Neutral Citation Number: [2017] EWCA Civ 2690

Case No: B4/2017/2056

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
FAMILY DIVISION
MR JUSTICE MOOR
FD16P00628

The Royal Courts of Justice
Strand
London
WC2A 2LL

Tuesday, 22nd August 2017

Before:
LORD JUSTICE McFARLANE
&
LORD JUSTICE MOYLAN

RE: W-L (A CHILD)

MR E DEVEREUX QC appeared on behalf of the Mother
MR M JARMAN appeared on behalf of the Father

JUDGMENT

LORD JUSTICE McFARLANE: I will invite Moylan LJ to give the first judgment.

LORD JUSTICE MOYLAN:

1. These proceedings concern a very young child who is now aged 16 months. The mother appeals from Moor J's order of 4 July 2017 dismissing her application to vary a contact order made by Peter Jackson J on 20 January 2017.

2. At this hearing the mother has been represented by newly instructed counsel, Mr Devereux QC. The father has been represented, as I understand it *pro bono*, by the same counsel who appeared at the hearing before Moor J, namely Mr Jarman. I am grateful to both of them for their succinct but comprehensive submissions.

3. The background can be summarised briefly. The father is a national of St Lucia; the mother is a national of the United Kingdom and St Lucia. They met in St Lucia and commenced a relationship. They started living together in St Lucia in March 2014. Their daughter, who I will call A, was born in England in early 2016.

4. The mother returned to St Lucia when A was one month old. The parents separated in June 2016. The mother came to England for a holiday in August 2016 and in October 2016 solicitors acting for the mother informed the father that they would not be returning to St Lucia.

5. The father started wardship proceedings in England seeking the summary return of A to St Lucia. Those proceedings were determined by Peter Jackson J's order of 20 January 2017 which was an order substantially made by consent. Both parties were represented by counsel at that hearing.

6. Prior to the hearing, expert evidence had been obtained from a St Lucian lawyer which was to the effect, in summary, that the father had no parental rights and no right to make any application in respect of A under St Lucian law. The mother was the sole custodian with exclusive parental authority, including the unilateral right to relocate with A to England without any court intervention.

7. The order of 20 January provides that A will live with her mother. Although not expressly stated, this was clearly on the basis that they would continue to live in England. Extensive contact arrangements were also included in the order. The father was to have contact in England in March 2017, in St Lucia in May 2017, in England in September 2017 and in St Lucia again in December 2017. There are more general provisions dealing with contact for 2018 and in subsequent years.

8. The contact provisions as ordered contain no conditions save that contact is initially to take place in the presence of one of the maternal grandparents. In addition, however, the order contains a recital to the effect that the maternal grandfather, who was present in court at the hearing in January, had said that in order to facilitate contact he would pay the cost of travel incurred by the parents on three occasions each year. That was, as I understand it, on the basis that this would continue until the child reached school age. The recital also indicated that all flights and the father's accommodation in England would be booked by the maternal grandfather.

9. The order contains, at paragraph 5 of the recitals, undertakings given by the father; a) not to

molest the mother, b) not to seek to prevent the mother from leaving St Lucia, and c) not to remove A from the mother's care. In addition, under recital 5d, the father agreed "immediately to sign a notarised document in St Lucia containing an equivalent set of undertakings" and, if the St Lucian courts permitted, to lodge the undertakings with an application that they be recognised in an order of that court.

10. Contact took place in England in March 2017. It did not take place in St Lucia in May. On 26 May 2017 the mother issued an application to vary the contact order, specifically to provide that contact should take place only in England. A number of matters were relied on in support of this application which are set out in some detail in the application.

11. The issue which was dealt with at greatest length was an assertion that the father had failed to comply with recital 5d of the January order. The notarised affidavit had not been supplied until April and, in it, the father said that he had been advised by St Lucian lawyers that neither the English order nor the undertakings could be enforced in St Lucia because they could not be recognised in that jurisdiction. This was said to mean, as set out in the mother's application, that the mother and A had no protection under the laws of St Lucia. The mother was concerned that the father might seek to obstruct her from leaving St Lucia with A.

12. Secondly, it was said that contact in March had not progressed as envisaged because the father had only spent an hour per day with A. Thirdly, it was said that the maternal grandfather was "no longer able to fund the cost of contact", after the newly proposed contact in England in July 2017. The maternal grandparents were otherwise said to be able to continue supporting contact.

13. In accordance with the rules, no evidence was filed with the application. The application came before Moor J on 4 July at a hearing listed for one hour. Both parties were represented by counsel.

14. The father sought the dismissal of the mother's variation application. The judge made his order after hearing submissions only. He read the application, the parties' submissions and other documents to which was referred, including a letter obtained by the mother from a lawyer in St Lucia which dealt with recital 5d.

15. Mr Dance, for the mother, submitted that there were a number of issues which required investigation because the January 2017 order was no longer workable. The three matters he advanced were: (i) that the father had not complied with recital 5d; (ii) that the maternal grandmother was no longer willing to be present during contact, although she would be present if a third party was also present; and (iii) that the maternal grandfather no longer felt able to fund contact.

16. The grandfather's position was said to be partly due to the father's behaviour during contact in March 2017, he was said to have been rude and aggressive, and also due to the grandfather's financial circumstances. The maternal grandfather did, as was indicated in the application, fund the father's travel to England in July 2017 to enable contact to take place. During the course of his oral submissions, Mr Dance described the maternal grandfather as being "no longer willing to fund the travel".

17. In a short judgment, Moor J acceded to the father's submission and dismissed the mother's application to vary the January order. He decided that the father had complied with paragraph 5d. Further, he considered the mother was herself able to remedy any alleged

deficiency. Contrary to the advice given to the father, the mother had obtained advice that a free-standing application could be made to the courts in St Lucia. The judge decided that the mother could act on the advice she had received, if she chose to do so, and included a provision in his order dealing with this.

18. As for the other matters, Moor J decided that they were insufficient to justify the variation application proceeding further. The maternal grandmother's decision did not prevent the agreed contact taking place. The grandfather's change of position was not sufficient, nor was the unspecified assertion that his financial circumstances had changed.

19. The judge referred to the fact that this was a carefully crafted agreement and order made only some four months prior to the variation application. He also referred to the fact that both parties had been represented and that the grandfather had been present at the hearing. In his view, none of the matters raised by the mother demonstrated any sufficient prospect of the January order being varied. He therefore dismissed the application.

20. In the course of his judgment, Moor J also stated that the maternal grandfather must comply with the agreement that he had made in January. However, in his reasons for refusing permission to appeal, he clearly recognised that the obligation is on the mother to comply with the order and not the grandfather.

21. Turning now to the parties' submissions, which I propose only to summarise but which I have taken fully into account when determining this appeal. The mother's case has been advanced comprehensively and persuasively both in the written skeleton argument and in the course of Mr Devereux's oral submissions today.

22. For the purposes of this appeal, her case has focused on the asserted change in the grandfather's agreement to fund the travel costs of contact. Her case, as set out in the grounds of appeal and in submissions, can be summarised in this way. It is submitted that the judge was wrong to determine the mother's application summarily, without giving her an opportunity to file evidence and without further investigation, following the grandfather saying he was no longer willing and/or able to fund the travel expenses incurred in contact. Her application was, therefore, not fairly determined. The result is that there is an order for contact with which, on the mother's case, she is unable to comply.

23. During the course of his submissions Mr Devereux took us to the judgment and submitted that Moor J was wrong to conclude that none of the matters relied on by the Mother raised a sufficient prospect of her application being successful to justify permitting it to proceed. He rightly acknowledged that judges have a wide discretion in how to determine an application and that this includes deciding cases summarily. However, he submitted that the approach taken by Moor J was robust to the point of unfairness. In his submission, more lengthy investigation was required so that the court could properly analyse the impact of the changes in circumstances relied on by the mother. The judge was not in a position properly to come to the conclusion which he did on the information or evidence available to him. The application should not, therefore, have been dismissed at what was a directions hearing, but should have been listed for a further hearing after evidence had been filed. This would have enabled a fuller assessment to be undertaken. He also referred to two authorities, *Re C (Family Proceedings: Case Management)* [2013] 1 FLR 1089 and *Re B (Case Management)* [2013] 1 FLR 963.

24. Mr Jarman submitted that the judge's decision was one which he was entitled to make. The matters relied on by the mother did not meet the threshold sufficient to justify the

continuation of her application. The order had only been made relatively recently and in essence, when stripped down, the mother was seeking to withdraw from what had been agreed and ordered in January because she was no longer happy with contact taking place in St Lucia. The main reason advanced by the mother was the father's asserted failure to comply with recital 5d and that had been dismissed by the judge. The judge had considered whether there was any good reason for interfering with the January order and decided that there was none.

25. In summary, Mr Jarman submitted that the application made by the mother did not disclose a prima facie case that amounted to a material change in circumstances. In his submission, at its highest, it was an attempt by the mother to slow the progress of contact that had been carefully crafted in January.

26. In *Re C*, Munby LJ (as he then was), referred to the broad discretion afforded to a judge in family proceedings to determine the manner in which an application should be pursued. This included, and I quote from paragraph 14, "In an appropriate case, he can summarily dismiss the application as being, if not groundless, lacking enough merit to justify pursuing the matter". Quoting further, in paragraph 15 he said:

> "The judge will always be concerned to ask himself, "Is there some solid reason in the interests of the children why I should embark upon, or having embarked upon why I should continue, exploring the matters which one or the other of the parents seeks to raise?"'

In paragraph 18 he said, "It is pre-eminently a matter for the trial judge in a case of this sort to determine the form of procedure which will best meet the welfare needs of the children".

27. The appeal in that case was dismissed because, although the judge had adopted a "robust" approach, "It is quite impossible in my judgment to assert that the judge in taking that view and adopting that approach exceeded the generous ambit of discretion which the law conferred upon him as the trial judge", paragraph 18.

28. In the latter case of *Re B*, Black LJ decided that the judge's approach "deprived the mother of the proper opportunity to answer the case against her but also deprived the court of evidence that was necessary to enable it to make reliable findings of fact", paragraph 36. Black LJ concluded by noting, in paragraph 48, that, "Robust case management … very much has its place in family proceedings but it also has its limits".

29. The issue raised in this appeal is which side of the line did Moor J's decision fall. Was it an appropriate example of robust decision making in accordance with the overriding objective and the child's welfare, or was it a decision based on information and evidence which was inadequate to enable the court to reach a properly founded welfare decision? Did it give inadequate consideration to the mother's case, such that she did not have a fair hearing of her application? Before determining this issue, it is worth reflecting on the circumstances leading to the judge's decision.

30. The parents separated when their daughter was three months old. When she was five months old, she came to England with her mother. Her mother then decided to stay here in circumstances where, because the parents were not married, the father had no significant rights under St Lucian law. The father has continued living in St Lucia while the mother

and the child have made their home in England.

31. In January, the parents, with the assistance in particular of the maternal grandfather, reached agreement as set out in the order. In the course of his judgment, Peter Jackson J acknowledged the significant steps taken by both parents. He commended the father for recognising that it was in A's best interests for her to live in England with her mother. He also commended the mother and her parents for enabling what he described as a "decent amount" of contact between A and her father to take place. As he said, and I agree, the agreement reached by the family provided a structure which was undoubtedly in A's best interests as she grows up. It was clearly based on a recognition by the family that it was appropriate for contact to take place both in St Lucia and in England. Given the parents' own financial circumstances, the maternal grandfather provided the assistance required to ensure that this could happen.

32. The path of a separated family is often not easy. Issues and difficulties will appear and have to be addressed. They need to be addressed with the clear objective of meeting the child's long-term best interests. This will sometimes require assistance from the wider family, recognising their ability to help and achieve the best outcome for the child. That is clearly what happened in this case in January and is what I would urge the family to seek to achieve again for the future.

33. Returning to the question raised by this appeal, was Moor J's decision wrong by being too robust, as submitted by Mr Devereux, or was it a decision which he was entitled to make in his discretion, as submitted by Mr Jarman.

34. Having carefully considered all the points raised on behalf of the mother and the father, I have come to the clear conclusion that it was a decision which the judge was entitled to make. He was entitled to determine that the matters advanced by the mother were not sufficient to justify her application to vary the January order continuing to a further hearing. I acknowledge that it was a robust decision. I can understand why the mother might feel that her application has not been sufficiently considered but, as referred to above, judges have a broad discretion when making decisions of this nature.

35. I understand, also, that dismissing the application does not resolve all the issues as referred to during the hearing, but that is not the question. The judge had a very full written application and had received extensive submissions. He was in a position, in my view, properly to decide that there was no good reason to interfere with the January order and to permit the variation application to continue. The carefully agreed January order had only been followed by one period of contact. This was, frankly, insufficient to give contact a chance of developing as set out in the order.

36. Finally, to return to Peter Jackson J's judgment, he said that nobody should be naive enough to think that there would not be moments of difficulty. He urged, as I do also, the parents and their families to focus on seeking to make a success of contact. A will benefit from this and will be grateful to them for having done so.

37. Accordingly, I propose the appeal be dismissed.

LORD JUSTICE McFARLANE:

38. I agree.

End of Judgment

Transcript from a recording by Ubiqus
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