

IN THE FAMILY COURT
ON APPEAL FROM DISTRICT JUDGE HARPER

Friday, 11 October 2019

Before

HIS HONOUR JUDGE AHMED

G

- v -

M

The Appellant appeared in person assisted by his McKenzie Friend
The Respondent was represented by Mr Robert Denman of counsel

APPROVED JUDGMENT

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

HHJ AHMED:

1. On 9 May 2019, District Judge Harper heard what was an application for permission to make an application for a child arrangements order. The applicant was G. He is the grandfather of a child called S. She was aged 11 years and 9 months at the time of that hearing. The judge decided that G did not require permission, but dismissed his application for a child arrangements order. G sought permission to appeal against that order. The first oral hearing, on 23 July 2019, could not proceed as there was no transcript of the hearing. A transcript was obtained subsequently. However, I had by then listened to the audio recording of the whole hearing. I granted permission to appeal on 5 September 2019. This is the hearing of the appeal.
2. The Judge had a busy list with 7 cases for him to consider. These were all or mostly first hearing dispute resolution hearings (FHDRAs). Heavy lists of cases requiring the judge to try and resolve the dispute in each case place enormous pressure on first instance judges, who must allocate limited time between those cases and yet deal with them all justly. This case was one such. It was a first hearing. The case started at 12.15 pm and ended at 12.35 pm with a final order. On any view, that was a rapid resolution of a case with a complex background and some potentially difficult issues.
3. S had been the subject of care proceedings issued by East Sussex County Council. HHJ Susan Sullivan concluded those proceedings in February 2018 by making a supervision order, with S to live with her mother, M, and cease to reside with her grandfather, G. He says that he had been her carer from her

being a baby until the age of 9 years. At the time of the hearing before the Judge, S had not lived G for some 14 months. G wanted to spend time with S and preferably have her live with him again. However, S had made allegations 'of a concerning nature'. She was interviewed by the police for a day, but the police decided that they did not have enough evidence to take matters further. G denied absolutely any abuse or wrongdoing. He maintained his denial at the hearing.

4. The Judge had a report from Ms A, who is a social worker, in which she concluded that the application by G should not be allowed to proceed further. That was challenged by G, who said to the Judge that nothing had been proved against him. The Judge's approach was: "Of course the test that they apply is on the criminal burden of proof, not the civil burden of proof which applies today." Clearly, the Judge meant to refer to the standard of proof rather than the burden of proof. However, it is not clear why the Judge referred to the standard of proof at all. He was not conducting a fact-finding exercise. He risked leaving the impression that he was considering the truth or otherwise of the allegations.
5. The Judge turned his attention to the question of whether G required the court's leave to pursue his application. Perhaps because he may not have had the statute in front of him, he appeared to be unsure of which section of the Children Act 1989 governed this issue, referring first to section 9 and then correctly to section 10. He concluded that G would not need leave of the court to pursue the application because S had lived with him for a period of time and so fell within section 10 (5) of the Children Act 1989. As Mr Denman accepts, that was incorrect because section 10 (5) is subject to section 10 (10), which provides that the child must have lived with the applicant during the 3 months prior to the application. The section is a trap for the unwary so one can understand how the Judge was ensnared by it. The result was that the application was dealt with as a substantive application, whereas it should have been considered as an application for permission to issue the substantive application.

6. The Judge should first have been applying the criteria in section 10 (9). However, as he was no longer dealing with the leave application (having determined that leave was not required) he applied the section 1(3) welfare checklist in the Children Act 1989.

7. The Judge began consideration of the welfare checklist with the child's wishes and feelings. Mr Denman, in his excellent and valiant submissions, makes the point that the Judge cannot be said to have given greater weight to that factor merely because he spent much time on it. However, it is plain from the transcript of both the Judgment and the discussion that preceded it, that he regarded S's wishes and feelings as determinative of the application. That is apparent from the following quotations:

“I have discussed with him [G] what I am supposed to do in circumstances where S has told the social worker that she does not wish to see him. Was I going to order that she saw him effectively forcing her to see him when she had said no? He did not have an answer to that question.”

“S has indicated to the social worker that she does not want to see her grandfather. I cannot see any court in those circumstances ordering or making an order of any sort that would oblige S to see her grandfather.”

8. The Judge considered the effect of a change in circumstances: “Given that S has had a major change of circumstances in February last year, or maybe slightly earlier, it would be inappropriate to make any order in these proceedings which will create yet another change of circumstances.” He did not consider all the relevant changes in circumstances, namely a change of residence and a cessation of all contact with G.

9. When considering any harm that the child had suffered or was at risk of suffering, the Judge refers to the section 31 threshold having been met in the care proceedings whilst S was in the care of G. The Judge does not refer to what facts were found to satisfy the threshold criteria, but nonetheless concludes, “There is the risk of *further* suffering.” [*Emphasis added*]. That implicitly amounts to a finding that S had suffered harm whilst in the care of G. It was an assumption made by the Judge, which was not open to him to make on the evidence which he had before him. It may have been only a likelihood of harm, rather than actual harm, that caused the threshold to be crossed. In any event there has to be a factual basis before there can be an accurate assessment of the risk of harm. No allegations have been proved against G and no facts have been found.

10. When considering under section 1(3)(f) how capable the parents or any other relevant person was of meeting the needs of the child, the Judge said that that subsection was not relevant because G was not a parent as he was a grandparent. The words in the subsection are: “...or any other person in relation to whom the court considers the question to be relevant.” That may include a grandparent with whom the child has lived. As Mr Denman concedes, the Judge fell into error in excluding G from consideration under that subsection. The Judge referred to his having in mind the case law in relation to what might be relevant when dealing with a parent as opposed to a grandparent. He does not set out the principles from such case law and therefore it is not possible to see what he has taken into account, thereby making the Judge’s reasoning obscure. General references to ‘case law’ have little or no value as reasoning.

11. The Judge considered whether it was appropriate to obtain further evidence from any party or for the social worker to be cross-examined. He concluded that having heard G and what Ms A had said, any further evidence would be a pointless exercise because he was not able to see any circumstances in which,

as things rested, the court would countenance the application going forward. Accordingly, the Judge dismissed the application.

12. Where an application has so remote a prospect of success that it would be wrong to allow it to go any further, it may be appropriate to hear no oral evidence, nor to investigate it any further (*Cheshire County Council v M* [1993] 1 FLR 463, FD). In that case, the father had confessed to having sexually abused the children. It was a clear and strong case for not allowing his wish to be involved in the children's lives any further. It is very different from this case.

13. In cases that are not so clear-cut and do not fall within the limited *Cheshire County Council v M* category, the court nonetheless has a wide discretion to conduct the case as is most appropriate for the issues involved and the evidence available (*Re C (Contact: Conduct of Hearings)* [2006] 2 FLR 289, CA). The overriding objective in FPR 2010, r 1.1(2)(b) requires the court to deal with cases in ways that are proportionate to the nature, importance and complexity of the issues. In family proceedings, a judge has an inquisitorial role and his duty is to further the welfare of the children, which is his paramount consideration. The court will not necessarily hold a full hearing with the parties being permitted to call oral evidence and cross-examine any witnesses that they may choose. However, applications about with whom a child should live should normally be decided on full oral evidence in order for the court to have all necessary evidence before it and to be able to conduct a proper analysis. Applications for contact may be heard with and without oral evidence or with a limited amount of oral evidence. In *Re N; A v G and N* [2010] 1 FLR 272, FD, it was said that important factors for the court to consider included:

(a) whether there is sufficient evidence on which to make the decision;

(b) whether the proposed evidence that the applicant for a full trial wishes to adduce and whether the opportunity to cross-examine the witnesses is likely to affect the outcome of the proceedings;

(c) the welfare of the child and the effect of further litigation;

(d) whether the delay will be so detrimental to the child's well-being that exceptionally there should not be a full hearing;

(e) the prospects of success of the applicant for a full trial;

(f) whether the justice of the case requires a full investigation with oral evidence.

14. However, the court has to be careful not to deal with the matter in too peremptory a way. Where there are disputed matters that go to the heart of the issue, the court must determine them rather than try to bypass them to progress the case (*Re S (Contact Order)* [2013] 1 FLR 825, CA). See also *Re L (A Child)* [2016] EWCA Civ 871, where a contact order was set aside where it had been made without the children's special guardians having the opportunity to hear the evidence of other witnesses or to make submissions on the issue of contact.

15. Robust case management very much has a place in family proceedings, but it also has its limits (see *Re B (Case Management)* [2013] 1 FLR 963, CA, where the judge held an unnecessarily truncated hearing and made a crucial finding of fact on the basis of limited evidence). The Judge in the present case made a finding that S did not wish to see her grandfather on the basis of limited evidence and failed properly to explore all realistic options to determine whether there was any alternative to there being no contact between G and his granddaughter, who had cared for her for most of her life.

16. It is clear that, where the court hears oral evidence from one side, it is wholly inappropriate not to hear from the other (*Re F (A Minor) (Care Order: Procedure)* [1994] 1 FLR 240, FD). Reasons for a decision to refuse to hear oral evidence from a party should be given by the Judge. No such reasons were given by the Judge. G has difficulty with his speech and his hearing. The Judge

does not appear to have addressed those issues and how they might have affected G's presentation of his case.

17. The Judge relied upon informal, partial, unsworn evidence from the social worker and did not hear oral evidence from the grandfather. The hearing lacked structure, was directive towards the parties and was derived from a pre-determined view point, rather than being adversarial or even quasi-inquisitorial. The decision was made on the sole basis that the child did not wish to see the grandfather. Many of the cases that first instance judges see are where the child is of similar age and is saying that he or she does not wish to have contact. Those cases are not prevented from proceeding because of the child's *expressed* wishes and feelings. The issue of whether her expressed wishes were her true wishes was not raised by the Judge and was not explored. Nor was it considered how the refusal of contact by the child was to be addressed and managed. The 8 or 9 years for which the child may have lived with the grandfather were not considered and therefore not given the weight that they may have deserved.

18. The Judge acted prematurely and unfairly in dismissing the application. This was the first hearing of the application. If the Judge had decided, as he did, that he would hear the substantive application there and then, he should not have summarily dismissed the application. This case did not fall within *Cheshire v M*. The approach of the Judge was outside the broad discretion of the court to restrict evidence and investigation. Having decided to hear the substantive application, he heard only part of the case and arguments on one side, so was not able to do justice to the parties or to the child. G was not given the opportunity to give any or any proper evidence on factual or on welfare issues. He was not given the opportunity to call witnesses, nor to adduce any documentary evidence, nor to test the evidence of Ms A or the mother through cross-examination. The possibility of indirect contact or supervised or supported contact was not properly explored, for the child if for no-one else. Also not explored was the possibility of work being done with S to assess

whether and how contact could take place, in whatever format. The Judge was wrong in his decision and in his conduct of the hearing.

19. Accordingly, the appeal must be allowed.

20. The grandfather's application for permission to apply for a section 8 order is to be remitted and to be listed before a different District Judge. That application might result in the case not proceeding any further or it might begin a process of renewing the relationship between S and her grandfather.

Appeal allowed.

His Honour Judge Ahmed

11 October 2019

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