Neutral Citation Number: [2009] EWCA Civ 674
Case No: B4/2008/1555

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM GLOUCESTER COUNTY COURT
(HIS HONOUR JUDGE HARINGTON)

Royal Courts of Justice
Strand, London, WC2A 2LL
Date: Thursday, 23 April 2009

Before:
LORD JUSTICE THORPE
and
LORD JUSTICE WALL
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IN THE MATTER OF C (A CHILD)
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(DAR Transcript of
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- -
The Appellant appeared in person.
The Respondent did not appear and was not represented.
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Judgment (As Approved by the Court)

Lord Justice Thorpe:

1. This is an application which was heard by Wilson LJ without notice on 27 January. Having heard the applicant mother, he decided to adjourn her application for hearing on notice to the respondent with appeal to follow if permission granted. He anticipated that the respondent father would receive public funding and he ascertained that counsel who represented the father below, Miss Goldie, would be available on 3 February and accordingly fixed the case for hearing on that date. Unfortunately it was not so listed. There was at least one application for adjournment, which was considered by Holman J. He adjourned the case for hearing today. There is no appearance by the respondent husband or by Miss Goldie and we must assume perhaps that public funding was not made available.

2. The point that troubled Wilson LJ is easily identified by reference to the order of the judge below, HHJ Harington, of 19 June 2008. On that day he had before him an application by the mother to enlarge the supervised contact that she was having to the child of the relationship, A, who was born on 5 January 2001. The application faced considerable obstacles, which I would identify as follows. There are concerns about the mother's health. On 21 December 2004 a consultant adult psychiatrist had recorded the opinion:

"I am broadly in agreement with previous experts that this lady suffers from a schizophreniform illness."

Accordingly on 21 May the district judge had adjourned the mother's application, recording that the mother wished to obtain legal representation and ordering that she should file copies of all medical evidence, including Dr Fear's last report by 30 May.

3. Appearing before HHJ Harington on 19 June, the mother informed him that she had seen a solicitor but he was unable to act for her. There was no sign of any of the medical evidence directed.

4. A second obstacle in her path was that the professional social worker, Lynne Pardoe, had filed a report dated 11 April 2008 in which she recommended that contact should continue without enlargement, namely that it should continue as supervised contact. At the hearing the judge heard evidence from the social worker who had taken over the case from Lynne Pardoe, a Mrs Price. Mrs Price expressed her view not only on the desirability or the need to maintain supervision but also that the mother was unlikely to comply with any direction for filing the necessary reports.

5. So when the judge came to give judgment he did so briefly. He recorded in paragraph 5 that the mother had appeared unrepresented and the father by Miss Goldie. He referred to the district judge's direction, which had not been complied with. He recorded that the mother's submission was that nothing had been wrong with her in the past or, alternatively, if there had been medical problems in the past she had now recovered, but the judge noted that there was no medical evidence to substantiate that case. He referred to the opinions of Mrs Price and Miss Pardoe and effectively and succinctly dismissed the mother's application for unsupervised contact on the basis that the present supervised contact continues.

6. Now, before us this morning Miss Cahill has informed us that there have been subsequent difficulties and there has been no contact at all over the last three-and-a-half months. If that be the case it is obviously contrary to the judge's expectations and would appear to justify an application to the judge to establish factual developments since 19 June and then to exercise a discretion as to the management of the immediate future. I have endeavoured to explain to Miss Cahill that it is not the function of this court to carry out the task which is so essentially the task of the trial judge. Our function is to review the judgment of 19 June on the evidence then available to the judge and to ask the

standard question: has the judge fallen into error of law, has he misconducted the balancing exercise, or has he arrived at a conclusion which was plainly wrong?

7. I am unhesitatingly of the opinion that no criticism can be made of the judge in reaching the conclusion that contact should continue as then presently supervised. So I would simply refuse the application for permission in that quarter. But that is only half the story because, as the judge recorded in paragraph 11, counsel for the father not only sought the dismissal of the mother's application but that she should be shackled by a section 91(14) order, on the grounds that there was a history of litigation and that it was upsetting for A to know that his father was having to come to court on a regular basis to deal with the matter. The judge noted that there was no formal application for such an order but seemed to have accepted an undertaking to lodge one "if necessary". Of Miss Goldie's application the judge said little. He simply said: "It also seems to me that it would be in A's best interests if I accede to the application to make a section 91(14) order. The order that I am going to make is that for the next five years the mother cannot bring an application in relation to A under the Children Act except with the permission of the court. She can of course apply for permission but unless she gets it she cannot bring an application. After five years the order will expire."

8. Now, the mother's complaint against that subsidiary order is both obvious and well justified. Here the judge had a litigant in person with a medical history suggesting that she had been and perhaps continued to be in the care of a consultant adult psychiatryist. She had had no notice of the application whatsoever and there is nothing to suggest that the judge explained to her the rights that she undoubtedly had to seek an adjournment, to submit that an application of that nature should have been made with due formality and, if not so made, should await preparation with due formality for trial on some future date. I would also observe that the duration of the order, five years, in relation to a child of A's age seems on the face of it disproportionate.

9. In summary, in my judgment this order was made altogether too casually and in disregard of clear authority from this court. The making of these orders should always be exceptional and careful consideration in every case should be given to the duration of the order to see that by unnecessary extension it did not prejudice rights of access to the court.

10. Accordingly, given that almost a year has passed during which this order has been operative, I would simply say that it should be set aside and, as from today, the mother should be at liberty to bring whatever application she wishes in the Gloucester County Court. That is particularly appropriate given that we have been informed today of the unexpected breakdown of the arrangement on which the judge relied. Plainly if there were any inhibition on the mother to return to the court to report this unfortunate development it would be unwarranted. So I would grant permission in relation to the application to challenge the section 91(14) order, I would allow the appeal and I would set aside the order.

11. My Lord has prepared some guidance which, in his experience, is needed to reduce the number of applications which raise assertions of procedural irregularity in the history of applications to the court under section 91(14). I have had the opportunity of reading his proposed guidance statement and I am in complete agreement with it.

Lord Justice Wall:

12. I agree. On the first limb I simply add a few words to reinforce what my Lord has said. Many litigants come to this court thinking we have powers we do not in fact possess. This order was made on 9 June 2008. The question which the judge had to decide was whether or not contact should be supervised or unsupervised. In the exercise of his discretion he decided, on material plainly sufficient to enable him to exercise that discretion, that contact should remain supervised. This court simply does not have the power to investigate what has happened since 9 June 2008. Our function is simply to review what the judge did on that date. It is not a question of us refusing to exercise jurisdiction. We simply do not have it and cannot exercise it. The mother's remedy, as my Lord has indicated, is to go back to the county court and seek the reinstitution of contact.

13. As far as the section 91(14) application is concerned I am in complete agreement with everything my Lord has said, but I would like to take this opportunity to set out what in my judgment should happen procedurally when the court is minded to make an order under section 91(14) of the Children Act 1989.

(1) Ideally, such an application should be made in writing on notice in the normal way. The court can then, having heard all relevant submissions, make an order one way or the other.

(2) There will, however, be cases in which the question of a section 91(14) order arises either during or at the end of a hearing. It may arise on the application of one of the parties, or on the court's own initiative. One or more of the parties before the court may be unrepresented.

(3) In the circumstances identified in paragraph (2), the court may make an order under section 91(14). It is, however, of the utmost importance that the party or parties or other persons affected by the order, particularly if they are in person: (a) understand that such an application is being made, or that consideration is being given to making a section 91(14) order; (b) understand the meaning and effect of such an order; and (c) have a proper opportunity to make submissions to the court in answer to the application or to the suggestion that a section 91(14) order be made.

(4) Where the parties (and in particular the person affected by the section 91(14) order) are unrepresented, it may be possible for the court to deal with the matter in argument without a formal application, although if the representative for the party affected seeks a short adjournment to take instructions, such an application should

normally be granted. If there is a substantive objection to the section 91(14) order, then the court should require the application to be made formally on notice in the normal way.

(5) Where the party affected by a proposed section 91(14) order is in person it is particularly important that he or she (a) understands the effect of such an order; and (b) is given a proper opportunity to respond to it. This may mean adjourning the application for it to be made in writing and on notice.

(6) Where the parties are both or all in person, there is a powerful obligation on any court minded to make a section 91(14) order to explain to them the course the court is minded to take. This will involve the court telling the parties in ordinary language what a section 91(14) order is; and what effect it has, together with the duration of the order which the court has in mind to impose. Above all, unrepresented parties must be given the opportunity to make any submissions they wish about the making of such an order, and if there is a substantive objection on which a litigant wishes to seek legal advice the court should either normally not make an order; alternatively it can make an order and give the recipient permission to apply to set it aside within a specified time.

(7) None of this guidance is designed to address the merits of section 91(14) orders, which as my Lord has indicated are exceptional, and in relation to which there is now a substantial jurisprudence.

14. On the facts of this case I am quite satisfied the judge was wrong to make the order under section 91(14) and, like my Lord, I would give permission to appeal, allow the appeal and set aside the order under section 91(14).

Order: Appeal allowed in part