[2011] EWCA Civ 745

Case No: B4/2011/1315/PTA+A

IN THE HIGH COURT OF JUSTICE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM Leicestershire County Court
His Honour Judge Jenkins
LE08C10391

Royal Courts of Justice
Strand, London, WC2A 2LL

28/06/2011

B e f o r e :

SIR NICHOLAS WALL THE PRESIDENT OF THE FAMILY DIVISION
LORD JUSTICE RIX

Between:

1. MG
2. JJ **Appellants**

1. A Local Authority
2. JG
3. RG (by the Children's Guardian)
4. A City Council **Respondents**

Hannah Markham (instructed byThe Emery Johnson Partnership) for the First Appellant
Kate Tompkins (instructed by Dodds & Partners) for the Second Appellant
Amanda Barrington-Smyth (instructed by A Local Authority) for the First Respondent
Brendan Roche (instructed by Cartwright King) for the Second Respondent
Barbara Connolly QC (instructed by Quality Solicitors Wilson Browne) for the Third Respondent
William Tyler (instructed by A City Council) for the Fourth Respondent

Hearing date: 16th June 2011

HTML VERSION OF JUDGMENT

Sir Nicholas Wall P.

1. This is the judgment of the court.

2. These are applications for permission to appeal by a mother and one of the children concerned (with the appeals to follow if permission is granted) from an order of His Honour Judge Jenkins sitting as a High Court Judge in the Leicester District Registry of the Family Division on 26 April 2011. The cases were placed in our list for 16 June 2011 by Black LJ on 26 May 2011, but as we did not finish the argument until 6.00 pm on 16 June we took the view, given the urgency of the case, that the most sensible course was to announce our decision, but to reserve our reasons, which we now give.

3. The case involves protracted and difficult care proceedings under Part IV of the Children Act 1989 (the Act) instituted by Leicester City Council (Leicester) as long ago as 2008. It concerns two full brothers, whom we will identify as JJ and R. JJ is now 13: R is 7. Most of the many hearings in the case have been taken by Judge Jenkins, who plainly knew the case well, and the orders under appeal are interim care orders made by the judge in favour of a second local authority (known – for reasons which we will explain – as the X Local Authority) and designed to remove the children from their mother's care.

4. An unusual feature of the case is that one of the applicants for permission is JJ himself who, for this purpose, has parted company with the CAFCASS guardian and was separately represented before us.

5. The decision which we announced at the conclusion of the argument on 16 June 2011 was that; (1) permission to appeal would be granted; (2) the appeals would be allowed; (3) there would be interim care orders in favour of X local authority in relation to both boys; (4) there would be fresh injunctions against the father (with a power of arrest to be attached) preventing him from visiting or making contact with the boys (save for the purposes of supervised contact arranged by X local authority) or going within 100 metres of where the boys were living; and (5) that the final hearing of the case proceedings would be taken by Judge Jenkins sitting in Leicester in September 2011.

6. Although under interim care orders the power to direct where the boys should live rests ultimately with the local authority to whose care they are committed, our order was predicated on the basis that the children would live with the maternal aunt and uncle, Mr. and Mrs B until the final hearing, and that they would continue until that time to attend the same schools. We understood that this plan was acceptable to X Local Authority.

7. This judgment will explain our reasons for reaching these conclusions. We do not propose to delve into the background of the case, but will approach it on the basis of recent events.

The appeals

8. Two issues appear to have dominated the case. The first is the fragile mental health of each of the children's parents and, in this context the mother's capacity to care for the boys. The father has been ruled out as a carer by the judge.

9. The second issue is the relationship between the parents themselves. So damaging is this perceived to be that Leicester's care plan was that the children should be placed with their mother in the area of X local authority, at a location unknown to the father. This, of course, involved X Local Authority becoming the "designated" local authority for the purposes of section 31 of the Act.

10. Unfortunately, the transfer of the allocation between local authorities did not run as smoothly or as co-operatively as is envisaged either by the Act (we have in mind, in particular, the much overlooked duty in Part III of the Act section 27 for local authorities to cooperate with one another) or by the authorities – we have in mind, in particular, ***L v. London Borough of Bexley*** [1996] 2 FLR 595 and ***Re C (Care Order: Appropriate Local Authority)*** [1997] 1 FLR 544.

11. We are not in a position to attribute responsibility for this state of affairs. We record simply that when the judge gave a major judgment in the case on 7 September 2010 the hearing was intended to be the "final" hearing, with Leicester's care plan being the placement of the children with their mother under care orders in the area of X local authority. As he stated, however, the judge was, "regrettably" unable to make such orders because "the question of who the designated local authority should be" was unresolved.

12. In his judgment given on 1 September 2011 the judge found that the children's father "continues to present a risk of emotional harm to the children and the case must be managed on that basis", and effectively ruled him out as a carer for the children. This, as we understand it, is now a position which the father accepts. The judge ordered that the children should have supervised contact with him on four occasions each year.

13. Although the children remained living with their mother under Leicester's care plan, X authority came to the view that it should be altered and the children taken away from their mother's care. It was this issue which came eventually before the judge on 31 March and 1 April, and resulted in the reserved judgment of 26 April. By this time, there was still not a "fully assessed care plan" for the court to approve. Moreover, the judge himself had moved circuits, and gave his judgment over a video link from Leeds. As we have already related, the outcome of the hearing (which was still not ready for final adjudication) was interim care orders in favour of X local authority in relation to both boys, and their consequential removal from their mother's care.

14. For the mother and for JJ counsel take one short and in our view compelling point. The judge was plainly making interim orders. He says so, and the orders themselves are so drawn. Yet, at the same time, he declined to rely on the authorities about making interim orders, and treated the hearing as the final hearing, so that the orders, although expressed as interim, are, in effect, final orders. This, it was submitted, was unfair on both the mother and the children: she, in particular, had been effectively denied the opportunity to argue, at a final hearing, that she was properly able to care for the boys in accordance with Leicester's interim care plan.

15. Whilst we have some sympathy for the judge, who knew the case well and clearly took the view that it "crie(d) out" for a solution, we think counsel's submission is well founded, and is sufficient, in our judgment, to vitiate his exercise of discretion.

16. We propose to deal with the point quite briefly, particularly as we have come to the view that there has to be another, final, hearing, at which the mother should be given the opportunity, on full and appropriate evidence, to argue that Leicester's original care plan should stand.

17. In paragraph 14 of his judgment, when dealing with the law, the judge states: -

> "…… Various authorities were produced to me dealing with the appropriateness of the approval of care plans, the placement of the children with members of the family and about the removal of the children from a parent during the course of interim hearings, but this is not such a situation as is envisaged by these authorities. The unusual circumstances of this case are in effect that were there an appropriate care plan which the court could approve the court has had a full hearing of the matter and is approaching the resolution of the matter. Furthermore, the court needs after such a long delay and where the children's lives have been severely disrupted by continual change , the court needs to reach a situation where care orders can be made and the management of the case entrusted to a local authority without the local authority managing the case being subject to a series of delayed hearings and continual change. The local authority needs to be able to react to change in a way which is appropriate rather than the matter having to be submitted to the court".

18. The judge thus concludes: "Sadly, what has proved to be a trial period with the mother, in my judgment, now needs to come to an end". Furthermore, the intellectual dichotomy between final and interim orders is clear from the final paragraph of the judgment: -

> "40. Interim care orders are inevitable but, in making interim care orders, I now approve the care plan of the local authority and, in the particular circumstances of this case, it seems to me appropriate for them to say that the local authority must deal with the placement, as a final hearing approaches, as they think appropriate. The court obviously has a continuing and vital role in the approval of a final care plan but that needs to be achieved as soon as it possibly can."

19. Reading the judgment as a whole, we are in no doubt that the judge was making what he understood to be final orders, although for the reasons he gives he acknowledges that they must be labelled as interim. For this reason, it seems to us, he did not refer to the authorities cited to him on removal of children from their parents under interim care orders. We are, therefore, satisfied that, despite his deep knowledge of the case, and despite the wide discretion with which an experienced circuit judge such as Judge Jenkins has to conduct hearings in the manner in which he thinks fit, his decisions: (1) to make interim orders whilst regarding them as final, and; (2) to distinguish all the cases on interim orders by reference to the facts of this case constitute mis-directions which are sufficient to vitiate the exercise of his discretion, and require us to interfere.

20. To be entirely fair to the judge, it seems plain to us that he has had a change of heart since he delivered judgment, since at a directions hearing on 27 May 2011, he gave directions which, inter alia, permit up to date evidence on the mother's behalf. The judge has also arranged for a final hearing over a period of days before himself or another judge in September or October of this year.

What should we do?

21. As the judge's exercise of discretion seems to us fatally flawed, it falls to us to exercise it afresh. We now know that there is to a final hearing in either September or October of this

year. It seems to us that our function is to hold the ring until that hearing which, we hope, will indeed be the final hearing of the proceedings. In other words, to put the matter colloquially, what should happen between then and now?

22. In reaching our conclusion in this regard we have clearly in mind all the recent learning, largely from the court, in relation to interim care orders where the interim plan is removal of the children from a parent's care. We summarise those authorities by asking ourselves the question whether the children's safety (using that term to include both psychological and physical elements) requires removal, and whether removal is proportionate in the light of the risks posed by leaving them where they are. We also balance the strong wish of JJ in particular to stay with his mother, and the harm likely to be caused to the children by an abrupt removal.

23. In considering the exercise of our discretion, we are dealing with events as they currently present themselves, and are strongly influenced by the views of the guardian, as expressed through Miss Barbara Connolly QC. The guardian she retold us, without contradiction, was the one professional person who had been in the case throughout.

24. Miss Connolly explained that the guardian was of the view that interim care orders were appropriate. She confirmed that the danger to the children was when the parents were together. The father's behaviour was deeply manipulative and questioning, and there was plainly evidence before the judge that he had tried to find out where the mother was.

25. Before the judge, the guardian's view was that the mother had only "come clean" when the telephone records became clear that there had indeed been contact between her and the father. It was difficult for the mother to maintain separation from the father, and the guardian had serious anxieties about the resumption of the relationship between them. The real difficulty, said the guardian, was contact with the father, even if the mother did not tell him where she was. The guardian was also concerned about managing the risk to the mother's mental health, and had doubts about her capacity to care for the boys in the interim.

26. Such were his concerns that, balancing all the relevant factors, he had come to the clear view that interim care orders were called for, and that pending the final hearing the children should be removed from their mother's care.

27. The guardian favoured an interim placement with Mr. and Mrs. B The children had stayed there before. They knew and liked the placement. Their aunt could stand up to the father and protect them from him.

28. The principal answer to the guardian's anxieties was that there was no recent evidence of contact between the parents, and that the risk of harm to the children of removal was far greater than any damage which might arise were they to stay where they were. A change in the case plan was thus called for.

29. Having weighed the facts as carefully as we can, we have come to the conclusion that the best interests of the children require there to be interim care orders pending the final hearing, during which time the boys will live with their aunt and her husband.

30. We think it, however, important to add a number of riders. The first is that the children's education should not be disrupted, and we were pleased to hear from the X local authority that it would arrange for the boys to be transported to and from their current schools from Mrs. B's address.

31. Secondly, we make it clear that these are interim orders. The mother is not to be written off as carer. Everything is still 'to play for', although we cannot and do not predict the outcome. It may be that the mother will have to choose between her husband and her two younger children. She will have to show that she can keep the children safe from their father. She will have to show that she can care for the boys well enough. But the boys themselves should be told that these are temporary orders pending a final hearing. Quite how and by whom they are told we must leave to the professionals in the case. We are, however, very conscious that we are going against the wishes of a competent 13 year old, and that he needs to know that this is not the end of the road.

32. These, accordingly, are the reasons for our decision on 16 June. We have also considered carefully whether we should direct that the final hearing should be before another judge. We

have, however, come to the conclusion that the principle of judicial continuity prevails; that Judge Jenkins will judge the case fairly on all the evidence presented to him, and reach a proper conclusion in relation to the boys' best interests. This may involve a revision of the views which he expressed in the judgment under appeal: it may not.

33. We appreciate also that given Judge Jenkins' move to the North of England our view that he should take the final hearing may well cause inconvenience to him and to others. We are of the view, however, that listing is a judicial function, and that judicial continuity is of the utmost importance in this case.

Footnote

34. We have been supplied with a small bundle of documents from the Leicestershire police addressed to Judge Jenkins. We were asked by X local authority to order disclosure of these document. We decline to do so. It seems to us that the disclosure of these documents (which have not influenced our decision) should be a matter for the judge at or before the final hearing.