Re R (Children) [2011] EWCA Civ 558 (29 March 2011)

Case No: B4/2011/0599

IN THE COURT OF APPEAL (CIVIL DIVISION)

ON APPEAL FROM BOURNEMOUTH COUNTY COURT

HIS HONOUR JUDGE BOND

Royal Courts of Justice

Strand, London, WC2A 2LL

29th March 2011

B e f o r e :

LORD JUSTICE THORPE

LORD JUSTICE ETHERTON

and

MRS JUSTICE BARON

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In the matter of R (Children)

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Mr Jason Nickless (instructed by Jeromes Solicitors) appeared on behalf of the Appellant.

Mr Darren Bartlett (instructed by Jacobs and Reeves) appeared on behalf of the Respondent.

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HTML VERSION OF JUDGMENT

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Lord Justice Thorpe:

This application, with appeal to follow if permission granted, focuses primarily on two boys, H, who is nine, and T, who is seven. They were living with their father on the Isle of Wight from a date in 2009 yet to be established. The father does not have parental responsibility. On 28 August 2010 he applied for parental responsibility and residence on the appropriate court form C100. On 29 September 2010 the mother, who has relocated to Dorset, removed T, but not H, from school and took him off the island and back to Dorset.

There was a listing of the father's application by form C100 in the Isle of Wight Family Proceedings Court for 6 October. It was a 15 minute appointment for directions. The solicitors who act for the father, informed about T's peremptory removal from his settled home, apparently wrote a letter to the clerk to the Family Proceedings Court asking for the directions hearing of 6 October either to be expedited or to be extended in duration. We have not seen the letter; it is not available in this court

today; we are simply informed by counsel that it was dispatched somewhere between the 29th and the 6th and that it went unanswered.

The issue has not been further investigated. We have no opportunity to see what the clerk to the bench would say about it, and it seems that the father's solicitors did not make an issue of the fact that the letter went unacknowledged.

So on 6 October, at the 15 minute direction appointment, the solicitor for the mother sought a transfer to the Family Proceedings Court in Bournemouth on the obvious ground that that is where the mother lives and that is where the child T now was. That application was opposed by the father's solicitors. Apparently the clerk informed the solicitors that the issue would be adjourned for seven days to allow more time to be given for argument for and against transfer. The mother's solicitor then asked whether his client could be excused attendance on the 13th and that application was granted.

So on the 13th again only the solicitors attend, the transfer application is granted and the case leaves the island. The reaction from the father's solicitors two days later, 15 October, is to sign up a completed form C2 seeking an interim residence order, ie the immediate return of T to the island pending the hearing of the C100. That application was apparently DXed to Bournemouth but was not issued until 21 October. Seven days later there was a directions hearing in Bournemouth and a date given, 26 November, for the hearing of the C2 application. There was a one-day hearing on the 26th at which both parents gave evidence and on the 29th the C2 application was refused and the Justice's reason stated.

It seems that the transferred C100 application was not the subject of any expedition application when the C2 failed. What instead occurred was an appeal against the dismissal which went to the county court under the amended routes of appeal structure put in place some year earlier and the appeal was heard by HHJ Bond on 14 February. On that day the mother was apparently not ready and she was given two days grace. The issue was argued on the 16th and on the 18 February HHJ Bond handed down his judgment which explained that he was dismissing the appeal but was retaining the proceedings, and the C100 would thereafter be a county court case in Bournemouth rather than a Family Proceedings case.

Again, when the father failed in his appeal it seems that no application was made to HHJ Bond for particular expedition of the C100. So the C100, proceeding as a main stream residence and parental responsibility order application, comes for directions before District Judge Dancey on 18 March when he lists for fact-finding, three days, first available after 3 May.

Fact-finding was ordered as a preliminary issue trial to investigate the mother's allegations of domestic violence, and Mr Nickless, who appears today for the father, informs us that the earliest date after 3 May for a three-day fact-finding in front of a district judge is 6th/7th November; in front of a circuit judge there would be an at risk listing on 6 June; but a guaranteed listing in front of a circuit judge would not be earlier than the 30th August.

The application in this court for permission to appeal the judgment of HHJ Bond was issued on 11 March and referred to my Lady, Baron J, who, by her order of 17 March, set up an urgent hearing of the application. We have heard Mr Nickless this afternoon eloquently advance his principal submission that the Justices misdirected themselves in law, failing to understand the force and effect of the decision of this court in the case of Re H (Children) [2007] EWCA Civ 529.

The eloquent submission is that this was the plainest case of a wrongful, selfish act on behalf of a parent jeopardising the welfare of a child, and that it was the obligation of the Justices to see the case in that light and to reverse the wrongful act at the earliest possible opportunity.

The difficulty that Mr Nickless faces in advancing that submission is that it ignores the procedural history between 29 September, the day of removal, and the hearing in front of the Justices, 29 November, and the hearing in front of HHJ Bond, 16 February, and the hearing in this court, 29 March.

In reality, the approach to this court inevitably falls on the fact that, even were we persuaded that there was some misdirection in law, it would be quite impossible for us to allow the appeal and to grant the relief on the C2 which the Justices refused.

We know nothing about the life of T between 29 September and 29 March. Were we to make that order, it would risk cavalier disregard of welfare. So we must focus, it seems to me, on the procedural issues which have been largely discussed at this afternoon's hearing.

An application for a second appeal is prohibited by Section 55 of the Access to Justice Act 1999 unless it is demonstrated that there is an important point of principle or practice or some other compelling reason. I think that Mr Nickless just clears that fence on the ground that there is a point of practice which this case demonstrates requires our focus.

So I record the contrast is between what ought to have happened and what did happen. What ought to have happened in this case, as in every case in which a child is seemingly wrongfully removed from a primary carer without consultation or consent and without apparent justification, is an application without notice to the available court on the same day or on the evening of that day or on the earliest available opportunity the next day. A judge is always available in the family division to receive and rule upon such an application. We are told that similarly a judge is always available in the Portsmouth County Court at least during court office hours. It seems that there is no such service provided by the Family Proceedings Court. In the Isle of Wight the court sits only one day a week, and any application, even if it be urgent and without notice, seemingly has to wait for the next sitting of the court.

So the first and perhaps principal error is that the team reaction to the removal of T on the 29th was not an immediate application for an order of peremptory return; it was a reliance upon the pre-issued C100 and an application that existing court time should be either expedited or extended to deal with the crisis. When that tack failed the alternative remedy invoked was the form C2 application for immediate return pending the determination of the C100. That resulted in a reasonably robust response in the Bournemouth Family Proceedings Court which provided directions seven days after issue and a one-day hearing 28 days after directions.

What I think is to be emphasised is that these two remedies are not exclusive and may be invoked simultaneously and pursued contemporaneously. So when the expedition application got nowhere in the Isle of Wight FPC in early October, and the alternative relief, an interim order on a form C2 application, having failed at a prompt hearing on 26 November, the application for expedition of the prior issued C100 needed to be hard pressed. It was not, and the reliance was only upon the wounded C2 application taken up by way of appeal.

When the appeal failed in front of HHJ Bond on 18 February there was still an opportunity for the disappointed appellant to say, well, if I cannot succeed on my appeal at least give me expedition of my prior issued C100 application. It seems that no application was made. It was simply accepted that the C100 would be in the general ruck of applications in the Bournemouth court.

So we have the situation now outlined by Mr Nickless today that even if the circuit judge were to determine the preliminary issue trial on, say, the 2 September, there would then be a substantial wait for CAFCASS inquiry, before the listing of the welfare issues on the foundation of the findings of fact.

So, says Mr Nickless, it will be at least 15 months between the issue of the C100 and its trial.

Sadly, that sort of delay is not unusual in a busy county court and it is very important, therefore, that the court should have sufficient flexibility to expedite cases that are manifestly deserving of expedition, having a priority over and above the general, and it does seem to me that it is not too late for that issue to be considered by HHJ Bond. He is the designated judge in Bournemouth and is therefore controlling family justice in that area generally. He may be able to provide exceptional priority to ensure that there is a profound investigation and a merit welfare decision, given that T may be at risk of harm as a consequence of the unilateral action of his mother on 29 September and given that his brother H may be at risk of harm, given that the siblings are separated.

So the lesson to be learnt from this case is 1) that seemingly unlawful removal of a child from the home of a primary carer ordinarily speaking calls for a peremptory order for return; 2) any application for a peremptory return order must be issued at once to a court which has the facility to offer a 24-hour service, or at least a service on every court sitting day, for the issue of an immediate order on a without notice basis and for accommodating the necessary inter partes hearing within days thereafter; 3) if there is no such application issued and the court is not engaged for peremptory return order, but weeks are allowed to pass between the date of removal and the date of any judicial investigation or determination, then the ordinary rule is unlikely to be equally applicable. The force of the decision of this court in Re H had undoubtedly to some extent dissipated between 29 September and the order of the Bournemouth Family Proceedings Court on 29 November.

So for those reasons I would dismiss the appeal constituted by the grant of permission but invite HHJ Bond himself to look again at the timetable that has emerged as a result of the order of 18 March and to see whether either a district judge or a circuit judge cannot be made available much more quickly. In these cases there is not a rule that an allegation of domestic violence automatically and necessarily results in a split hearing. It may be that, given the urgency in this case, it would be more sensible to go straight to one hearing to resolve all issues and to get the CAFCASS officer under way immediately. It is unlikely that an all in hearing would be possible in a timeframe shorter than the CAFCASS service will require to investigate, and a CAFCASS welfare investigation is obviously crucially needed to see what has been going on within the family since T's removal last September.

So that is the solution I would propose for this appeal.

Lord Justice Etherton:

I agree.

Mrs Justice Baron:

I agree.

Order: Application granted; appeal allowed