Re C (A Child) [2008] EWCA Civ 502

Case No: B4/2008/0400

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL (CIVIL DIVISION)

ON APPEAL FROM WARRINGTON COUNTY COURT

(HER HONOUR JUDGE CASE)

(LOWER COURT No. WA06P00458)

Royal Courts of Justice

Strand, London, WC2A 2LL

11th April 2008

B e f o r e :

LORD JUSTICE WILSON

and

LORD JUSTICE TOULSON

IN THE MATTER OF C (A Child)

(DAR Transcript of

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Official Shorthand Writers to the Court)

Mr Paul Wright (instructed by Stephensons, St Helens) appeared on behalf of the Appellant, the father.

Miss Samantha Hillas (instructed by Jones Robertson, Runcorn) appeared on behalf of the First Respondent, the mother.

Ms Lisa Edmunds (instructed by Forshaws, Frodsham) appeared on behalf of the Second Respondent, the child by her guardian ad litem.

HTML VERSION OF JUDGMENT

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Lord Justice Wilson:

A father applies for permission to appeal against directions given in proceedings under the Children Act 1989 by Her Honour Judge Case in the Warrington County Court on 6 February 2008. The judge's directions were that two hearings which had been fixed to take place before her in the following weeks, namely a fact-finding hearing on 27 and 28 February 2008 and a review hearing on 13 March 2008, be vacated and that instead the fact-finding hearing be listed before the Halton Family Proceedings Court with a time estimate of two days as soon as possible. The judge gave these directions of her own motion and without conducting a hearing or affording the parties an opportunity to make representations about them.

The proceedings were initiated in 2005 by the father in respect of his daughter, A, who was born on 26 May 2002 and is thus now aged five. His applications were for a contact order and a parental responsibility order in respect of her; and he has recently added an application for a residence order in respect of her. The first respondent to the applications is the mother, who cares for A, together with her two older children [...] who have other fathers. The second respondent is A herself, who appears by a guardian ad litem appointed pursuant to Rule 9.5 of the Family Proceedings Rules 1991, namely Mrs Gould, a CAFCASS officer. The mother's stance in relation to the father's proposed appeal is one of neutrality; but the child, by her guardian, supports it.

The parents lived together between 2000 and July 2005. In October 2005 the father issued the applications for orders for contact and parental responsibility in the St Helen's Family Proceedings Court and they were swiftly transferred to the Halton Family Proceedings Court. It soon became apparent that the mother wanted to refuse to allow any direct contact between the father and A. Between November 2005 and April 2006 five sets of directions were given by the family proceedings court. One direction was for the court to conduct a fact-finding hearing in order to determine the truth of

disputed allegations of domestic violence made by the mother against the father; but on the day of the proposed hearing the magistrates declined to conduct it on the basis that in their view the dispute was irrelevant to the issues raised by the father's applications. Then, on 15 May 2006, in accordance with the recommendation of Mrs Gould, whose role then was only as a CAFCASS reporter, the family proceedings court directed that the proceedings be transferred to the Warrington County Court on the ground of their complexity.

The transfer to the county court was directed pursuant to Article 7 of the Children (Allocation of Proceedings) Order 1991, S.I. 1991/1677. The article confers power on the family proceedings court to transfer such proceedings to a county court where it considers it in the interests of the child to do so having regard, first, to the general principle that delay in determining proceedings is likely to prejudice a child's welfare and, secondly, to various questions specified in the article, in particular "whether the proceedings are exceptionally grave, important or complex".

Thus, from May 2006 until February 2008, the proceedings continued in the Warrington County Court. A number of district and circuit judges made orders during that period. In June 2006 a district judge directed that a psychological assessment of both parents be undertaken. In November 2006 a circuit judge directed that A should be made a respondent and that Mrs Gould should be her guardian ad litem. In December 2006 another circuit judge was so concerned about the mother's parenting of A and her two older children that he directed the local authority to prepare a report under s.37 of the Act of 1989, thus upon the basis that it appeared to him that it might be appropriate for care orders to be made in respect of them.

Her Honour Judge Case made her acquaintanceship with the case at a directions hearing on 23 February 2007. She conducted three further hearings of the proceedings between June and November 2007. It was she who, by order dated 1 June 2007, directed that contact between the father and A should begin, albeit under the supervision either of Mrs Gould or of the local authority. It appears that the supervised contact proceeded

reasonably well. Then, by order dated 12 September 2007, Her Honour Judge Coppel, then a recorder, made an order that there should be unsupervised contact between A and the father for an hour on each alternate Tuesday and for two and a half hours on each alternate Saturday. At a hearing on 25 September 2007 Judge Case varied the order for unsupervised contact but only in relation to arrangements for A's hand-over and she directed that the applications should remain listed for final hearing by herself for half a day on 13 March 2008.

Pursuant to Judge Case's order dated 25 September 2007 A's contact with the father was to begin on that very afternoon. But it did not take place because immediately after the hearing the mother alleged that A's half-sister, J, had informed their maternal grandmother on the previous evening, 24 September, that in 2002 the father had touched her, J's, vagina; the mother also alleged that A herself had also informed both her and the grandmother that the father had touched her, A's, vagina during one of the occasions of supervised contact which had occurred since June 2007. The Cheshire Constabulary conducted an investigation of J's allegation against the father; and they conducted a videotaped interview both of J and, under caution, of the father. In November 2007 they decided to take no action against him in relation to the allegation. They seemed to have decided, perhaps unsurprisingly, not even to investigate the allegation referable to A during an occasion of supervised contact.

In the light of the continuing absence of contact the father sought a further hearing in the Warrington County Court and issued the application for a residence order referable to A. On 16 November 2007 Judge Case gave directions and directed that the matter be restored for hearing on 27 November 2007. It was at the hearing on that day, namely 27 November, that a circuit judge other than Judge Case gave the crucial direction that the matter be listed before her (Judge Case) for a fact-finding hearing on 27 and 28 February 2008. He directed that it be a hearing to determine all issues of fact in relation both to the sexual allegations apparently made by J and by A and to the allegations of domestic violence which from an earlier stage had been made against the father by the mother. The judge gave various directions for the efficient assembly of material for the fact-finding hearing, including that the mother should file a statement by the maternal

grandmother and should file a schedule in which each allegation made by her against the father was set out and that the father should respond to it. In a footnote to his order the judge recorded that the parties intended that oral evidence be given at the fact-finding hearing by six witnesses, namely the father, the mother, the grandmother, two social workers and Mrs Gould.

The three parties, all legally represented, thus prepared for the hearing fixed to begin on 27 February 2008. The mother duly served a statement by the grandmother and a schedule of her allegations; and the father responded to the schedule. It is possible however that the documents were not filed.

Out of the blue, on 8 February 2008, the solicitors for each of the three parties received by fax the order of Judge Case dated 6 February 2008. It recited that it was made of the court's own motion and it provided as follows:

"1. The finding of fact hearing listed on 27 and 28 February 2008 and the review hearing on 13.3.08 are hereby vacated.

2. The finding of fact hearing be listed before the Halton Family Proceedings Court with a time estimate of two days as soon as possible.

3. Save as above, the order … dated 27.11.07 do stand."

At the time of their receipt of the judge's order the solicitors also received written notification from the county court that the Halton Family Proceedings Court would give directions at a hearing on 18 February 2008 with a view to fixing dates for the fact-finding hearing. In the light of the father's swift filing of an Appellant's Notice in this court, the hearing in the family proceedings court was adjourned.

Today's hearing arises at the direction of Wall L.J. given on paper. On 13 March 2008 he adjourned the father's application for permission to appeal and directed that it be considered at an oral hearing, on notice to both other parties and on the basis that, were permission granted, the substantive appeal should follow forthwith. Wall LJ was in particular concerned that, in that there had been no hearing and no judgment, it was unclear why Judge Case had vacated the hearings, particularly the fact-finding hearing, and had transferred the matter to the family proceedings court. So he directed that the judge be invited to give written reasons as to why she had given such directions and indeed why she had given them without a hearing.

By memorandum dated 1 April 2008 Judge Case responded to the invitation of Wall LJ. Under the heading "Reasons for making order dated 6.2.08" the judge, by the first eight paragraphs, set out some of the forensic history. Then she proceeded as follows:

"9. …on 27.11.07 another Circuit Judge, new to the case, approved an order for a Finding of Fact before me on 27th and 28th February 2008.

10. This hearing only came to my notice at the beginning of February 2008 when it was clear there was insufficient court time and a new date in the County Court would be many weeks off.

11. I decided these new allegations of sexual abuse and old allegations of domestic violence were likely to get an earlier hearing before the FPC who frequently complained of lack of work.

12. Furthermore the issues were simple matters of fact.

13. The complexity which had originally given cause for transfer had been resolved or considerably reduced because:-

i. Between 23.2.07 and 25.9.07 mother's

implacable hostility had been much reduced as a result of the intervention of the Guardian and the counselling work done with mother so that by September 07 she agreed to unsupervised contact for short periods;

ii. Children's Services could no longer justify their involvement in contact on grounds of any risk to the child;

iii. The police had investigated and in effect 'dismissed' the allegations of sexual abuse by their criteria;

iv. It was not clear whether mother really intended to pursue the allegations having failed to file any Schedule as ordered by a Circuit Judge on 27.11.07.

14. In all the circumstances this seemed to me to be an appropriate matter to 'cascade' to the FPC to avoid delay.

15. However, I only intended to transfer to the FPC the 2 days hearing for a Finding of Fact which I could not accommodate. I fully expected the matter to be returned to the County Court, if not resolved at the FPC, for final determination of the issue of contact. I agree my order could have been more precise."

Under the heading "Reasons for making the order without a hearing" the judge wrote:

"Quite simply lack of time. Had there been time before me I should like to have let the parties be heard before I made the order on 6.2.08 as to whether they had objection. Unfortunately I was involved in other Judicial Business on 8.2.08 and thereafter on leave and unavailable until 26.2.08.

It was unfortunate that the County Court could not accommodate the parties even if before another Judge."

When on 8 April 2008 I took a preliminary look at the papers filed for today's hearing, there were two aspects of the judge's memorandum dated 1 April 2008 which caused me surprise and concern respectively.

My surprise arose from the judge's clarification that she intended only to transfer to the family proceedings court the task of conducting the fact-finding hearing and that, save in the event that all issues between the parents might be resolved at that hearing, she expected the proceedings then to be transferred back to the county court for final

determination. Upon rereading the judge's order I realised that, on one construction, it did provide for the transfer only of the fact-finding hearing; I have to confess, however, that I had not understood the transfer to be so limited. Counsel tell us today that none of the legal advisers on any of the three sides realised that the direction was limited to transfer of the fact-finding hearing.

My concern arose from the judge's statement that, by 6 February, there was insufficient court time on 27 and 28 February for the fact-finding hearing then to proceed. It seemed to me that we might today need to be extremely critical of the family listing officer in the county court for having, presumably after 27 November 2007, filled the judge's list for 27 and 28 February with other matters in circumstances in which directions had been given for the fact-finding hearing to take place on those dates. In fairness, therefore, I decided that my clerk should, by email, put four questions to the court manager of the Warrington County Court. My questions and his swift answers in response were copied to all three firms of solicitors.

(a) My first question was whether on 27 November 2007, when the dates were fixed, two clear days had indeed been available on 27 and 28 February 2008 at which Judge Case could conduct the hearing. His answer was that (subject to a one hour appointment in her list for 28 February) those two clear days had indeed then been available at which she could conduct the hearing.

(b) On the assumption that his answer to the first question would in effect be as above, my second question was when and why the dates had ceased to become available by 6 February 2008. His answer was that they had not ceased to become available by 6 February.

(c) My third question was for him to identify, on the basis of the lists as they stood on 6 February 2008, the first two days after 28 February 2008 when a judge with the appropriate family law training could have conducted the two day hearing in his court. His answer was that the two day hearing could have been accommodated during the week beginning 3 March 2008 and that, although as of 6 February the lists for that week were already heavily loaded, his experience was that, in the light of the general rate of

settlement of listed family matters, the fact-finding hearing could then have been accommodated.

(d) My fourth question was for him to identify the first two days following today's hearing when a judge with the appropriate family law training could conduct the two day hearing in his court. His answer was that Her Honour Judge Coppel, who certainly has the appropriate training as well as knowledge of this case, could conduct it on 1 and 2 May 2008.

The power to transfer proceedings from a county court back to a family proceedings court is presently contained in Article 11 of the Order of 1991. The power arises where the county court, having regard both to the general principle hostile to delay and to the interests of the child, considers that the criterion cited by the family proceedings court as the reason for transfer to the county court either "does not apply" or "no longer applies". The two different phrases are used in the article in relation to different criteria. As it happens, the article, as drawn, provides that, where the criterion for transfer to the county court was exceptional complexity, the power to transfer back arises only when the county court considers that the criterion "does not apply": see Article 11(1)(a). The draftsman seems deliberately not to have adopted the words which he favoured elsewhere in the article, viz "no longer applies". Nevertheless the phrase "does not apply" is of course in the present tense; and I am sure that a liberal construction should be given to the article, such that it would permit retransfer of proceedings which, at the time of the transfer to the county court, were exceptionally complex but which, for some reason, had lost their exceptional complexity. I am satisfied that, in principle it is open to a county court, even under the present article, to transfer proceedings back to the family proceedings court in such circumstances.

I am also aware that the Ministry of Justice is presently conducting a consultation in respect both of a draft order which would replace the Order of 1991 and of a draft practice direction which the President of the Family Division and the Lord Chancellor would jointly issue. For reasons which I understand and find persuasive, transfer of certain family proceedings from the county court to the family proceedings court will be expected to take place more widely pursuant to the proposed instruments and indeed is likely to become compulsory in specified circumstances. Nothing in this judgment is

intended to discourage judges of the county court from exercising their powers, and indeed in future discharging their likely duties, in relation to transfer in accordance with published judicial and governmental guidelines. In that regard I note that, pending the making of the proposed order and the issue of the proposed practice direction, family judges have been invited by the President of the Division to exercise their powers of transfer of family proceedings between courts by reference to draft Guidance issued by him in December 2006.

In my view the judge's directions were objectionable for six different reasons: (a) The proceedings had lost none of their complexity. Although for a period the mother had been more amenable to the father's contact with A, that period had come to an end. On the contrary the proceedings had gained in complexity when she introduced the allegations of sexual abuse after the hearing on 25 September 2007. In his draft Guidance issued in December 2006 the President specifically stated that a factor which militates against trial in the family proceedings court is a disputed allegation of sexual abuse.

(b) I have never encountered -- nor have counsel -- a transfer to the family proceedings court of one discrete part of proceedings. I can well imagine that a family proceedings court might wish to transfer one discrete issue, for example of law, to the county court on the basis that it then expected the county court to decide to transfer the proceedings back to it in the light of its determination. But I cannot presently envisage circumstances -- although I would be foolish to say that they cannot exist -- in which a transfer to a family proceedings court of a discrete issue will be appropriate. All I see as attendant upon that course is a spectre of severe judicial discontinuity. The proposed new instruments, which I have read in draft, do not seem to prohibit transfer of discrete issues to the family proceedings court but I do not read them as specifically anticipating it.

(c) Even had it been appropriate to consider a transfer to the family proceedings court of the task of conducting the fact-finding hearing, such would have been a matter fit for consideration at, and certainly no later than, the hearing on 27 November 2007, when another judge directed, instead, that it should be heard by Judge Case on 27 and 28

February. It was far too late for the transfer to be directed ten weeks later and only three weeks prior to the fixture. The inconvenience for the parties, their solicitors and counsel in facing the late abortion of the hearing needs no emphasis. Worse, the delay in concluding applications in relation to A which had been on foot for over two years was likely to be detrimental to her.

(d) The reasons which led the judge to conclude on 6 February 2008 that it would not be possible for her to conduct the hearing on those days remain unclear. What is clear is that there is no room for criticism of the listing officer of the Warrington County Court.

(e) It was unprincipled for the order to be made without notice to the parties and without their receiving an opportunity to make representations. It is unnecessary to bolster so fundamental a proposition by reference to rule. But, as it happens, Rule 4.14(3)(a) of the Rules of 1991 provides that directions under paragraph (2) (which includes, at (h), a direction for the transfer of proceedings to another court) may be given "of the court's own motion having given the parties notice of its intention to do so, and an opportunity to attend and be heard or to make written representations". So either Judge Case should have conducted a hearing on notice to the three parties, if necessary by video-link or even by telephone; or she should have caused another judge of the Warrington County Court to conduct such a hearing; or at least she should have invited written representations from each of them before giving her directions.

(f) There is no evidence that the judge complied with Rule 4.6(6) of the Rules of 1991, which required her, prior to giving her directions, to notify the family proceedings court of her intention to give them and to invite the views of the clerk to the justices upon whether such directions should be given.

In these unhappy circumstances I consider that we should grant the father's application for permission to appeal, should allow the appeal, should set aside the judge's directions dated 6 February 2008 and should direct that the fact-finding hearing be conducted by Her Honour Judge Coppel in the Warrington County Court on 1 and 2 May 2008.

Lord Justice Toulson:

I agree

Order: Application granted; appeal allowed