



Neutral Citation Number: [2019] EWHC 3738 (Fam)

Case No: CV190C1058

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Birmingham Civil Justice Centre

Date: 13/12/2019

Before :

MR JUSTICE KEEHAN

Re C (Lay Advocates)

Between :

A LOCAL AUTHORITY

Applicant

- and -

M

1st Respondent

-and-

F

2nd Respondent

-and-

C

(A Child through his Children's Guardian)

3rd Respondent

Miss L Summers (instructed by **Local Authority Legal Services**) for the **Applicant**

Ms J Rodgers (instructed by **Kundert Solicitors LLP**) for the **1st Respondent**

Mr J Lee (instructed by **Askews Legal LLP**) for the **2nd Respondent**

Mr J Turner (instructed by **Brethertons Solicitors LLP**) for the **3rd Respondent**

Hearing dates: 13th December 2019

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....
MR JUSTICE KEEHAN

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

The Hon. Mr Justice Keehan :

Introduction

1. These public law proceedings concern one child, C, who was born on 31 July 2019 and is 4 months of age. His parents are M, the first respondent, who is 18 years of age, and F, the second respondent, who is 19 years of age.
2. These proceedings were commenced by A local authority on 9 August 2019 because it was the view of the Children’s Services Department that neither the mother nor the father had the capacity to care for C. He was made the subject of an interim care order on 14 August.
3. On his discharge from hospital C moved to live with his mother and father at Bonner House, a residential assessment centre. The placement came to an end in early September when:
 - i) the father was required to leave the unit after the mother had made a very serious allegation against him; and
 - ii) the mother left the unit a few days later. C has subsequently been cared for by foster carers.
4. The matter is timetabled through to an issues resolution hearing on 30 January 2020.
5. On 29 November 2019 HHJ Watson re-allocated the proceedings to me for me to determine a discrete issue in respect of the funding of lay advocates for both parents.

Background

6. In the pre-proceedings phase of this case the mother and the father underwent cognitive assessments conducted by Dr. Gillett and capacity assessments conducted by Dr. Lockyer.
7. Dr. Gillett advised that the mother had global intellectual impairment with significant defects in verbal, perceptual and adaptive reasoning. She gave broadly the same opinion in respect of the father. She recommended that lay advocates should be appointed for both parents at the earliest opportunity to support the mother and the father at all formal meetings, pre-proceedings meetings and all court hearings.
8. Dr. Lockyer agreed. In respect of the mother he advised that:

“with the benefit of ongoing support from his solicitor a [lay] advocate [the mother] would be considered to have capacity, as defined in the Mental Capacity Act 2015.”
9. Further he opined that he:

“agreed with the recommendations within Dr. Gillett’s report, namely that [the mother] would require the support of a [lay] advocate over the course of the current proceedings, including at court hearings, in addition to a number of recommended

measures for imparting information to and communicating with [the mother]”.

10. In respect of the father Dr. Lockyer advised that on:
- “the basis of an intellectual assessment undertaken in July 2019, [the father] has a significant impairment of intelligence with significant limitations in three of the four domains of intellectual functioning.... with the benefit of ongoing support from his solicitor a [lay] advocate in addition to a number of recommended measures for imparting information to and communicating with [the father]he would be considered to have capacity, as determined within the Mental Capacity Act 2005, to provide instructions to his solicitor, in respect of the current proceedings”.
11. Accordingly, Dr. Lockyer’s assessment that the mother and the father have capacity to conduct this litigation is predicated on the basis that both have:
- i) the support of their solicitor at all formal meetings and all court hearings (I consider the former to include conferences with counsel and/or solicitors to take the mother’s and the father’s instructions);
 - ii) the support of a lay advocate at all formal meetings and all court hearings (with the same rider as in para (a); and
 - iii) the implementation of the recommended measures for imparting information to and communicating with them.
12. Dr. Lockyer was asked to clarify his opinion and recommendations on whether the mother and/or the father would retain capacity without the support of a lay advocate. He responded as follows:

“...I am of the opinion that both would experience difficulties, in terms of following and understanding the evolving Court process at Court hearings or any other meetings relating to the current proceedings, without support. However, the issue of whether an advocate would be necessary to enable their understanding at Court hearings would depend on whether the Court could accommodate sufficient breaks in proceedings when issues arose that either of the parties failed to understand. This measure would enable their Solicitors to explain such matters. Should this be possible, and as long as the recommended measures for imparting information to, and communicating with both parties, which were detailed within Dr Gillett's report, were employed, the respective Solicitors should be able to manage such issues. However, should this not be possible, I am of the opinion that both parties would require the support of an advocate.

With respect to the issue of both parties giving instructions to their Solicitors, I am of the opinion that should the respective

Solicitors employ the recommended measures, this should be sufficient to enable both parties to give instructions. However, should this not be possible for whatever reason, both parties would require the support of their respective advocates.”

13. The order of DJ McCabe who made the interim care order, included the following recitals:

“Dr Gillett in her report...concluded that the Mother and Father required the assistance of an advocate to understand documentation and to effectively participate in proceedings

The Court considers that the appointment of an advocate is necessary to allow mother and father to participate in the proceedings. HMCTS is unable to fund the costs of an advocate, unlike the position of an intermediary.

The Court has received submissions from the mother and father’s representatives who are unable to effectively represent mother without the services of an advocate.

The Court is firmly of the view that the costs of an advocate are to assist mother and father in the same way as an interpreter and should be borne by the Legal Aid agency although it appears that the LAA have refused to fund the same.”

“The solicitor for the father and mother shall instruct an advocate...this is to include preparation for those hearings which extends to conference with their solicitor.”

14. On 10 October 2019 the Legal Aid Agency (‘LAA’) notified the solicitors for the parents that the LAA could not fund lay advocates.
15. Accordingly, the position was reached where two psychologists recommended the appointment of lay advocates for the parents but neither the LAA nor, apparently, HMCTS would agree to fund the costs of the lay advocates. I am not clear which office or which manager of HMCTS made and/or communicated to the court and/or the parties the decision that HMCTS would not fund lay advocates.
16. In the circumstances the matter was re-allocated to and listed before me.

Law

17. The European Convention of Human Rights and Fundamental Freedoms, Art 6(1) provides that:

“ In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order

or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.”

18. It is unlawful for a public authority to act in a way which is incompatible with a right under the European Convention on Human Rights and Fundamental Freedoms: s.6 of the Human Rights Act 1998 which provides:
- i) (1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.
 - ii) (2) Subsection (1) does not apply to an act if—
 - a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or
 - b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.
 - iii) (3) In this section "public authority" includes—
 - a) a court or tribunal, and
 - b) any person certain of whose functions are functions of a public nature, but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament.
 - iv) (4) (repealed)
 - v) (5) In relation to a particular act, a person is not a public authority by virtue only of subsection (3)(b) if the nature of the act is private.
 - vi) (6) "An act" includes a failure to act but does not include a failure to—
 - a) introduce in, or lay before, Parliament a proposal for legislation; or
 - b) make any primary legislation or remedial order.

Analysis

19. I accept the opinions and recommendations of Dr. Gillett and Dr. Lockyer. In respect of Dr. Lockyer’s addendum report, however, I consider that imposing the burden on the parent’s respective solicitors:
- i) to ensure the parents understand the evidence and the issues; and
 - ii) are enabled to communicate their instructions in an accurate and fulsome manner,

is to require too much of extremely busy public law solicitors.

Moreover, with great respect to them, they are unlikely to have the skills and experience to undertake these tasks as effectively and efficiently as a skilled professional. It must be remembered that the mother and the father function at an extremely low level.

20. On the basis of the experts' assessments of both parents, I take the view that if provision is not made for a lay advocate for each these parents there would be a grave risk of a potential breach of their article 6 rights. Absent the appointment of a lay advocate, there would be a real likelihood that they would not be able to engage with the proceedings to such a degree that neither of them had a fair hearing.
21. As I have set out above, public authorities, including HMCTS and the courts, are obliged not to act in a way which is incompatible with a person's Convention rights. There is a duty upon both to ensure that a party's right to a fair trial is not breached.
22. In my judgment that there is no material difference between the services provided by an interpreter, an intermediary or a lay advocate insofar as they each enable and support parties and witnesses to communicate and understand these proceedings. HMCTS routinely pay for the services of interpreters and intermediaries, I cannot see any principled reason why it should not also pay for the services of lay advocates in an appropriate case.
23. Accordingly, I had enquires made of the relevant Court Service budget holder who agreed to fund the reasonable costs of a lay advocate for both parents.

Conclusion

24. Accordingly, I will appoint a lay advocate for the mother and a lay advocate for the father. They cost £30 per hour which I consider to be entirely reasonable. I have assessed the likely number of hours of work on this for the lay advocates to be 50 hours.
25. Further, I will make an order that HMCTS will pay for the costs of a lay advocate for the mother and for the father.