

Case No: B4/2007/2075

Neutral Citation Number: [2007] EWCA Civ 1363
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM WORCESTER COUNTY COURT
(HIS HONOUR JUDGE RUNDELL)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Thursday, 22nd November 2007

Before:

LORD JUSTICE THORPE
LORD JUSTICE HOOPER
and
LORD JUSTICE RICHARDS

IN THE MATTER OF M (Children)

(DAR Transcript of
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THE APPELLANT APPEARED IN PERSON.

Mr N Cole (instructed by **Sharratts Family Law**) appeared on behalf of the **Respondent**.

Judgment
As Approved by the Court

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Lord Justice Thorpe:

1. At the heart of this appeal are three girls: J, who is eight years of age; G, who is six; and S, who is two. There is a very unhappy history to the case, which resulted in the breakdown of the arrangements for the care of these children, initially put in place after the separation of their parents. Cardinal dates besides the birth dates of the girls are the marriage of the parties in 1997, and 9 October 2004, when the father in emergency made arrangements for the three girls to be cared for by his family in London. When I say his family, I particularly identify his mother and his sister. That was a brief intermission, since the mother recovered the children from their paternal grandmother some two weeks later, and they remained thereafter in her temporary care under the surveillance of the Court's supervisory jurisdiction. Orders were made by District Judges, by Recorders, by Circuit Judges, culminating in a catastrophic breakdown in March 2005, when the mother's alcohol dependence resulted in the children's removal by the father to London, to his family, where they have remained ever since. The role of the Court, however, continued. In the County Court the judge ordered a S.7 Report to be prepared by the Local Authority; and it is to be noted that HHJ Rundell first came into the case on 23 June 2005, when he made an interim Residence Order to the father and gave directions to move the case towards a final trial.
2. According to the excellent chronology, which we are told has been prepared by Miss Lorna Myer QC, who appeared for the father at the trial, HHJ Rundell has had the case before him on no less than eight occasions preceding the final hearing. So he has had continuity of case management and of judicial control. The fundamental issue before HHJ Rundell at the final hearing which commenced on 26 July was whether the evidence of the mother's recovery from the low point that had impelled the children's move to their paternal family was sufficient to justify returning the children to the Midlands despite the strong security that had been established by the father over the course of the preceding two and a quarter years. The judge had to balance on the one hand the availability of a full time mother, if sufficiently recovered, against the security that the father had achieved, with great credit to his responsibility and commitment to his girls. So in preparation for the final hearing, the judge ordered on 25 May that the witnesses would be the parents, the father's sister and father's mother, and that other evidence would be in written form. So we know from the chronology that on the Thursday 26 the judge heard from the paternal aunt, the mother and the father only in chief. He desired to satisfy himself as to what had happened at an interlocutory hearing before a recorder on 13 February 2006, so he listened to the tapes overnight, and on the following day there was an agreement between counsel that transcripts should be obtained of the tapes of that hearing.
3. The oral evidence continued. The little girls' grandmother gave evidence, and the case was again adjourned for completion of the father's evidence and for the evidence of the CAFCASS officer, all given on 14 August. On 17 August the judge received written submissions from counsel, and five days later he gave a judgment which was obviously carefully considered but still *ex tempore*. The application for permission to appeal had been anticipated by the

judge as a possibility and it was a factor that contributed to his decision not to order the move from father's care to mother's care until the end of the Christmas holiday. An application to this court for permission to appeal was sealed on 3 October. By then the father had dispensed with the services of his litigation team and he lodged the Notice of Appeal as a litigant in person. That accordingly was listed for oral hearing and came on before my Lord, Wall LJ, on 2 November. As we can see from the transcript of his brief judgment, his principal concern was to ensure that the father's argument, which he considered to merit further consideration, should be heard at the earliest possible opportunity by a three-judge constitution. He therefore, in order to ensure that, listed the case for today as an oral hearing on notice with appeal to follow if permission granted. It seems that that was not understood by the associate at the day, and the order drawn to reflect the judgment by paragraph one granted the permission application. Particularly given the fact that Mr M remains a litigant in person, we have accordingly treated today's hearing as the hearing of an appeal for which permission had previously been granted. He has advanced his case with considerable skill, which is perhaps not surprising, given that he is by profession a lawyer and no stranger to litigation in other fields.

4. He has criticised the judge for reliance on the evidence of a specialist, who is conveniently referred to as Dr Laki, Laki being his given name. Mr M has said that Dr Laki's written reports are gravely flawed, in that he has expressed opinions which are clearly contradicted by other documentary evidence in the case. The difficulty with that submission for me is that it is manifest that Mr M's litigation team did not regard the evidence of Dr Laki as being flawed or contentious since they did not require his attendance for cross-examination, and none of the points that Mr M seeks to put to us today were put to the judge during the trial. Mr M has sought to blame his litigation team for that, but the principles by which this court decides appeals must be upheld. These are not considerations to which I am able to give any further consideration.
5. His second complaint is I think plainly open and rests on a firmer foundation. Caroline Fletcher, the social worker responsible for the S.7 report, in May 2005 had concluded against the mother, not only that she had an alcohol dependency but that she also had a fundamental tendency to put her own emotional needs before those of the children. That was as it were adopted by the CAFCASS officer, Mr Webb, who in his first report specifically said that he wished Caroline Fletcher's report to be read in conjunction with his; and it is undoubtedly a point taken by Miss Myer in her closing written submissions.
6. It is not one that is discretely dealt with by the judge, who focuses on the primary question of whether the mother's alcohol dependence was as it were reactive to extraordinary stress in her life and clearly a thing of the past. The judge did not as it were sever from that a separate consideration of whether she had a chronic tendency to fail the children emotionally. However, Mr Cole, who represents the mother, has drawn attention, and rightly drawn attention, to the judge's implicit consideration when in paragraph 31 he said:

(checked to audio as no bundle available)"I think she now has insight into her position and her past problems and the impact that they had on the girls."

And then perhaps of even greater significance in paragraph 35:

(checked to audio)"I think given the passage of time their emotional needs would also be met in either location."

7. The perfect judgment would perhaps have separated out these two considerations, which were certainly separate in the mind of the reporter, and dealt with them individually; but insofar as the judge's treated the two as one rolled up issue, it does not seem to me that that could possibly in itself result in a successful appeal and an order for retrial.
8. Mr M is also understandably unable to accept the judge's optimism for the future. He says that he judge minimised the mother's difficulties by ignoring evidence of a tendency to drink excessively pre-2004. He submits that the judge equally minimised her past failing, by, in paragraph 31, saying, looking to the future, if she fails for " a second time she will have blown it." Well, says Mr M, if the judge had been doing his maths correctly and impartially he would have counted many more than one previous failure. Then, he says, alcoholics simply never recover. She had a history of deception and irresponsibility within her alcoholism, and all that has simply been brushed over by the judge.
9. The submission is perfectly well made, but in the end the assessment of the mother's future capacity was for the expert evidence in the case; and as to that, clearly the person with the greatest expertise was the consultant, Dr Laki. Now he had given a full report in May 2005, in which he had diagnosed the mother as suffering: first from an alcohol dependence syndrome, currently abstinent. Of that he said:

(checked to audio)"There was also evidence that this was of mild severity, there being no markers of chronicity, for instance neuropathy, liver impairment."

10. He secondly diagnosed adjustment disorder in that the mother's difficulties were clearly related to particular stressful events. So that is how Dr Laki assessed his patient historically: More recently he had, in answer to a query from Mr Webb, reported in writing in November 2006 confirming that the mother had been abstinent from alcohol for a prolonged period. Blood tests had all been normal. Her mental state had been quite normal for over two years. She had been taking no medication. She had rehabilitated herself and was happy at work; she had a good network of supportive friends. He concluded by saying that he considered she had thought a lot about the return of her children and had strategies to deal with the additional burden of care.

So that update gave the mother a clean bill of health and was positive about her insight.

11. It was not the last word because we see from Mr Webb's final report of May 2007 that he had, in the days preceding the completion of the report, spoken again to Dr Laki, who had reported that he was seeing the mother less frequently, which he viewed as appropriate given her growing confidence and ability to cope. He opined that she had reasonable plans for the future, and said that he was reassured to hear that mother had continued to make good progress over the preceding six months. It seems to me therefore that, given that Dr Laki was not required to attend court, the father was effectively bound by these statements of fact and opinion, and it is not open to him to raise here issues which would more properly have been raised during the course of the trial.
12. Mr M's final point is one that also has caused me some initial concerns. He points out that, during the course of the mother's evidence on the first day when cross-examined by Miss Myer, she had admitted to taking sleeping tablets, and that in the evening she had been overcome with sleep during the course of telephone conversations with the girls. Now, Mr M complains that the judge has dealt with this factor in an altogether unrealistic way in paragraph 29 of the judgment, when he simply said she is not on anti-depressants, although she has an occasional sleeping tablet, but not recently.
13. Mr M makes the point that no-one would question a mother's capability if she was partially-dependent on sleeping pills in order to sleep the night through. This, he says, was an extraordinary admission of dependence on sleeping pills during the ordinary course of the day. He says that that is borne out as an important part of his case at trial by what Mr Myer wrote in her submissions to be found at page A55.
14. What to make of this? Clearly, it was something that was within the arena at the conclusion of the first day. Clearly, there was ample opportunity for any of the parties, or the judge himself, to have taken that issue up and ensured further investigation. The fact is neither of the parties nor the CAFCASS officer nor the judge thought it necessary to initiate such investigation, and, accordingly, whilst the judge's treatment of this point in the passage that I have already cited may be something of a glossing over of a point to which the father attached importance, it cannot in my judgment be said to be a judicial error of the magnitude to justify the intervention of this court.
15. Far from general criticism, I would be generally supportive of a judgment in which the judge more than once acknowledged the great difficulty of the decision that confronted him and then, having made a general review of the evidence and the relevant circumstances in paragraphs 40 to 43 inclusive, carried out the discretionary balancing exercise. All the factors that he recognised for and against the mother were relevant. In my opinion, nothing that was relevant was overlooked; and precisely the same can be said of the judge's identification and weighing of the factors going for and against the father's case.

16. Of course this was a case on the knife edge. It could have gone the other way. Another judge in the same court might have reached a different conclusion. But HHJ Rundell had a good deal of judicial experience of this case and he arrived at what he believed to be the best solution for these children. One factor that was of importance to him was that, were he to return the children to the Midlands, that would open the possibility of something closer to shared care between these two parents. It would be very difficult to envisage a shared care regime if the children remained in London, because there was no realistic prospect of the mother relocating to London. By contrast, if the girls returned to the Midlands, that was where the father's work life was firmly fixed, and there would be then the opportunity for parental sharing and for father to have contact with the children other than at the weekends. That is a consideration, that I put to Mr M today; and he could not contemplate it because he cannot accept the judge's primary premise. But with the passage of time, he may be able to see that, whatever may have been the differences between these two as husband and wife, they remain long term sharers of a responsibility for these three girls. Within that context I would certainly urge him, after the girls' return, to think constructively of the opportunities for sharing in the lives of the girls — not just at weekends but also during the school week. All that said, I would dismiss this appeal.

Lord Justice Hooper:

17. I agree and only wish to add this. The argument put forward by the appellant which has caused me the most concern turns on the failure of the part of the judge to deal in any detail with a consistent theme in the reports of Caroline Fletcher, who, as Thorpe LJ said, is a social worker in the employment of Worcestershire County Council with the children and family duty and assessment team. She wrote a number of reports, and it is necessary only to refer to one: that which she wrote in May 2006. At paragraph 22 of that report she wrote:

"Children Services are of the same opinion as highlighted in the previous reports: that [Mrs M] is not capable of meeting her children's long term basic physical and emotional needs as she remains extremely needy herself. Despite advice from myself, Mrs M refuses to put the needs, especially emotional needs, of her children before her own."

18. I refer to one other passage which can be found at page 11 of the report, when Caroline Fletcher consulted teachers who were teaching J. They made it clear to her that they felt that the children were being emotionally abused by their mother and that J in particular seemed to be treated more as a friend and confidant, rather than a daughter. There is reference to an excessive number of phone calls interfering with the lives of the daughters when in residence with their father, and there is particular reference to what can be described as manipulation of J. As my Lord has also said, in his two reports Mr Webb, the CAF/CASS officer, states that his report is to be read in conjunction with the

previous reports from Caroline Fletcher; and we are told in evidence that Mr Webb said that he accepted what Caroline Fletcher has said. No doubt that was one of the reasons why he concluded that the children should remain resident with the father, rather than, as the judge ordered, be returned to the mother. I am satisfied that the judge did have sufficient regard to this view, having regard to what he said in paragraph 38, which my Lord has already read out. Like him, I would have preferred to see more reasons for that conclusion.

19. That said, it seems to me of fundamental importance that the mother now cooperates fully and fairly with the order for contact which the judge is going to make on or about 17 December. It is of equal importance that she does not seek to influence the children against such contact or against their father and grandmother. Should she not fully and fairly support the order of contact which is going to be made, and should she undermine it, then it would tend to suggest to me that the concerns expressed by Caroline Fletcher remain valid current concerns, contrary to the judge's view in paragraph 35. That might put in issue the order with which we are concerned in this appeal. I invite the parties to place before the judge a copy of our judgment when he considers the matter of contact on or about 17 December.

Lord Justice Richards:

20. I agree that this appeal should be dismissed for reasons give by both my Lords.

Order: Appeal dismissed