[2010] EWHC 1914 (Fam)

Case No: HB09C00390

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

30/07/2010

B e f o r e :

MR JUSTICE HEDLEY

Between:

WSCC	**Applicant**
- and -	
(1) M	
(2) F	
(3) W (a child)	
(4) X (a child)	
(5) Y (a child)	
(6) Z (a child)	**Respondents**

(The 4th, 5th and 6th Respondents by their Children's Guardian)
Anna McKenna (instructed by WSCC Legal Department) for the Applicant
Rohan Auld (instructed by Anthony Morris Solicitors) for the 1st Respondent
Jacqueline Roach (instructed by Mahany & Co.) for the 2nd Respondent
Richard Tambling (instructed by John Stebbing at Stephen Rimmer LLP) for the 3rd Respondent
Peter Horrocks (instructed by Jane Dahill at NLH Solicitors LLP) for the 4th, 5th and 6th Respondents (their Children's Guardian)
Hearing dates: 19th July 2010

HTML VERSION OF JUDGMENT

Mr. Justice Hedley :

The Issue

1. This is an application by a local authority for permission to withdraw care proceedings pursuant to FPR 1991 4.5; it is supported by the parents and by W (a party in his own right). The guardian advocates that no order should be made in this case but is less confident in (but does not seek to oppose) withdrawal as the proper route to that end. The alternative approach is the conduct of the listed fact finding hearing leading to no order under Section 1(5) of the Children Act 1989 (the Act). It is accepted by all that the giving of such permission involves a discretionary exercise by the Court.

The Law

2. It was not immediately clear as to the basis on which such an exercise is to be undertaken, for the granting of permission (for example under Section 10(9)) is not always seen as a decision regarding the "upbringing of a child" so as to engage Section 1(1) of the Act. It is the fact that the giving of permission would involve the discharge of an interim care order; any application for a discharge would unarguably engage Section 1(1).

3. I have derived considerable assistance on this point from the judgment of Waite LJ in London Borough of Southwark -v- Y [1993] 2FLR 559 C.A. This question is considered between p.

572D and 573H. The effect of the judgment is that Section 1(1) is engaged but because an application for permission falls outside Section 1(4), then Section 1(3) is strictly not engaged. However, Waite LJ continues at p. 572H -

> "I would not expect [that] to make the slightest difference, in practice, to the way in which applications to withdraw care proceedings under r. 4.5 are approached by the courts … the only practical results, therefore, … is that a court dealing with an application to withdraw proceedings under r. 4.5. is free, when assessing the considerations affecting the welfare of the child so far as they apply to that application, to make specific use of the S. 1(3) checklist if it so wishes, but cannot be criticised if it omits to do so."

It follows from that that Section 1(1) is engaged and Section 1(3) is available for the assistance of the court but its use is not mandatory. The court makes it clear that the consequences of giving permission (i.e. discharging interim care orders) do not determine of themselves the nature of the application. In other words the focus is on permission not on discharge.

4. Although new Rules are still under consideration, it seems to me that in considering such applications as this the court should take into account the principles set out in CPR 1 as to the 'Overriding Objective' which is to be included in new FPR and which is implicitly recognised now in family proceedings. A refusal of permission would commit the parties and the court to the listed 15 day hearing which would be substantially taken up with the hearing of expert medical evidence. Whilst proportionality could not be allowed to trump welfare, it nevertheless remains a factor to which the court should give proper consideration.

The Ambit of the Judgment

5. In order to decide this application, it is necessary for the court to have in mind four particular aspects of the case: (i) the general background of this family; (ii) the institution of proceedings; (iii) what happened during those proceedings; and (iv) a welfare assessment of the position of each child now in the context of their future minority. The parties submitted that, although the actual permission hearing was brief (though the required reading was not), a full judgment would be necessary not least because the local authority acknowledged that the evidence could indeed satisfy the requirements of Section 31(2) of the Act.

6. Having carefully considered these matters, I agree with that approach. Indeed in the light of matters thrown up by this case, I consider that the judgment should be adjourned into open court subject to anonymisation and the usual reporting restrictions on anything that may identify or reasonably lead to the identification of any child. I accordingly directed that judgment would be handed down without the need for attendance by any party. This I now do.

The Background

7. There are currently four children involved in these proceedings: W aged 14, X aged 12, Y aged 9 and Z who will soon be 5 and is the only girl in the family. It will, however, be necessary to mention two other children in this judgment: U aged 18 and who has long since been adopted elsewhere and V aged 16 who is in long term foster care. There are three adult parties in this case: F who is the father of Y and Z but has also acted in that role for W and X; M who is the mother of U, V, W, X and Z; and SM who is the mother of Y. F and M had been in a relationship for some time but married on 6th June2009. There are three other adults (all former partners of M) who will be mentioned: P (now deceased) was the father of U, Q who is the father of V, W and X, and R; neither R nor Q have taken any part in these proceedings. It will be convenient in this judgment, however, to refer to M as 'the mother' and F as 'the father'.

8. The mother's relationship with P began when they were respectively aged 15 and 18. It was a stormy relationship characterised by domestic violence which resulted in U being removed (in the event permanently) and made the subject of a care order on 3rd June 1992. The mother then had a relationship with Q which was also characterised by domestic violence; indeed in 1997 Q served a short prison sentence for making threats to kill the mother. V was not an easy child and there was frequent involvement from a London local authority. Between 2001 and 2003 the mother was in a relationship with R which ended because R's violence extended to W and X. The mother was involved in further care proceedings which culminated on 11th June 2004 with a care order in respect of V and supervision orders in respect of W

and X. thereafter the mother moved, began a relationship with the father and they now reside in the area of the applicant local authority.

9. Y is the child of the father and SM. They have been involved in extensive private law proceedings. It is sufficient for present purposes simply to record that Y has lived with the father since the summer of 2007. SM, who currently lives in France, is content that that should continue and she looks to make contact arrangement directly with the father - as, of course, should be the case. It is, however, to be noted that, unlike the mother, the father had had no significant dealings with social services before this case.

10. The mother has a long history of engagement with the medical authorities, the details of which are exhaustively available in the evidence and the material aspects of which are set out in the report by Dr. Kathryn Ward dated 27th May 2010. However, it is perhaps pertinent to refer to a passage in that report dealing with a psychiatric assessment of the mother (at p.9/E351) in these terms -

> "In February 2003, Dr. Churcher-Brown, psychiatrist, found that M came from an emotionally deprived and disturbed family background and that her low opinion of herself was typical of people with such a childhood history. She was the victim of childhood physical and sexual abuse and in adult life became involved with violent men. He described her previous episodes of emotional distress as adjustment disorder - transient and in response to significant life events. Dr. Churcher-Brown did not consider that M was suffering from any formal psychiatric disorder. He described "some pathological personality traits which are a reflection of her traumatic early life". He did not feel that she fulfilled the criteria of any formal personality disorder. "

That is an important perspective not to be lost in the evaluation of this case. Happily no-one has ever suggested that the father is a violent man but one has to conclude that the mother is quite emotionally dependent whilst at the same time having a history of violent and unsustainable relationships with P, Q and R. Sadly these consequences of early life abuse are all too well known to the court.

11. The children also have had significant engagement with the medical profession, the details of which are to be taken from the same source. This is particularly so in the case of X, to some extent so in the case of Z and was said to be becoming so in the case of W. It is, in the events that have happened, unnecessary to go into great detail, suffice it to say that X was at one stage being treated by the mother as a disabled child in need of a wheelchair and special school and W was becoming visibly concerned about his heart. It is, however, important to observe that this family had no significant involvement (as a family unit) with this local authority prior to the events of September 2009

The Institution of Proceedings

12. That then is a sufficient background against which to consider the institution of these proceedings. The mother clearly had had a very troubled life, the father had had a failed relationship and they had a family unit which involved two other parents beyond those who lived there. There were, from a social work perspective, clearly a number of danger signs but it is also the case that generally the family functioned effectively and no particular issue had been raised until those that emanated from Dr. Atkinson.

13. Dr. Patricia Atkinson is a consultant community paediatrician with the West Sussex Primary Care Trust having held that post since 1994. It is apparent from a comment in the judgment of HHJ Norrie on the 4th September 2009 that Dr. Atkinson has considerable forensic experience as well and is in that field locally highly regarded. She had also had involvement with the family since February 2006. In these circumstances any views expressed by her were likely to be accorded considerable weight both by the local authority and the court.

14. Over a period of time Dr. Atkinson had conceived first a suspicion and then a conviction that the mother had fabricated symptoms in respect both of herself and also W and Z and, in particular, X. She had shared those views with the local authority and had advised social services intervention. Given those issues set in the context of the history of this case, an intervention was then all but inevitable; it was the mode of intervention that was to be deeply controversial. In order to set the context for the intervention it is important to understand not only what Dr. Atkinson's views were but the force with which they were expressed. This is to

be ascertained from two letters dated 2nd and 3rd September 2009 to the local authority solicitor. She stated her view thus -

> "It is my opinion that these three children have been subject to fabricated illness, and that their mother … has indulged in verbal fabrication resulting in unnecessary treatment and investigation."

She then sets out the facts from the medical records and her own involvement upon which she relies to justify that opinion. She ends her first letter thus -

> "It is my opinion that M demonstrates a classic case of fabricated or induced illness. I am of the opinion that she fabricates illness in herself necessitating unnecessary medical intervention, investigation and treatment, not to mention unneccesary utilisation of the emergency services. I am also of the opinion that she demonstrates fabrication of illness in her children particularly in X, but more worryingly that she is beginning to focus on W and potential cardiac problems. Consequently, I fear for the safety and well being of these children, and I advocate that they are removed from the care of M until further investigation can be completed by Social Services."

Clearly any responsible local authority would in those circumstances have to take action. This local authority decided to institute care proceedings and to seek a removal. The question then arose as to when to engage with the family. Dr. Atkinson was quite clear about that. In her second letter she wrote-

> "I feel that these children are at continued risk of harm and, consequently, advocate that they are removed from the care of M whilst further investigation is carried out. I am also of the opinion that it would be detrimental and, indeed, dangerous to inform M prior to the event of the intention to remove the children from her care. I say this on the basis that this is a complex case of factitious illness involving a large number of hospital departments and feel that it is a particularly difficult case owing to the fact that not only are the three children who are currently resident with Mother subject to factitious illness allegations, but the mother is also fabricating illness in herself. It is well recorded that, in such complex cases of factitious illness, challenge of the perpetrator can result in verbal fabrications rapidly being converted into induced illnesses in the children. There is always a risk that such inductions could potentially be fatal."

In those circumstances the local authority applied and (on transfer to Brighton County Court) their application came before HHJ Norrie on 4th September in which the local authority sought interim care orders in respect of W, X, Y and Z based on an interim care plan for immediate removal of all children into foster care.

The History of the Proceedings

15. Such an order would of course be both most unusual and highly draconian as the learned judge was well aware. She heard oral evidence from Dr. Atkinson in support of her letters and noted that the application was supported by the guardian who had some knowledge of the earlier proceedings. HHJ Norrie granted the application and, in the course of a necessarily brief judgment, she said this -

> "3. My duty is to protect the welfare of the children, which is paramount. In these extraordinary circumstances, and based on the evidence of Dr. Atkinson who is known extremely well to this court, in the interests of their welfare and safety, it is important the children are removed without - the father is not the birth father of all the children, but it would seem that he is a father-figure role - the knowledge of the parents. Bearing in mind the human rights of both of the adults in this case, I am satisfied that the case should come back to me on Monday, thereby giving the parents the earliest opportunity to deal with this matter."

On the Monday the case was duly transferred to this court.

16. The order was executed that day by social workers supported by the police. In order to understand the dynamics of that event, it has to be remembered not only that the family had not an inkling of social services' involvement but also that the children concerned were deeply unwilling to be removed. There are a number of accounts of that event which whilst not reconcilable (and in respect of which I make no findings) nevertheless require the conclusion

that it was deeply traumatic to all these children. W and (especially) Y made it clear by their behaviour in foster care how much they resented what had happened.

17. It is a matter of regret that it was not until November that a fully contested interim care order could be accommodated. Happily the interim was not wholly wasted: contact was set up which was clearly of a good quality; the mother offered to leave the home so that the children could be cared for by the father; expert witnesses were instructed to deal with the medical issues; and Mr. Stephen Pizzey, an independent social worker, was instructed to do a family assessment. His report is dated 13th November 2009. The interim care order was dealt with by Mr. Richard Anelay Q.C.; as a result of observations of his, the care plans were changed and it was agreed that the children would return to the care of their father in the absence of the mother. In the aftermath of that hearing that is exactly what happened.

18. As things have turned out, the children have lived at home in the care of the father ever since. It was indeed Mr. Pizzey's view that the children should return to the care of both parents on his assessment of the balance of risk. In the event the mother did return home but not until April 2010. By then most of the medical expert evidence had been filed. In broad terms that evidence demonstrated that both in respect of the mother and the children there were genuine medical conditions that underlaid the history. This never was (nor was ever suggested to be) a case of imposed or imputed illness. It was a case, so it was said, of grossly exaggerated or fictitious symptoms. The tenor of the medical evidence was broadly against fictitious symptoms but did admit of over-anxious reporting or dramatic exaggeration. At the time, however, that the mother arrived home, there was still awaited the paediatric overview from Dr. Ward and the response of Dr. Atkinson. It should be recorded that since April the family have satisfactorily lived together as a family unit.

19. Dr. Ward's report is dated 27th May 2010 and is both full and comprehensive. Dr. Ward considered the position of each child individually. In respect of W Dr. Ward found no evidence of fabrication but acknowledged the place of maternal anxiety and the reason for it. She sees W as essentially a fit and healthy young man. X was more problematic because his medical condition was more complex. Dr. Ward posed herself this issue: -

> "X has had enormous input from health professionals. He has a number of well documented medical problems but this should not negate the importance of considering whether there has been over-medicalisation and impairment of the child's everyday life as a result of unnecessary restrictions and medication."

Dr. Ward then goes on to make these comments -

> "Review of the medical records reveals many examples of inconsistency and exaggeration. M was recognised as being a highly anxious parent and at times professionals spoke of her description being dramatic. The GP refers to this and often records her description verbatim…The consequence of escalating concerns about X's health was that he was effectively disabled, using a wheelchair, not going to school and spending a significant amount of his time in the presence of health professionals…**There is clear evidence of exaggeration of symptoms in all of X's medical problems. It is more difficult to be certain that symptoms were completely fabricated as it is difficult to know whether he was having fits or not. However the fact that his seizures ceased abruptly when M was no longer X's primary carer suggests that there was fabrication.** (Author's emphasis) Obtaining specialist treatments or equipment for children who do not require them. **Requests for an electric wheelchair, a ripple bed and a special school were undoubtedly unjustified and damaging. Professionals were probably influenced in prescribing treatment for gastro-oesophageal reflux and epilepsy by the mother's dramatic and exaggerated description of symptoms** (Author's emphasis)"

She concludes by saying that apart from the need to manage his Eczema, "he now presents as a happy, lively boy who enjoys all aspects of school, sport and other activities."

20. Y of course does not fully feature in this enquiry and Dr. Ward reports nothing of relevant concern. As to Z, her view is that whilst Z did have genuine medical issues, there was a concern over dramatic presentation -

> "the dramatic way in which the history was delivered [by mother] is likely to have affected the investigations and may have led to more investigations being checked than usual in simple constipation … in summary, professionals have been concerned at the over dramatisations and focus on illness in Z."

Further than that she does not go.

21. There was then a telephone meeting between Dr. Ward and Dr. Atkinson, the transcript of which I have read. I think it can be adequately summarised by saying that Dr. Atkinson does not dissent from Dr. Ward's views though I think may take a stronger view in terms of degree of seriousness at the over-reportings. It was in those circumstances that the local authority began to take stock of where the case was going, given particularly the emotionally healthy developing situation in the home.

22. The social worker holding the case Ms. Louise Fox has proposed a safeguarding plan set out in a document of 12th July 2010. The parents have readily agreed to accept and co-operate in this plan. The effect of the plan is the withdrawal of social services and the devolving of safeguarding responsibilities on to the health and/or school authorities. Its perceived weaknesses in the eyes of Dr. Atkinson and, to some extent, the guardian are threefold: it makes no clear provision for monitoring and supervision; it does not include a requirement for therapy; and there is no requirement to engage with CAMHS. To a great extent those weaknesses spring from the views of the family as to the best way forward.

General comment on the Case

23. That leads the court to a consideration of the final matter namely a welfare assessment as it stands today. However, the parties invited the court to make any comment on how things have come to be as they are and as to whether things could (or should) have been done differently. I have taken the liberty of adverting to a very recent decision of the Court of Appeal in the case of A -v- East Sussex CC & Another [2010] EWCA Civ 743. That case draws the distinction between things done lawfully and things done in accordance with best practice; a failure to comply with best practice does not thereby render an act unlawful and neither does the fact that an act was performed lawfully mean that it accords with best practice. The case also draws attention to the fact that child protection comes with a human price-tag; see generally paragraphs 21 - 25 of the judgment which can, if desired, be incorporated into this judgment.

24. I do not think any useful comment can be made as to the progress of this case after transfer to the High Court. The state of the lists and the difficulty of getting time for substantial interim hearings are well known though it remains important to accommodate such matters where, as here, they are genuinely necessary. It was most unfortunate that Mr. Pizzey was not (for good reason) able to complete his report for or give evidence on the first planned date.

25. Furthermore, I do not think I can fairly express any view on whether Dr. Atkinson was entitled to express the opinions that she did on 2nd and 3rd September 2009 without hearing either Dr. Atkinson or other expert evidence on the medical history. Certainly Dr. Atkinson must be taken as urging with all her considerable influence and authority the removal of these children without notice to the family and must be taken to realise the likelihood of her advice being followed in those circumstances. Any forensic (or indeed treating) expert in those circumstances owes a heavy duty in taking that position unless convinced in good conscience that it is the only course consistent with the children's welfare.

26. Given what they knew the local authority were inevitably going to institute proceedings. In the light of the actual comments of Dr. Atkinson (as recorded above) it was perhaps unsurprising that they made the application that in fact they did make. That said, a local authority has no duty slavishly to follow medical advice. It is the social worker and not the doctor who is the child care expert. The social work team have an independent duty to satisfy themselves as to the route that best promotes the welfare of the relevant child. It is a matter for speculation, of course, what would have happened had the local authority given notice to the parents or what stance they (or indeed Judge Norrie) may have taken had the mother made there and then an offer to leave. The local authority would have been aware that where possible alleged perpetrators rather than children should be removed from the home just as they could and should have foreseen the trauma surrounding the actual removal. It is perhaps a sign of the

times in which we live that no-one seems seriously to have considered the prospect of the father as sole carer.

27. None of this is intended as criticism of the actions taken in the circumstances of this case as known to the local authority or the learned judge, still less is it intended to impugn the legality of any action taken or to suggest that the interim threshold requirement under Section 38(2) was not made out- it clearly was. It is merely to re-emphasise that in cases like this both the local authority and the court owe separate and distinct duties to safeguard the welfare of children by applying their own distinctive expertise. It may be that the trauma suffered by these children was simply an unfortunate part of the price that society pays for a system of child protection but the very fact of that trauma emphasises the need for everyone - expert, social worker and court - to tread as gently in this area as the safety and welfare of the relevant child permit.

The Welfare Assessment

28. And so to the position as it stands today. On the positive side it is clear that all children are delighted to be at home and the parents are delighted to have them. Social work and school reports are positive. The children's health is holding up. The parents have signed up to the safeguarding plan. On the negative side, the family will not be involved with social services, the children and parents are reluctant presently to engage with therapy or CAMHS notwithstanding the traumatic experiences they have gone through. Having no order in place (whether by withdrawal or under Section 1(5)), will mean that the parents have to be trusted to be sensitive to such needs and willing to have them met if necessary.

Conclusions

29. I am satisfied given all I know that there should be no further compulsive intervention by the state in this family. My reasons can be shortly stated. First, all the present signs are that this family can function alone. Secondly, given the ages of W, X, and Y, intervention in the teeth of their wishes is unlikely to be fruitful. Thirdly the father has demonstrated an impressive capacity to work with professionals to whose views he is profoundly opposed. Fourthly, I think the family's present resistance to therapy or CAMHS is wholly understandable but I think the parents can be trusted to seek help if it is needed. Fifthly, I think the experiences of the last nearly 12 months have been effective to engender caution in the manner of reporting illnesses and in making the father realise that he must play a central role in the healthcare of these children. Lastly, I think it would not be healthy for the development of these children to be members of a family dependent on professional support or supervision.

30. Of course risks remain. The mother's personality remains as it was. There is a risk that she will not sustain this relationship although I think the joint experience of the last few months has greatly strengthened it. However, as the children get older they will have their own views as to where they want to live. There is a risk of medical dramatisation although I think the fact that Dr. Ward's report and review, attached to each child's medical records as it will be, is sufficient to alert professionals to caution if dealing with the mother alone. I am satisfied that the benefits outlined in the previous paragraph compellingly outweigh the risks which are mitigated as explained above and can be managed through the agreed safeguarding plan.

31. Given those views should this case be resolved by making no order after a fact finding hearing or granting the local authority permission to withdraw these proceedings? I am satisfied that I should follow the latter course. My reasons are as follows: first, I do not believe for the reasons given that these children's welfare needs to be safeguarded by fact finding; secondly, I am of the view that their welfare will be promoted by the cessation of proceedings; thirdly, indeed I think the reverse applies - their welfare will be undermined by adversarial proceedings (as fact finding is) between their parents and the local authority: and fourthly in all the circumstances I do not think a fact-finding hearing would be a proper and proportionate use of public resources or those of the court. Accordingly I give the local authority permission to withdraw these proceedings.

Concluding Observations

32. I have given a full judgment in this case with three purposes in mind. I believe it is right that a public account should be given of why proceedings are to be withdrawn notwithstanding the existence of evidence potentially capable of satisfying the requirements of Section 31(2) of the Act. I hope that this judgment may provide further food for thought for experts, local

authorities and judges concerned with taking emergency action, along with those matters adverted to by the Court of appeal in A -v- ESCC & Another (above). I hope too that in due course it may be of assistance to W, X, Y and Z in making some sense of the unhappy events that have befallen them over the last year. This judgment must not be read as deciding any contested issue of fact. It is intended to be uncontroversial as to fact and merely descriptive of what has brought all these events about.

33. The parties have agreed the ambit of disclosure in this case. I agree with it. This judgment being public requires no permission for its disclosure save that it must not be used to identify the children in any circumstances where there would otherwise be no right to do so. Finally I wish to express my appreciation to counsel for all parties for the considerable assistance they have given me in this case.