidence. They have secured the mother's admission to Beacon Lodge, and she herself is responsible for the failure of that

residential assessment. The local authority feel that enough is enough, and that the inevitable must take its course. I also recognise that the judge's acceptance of those submissions is at first blush clearly within her discretionary ambit, particularly given that the local authority's submissions have the full support of the guardian ad litem. I also recognise the realism of the language with which the judge explains her conclusion.

[7] However, in the end what most impresses me is that this is an unusual situation in that the mother is not just herself a minor (after all, that sadly is commonplace), but she is also incapable of conducting this vital piece of litigation. She has not the capacity and is therefore dependent upon the services of the Official Solicitor. The Official Solicitor, having all the responsibilities that he has for the mother, in the context of this litigation, requires a medical assessment by a specialist, namely a child and adolescent psychiatrist, who will have the particular expertise to assess the mother in the context of her relationship with her second-born child, and will be able to advise the court not just as to the mother's disability, but also on how it impacts upon her potential to provide adequate parenting for S.

[8] The judge decided against the instruction of Dr Shaw, simply saying that she did not think it necessary, when Dr Bichard's report and recommendation was not only available but was very clear. The judge's essential reasoning was that because Dr Bichard was of the view that at the present time T cannot parent a child, there was no justification for instructing a consultant psychiatrist. It seems to me that that reasoning is deficient in that it does not sufficiently recognise T's incapacity and dependence on the Official Solicitor. If the Official Solicitor, with the responsibility that he holds in the litigation, requires that assessment, it seems to me that a judge should be slow to refuse it. That refusal is all the more extreme if its immediately foreseeable consequence is to deprive the incapacitated litigant of any prospect of averting the care and placement orders sought by the local authority.

[9] The judge was also reliant upon a very pragmatic point, with which I have considerable sympathy, that there had to be some proportionate judgment between the benefit likely to be derived from the instruction of Dr Shaw and the cost of instructing him. There was before the judge information to the effect that Dr Shaw's report was going to cost £6,902, on the basis that his charging rate was £203 an hour and that he would spend 34 hours on compiling a report, 18 of which would be consumed by writing up his notes in the report. A judgment on proportionality has to recognise that one possible consequence of a report from Dr Shaw would be to curtail future costs in the litigation because, obviously, if Dr Shaw were to report in total agreement with Dr Bichard, that really would seem to be the end of the forensic road for the mother. So, on one view, the instruction of Dr Shaw could even be seen to be an economical step. However, I sympathise with the judge to the extent that it does seem very expensive. I have no idea what current rates are for the instruction of experts and it may have only been a

guide or a warning from Dr Shaw because obviously if he were able to complete the task in less than 34 hours, then the bill would be less.

[10] We also know that in the interim the mother has been referred to another consultant child and adolescent psychiatrist, Dr Wong at the Parkside. The sharing of information between Dr Shaw at the Tavistock and Dr Wong at the Parkside might enable Dr Shaw to fulfil his instructions more quickly.

[11] As to the application to refer the papers to Crown Lodge, again the judge's reasons for refusing were essentially pragmatic. She said:

> 'I've got to take a realistic view. I have a wealth of evidence [words omitted] and I've got to take a view whether it is realistic or fair to your client to even begin to raise her hopes and say "I'll send this off for a viability assessment".'

[12] In relation to that, I would only emphasise that allowing the case to go to Crown Lodge involved only 14 days of waiting for an answer, 'yea' or 'nay'. If the answer were 'nay', then no

cost to the parties and again the probable acceleration of the future course of litigation. Even if the answer were 'yea', that would only open the door to an application under s 38(6) which might have only uncertain prospects of success. I have the impression that this was presented to the judge as an application under s 38(6) when in reality it was only an attempt to prepare the way for a s 38(6) application. The judge was clearly right to bring into the reckoning fairness to the applicant, but it seems to me that bringing that into account opened up not so much the question 'Is it fair to raise the applicant's hopes?' but 'Is it fair, given her art 6 entitlement, to effectively deprive her of a positive case to present at final hearing?'

[13] So I reach the conclusion that there is sufficient basis upon which this court can reverse the judge on those two points; to say only that the Official Solicitor have leave to instruct a child and adolescent psychiatrist and to refer the papers to Crown Lodge. Presumably there will be the usual collaboration between the parties before any letter of instruction is written to either Dr Shaw or whomsoever else the Official Solicitor may choose to instruct. That is the order that I would propose and those are my reasons for proposing it.

WALL LJ:

[14] I agree. I add a judgment of my own because we are overruling what is essentially a case management decision made by an extremely experienced and specialist circuit judge. There is, however, in my judgment, a point of principle arising in this case which enables us to do so. What plainly distinguishes the case from the ordinary run of care proceedings, in my view, is that the mother of the child concerned, first, is herself under the age of 18 and thus still a minor and, secondly, is not capable of instructing a solicitor in the proceedings, that being the view of the expert instructed on behalf of the local authority. She is thus represented by the Official Solicitor, and it is the Official Solicitor who applies on her behalf for a psychiatric report and for a viability assessment to determine whether or not there should be a further residential assessment. In the case of *RP v Nottingham City Council and the Official Solicitor (Mental Capacity of Parent)* [2008] EWCA Civ 462, [2008]

2 FLR 1516, this court had occasion to examine the role of the Official Solicitor in such cases in some detail. It is, in my judgment, a great pity that this decision was not brought to the judge's attention. Had it been, I doubt if she would have refused the relief sought by the Official Solicitor.

[15] In my judgment, the Official Solicitor has a duty to explore avenues which are properly open to him in order to ascertain whether or not this mother can parent this child. My assessment of the case (and indeed, with customary frankness this morning it seemed to me that this was accepted on behalf of the local authority) is that the local authority has taken the view that this mother cannot parent this child, that any further investigation is therefore a waste of time. I wish to make it as clear as I can that I do not criticise the local authority one iota for forming that view. They may well be right. They have to take a view – it is their responsibility in the forensic process – but ultimately it is the judge who will have to decide whether or not a care order is made, and the judge must have as much information as can properly be obtained before making what is, on any view, a very important decision.

[16] I see this case, I have to say, in the wider context of the family justice system. Care and adoption orders are at the very extreme, indeed at the limits of, the court's powers. There is a view abroad, a view which in my view is wholly erroneous, that the court is simply a rubber stamp that approves the activities of social workers, who in turn are only too willing and anxious to remove children from their parents' care. As I say, that, in my judgment, is a wholly fallacious view. However, its corollary is that the forensic process must be fair. I see that in *ReLandH (Residential Assessment)* [2007] EWCA Civ 213, [2007] 1 FLR 1370, a case helpfully cited by Ms Ford in her skeleton argument, I said this (at para [85]), and I stand by it:

> 'what is equally important is that the hearing of the proceedings should be fair (or, to put the matter in the language of the European Convention, Art 6 compliant) and that the court should have before it all relevant evidence necessary for the decision.'

[17] That was what was put to the judge, because counsel then acting for the Official Solicitor, who is acting for the mother in this particular case, made it very clear that the Official Solicitor had a duty and a responsibility to obtain information and to put all that information before the court. Ms Harris, then appearing for the Official Solicitor, first of all in relation to the assessment and in relation to Dr Shaw, said this:

> 'If Crown Lodge see the papers and see [the mother] ([T] as she likes to be called) and say no that will be the end of it. There won't need to be a contested section 38(6) hearing, but I would say in any event there should be a report from Dr Shaw to deal with the "functioning" issue, to deal with the general psychiatric work that we would like to see. Quite apart from the benefit of everybody having the mother functioning optimally we don't know what further (inaudible) assessments are going to produce and whether there may be issues of ongoing contact for the child should mother be unable to parent herself.'

[18] In my judgment, the Official Solicitor had a plain duty to investigate the case on the mother's behalf and to obtain whatever evidence he thought appropriate in order to do so. It may well be, as my Lord has pointed out, that when Dr Shaw reports and/or when Crown Lodge undertake the viability assessment that the answers will be negative, in which case the Official Solicitor will be able to go to the court and produce those reports and that will in all probability be the end of the proceedings.

[19] There is also abroad at the moment, and this is why I think I feel perhaps more strongly about this case than my Lord, what is, in my view, an ill-informed opinion that experts are – the phrase has been used – the 'hired guns' of those who hire them or those who instruct them. Anyone who practises in this Division knows that this is not the case. But if the application for a care order proceeds to trial on the current evidence the result, as Ms Ford realistically accepts, is a foregone conclusion. A care order would be made. In all probability a placement order would be made. What the Official Solicitor wants to do, as I see it, is to obtain a further independent – and I stress the word 'independent' – psychiatric assessment of the mother in order to assist him in deciding how he should put her case before the judge, whoever it is, who takes the final hearing. In my judgment, the Official Solicitor should be allowed to take that course and obtain the report he seeks.

[20] The obtaining of such an opinion is, in my judgment, in the interests of a child, the mother and family justice generally. In my judgment, the judge was plainly wrong, as a matter of principle, to refuse to order the report. The risk of what she has done, in my view, is that the mother's perception may well be that the odds are entirely stacked against her and that the adoption of her child is indeed a foregone conclusion.

[21] As to the s 38(6) assessment, it is already apparent, I think, from the extract which I have read from the transcript that the judge was not being asked to make an order under s 38(6). All she was being asked to do was to allow the papers to go to Crown Lodge so that Crown Lodge could report on whether or not an application should indeed be made for a s 38(6) assessment at Crown Lodge. In my judgment, once again the judge was plainly wrong to cut that source off in the way that she did. There was no point, she thought, even in going down that road. She said that there was no point in even asking them to do a viability assessment because the case was hopeless. In my judgment, I regret to say that smacks of pre-judgment. It may well be that the result is what the judge predicts. It may well be that this mother cannot care for this child but this mother, in my view, is entitled to a fair forensic process and, in my judgment, the judge by the course she has taken has prevented her from having it.

[22] I would, therefore, have no hesitation whatsoever on the point of principle in giving the permission to appeal which is required and allowing the appeal and making the order my Lord proposes.

Application granted; appeal allowed.

Solicitors:*Gillian Radford & Co* for the appellant

Hodge Jones & Allen for the respondent

PHILIPPA JOHNSON

Law Reporter