Re M (Children) [2009] EWCA Civ 1216 (27 October 2009)

Case No: B4/2009/1887

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL (CIVIL DIVISION)

ON APPEAL FROM THE WANDSWORTH COUNTY COURT

(HIS HONOUR JUDGE WINSTANLEY)

Royal Courts of Justice

Strand, London, WC2A 2LL

27th October 2009

B e f o r e :

LORD JUSTICE THORPE

and

LORD JUSTICE WALL

_____

IN THE MATTER OF M (Children)

_____

(DAR Transcript of

WordWave International Limited

A Merrill Communications Company

165 Fleet Street, London EC4A 2DY

Tel No: 020 7404 1400 Fax No: 020 7831 8838

Official Shorthand Writers to the Court)

_____

Ms Julie Gasparro (instructed by Messrs Hornby Levy) appeared on behalf of the Appellant.

Ms Joanna Burt (instructed by Hane & Co Solicitors) appeared on behalf of the Respondent.

_____

HTML VERSION OF JUDGMENT

_____

Lord Justice Thorpe:

Mr and Mrs M are engaged in contested contact proceedings in the Wandsworth County Court.

They married in 1992 and the current dispute centres on N, who was born in 1996 and who is accordingly 13, and R, who was born on 23 February 2000 and is accordingly nine. The separation took place in 2007 following violent quarrels between the parents, and the mother is now living with the children at an undisclosed address. There are two children of the family who are now grown up and therefore out of the court picture. Unfortunately the father suffers from bi-polar affective disorder, and his stability is dependent on lithium intake and control. He seems to be reasonably aware of his own condition and needs, but is not always as meticulous in taking the lithium as he should be and perhaps irregularity has led to violent episodes, some of which have been investigated by external agencies, and one of which has resulted in criminal proceedings at their conclusion. Mr M pleaded guilty and received a community order with supervision and a mental health requirement on 2 March 2009.

In the family justice system his contact application was commenced in September 2008, and since his concessions as to past violence to the respondent and to the children was at best described as partial, the court arranged for a fact finding hearing on 30 June. It was anticipated that directions would be given on 14 July in the light of the facts found to set the case forward towards its ultimate welfare disposal.

On 30 June the case came before HHJ Winstanley, and Ms Gasparro, who has acted for the father throughout, applied for an adjournment. She was instructed that on the previous day he had had a meeting with his psychiatric social worker. He was in a distressed state and it was agreed that he was not fit to give evidence on the following day. On the following day he attended his general practice in the emergency clinic and was seen by a doctor. So Ms Gasparro was able to tell the judge on instructions that her client was unfit, that his present state was corroborated medically and that he had an impeccable record of attending previous court hearings.

The judge drew the distinction that this hearing of 30 June was in a different category since it would involve Mr M's cross-examination on the difficult areas of past violence. He also surmised that the father's case was short of any reasonable prospects of success, since the boys were largely opposed to contact and that, despite the father's denials, there was clearly a serious history of violence in the past. The judge further reasoned that any delay would be contrary to the interests of the children and he concluded not only by refusing the application but by dismissing the father's case comprehensively. So Ms Gasparro asked for permission which the judge refused. The papers were put before my Lord, Wall LJ, who on 2 October ordered an oral hearing on notice with appeal to follow. This is that hearing.

Clearly Ms Gasparro has a very strong case, and we simply invited her to confirm her essential complaint that the judge dismissed this application prematurely, not sufficiently distinguishing between an application to adjourn the necessary preliminary issues and an application to adjourn the welfare disposal, when wider questions would fall for consideration. The contrary case has been put by Ms Burt, who has done her client excellent service given that she was not instructed until 9.26am this morning since her solicitors were unable to get the confirmation that they thought they needed from the Legal Services Commission.

It seems to me quite plain that once my Lord had made the direction which he did on 2 October, the respondent was entitled to publicly-funded representation and that could perhaps have been dealt with under devolved powers by the solicitors themselves. However, I am quite satisfied that Ms Burt has put the only arguments that could be put for her client strongly and persuasively. She has said that delay was in fact all important, and the judge was having regard to the fundamental interests of the boys in calling a halt when he did.

I cannot accept that submission. If delay was to be central to the judicial decision then the nature of the delay had to be ascertained. The judge, had he made enquiries of the court office, might have discovered that perhaps there had been a settlement, so that perhaps the case could be re-listed within a relatively short time. The essential balance for the judge was to focus on the preliminary stage at which the case stood, namely fact finding. He directed himself correctly that the case could not proceed to welfare disposal without the completion of fact finding but, given that all that was sought was adjournment of the fact finding, the judge had to confine his discretionary consideration to issues that were so limited and not issues that would arise at an investigation of the merits of the father's case at a later stage in the proceedings.

It seems to me that the judge correctly directing himself should have seen that to dismiss the case in its totality at that stage was likely to result in a denial of the father's entitlement to a fair trial and that, given the presence of the corroboration and the absence of any prior failure to attend, the only acceptable conclusion was to grant the adjournment for the shortest possible time that could be arranged with the court office and giving the father ample warning that on the next occasion his attendance was absolutely essential and that further adjournment would not be granted without the fullest corroboration and without evidence of exceptional circumstances. So although I recognise that the judge was motivated by the highest considerations and was above all looking at the interests of the children, he fell into error and arrived at a conclusion that was plainly wrong.

I only add two points. First, that this is not an entirely hopeless case since N, when interviewed by the CAFCASS office, ultimately conceded that he might see his father under strictly supervised circumstances. Clearly if N goes that far he would be likely to take his younger brother with him. The other point that I just mention in passing is that the judge in his judgment expressed the view that the court welfare officer had a crucial contribution to make at the fact finding stage. I do not myself follow that. It seems to me that the court welfare officer's essential contribution will be made at the welfare stage.

I end with a word to the father, who has attended court his morning. Clearly he will receive every sympathy from the court given that his past outbursts probably are accounted by his internal chemistry and the possible under-dosing with the lithium. When he is in that state he is probably not the most reliable historian, and he may need to acknowledge that other people who have been involved in these incidents are more likely to have a reliable recollection even if they have not themselves been the victim of an outburst. So it is possible that this fact finding stage could be resolved by more generous concessions made by Mr M. They would not necessarily damage his prospects of establishing some limited supervised contact to the boys and indeed they might improve his prospects because he would be given credit judicially for realism, and perhaps the antipathy within the family, the understandable antipathy of mother and sons, would be diminished if he were able to make more generous admissions and acknowledgments.

All that said, I would grant permission and allow this appeal, restore the application for contact and express the hope that the Wandsworth County Court will be able to re-list at the earliest opportunity. I have expressed the hope that these parents might move from the present position less adversarially and maybe they would consider discussions aided by local mediation services. Certainly the charity Mediation in Divorce, which takes cases in the Richmond, Twickenham and Brentford areas, might be able to assist and since the parties are publicly funded I understand that the mediation services would be available to them under their certificates.

Lord Justice Wall:

I agree.

Order: Application granted; appeal allowed