[2010] EWCA Civ 324

Case No: B4/2010/0567

IN THE HIGH COURT OF JUSTICE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM
His Honour Judge Cleary, sitting in the Coventry County Court 5th March 2010

Royal Courts of Justice
Strand, London, WC2A 2LL

30/03/2010

Before :

LORD JUSTICE THORPE
LORD JUSTICE WALL
and
LORD JUSTICE AIKENS

Between:

MB (The Mother)	**Appellant**
- and -	
County Council	**1st Respondent**
AB (The Father)	**2nd Respondent**
KB and EB (The Children)	**3rd and 4th, Respondents**
B (Children)	

Aiden Vine (instructed by Blakemores - Solicitors) for the Appellant
Rebecca Franklin (instructed by Warwickshire County Council) for the 1st Respondent
Davinder Dhaliwal (instructed by Maurice Andrews – Solicitors) for the 2nd Respondent
John Vater (instructed by Johnson & Gaunt – Solicitors) for the Children and the Guardian
Hearing date: 11th March 2010

HTML VERSION OF JUDGMENT

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Lord Justice Wall :

1. We heard this matter on 11 March 2010, and announced our decision at the conclusion of the argument. We granted permission to appeal, but dismissed the appeal. The stay, which I had ordered on 9 March thus ceased to have effect. We ordered the assessment of the costs of those parties who were publicly funded. We reserved our reasons, and this judgment will explain why I take the view that the orders we made were the right ones. As the case is ongoing, I would propose the imposition of reporting restrictions.

2. MB is the mother of four children by two different fathers. We are only indirectly concerned with the two eldest, NH and IH. The former is a girl who will be aged 17 in April: the latter a boy who is 14 and a half. Their father plays no part in the proceedings.

3. The two children with whom we are directly concerned are KB a girl aged 11 and EB, a boy, who will be 10 in June of this year. On 5 March 2010, His Honour Judge Cleary, sitting in the Coventry County Court made interim care orders in relation to KB and EB who had been living with their maternal aunt since 15 February 2010, and before that with their parents, MB and AB and their siblings NH and IH..

4. It was common ground that the placement of KB and EB with their aunt would have to come to an end in any event, and the contest was whether KB and EB should return to live with their mother, or whether they should live for the time being with foster parents under interim care orders, whilst an assessment was made of their mother's capacity safely to care for them and, in particular, whether she could protect them (and herself) from their father AB, from whom the mother was separated.

5. NH and IH, who, at the time of the hearing before the judge were living with their maternal grandmother, had made it clear to the children's guardian that they intended voting with their feet, and that they would return to live with their mother. Given NH's age, the local authority, which had brought care proceedings in relation to all four children, applied to the judge for permission to withdraw its application for a care order in relation to her, an application which the judge granted.

6. In relation to IH, the position was not quite so straightforward. The local authority's original plan had been to move him to live with his aunt (in place of KB and EB) but it became clear to the local authority (following a visit to IH by the guardian) that, in the judge's phrase, "any attempt to keep (him) from his mother would be, if not impossible, certainly inappropriate"; and the local authority "after some observable confusion" accepted that it would reconsider its plan in relation to IH having, as the judge put it, "at one stage early this morning and perhaps a little over-hastily, indicated that it would in fact withdraw proceedings altogether".

7. In the event, whilst the position is both unclear and unsatisfactory, we are not directly concerned with IH, in relation to whom the judge made a residence order in favour of the mother, combined with a supervision order in favour of the local authority. It is plain, therefore, that IH will, like NH, return to live with MB.

8. The judge had no difficulty in deciding that the threshold criteria under section 38(2) of the Children Act 1989 were satisfied in relation to both KB and EB: indeed, they were conceded by MB. It is, however, in my judgment impossible to disentangle those criteria from the question of whether or not it was appropriate for the judge to make interim care orders, which undoubtedly had the effect of separating the children from their mother.

9. In an extempore judgment given late on the Friday afternoon, the judge identified the criteria in the citation from his judgment which follows. I should say that at the hearing of the appeal, we only had a note of the judgment, albeit one the judge had both commented upon and approved. We have now been supplied with a transcript, which the judge has also approved, and I propose to take my citations from it. This is what he said about the threshold:

> 22. The threshold can be summarised thus. (MB) is unable, it is reported, to prioritise her children's needs before her own and has not always cooperated with social services. There has been persistent domestic violence between the parents and the children have been constant witnesses to these incidents; and hitherto neither parent appears to have understood the seriousness of the violence and the impact of this violence upon the children. (MB) is, it is said, unable to protect the children from their father or from witnessing the violence between them, and although she has stated to social services on a number of occasions in the past that she wishes to leave him because of her fear of him she has not done so. For his part (AB) has been very aggressive and confrontational with social services generally, throughout professional involvement. Further, father has struck the children and has, it is reported and asserted, struck (EB) in particular and with a belt. His threats to (MB) are reported by her. She has included very serious threats and terrifying ones which include a threat of assault with an axe, and indeed the children have seen him brandishing an axe from time to time. Those are just some of the allegations and although I do not at this stage make findings particularly against the father it is clear from a perfectly frank admission by the mother in the position statement lodged very helpfully by her counsel that the threshold criteria certainly are met for the purpose of this application.
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> 23. In brutally short summary, and I hope I can be forgiven for this, the issue before this court is not whether there should be an interim care order but whether within the terms of that order the younger two children should be kept from the family home while assessments are carried out, assessments

being essentially of a psychological nature to assess whether, with clinical help, the mother genuinely can disengage herself from this father, and indeed whether this father can no doubt again with professional help moderate his behaviour and eschew violence and abuse both towards the mother of his children and indeed of his stepchildren and the children themselves.

10. In my judgment, this question raised by the appeal is very simple. Where, in the circumstances I have just set out, the local authority's position is that the necessary assessment of a mother's capacity to care for and protect her children cannot safely be carried out whilst the children are living with her, is the concept of an interim care order sufficiently flexible to enable a judge to remove children temporarily from their mother's care in order for the assessment to be made?

11. Put in this way, the answer seems to me obvious. The remedy is available, and on the facts of this case the judge was plainly right to avail himself of it.

12. This is the second time in recent months that this court has had to address the subject of interim care orders. In ***Re B (a child) (interim care order)***[2009] EWCA Civ 1254, [2010] 1 FCR 114, I took the opportunity to remind the profession of what was said about interim orders in a leading textbook and in other cases. In paragraph 52 of my judgment I cited paragraph 40.40 of the first volume of ***Rayden & Jackson on Divorce and Family Matters*** 18th edition, 2005 where I found the following:-

> "The making of an interim care order is an essentially impartial step which effectively maintains the status quo and does not give a local authority in whose favour it is granted a tactical advantage over other parties; the regime of an interim care order should operate as a tightly run procedure closely monitored by the court and affording all parties the opportunity of frequent reviews as events unfold".
> I added:-
> 53 For these propositions, three authorities are cited, two of which are decisions of this court ***Re G (Minors) (Interim Care Order)*** [1993] 2 FLR 839 and ***Re M (a minor)(Appeal: interim order)(No 1)*** [1994] 1 FLR 54.

13. As Judge Cleary recognised (see paragraph 45 et seq. of his judgment) the question which the judge who takes the final hearing in the instant case will have to decide is whether or not these parents together, or the mother on her own (if she elects to and can live without the father) can safely parent the two children with whom we are concerned. In order to assist the judge in deciding that question, the local authority wishes to make an assessment of the mother's ability to maintain a life style independent of the children's father and whether or not she has the capacity to protect and care for them. Its case – for which there was an abundance of evidence - was that this exercise could only be safely attempted if the two children were not living with their mother.

14. In my judgment, the judge did not commit any error of law in taking the view that interim care orders were the appropriate mechanism to achieve this objective. The citation which follows shows how he approached the case. Once again, I bear in mind that this was an extempore judgment, although, now that I have seen the transcript, it seems to me that what the judge was saying was both clear and sensible. I propose to set out what the judge said *in extenso*-

> 50. I have considered the law. As I have indicated I have considered the statutory requirements.
> 51. I must bear in mind of course that before I make an interim order I must be satisfied that there are reasonable grounds for believing that the threshold criteria under section 31 of the legislation are satisfied and that it is better for the child to make an order than to make no order.
> 52. I must consider the child's welfare pursuant to the subsection to which I have already made reference.
> 53. As to the threshold, section 31.2 provides that a court may only make a care or supervision order if it is satisfied that the child concerned is suffering or is likely to suffer significant harm and that the harm or likelihood of harm is attributable to the care given to the child or likely to be given to him if the order were not made not being what it would be reasonable to expect a parent to give him.

54. In an application for an interim order I need only be satisfied that there are reasonable grounds for believing that the section 31 conditions to which I have referred are satisfied. 'Is suffering' can be translated as 'at the moment of the hearing or at the commencement of the proceedings.' 'Is likely to suffer' is translated as 'a real possibility, a possibility that cannot sensibly ignored.' And 'significant harm' is in part defined. That is as to harm. Under section 31.9 the legislation is helpful by indicating that 'harm' includes ill treatment which includes not only sexual abuse but other forms of ill treatment which are not physical. By that I pause and remark to myself, and I doubt that there is any argument against this, exposure to domestic abuse between the parents, impairment of physical or mental health or, finally, impairment of physical, intellectual, emotional, social or behavioural development. And when I consider a real possibility, a possibility that cannot sensibly be ignored, I hear, and this resonates throughout that which I have heard over the last two days, N's comment. When she heard her mother say that she would disengage from her father or stepfather she said words to the effect of: "Oh, yeah, for the 500th time."

55. It is of course for the local authority to satisfy the court on the balance of probabilities that there are reasonable grounds for believing that the threshold criteria are satisfied and in this case the mother does accept that.

56. The issue now is whether or not, the threshold criteria having been met, there is a need, an urgent need, to keep the children from their mother for the weeks to which I have referred rather than any longer period.

57. In his skeleton argument on behalf of the mother counsel argues that the risk of harm to the children is a two-sided coin and that there is a balancing exercise which must include consideration of the risk of short term emotional harm in separating a child from parents, siblings and home, and a very high standard must be established to justify interim removal.

58. In support of that argument I am reminded of the case of ***Re M***. (*I assume this to be a reference to the decision of this court in **Re M (Interim Care Order: Removal)*** [2005] EWCA Civ 1594, [2005]1 FLR 1043) As is acknowledged I think by counsel every case before this court is fact-specific. It is difficult if not impossible to find a rule to which all cases can be compared when faced with these unhappy applications. And of course I remind myself that ***Re M*** involved retention in foster care under a decision taken in the knowledge that because a professional assessment was to be undertaken by (in that case a hospital) the judge was validating an arrangement which would extend the absence of the child from the family home for some ten months.

59. It was argued persuasively in the case of ***Re H*** (*I take this to be a reference to the decision of this court in **Re H (a child) (interim care order)*** [2002] EWCA Civ 1932, [2002] 1 FCR 350)-- the citations of both these cases are plain from the submissions of counsel -- again persuasively that the interim application was a 'dry run' because an order sanctioning separation was effectively determinative of the parents' long term case.

60. I therefore derive limited assistance from those two cases.

61. More recently, in the case of ***Re LA***, (*this is plainly a reference to the decision of this court in **Re LA (Care: Chronic Neglect)*** [2009] EWCA Civ 822, [2010] 1 FLR 80) it is acknowledged that the test for removal is not so high as to require an imminent risk of really serious harm.

62. In my judgement, I must balance the harm which in my view is a distinct possibility, a possibility that cannot sensibly be ignored, given the quite dreadful history in this case and in particular the wholesale failure of the mother to engage the protective mechanism put at her disposal on the 25th February and even unhappily not to report it to the local authority but to only do so after her sister in despair revealed what had happened against the risk of ascertainable emotional harm to these children if they are not immediately returned.

63. I have said already that the two younger children are, if I can use the term, if not resigned to it, ready for it. They will not be wrenched from their

> mother's side. They are not at home. They see their mother regularly and under minimal if any supervision, for she has been taking them to and from school, she has been staying over with them, but in a protective environment. That is when she has been staying over in other family homes.
> 64. In my judgment the balance is struck in favour of the local authority concerns. There is a real possibility that mother will not disengage. Despite her best wishes, her endeavours will come to nothing. That is a risk and it is a real risk. It is entirely right for the guardian and indeed the local authority to oversee whether or not she can, for it will be an emotional as well as physical struggle, to maintain that which she has not adhered to over the last decade when she has already hitherto obtained an injunction in the past and it has availed her nothing. That was in 1999 when the husband's, the father's behaviour was perhaps at a similar height. It has not gone away.
> 65. At that time and at that height she still failed to maintain her distance from him. I do not belittle her for that. I acknowledge that it is terribly difficult when she has been under his control, his controlling behaviour, for so long. She is very vulnerable at this moment and she admits that. She admits she needs help. It is during these very important weeks that the children have to be in a protective environment, an environment from which they can be ring-fenced away from the gunfire.
> 66. If mother passes muster, if I can use that term, then the signs are good, good to the extent that I will limit the period, and this will have to be on the local authority care plan. They must acknowledge this, and if they don't I would like to know why, given their acceptance at the stand that this is a sensible idea. I will limit this period until the next time that I can engage with it, which I think is, as I have already indicated, in May. And I will expect the local authority - if the guardian supports this -- to have already put in place a phased return to the mother of her younger children.
> 67. Whereas I made it plain during this hearing that I would expect the mother to show cause why the children should not be accommodated in the way suggested by the guardian and ultimately accepted by the local authority, next time the ball will pass and the local authority will have to show me why the children should not be returned. I hope that is clear. But of course I will rely heavily on that which the guardian has observed over what I think is a six or seven week period.
> 68. Thus in generality I do make interim care orders in respect of the two younger children.
> 69. I think by common consent we have arrived at a situation where in respect of I, I make a residence order in respect of that little boy, subject to the supervision of the local authority.
> 70. As to the care plan, I do expect the parties to agree the issue of contact, which should be endorsed on the care plan. If that causes difficulty then this now being five o'clock in the evening, and I apologise for not only the inelegant nature of my judgment but also the fact that I have spoken for now well over an hour, I will entertain this case at ten o'clock on Monday morning to be told where the care plan is causing difficulty. I hope it will not. I do not think it will because I think the local authority does continue to harbour a significant amount of goodwill toward this mother, even if she finds at the moment in her distress that it is difficult to ascertain that.

15. We also have the judge's written comments on paragraph 67 of his judgment, a summary of which was highlighted in the note of the judgment made available to us. This is what the judge says about it:-

> counsel asserted (when seeking permission to appeal) that I had undertaken an inappropriate test when I indicated that it was for the mother to show cause why the children should not be placed in temporary accommodation.
> I made it plain at the time and on Monday (that is 8 March 2010, when the judge's directions order was drawn) and I am disappointed that I have to do so again, that that remark was made at the conclusion of the local authority evidence, midway through the case, and before the short adjournment,

having received and digested not only the conceded threshold but also the oral evidence of the local authority and the children's guardian.

I did not advance that offering as a legal test. As counsel was, and is reminded, I articulated my thoughts at that stage in an attempt to secure cooperation between the parties. I made what I took to be a similarly helpful remark at the conclusion of my judgment when I made it plain that upon the review (in June) I would expect the contrary to be the case – namely that the local authority will then have to show cause why the children should not be returned to the mother (rather than her mounting a case to show why they should.

16. In his skeleton argument, Mr. Aidan Vine of counsel, on the mother's behalf, advanced two grounds of appeal. Firstly, he submitted that the judge did not apply the correct legal test for approving a care plan for removing children from parental care under an interim care order. Secondly, he argued that the judge approached his decision on the basis that the onus was upon the appellant to show cause why the children should not be placed in foster care.

17. In my judgment, neither ground is sustainable, as I think, is plain from the extensive citation from the judge's judgment which I have provided. Taking the second ground first, it does not seem to me that, on a fair reading of his judgment, the judge did reverse the burden of proof as the appellant seeks to allege. He rightly found the threshold established. In this respect, the burden of proof was on the local authority, although the point was conceded. The judge rightly then decided that the question was whether it would be "better for the child to make an order than to make no order" and that he had to consider " the child's welfare pursuant to the subsection" to which he had already referred. This is a clear reference back to an earlier passage in his judgment in which he had specified, in particular, sections 1(3), 1(5), 31 and 38 of the Children Act 1989, as well as ECHR Articles 6 and 8 and the United Nations Convention on the Rights of the Child.

18. In summary, therefore, the judge was rightly considering a welfare question, and within that welfare question the test was whether or not there was what he described as "an urgent need to keep the children from their mother for the weeks to which I have referred". In my judgment, this is not an approach which can be faulted. As the judge noted, the burden of proof was on the local authority to satisfy the court that the threshold criteria were met: whether or not interim care orders were made then became a welfare issue.

19. His Honour Judge Cleary was, of course, the judge at first instance in ***Re LA***. I note in passing the tribute which Thorpe LJ paid to him in this court in paragraph 5 of his judgment, a tribute which I would seek to echo in relation to the current extempore judgment under appeal in the instant case. In particular, the judge was careful to avoid falling into the trap identified in that case (and in ***Re H***), namely that the interim order should last until the final hearing and be thus determinative of outcome. In my judgment, moreover, and given the nature of the threshold, the ***Re LA*** test was plainly met in this case.

20. In my judgment, therefore, the judge did not apply the wrong test.

21. Although he does not mention it, we understand that the judge was referred to the decision of this court in ***Re B***, which had been handed down on 25 November 2009, and apart from being available on ***Bailii*** had been fully reported in the second issue of the FCR for 2010, dated 23 January 2010. In that case, this court approved the test enunciated by the trial judge namely (on the basis that the threshold criteria for an interim order were satisfied) : "whether the continued removal of (the child) from the care of her parents is proportionate to the risk of harm to which she will be exposed if she is allowed to return to her parents care": see paragraph 31. Had Judge Cleary referred to this passage or applied this test the answer would, in my judgment, once again, have been obvious. Furthermore, as it seems to me, the test approved in ***Re B*** is one which can be universally applied, and which addresses the judge's observation that "it is difficult if not impossible to find a rule to which all cases can be compared when faced with these unhappy applications".

22. I have accordingly reached the very clear conclusion that the mother's attack on the judgment fails, and that the appeal, whilst passing the permission hurdle, falls to be dismissed.

23. Whilst the foregoing is sufficient to dispose of the appeal, I cannot part from the case without making a number of additional observations. The first is that this is another example of the

speed with which the family justice system can operate when called upon to do so. The hearing before the judge was on 5 March 2010. I saw the papers on 9 March 2010, and the appeal was heard on 11 March. I would like to congratulate the parties on their level of preparation and their skill in presentation, and I am also grateful to the judge, both for dealing with the case so expeditiously and for attending so promptly to his approval of the judgment and his comments on the note of judgment.

24. Secondly, when I saw the papers on 9 March 2010, I did not have a copy of the order made by the judge on 8 March 2010. This is hardly surprising, because when a copy was produced at the hearing of the appeal, it had not been seen by the appellant's counsel. I have, of course, now seen the order which the judge made on March 8, which gives sensible directions leading to a final hearing.

25. I am sympathetic to the judge's "melancholy experience" that the final hearing could take more than 40 weeks. For the avoidance of any doubt, however, I need to emphasis the obvious, namely that interim care orders are precisely that. The order made by the judge expires on 30 April 2009. A first interim care order can last 8 weeks: all subsequent orders can only last 4: - see Children Act 1989, section 38(4) and (5). The fact that the judge's commitments may not enable him to revisit the case before the expiry of the current order does not mean that it has to be extended, or that the mother is not entitled to a hearing on or prior to 30 April 2010 at which she may argue that it should not be extended, and / or that the children should return to live with her.

26. The judge referred to previous proceedings between the parties in the country court, including an injunction and an occupation order obtained without notice by the mother on 19 February 2010, and confirmed *inter partes* on 22 February. He records that the injunction was broken on 25 February, when the father came to the family home, and the mother took no action to prevent him or to require him to leave. He also referred to a subsequent "ugly confrontation between the father and the social worker in respect of which there are continuing police investigations", and the fact that the mother made a serious suicide attempt on or about 17 February 2010.

27. Apart from confirming the risk which the father poses to the children, my reason for mentioning these matters is that we were somewhat surprised to see counsel for the father at the hearing of the appeal. We expected her simply to support the mother's case. Somewhat coyly, however, counsel announced that the father was "neutral" in relation to the appeal and that there had been "developments" about which she had learned on her way to court which changed the outright support which the father had given to the mother's case before the judge. These matter are plainly related to a passage in the skeleton argument provided on behalf of the local authority dealing with recent events, which asserted that the father has been in further breach of the injunction obtained by the mother and had, it appeared, been arrested following the mother telephoning the police. Whilst these matters are not for this court to investigate, what we were told plainly reinforces the judge's conclusions.

28. Fourthly, the judge describes as "perhaps unfortunate" that the local authority had not informed the mother in writing at an earlier stage that the children could return provided that she adhered to a number of agreements, including having no contact with the father, changing the locks on the family home, putting panic alarms in place and generally co-operating with the local authority.

29. I would express myself in stronger and different terms than "perhaps unfortunate". In my judgment it is imperative that sensible conditions such as those which the local authority sought to impose in this case are reduced to writing. If they are, there can be no argument about them, provided they are themselves clear. Indeed, the whole of the local authority's conduct of the application – which the judge describes as starting on "shifting sands" and at times manifesting "observable confusion" - is open to criticism.

30. Finally, we were informed by counsel instructed on behalf of the children that CAFCASS had initially instructed the guardian not to attend the appeal. The guardian's evidence had plainly assisted the judge in material respects, as his judgment makes clear. Although the proceedings had not been on foot for very long, the guardian had done a great deal of work, for which she is to be congratulated. Her counsel's skeleton, and the submissions he made to us on the guardian's instructions were also of material assistance to us.

31. This court is usually content to leave it to the professional discretion of the individual guardian as to whether or not the guardian is either represented at or attends this court. In our view, this is as it should be. Suffice it to say that, speaking for myself, the admirable work done by the guardian in the instant case demonstrates the importance of individual guardians being promptly appointed and properly fulfilling their role of advancing the interests of children both promptly and effectively.

Lord Justice Aikens

32. I agree.

Lord Justice Thorpe

33. I also agree.