Neutral Citation Number: [2011] EWHC 1277 (Fam)
Case No: FD11P00938

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/05/2011

Before:

MRS JUSTICE THEIS DBE

Between:

KY Applicant
- and -
DD Respondent

Mr Jeremy Rosenblatt (instructed by Passmores) for the Applicant

Hearing dates: 18th April & 5th May 2011

JUDGMENT (Anonymised)

This judgment is being handed down in private on 23rd May 2011. It consists of 8 pages and has been signed and dated by the judge. The judge hereby gives leave for it to be reported.

The judgment is being distributed on the strict understanding that in any report no person other than the advocates or the solicitors instructing them (and other persons identified by name in the judgment itself) may be identified by name or location and that in particular the anonymity of the children and the adult members of their family must be strictly preserved.

Mrs Justice Theis DBE

1. I am giving this short judgment in open court as it concerns issues which have wider application than this case.

2. My purpose in doing so is to remind practitioners of the principles that apply when orders are sought without notice, and in particular of the need for written evidence justifying the application to be placed before the court at the time of the hearing or, exceptionally, immediately after the hearing. The present case illustrates why this is important. It is also a reminder that without notice applications should only be made in

cases of genuine urgency. I have shown a draft of this judgment to the President of the Family Division, Sir Nicholas Wall, who agrees with what I have said below.

Background

3. This case involved a 5 year old child who lives with his mother. On 18th April 2011 I was the Applications Judge in the Family Division and was asked to take a without notice application in the morning. I was given the papers just before the hearing started.

4. It concerned prospective wardship proceedings, which had not been issued. The mother of the child was the proposed Plaintiff and the father the proposed Defendant. The orders sought were that the child be made a ward of court, the father of the child be prohibited from removing the ward from the care and control of the mother, a passport order in respect of the father and a direction for an inter parties hearing two weeks later.

5. The two page affidavit in support of the application was sworn by the mother on 15th April 2011. The only paragraph that provided any evidential basis for the application reads as follows:

"I was talking to my son's father [from a previous relationship] about 9 weeks ago and the Defendant Father heard the conversation as I was asking for money for my son. The Defendant Father said to me if I asked him for money, he would take Jack away from me. At that stage he was exercising some contact to Jack but that contact has now broken down and he has not seen him for 5 weeks."

6. When the matter was called on I questioned the basis for the application being without notice, when the alleged threat had been made 9 weeks previously. Mr Rosenblatt told me:

"I have been rung up abut this case and I know there have been problems, I believe, with public funding. My Lady, there are terrible problems at the moment and I can only relate my experience with solicitors; for non-Hague abductions a lot of solicitors are not getting the confirmation of funding through even with the devolving powers when they are entitled to it."

A little later he said

"I have had a discussion twice last week about this case with my solicitor who, by Thursday, was becoming very anxious because they had had mother on the telephone persistently. I then came in to chambers this morning not expecting to come into court to have this. So all I know is that there seemed to be last week extreme anxiety because I was rung up twice because the mother had telephoned the office twice."

Then

"... Last week, as I said to you, twice I was called because she was worried that the father was going to take the child to Heathrow."

I asked what this information was based on and Mr Rosenblatt stated:

"I gather it was information that she was receiving from the father and that is why the solicitor who, to be fair I think is cautious not to make unnecessary applications, by then was becoming very anxious. He felt we could only represent her obviously if she was going to comply with the legal aid requirements. That is what I was told.

I asked whether it was his understanding that there had been conversations reported from the mother that the father was going to take the child to Heathrow, Mr Rosenblatt stated:

"That was my definite understanding, yes. As I say, I was telephoned twice last week."

7. I made the orders sought, which included a passport order and a direction that a further affidavit be filed by 12 noon the following day from the Plaintiff confirming the information that had been given to the court by Mr Rosenblatt regarding further threats received last week as to the removal of child from the jurisdiction. Mr Rosenblatt sent a draft order to my clerk just after the hearing.

8. Later that day my clerk received an email from Mr Rosenblatt which said the following:

I have clarified today that there is to be no further affidavit on this mornings ex parte which Theis J understandably sought to have the passport order. ???

The threats referred to by myself that I was instructed upon I am now told related to a different case!! As there was no recent threats the passport order should not stand as it is my duty as I do so, to relate these further instructions now straightaway.

I have taken out any reference to a passport order: if Mother wishes for such relief I suggest she raises it on the return date.

I am about to advise the Tipstaff NOT to draw up a passport order.

9. Following receipt of this email I discharged the passport order and I included the following directions in the revised order:

(i) The solicitor with conduct of this matter on behalf of the Plaintiff shall provide a full written explanation to the court by 2pm 20th April 2011 of (a) the instructions he/she received from the Plaintiff (including the date(s) when such instructions were received) in relation to threats to remove the child from the jurisdiction (b) when and how such instructions were communicated to Counsel instructed on the 18th April 2011

(ii) Counsel instructed on behalf of the Plaintiff on 18th April 2011 shall provide a full written explanation to the court by 2pm 20th April 2011 of the chronology of the dates he received instructions and the content of those instructions from the solicitors who instructed him to make the without notice application on 18th April 2011.

10. On the 19th April I received the following written explanation from Passmores, the solicitors who instructed Mr Rosenblatt:

1. The Plaintiff arranged an appointment for 2pm 11th April 2011. Instructions were taken on this occasion in relation to her son. The Plaintiff indicated 9 weeks previously threats were made by the Defendant. Legal Services application forms were subsequently completed and an Affidavit drafted.

2. A telephone call was made to Counsel Mr Jeremy Rosenblatt on Thursday 14th April in relation to this matter but also in relation to a potential child abduction referral from a mother phoning from Heathrow and then travelling to the American Embassy.

3. The Plaintiff attended at Instructing Solicitors office on the afternoon of 15th April to swear her affidavit and papers were sent to Counsel's Clerk on the same day in the DX system. Perhaps on reflection the cases were not distinguished enough.

4. I apologise to Counsel and the Court if any confusion was caused following my brief conversation with Counsel.

11. On the 19th April I received the following written explanation from Mr Rosenblatt:

    14.4.11 Telephone call received by Counsel at about 3.00 pm from Catherine Roblin, Solicitor with conduct of case, mentioning a child abduction matter and seeing the Mother next day as there had been threats of a Father going to Heathrow twice that week for possible hearing next day, Friday 15th April at 2.00pm for urgent relief.

    18.4.11 Counsel finds original papers in his pigeon hole that morning having received no telephone call or scanned papers from Solicitors before. Had heard nothing on Friday before and assumed case was not proceeding. Counsel reads Affidavit, prepares originating summons and proposed order, delivers it by hand to Judge's Clerk and attend court.

12. The matter came back before me on 5th May. The Defendant had been served but did not attend. I made a prohibited steps order preventing the child being removed from his mother's care and discharged the wardship. It was clearly extremely careless of Mr Rosenblatt to relay instructions to the court from the wrong case.

Without notice applications

13. The correct procedure applicable to without notice applications has been set out in cases many times before but seems, on many occasions, to be observed more in the breach than the observance. The manner in which Mr Rosenblatt's application was made vividly demonstrates what can happen when proper procedures are ignored.

14. Mr Justice Munby (as he then was) in both *Re W (Ex Parte Orders)* [2000] 2 FLR 927 and Re S (Ex Parte Orders) [2001] 1 FLR 308 set out the procedure which can be summarised as follows:

    (i) Those who sought relief ex parte were under a duty to make the fullest disclosure of all the relevant circumstances known to them, including all relevant matters, whether of fact or law.

(ii) Those who obtained ex parte injunctive relief were also under an obligation to bring to the attention of the respondent, at the earliest practicable opportunity, the evidential and other persuasive materials on the basis of which the injunction had been granted.

(iii) Generally, when granting ex parte injunctive relief in the Family Division the court would require the applicant and, where appropriate the applicant's solicitors, to give the following undertakings:

(a) Where proceedings have not yet been issued, to issue and serve proceedings on the respondent, either by some specified time or as soon as practicable, in the form of the draft produced to the court or otherwise as might be appropriate;

(b) Where the application had been made otherwise than on sworn evidence, to cause to be sworn, filed and served on the respondent as soon as practicable an affidavit or affidavits substantially in the terms of the draft affidavit(s) produced to the court or, as the case might be, confirming the substance of what was said to the court by the applicant's counsel or solicitors; and

(c) Subject to (a) and (b) above to serve on the respondent as soon as practicable (i) the proceedings, (ii) sealed copy of the order, (iii) copies of the affidavit(s) and exhibit(s) containing the evidence relied on by the applicant and

(d) notice of the return date including details of the application to be made on the return date.

(iv) A person who found himself unable to comply timeously with his undertaking should either (i) apply for an extension of time before the time for compliance has expired or (ii) pass the task to someone who had available time in which to do it.

(v) Any ex parte order containing injunctions should set out on its face, either by way of recital or in a schedule, a list of all affidavits, witness statements and other evidential material read by the judge.

15. Mr Justice Charles in *B Borough Council v S & Anor* [2006] EWHC 2584 (Fam) stated as follows:

General comment on without notice applications

37. There is a natural temptation for applicants to seek, and courts to grant, relief to protect vulnerable persons whether they are children or vulnerable adults. In my view this can lead (and experience as the applications judge confirms that it does lead) to practitioners making without notice applications which are not necessary or appropriate, or which are not properly supported by appropriate evidence. Also there is in my view a general practice of asking the court to grant without notice orders over a fairly extended period with express permission to apply to vary or discharge on an inappropriately long period of notice (often 48 hours). It seems to me that on occasions this practice pays insufficient regard to the interests of both the persons in respect of whom and against whom the orders are made, and that therefore on every occasion without notice relief is sought and granted the choice of the return date and

the provisions as to permission to apply should be addressed with care by both the applicants and the court. Factors in that consideration will be an estimation of the effect on the person against whom the order is made of service of the order and how that is to be carried out.

38. Inevitably on a without notice application the court hears from only the applicant. Good practice, fairness and indeed common sense demand that on any such application the applicant should provide the court with:

    i) a balanced, fair and particularised account of the events leading up to the application and thus of the matters upon which it is based. In many cases this should include a brief account of what the applicant thinks the respondent's case is, or is likely to be,

    ii) where available and appropriate, independent evidence,

    iii) a clear and particularised explanation of the reasons why the application is made without notice and the reasons why the permission to apply to vary or discharge the injunction granted should be on notice (rather than immediately or forthwith as in the standard collection and location orders) and why the return date should not be within a short period of time. As to that I accept and acknowledge that a reference to notice being given if practicable, or for a short period of notice (say 2 working hours or just two hours if a week end or holiday period is imminent), may often provide an appropriate balance to avoid a sequence of effectively without notice applications, and that in some cases a longer period of notice may be appropriate, and

    iv) in many cases an account of the steps the applicant proposes concerning service, the giving of an explanation of the order and the implementation of an order. This is likely to be of particular importance in cases such as this one where emotional issues are involved and family members of a person who lacks capacity are the subject of the injunctions and orders. In such cases, as here, information as to those intentions are likely to inform issues as to the need for, and the proportionality of, the relief sought and granted

39. As to point (ii) I pause to mention that in my view it is surprising and disappointing how many times a without notice application for relief is made in the Family Division based only on largely unparticularised assertions by one side of serious allegations without any third party material to support them, or more generally the basis for the relief sought. I appreciate that in many instances there is a very real urgency and there will not be third party evidence of allegations of abusive behaviour that are readily available but in others there will be. A classic example, which occurs regularly, is that an applicant who seeks a return of children to his or her care fails to provide any third party evidence (e.g. from a school, a GP or records in their possession) to confirm that he or she is indeed the primary carer of the relevant children.

40. Guidance has often been given on the information to be provided and the procedure to be followed in seeking without notice relief (see at first instance *Re S (a child) (ex parte orders)* [2001] 1 WLR 211, [2000] 3 FCR 706, *W v H (ex parte injunctions)*

[2000] 3 FCR 481 *(by analogy X Council v B (Emergency Protection Orders)* [2005] 1 FLR 341 and *Re X (Emergency Protection Orders)* [2006] EWHC 510 (Fam)) and in the Court of Appeal *Moat Housing v Harris* [2005] 2 FLR 551 in particular at paragraphs 63 to 69, and see also the notes to CPR Part 25 and the practice note now reported at [2006] 2 FLR 354).

41. Naturally I endorse that guidance and do not seek to add to it save to emphasise the points made above and to record my own observations that practitioners (a) too regularly do not follow and implement that guidance, and (b) by such failure show an insufficient appreciation of the exceptional nature of without notice relief and the impact it has (or potentially has) on the rights, life and emotions of the persons against whom it is granted.

42. As to this I acknowledge that the courts must take part of the blame for such failures by granting relief without notice in cases when (a) the guidance has not been followed, and (b) the impact on the person against whom the relief is granted could be considerable.

43. I add that additionally there is a need (a) to comply strictly with undertakings given at the time the order is made, and (b) to keep full and proper records of what is put before the court and said to the court. This should include a record of the times of the hearing so that a transcript can be more easily obtained. The availability of a transcript does not however reduce the duty of those applying for without notice relief to keep a full record of what the court was shown and was told.

16. As well as endorsing the guidance set out above, there are three additional comments I would make:

(1) If information is put before the court to substantiate a without notice order, it should be the subject of the closest scrutiny and, if the applicant is not present in person to verify it, be substantiated by production of a contemporaneous note of the instructions. If that is not available, there may need to be a short adjournment to enable steps to be taken to verify the information relied upon.

(2) If additional information is put before the court orally, there must be a direction for the filing of sworn evidence to confirm the information within a very short period of time. If that direction had not been made in this case, the passport order would have been executed when the grounds for obtaining it were simply not there. That would have involved a gross breach of the defendant's rights, quite apart from the court having been given misleading information.

(3) Lastly, leaving the scrutiny that the court should give to without notice applications to one side, it is incumbent on those advising whether such an application is justified to consider rigorously whether an application is justified and be clear as to the evidential basis for it.