



Neutral Citation Number: [2023] EWCA Civ 1004

Case No: CA-2023-001361

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM LIVERPOOL FAMILY COURT
Ms Recorder Heaton KC
LV22C50660

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/08/2023

Before:

LADY JUSTICE MACUR
LORD JUSTICE MALES
and
LADY JUSTICE WHIPPLE

Between:

T (Children)

Appellant

Mrs Porter-Phillips (instructed by **St Helen's Borough Council**) for the **Appellant**
Ms Hymanson (instructed by **Butcher & Barlow Solicitors**) for the **1st Respondent**
Ms Banks (instructed by **Stephensons Solicitors**) for the **2nd Respondent**
Ms Gilchrist (instructed by **BDH Solicitors**) for the **3rd Respondent**

Hearing dates : 2 August 2023

Approved Judgment

This judgment was handed down remotely at 10.30am on 30 August 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Macur LJ:

Introduction

1. This appeal concerned the short-term living arrangements for three young children who had been residing with their father under interim care orders from 11 November 2022 to 7 July 2023. Following the children’s removal from home in the circumstances I describe below, St Helens Borough Council (“the LA”) sought to sanction their intervention by emergency application to the Court. An urgent hearing was arranged for 11 July 2023, on which date Ms Recorder Heaton KC gave directions for the children’s return to the father. The LA, supported by the Children’s Guardian, sought permission to appeal. The single judge, Baker LJ, granted permission to appeal and ordered the children to remain in the care of the LA pending the determination of the appeal.
2. We indicated at the conclusion of the hearing that we allowed the appeal and directed that the matter be remitted to HHJ Parker, the Designated Family Judge for Cheshire and Merseyside (or his designate), to allocate a Judge to conduct an urgent ‘Further Case Management Hearing’ for the re-listing of the LA’s extant application. We continued the interim order of Baker LJ, whereby the three children would remain in foster care pending further consideration at the rehearing.
3. Immediately before this hearing on the 2 August 2023, the mother filed an application seeking permission to appeal on different grounds to those drafted by the LA. Her grounds related to her asserted inability to engage fully with the proceedings before the Recorder. We dismissed this application summarily for, regardless of the merit of her complaints, the relief she sought was addressed by the directions we gave.
4. These are my reasons for joining with the decision to allow the appeal.

Background

5. The three children are aged 5, nearly 4, and 2 years 9 months. The youngest child is additionally vulnerable by reason of chronic respiratory disease and global developmental delay.
6. Care proceedings were commenced in October 2022 on the grounds of the children’s exposure to domestic abuse and the parents’ misuse of drugs and/or alcohol. In addition, the mother’s mental health had “a profound impact on her capacity to parent and consistently meet the needs of the children” to the extent that the LA “deemed it was unsafe for the children to remain in her care.”
7. On 11 November 2022, DJ Knifton made interim care orders, and approved the LA interim care plan for the children to remain in the father’s care with supervised contact with the mother.
8. On 18 November 2022, the LA sought to change the arrangement, concerned by the father’s behaviour towards the mother, but also in the belief that the parents were endeavouring to arrange for the mother to have unsupervised contact with the

children. DJ Knifton refused the application but required the parents to agree and sign a “contract of expectations.”

9. The resultant “contract of expectations” inter alia explicitly forbade: the parents independently arranging contact between the mother and the children; the mother attending at the family home; and the father permitting the children to have contact with other adults, including family members and friends, without first notifying the designated social worker.
10. In February 2023, the LA filed its final statement, in which it proposed that the children would remain in the father’s care subject to a 12-month supervision order pursuant to s 31(1)(b) of the Children Act 1989 with the intention that the LA would supervise weekly contact between the mother and the children until a suitable family member was identified to take over the role.
11. However, on 4 April 2023, the LA received a police referral that the father was alleged to have assaulted another man at the family home on 24 March, with the mother present. Subsequently, on 5 April, the middle child’s nursery reported that she had told two members of staff that her mother had been to the family home.
12. The local authority again applied to remove the children into foster care and sought directions for an application for placement orders. The father denied any involvement in the incident on 24 March and further denied that the children had been spending time with their mother outside of the agreed parameters.
13. On 12 April, DJ Knifton again refused the local authority’s application and made directions for the local authority’s application for a placement order.
14. On 20 June 2023, the LA filed an updating final statement changing its care plan to recommend that the children should remain living with the father under the “Placement with Parent Regulations.” and subject to care orders pursuant to s 31(1)(a) of the Children Act 1989.
15. However, on 6 July 2023, the local authority received another police referral that the father was a suspect in an aggravated burglary of a dwelling-house that had taken place at approximately 6.45 in the morning of 5 July 2023 and that he was to be arrested imminently. The local authority attempted to contact the father without success. He did not pick up the oldest child from school and did not take the children to the arranged contact with the mother.
16. On the same day, the eldest child disclosed to a social worker that the mother had been at the house. Also, that day, a contact team worker spoke to the mother who was said to be “worried for the safety of the children. [She had] received calls and messages last night from someone who said [the father] owes him money ... [the caller] has told her that he or anyone else won't do anything when the kids are present.” The caller knew the father’s address and suggested that the house would be smashed up when the children were away. The mother suggested that the father was

in drug debt. Nevertheless, she was worried that the children would be “put into foster care with strangers and then split up.”

17. The social work team manager visited the family home that day and saw the father with the two younger children. The father denied any involvement in the burglary and denied that the mother had been to his house. The children were taken to spend that night at the paternal grandmother’s home.
18. On 7 July 2023, the LA made an application for the order of further police disclosure about the burglary and the urgent removal of the children into foster care and sought a same-day hearing, but the matter could not be listed until 11 July. On the evening of 7 July, the LA removed the children into foster care.
19. On 11 July 2023, the LA received two pieces of CCTV footage and 29 pages of written police disclosure. The first CCTV footage showed the attempted burglary from a viewpoint across the road; the second showed the suspects walking past a different camera. A police incident detail log recorded that the female complainant who had answered the door in the early morning to two males heard one male she referred to as “Jamie” ask “WHERE’S THE COCAINE WHERE IS THE COCAINE.” The complainant slammed the door. One of the males began banging continuously and she heard him say “JAMIE COME ON LAD COME ON LAD THIS DOOR IS ABOUT TO GO IN.” She then saw “Jamie” banging at the front ground floor window. A broken wooden plank was repeatedly thrust through the letter box. Both males were shouting before they made off that they would get into the house and that they would kill the occupants.
20. The other male occupant of the address identified one of the males to be “Jamie” and that his alias was “JABBA” and/or “JABS” and identified him to live in the street where the father lived. The police case summary further identified “Jabba” to be an alias used by the father from other police intelligence.

The hearing on 11 July

21. The hearing was listed for one hour, although it understandably extended beyond the time estimate. The bundle was more than 350 pages long. The Recorder was requested to view the CCTV footage and have regard to the police disclosure documentation.
22. The LA, supported by the children’s guardian, sought to continue the children’s removal pending the final hearing. The parents opposed the application, albeit that the mother now seeks to distance herself from that stance based on her lack of legal representation and non-disclosure to her of the police materials and documentation upon which the LA relied. The Recorder heard evidence from the LA social work team and children’s guardian.
23. The Recorder refused the LA’s application and ordered the children to be returned to the care of the father once he was released from police custody “whether he is charged with any offence relating to events of 5 July 2023 or not”.
24. Following the hearing, the father was interviewed under caution and released on police bail until October 2023. Thereafter, the children were due to return to the

father's care on 14 July 2023 but on that day the LA filed an appellant's notice and Baker LJ made the order indicated in [2] above.

The Judgment

25. There is an approved agreed note of the ex-tempore judgment handed down on 11 July.
26. The Recorder referred in brief to the case history and noted that this was the third application to remove the children from the care of the father. She said she was not clear "precisely what the risk is" to the children. She noted the concerns which led to the issuing of proceedings included cocaine and cannabis misuse by the father. The final care plan suggested that the children would continue to be cared for by the father under the auspices of a care order, and that foster carers had experienced difficulties in caring for the younger child which may necessitate separating the children. She reminded herself of the relevant principles in *Re C* [2019] EWCA Civ 1998 at paragraph [2]. She indicated that the case was "close to a final hearing."
27. The Recorder indicated that she had read the bundle, police evidence and viewed the CCTV footage. She considered the incident captured on the CCTV footage was particularly alarming and very serious and noted that this was the second time the father claimed mistaken identity (seemingly referring to the incident described in [11] above). However, although "one man has similar facial hair to the father" she could not identify him as being as one of the two men shown on the CCTV footage. The father had denied involvement and had no relevant previous convictions. He said he was looking after the children at the relevant time and there were no concerns reported by the children's school and nursery regarding their presentation that day.
28. As she could not make any findings that the person in the CCTV was the father, she could not go on to say that the children were at risk as a result of it: "It may be that if the local authority pursues findings the court might be able to find that it is the father and in relation to the other incidents the court might be able to make findings... when there is further evidence available."
29. It was confirmed by the social worker and Children's Guardian that the father was providing basic care for the children and had a good bond with them; he did not experience the problems with the younger child as reported by the foster carers. The Recorder considered the impact of the prospective separation of the children if the younger child was removed to another foster placement.
30. The note of judgment concludes that it was "given extempore after 5pm and the advocates were asked whether they required a more detailed judgment or expansion of any points. They did not."

The Appeal

31. Ms Porter-Phillips who, together with Mr Hurley, appears on behalf of the LA, agreed that the four draft grounds of appeal can be assimilated into one and conveniently expressed in terms that the Recorder was in error in failing to conduct a multifactorial assessment of all the available evidence. The CCTV footage was only one part of the evidence. The police incident report and further 'intelligence' provided compelling

evidence that the father was involved in the aggravated burglary incident. A finding to that effect should trigger a review of the contextual evidence of drug misuse, dangerous and risky associations with other drug users, possible drug debt and reprisal implications, and what appeared to be a breach of the contract of expectations. The Recorder should have assumed an inquisitorial role and was wrong to assume that the resolution of factual disputes could await a final hearing, which had not yet been fixed. She needed to urgently evaluate the nature and likelihood of the risk to the children, the possible consequences and what necessary input could ameliorate the risk.

32. Ms Banks on behalf of the father submits that the Recorder had made a finding that she was unable to conclude that the father was involved in the incident on 5 July and therefore, there was no trigger to undermine the risk analysis in the LA's proposed final care plan filed three weeks before.
33. Ms Hymanson on behalf of the mother supports the appeal in order to achieve a fresh hearing, which outcome the LA seeks. She believes the children are settled in foster care.
34. The Children's Guardian, represented by Ms Gilchrist, supports the LA's appeal.

Discussion

35. I agree with Ms Banks, as is now conceded on behalf of the LA by Ms Porter-Phillips, that the Recorder did make a finding. That is, the Recorder found that she could not be satisfied that the father was one of the men in the CCTV footage of the attempted aggravated burglary. I cannot envisage many other tribunals that would be drawn to do otherwise. This finding, reliant on the CCTV evidence alone, cannot be faulted.
36. However, the Recorder failed to refer to the other materials contained within the police disclosure which could identify the father as involved in the incident; see [19] and [20] above. Ms Porter-Phillips, who did not appear below, concedes that the Recorder did not receive sufficient assistance on the point, and was likely to have been distracted by the way the LA framed its case by reference to, and apparent reliance upon, the CCTV footage. Regrettably, no advocate requested the Recorder to clarify whether she had taken this other evidence into account and if she had done so to give reasons why she rejected it. Although the Recorder said in the judgment that she had considered "all the available evidence," which she specified to include "police evidence," it does not appear to me from my reading of the note of judgment that the Recorder had taken this other material into account.
37. I bear in mind that due allowance should be given for the fact that this was, given the urgency of the situation, necessarily an ex-tempore judgment and accordingly may not particularise all the evidence which informed the Recorder's fact-finding exercise. However, there is no reference to any of the detail contained within the disclosed materials, as compared with the Recorder's detailed description of what she had observed on the CCTV footage. Whilst the Recorder may have considered there to be a good reason to disregard the police information, for example because it was hearsay evidence, this would go to weight not admissibility, and the information was of sufficient substance that she would have understood that she would be obliged to explain why she placed no reliance upon it.

38. Further, I regard the report of the mother's unprompted tangential disclosures regarding drug debt and possible repercussions to be pertinent circumstantial evidence that went beyond that which was recorded in the note of judgment as "a concern during contact about whether the father was using drugs or not engaging with Change Grow Live (CGL)."
39. Consequently, I am satisfied that the Recorder's finding that she could not identify the father as involved in the incident on 5 July was a finding reached without regard to all the evidence. A positive finding that he was, would not bind the court in its final assessment, but did have important implications on the light it shone on the other events that had based the two previous applications to remove the children, and for the future interim arrangements for the children.
40. I note that despite making a finding that she could not identify the father as one of the men involved in the incident from the CCTV footage which Ms Banks submits justified her summary dismissal of the application, the Recorder did go on to consider other welfare implications of the removal of the children from the father's care. There is no reason to question her assessment of the bond between the father and the children, and the weight she obviously gave to the daunting prospect of the children being separated if they remained in foster care, but her consideration of their physical and emotional welfare would undoubtedly have been significantly informed by any finding she did make that the father had been involved in the incident.
41. The Recorder said that she was not sure what the precise risk to the children was, although noted that the LA and Children's Guardian were saying that "we do not know who is looking after the children in the early hours of the morning during this incident." Again, it appears that the Recorder may not have received the assistance of a full articulation of the LA's case, namely that the children's physical safety and emotional well-being would be severely compromised by the father's probable use of and/or association with others involved in Category A drug use as suggested by his alleged involvement in the offences on 24 March and 5 July.
42. Finally, I note that the Recorder apparently failed to have regard to the children's reports that their mother had been in the family home, implicitly unbeknownst to the LA and potentially unsupervised in her contact with the children. The Recorder did not address the possibility that in these circumstances the parents' complicit disobedience of the contract of expectations presented a significant risk to the children. In this respect, she appears to have taken a 'compartmentalised approach, [and] deprived [her]self of a broad view of the real issues" (See *Re O (A Child) (Interim Care Order)* [2019] EWCA Civ 583 at [21]).
43. Before ending this judgment, I would wish to place the criticisms I make of the Recorder's judgment in context. The intense pressure upon the Family Court is well known and unabating. In these circumstances, over optimistic and unrealistic time estimates are sometimes given in the hope over expectation that things will 'work out,' as they sometimes do. However, a hidden mischief of an inadequate time estimate for a case inserted into a day's list at short notice can be the failure to factor in adequate preparation time for the judge.
44. The Recorder had no previous judicial involvement in the case and had other cases in her list. That she obviously managed to assimilate some of the complex background,

sought to conscientiously address the legal principles she had correctly identified, and produced a comprehensible ex-tempore judgment is to be commended.

Males LJ:

45. I agree with these reasons for allowing the appeal.

Whipple LJ:

46. I also agree with these reasons for allowing the appeal.