



Neutral Citation Number: [2020] EWCA Civ 282

Case No: B4/2020/0222

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE FAMILY COURT AT BRISTOL
HH Judge Cronin
BS19C01252

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28 February 2020

Before :

LORD JUSTICE MOYLAN
and
LORD JUSTICE PETER JACKSON

G (A Child: s.38(6) Assessment)

Rachael Morton (instructed by **South Gloucestershire Council**) for the **Appellant Local Authority**

Sarah Pope (instructed by **Lyons Davidson Solicitors**) for the **Respondent Mother**
Stuart Fuller (instructed by **Henriques Griffiths LLP**) for the **Respondent Child by his Children's Guardian**

Hearing date: 26 February 2020

Approved Judgment

Lord Justice Peter Jackson:

1. This is a local authority's appeal from an order under s.38(6) Children Act 1989 for a residential assessment. The order was made on 24 January 2020 on the application of a mother in the early stages of proceedings concerning her son Jack (not his real name), who is approaching three years of age.
2. The reason for the proceedings is that in December 2019 Jack, whose parents had separated when he was about three months old, was found to have a number of unexplained injuries on different parts of his body. At the time he was living with his mother and her boyfriend, and being cared for on a regular basis by his maternal grandmother and by her former partner, known by the mother as her stepfather. The mother's account is that on 15 December she left Jack with her boyfriend between 1pm and 10pm while she was at work. Jack then stayed overnight with the stepfather. On the afternoon of 16 December, the mother and stepfather took Jack to the GP, where he was seen to have injuries to his abdomen, the right side of his face, his left eye and his penis. A child protection referral was made and Jack was admitted to hospital. A child protection medical on 17 December identified 19 injuries including a black eye. On discharge from hospital Jack was placed in foster care, where he remains, with contact with his mother taking place three times a week. A police investigation is ongoing.
3. The local authority issued care proceedings on 18 December and on 19 and 20 December the matter came before Her Honour Judge Cronin. She made an interim care order and gave a detailed series of directions to progress the case. These included provision for any application for expert assessment under Part 25 to be filed by 17 January, for police disclosure by 21 January, for the filing of evidence by the parties and other witnesses, and for the mother to undergo drug testing. A further hearing was fixed for 24 January.
4. On 17 January, the mother issued an application under s.38(6) for an order that she and Jack be placed in a well-known residential assessment centre. The length of the assessment was to be 12 weeks with a report two weeks later. And the overall cost was estimated at £65,000 plus the costs of additional supervision.
5. The matter came before the judge on 24 January, by which time Jack had been living away from his mother for 5 weeks. The order for police disclosure had not been complied with and a charging decision was said to be imminent. The mother had filed a detailed statement describing the background and Jack's movements in the ten days before his admission to hospital. She alleged that her boyfriend must be responsible for the injuries, though she suggested that Jack may have caused some of them himself. The court also had a detailed statement from the social worker, recommending that Jack remain in foster care while assessments were undertaken and police investigations concluded.
6. The positions of the parties in relation to the mother's application were as follows:
 - (1) The mother argued that the assessment fell within the terms of s.38(6) and was necessary to assist the court to resolve the proceedings justly, as required by s.38(7A), having regard to the matters in s 38(7B): see *Re Y (A Child)(Section 38(6) Assessment)* [2018] EWCA Civ 992; [2018] 2 FLR 1083 at [18]. It

would assess concerns about the mother's parenting and assess the relationship between her and Jack. There was no other proposal for a parenting assessment and it is in Jack's interests to be safely reunited with his mother. The assessment would prevent delay and the police disclosure would not provide a conclusive factual matrix for the case.

- (2) The Local Authority accepted that the child would be likely to be physically safe at the assessment unit, but argued that it would be emotionally harmful to place Jack in the care of his mother when she might have caused him significant physical injury. Her application should be adjourned until the police evidence was available (as had been anticipated by the earlier directions) and the CPS charging decision was known. There needed to be a full enough evidential basis to determine whether it would be in Jack's best interests to be placed with his mother. In the light of certain aspects of the mother's behaviour and statements made by Jack in foster care, this would include a psychological assessment.
 - (3) The Guardian opposed the application at this stage because of the uncertainty about what had happened to Jack. She also pointed to the problem that would arise when the assessment came to an end as it could not be said to be safe for Jack to be placed with his mother in the community. She argued that the application was premature and that it could be considered quite soon when more information might be available and a charging decision might have been made.
7. The judge gave an extempore judgment, of which we have an approved note. She determined that the assessment centre could provide a proper assessment in a safe context. She considered that a parenting assessment was necessary because of concerns about the mother providing safe and stable care, and in the light of the number of people involved in Jack's care. The unit has a psychologist who could assess attachment. There was as yet no other proposal for assessment and time is passing. The proposal is safe because of the high level of supervision. The contact notes do not show a child who is likely to be afraid of his mother.
 8. The judge then addressed the objection to the parenting and psychological assessments taking place before there was further clarity about how Jack came by his injuries:

“The extent to which either of these assessments would be valid – I'm going to be blunt about the prospects of the fact finding hearing – the outstanding issue is whether the court can do this without a fact finding hearing having taken place. [Jack] suffered nasty injuries... If I put a line through the accidental injuries or birth marks there are still 11 – a great many. The first decision for the court will be how those were caused – and that will depend on looking at who had the opportunity unless someone makes an admission. The people who had the opportunity appeared to be the mother; her boyfriend (from whom she has now parted); [the stepfather], who was going to care for [Jack] overnight and the maternal grandmother, to whose home the stepfather took [Jack]; [Y], a friend of the

mothers and mother's sister [B]. It is going to be essential to look at a timeline.

The local authority may want to carry out investigations of their own: what time mother left work, how long she was in the house before [stepfather] removed [Jack]. Mother remains in the pool of perpetrators but it will be months before the court can make a decision regarding whether there is a single perpetrator and it remains possible that there will be more than one person in the pool. It is not in the child's interests to wait for a fact finding before receiving the [parenting] assessment and psychological assessment.

... The Local Authority and the Guardian have asked for an adjournment of the s.38(6) application until the police evidence has come through. I am prepared to be optimistic that during this week we will get a decision about charge, but the decision may be to charge or not, or to refer the decision to another officer if there is no clear lead. I am not confident I will get that information. I have to allocate a proportionate share of the Court's resources and consider the Family Procedure Rules. I cannot in all conscience adjourn this hearing and I can't provide another court hearing in two weeks' time and allocate more court time when we have had a hearing today already of two hours in length in the hope of gaining more information. It was not suggested that the local authority would conduct its own parenting assessment in the meantime.

I can identify a safeguard in that [the unit] won't accept Mother tomorrow. There is a vacancy in 2 or 3 weeks... If the police do make disclosure in 2 weeks, and it casts light on the factual issues, the local authority can always make an application to revoke my decision. ... If the mother is charged then her bail conditions may change and this may require me to revoke the order and I would undertake an examination of whatever evidence is before me at that stage.

I will order an assessment at [the unit] and an assessment by [the psychologist]. These are essential pieces of information and are necessary. There will be a joint instruction. There may need to be another hearing on the issue of instructing a paediatrician."

9. The resulting order stated that the mother's application was granted, with liberty to the local authority to apply to set the order aside if the police disclosure justified it when received; the instruction of the psychologist was authorised; other directions were made, and a further hearing was listed on 28 February at which a range of issues would be considered, including "whether this matter can be timetabled to a fact finding hearing".

10. The local authority applied for permission to appeal on 31 January, which I granted on 14 February. The grounds of appeal are in substance that the judge failed to consider the risk of emotional harm to Jack by placing him back with his mother when there are reasonable grounds to believe that she had injured him or failed to protect him; that she should have postponed a decision; and that the terms of the residential assessment were not clear. Its case is encapsulated by Ms Morton as being that this was the wrong assessment at the wrong time. The key question is whether the mother harmed Jack. At this stage in the proceedings there is no factual basis against which to characterise and quantify the nature of the risk posed to Jack, or to determine what assessment is appropriate or what questions need to be asked. The judge's approach put the cart before the horse.
11. Ms Morton points out that the range of possible factual outcomes has implications for the type of assessment that would be needed:
 - (1) The mother is exonerated of causing injury, or found responsible only of failure to protect: a residential assessment will be unnecessary.
 - (2) The mother is responsible for the injuries: a psychological assessment will be needed before further steps are taken.
 - (3) There is a 'pool finding' including the mother: consideration will need to be given to the most appropriate form of assessment.
12. The Children's Guardian supports the appeal. Her view is that this assessment is not indicated now and would be carried out in an evidential vacuum. It may become appropriate in future but that this is highly dependant on what findings are made about Jack's injuries. To the grounds argued by the local authority, Mr Fuller adds the submission that the assessment as currently envisaged is not necessary to assist the court to resolve the proceedings justly, as required by s.38(7A) and that the judge did not give proper consideration to the matters identified in s.38(7B). In particular insufficient consideration was given to the issues with which the assessment would assist the court and the questions it would enable the court to answer. In the absence of a factual basis, it could not provide the risk assessment that is needed. Finally, the Guardian is concerned about what should happen at the end of the assessment period if there is still no clarity about responsibility for the injuries. A negative assessment would mean the child would have to return to foster care and there is no guarantee that his current foster carers could have him back. A positive assessment would not, the Guardian considers, render it safe for Jack to be placed with his mother in the community before the facts are established. There is no plan beyond the assessment.
13. In her well-argued submissions on behalf of the mother, Ms Pope responds that this was a case management decision that fell within the wide ambit of the judge's discretion and that this court should slow to interfere. Nature and common sense dictate that a child is best placed with a parent whenever this can safely be achieved. There is no safety risk in the assessment and it is wrong to assume that the benefits of reunification in a highly supervised and monitored setting are outweighed by the risks of potential emotional harm, particularly as the judge did not consider that there was evidence of Jack being afraid of his mother. If the mother is found to have caused or failed to protect Jack from his injuries, it does not necessarily follow that she will be considered unable to care for him in the long term. If she is exculpated, delay being

contrary to a child's welfare, he will have been harmed by the separation. Those supporting the appeal also fail to bring the impact of prolonged separation upon the child into the balance. This is not a single issue case, in light of the concerns about the mother's general parenting. Parenting and psychological assessments are needed and no concrete alternatives were available. The assessments should be carried out on the basis of the alternative factual scenarios the court is being asked to consider. A placement at the unit is now available and mother and child should move there without further delay.

14. Ms Pope further argues that the arguments in support of the appeal effectively propose that an assessment can never take place ahead of fact finding. There is no support for this principle in statute or case law. On the contrary, s.38(6) is a specific exception to the general principle that once a care order is made, the local authority determines how parental responsibility is to be exercised.
15. Those then are the parties' submissions. As noted, the power of the court to order an assessment under s.38(6) only arises where the court is of the opinion that the assessment is necessary to enable it to resolve the proceedings justly: s.38(7A). In making its decision, the court must by ss.(7B) have regard in particular regard to:
 - “(a) any impact which any examination or other assessment would be likely to have on the welfare of the child, and any other impact which giving the direction would be likely to have on the welfare of the child;
 - (b) the issues with which the examination or other assessment would assist the court;
 - (c) the questions which the examination or other assessment would enable the court to answer;
 - (d) the evidence otherwise available;
 - (e) the impact which the direction would be likely to have on the timetable, duration and conduct of the proceedings;
 - (f) the cost of the examination or other assessment and
 - (g) any matters prescribed by Family Procedure Rules.
16. So the question on this appeal is whether the judge was entitled to find this assessment to be necessary in the light of these factors in particular. In answering that question, this court should give considerable latitude to the judge's evaluation and can only intervene if her conclusion is one that she could not reasonably have reached.
17. The judge was taken to ss.7(A) and (B) and, although she did not address them in terms, she clearly had them in mind when giving her decision. Her analysis was driven by factors (a) – any other impact which giving the direction would be likely to have on the welfare of the child, (d) – the evidence otherwise available, (e) – the impact which the direction would be likely to have on the timetable, duration and conduct of the proceedings, and (f) – the Family Procedure Rules. Under these headings she found that it would be good for Jack to be with his mother if possible

and that this could take place safely, that there had been a delay in the police disclosure and no application by any other party for an assessment, that it would take a long time for clarity to be achieved (if indeed it can be) about who had injured Jack, and that she had to allocate the court's resources appropriately.

18. I am very much alive to the judge's concern about delay. Investigations of this kind, often involving unrepresented intervenors, can be challenging and time-consuming. They may be difficult to accommodate in crowded court lists and the delay can work against the child's interests. Faced with this situation, any judge will exert him or herself to minimise the disadvantages inherent in the situation, and the transcript of the hearing shows that this is exactly what Judge Cronin sought to do.
19. However, this is a child protection issue. The starting point is that on 20 December the court found it necessary to make an interim care order with a care plan for Jack's separation from his mother and placement in foster care. The reason for that was that he had suffered ill-treatment in unknown circumstances. There was no possibility of him being returned to his mother in the community at that stage, and even today no one suggests that it would be appropriate for the court to authorise that.
20. Five weeks later, on 24 January, the court was no nearer to understanding what had led to Jack being injured and it was in those circumstances that the mother's application came to be considered. It dominated the hearing, with the result that the fundamental decision about timetabling the proceedings, whether to a fact finding hearing or to a composite hearing was not taken. That in my view put the court at a disadvantage when it came to consider what assessments were necessary.
21. The judge reminded herself that the first question for the court would be how the injuries were caused and she rightly posed the question of whether the proposed assessment would be valid. However, she did not answer it. Instead she found that a parenting assessment and a psychological assessment were necessary, but she did not address the argument that this assessment at this time could not provide the court with an answer to what is undoubtedly the central issue in the case. That is not to say that residential assessment cannot as a matter of principle take place before fact finding: it will sometimes happen in cases where there is a normal composite hearing, though this may be more likely in cases where there are multiple issues. But in this case, the judge needed to weigh up the fact that an assessment of the child with his mother could only be of limited value while the injuries to Jack remained unexplained, and that an assessment of this extensive kind might be unnecessary altogether. Likewise, the focus of any psychological assessment is not clear. An assessment of the attachment between mother and child does not require residential assessment and the nature of any psychological assessment of the mother would differ markedly, depending upon whether she was considered to have injured the child or not. Had the judge addressed these matters, I consider she would have been bound to acknowledge the force of the arguments made by the local authority and the Guardian, and to have declined to make the order, at least at this stage. The fact that an assessment might be necessary at some point did not mean that this assessment was necessary now.
22. I also consider that the judge was premature to base her decision on the absence of any rival assessment application and on the delay in police disclosure. The absence of other applications was not a consequence of inaction but of the view taken that there should first be police disclosure and fact finding. Similarly, an adjournment of the

mother's application would not have represented a significant expenditure of the court's resources, particularly as a further case management hearing had in any case been fixed. But in particular I consider that any decision about assessments should have been taken after the judge had charted the course of the proceedings, and in particular timetabled the case for a hearing at which the cause of Jack's injuries could be investigated, whether that was to be at the same time as welfare decisions, or separately.

23. I would only add that this case was not argued by the local authority on the basis of the cost of the assessment, and it is not a decisive feature here. However, by the terms of the statute the court is always bound to consider the cost of an assessment and it will only require the local authority to incur expenditure on this scale where the specific assessment in question is necessary.
24. I would therefore allow the appeal and set aside the assessment order. Having heard submissions from the parties on the question of whether the mother's application should be dismissed or adjourned, I would dismiss it. It was open to the judge to have adjourned it on 24 January but it is now clear that the court's priority must be to timetable the case to its conclusion. This outcome leaves the judge, whose creditable desire to expedite these proceedings I commend, free to consider any fresh Part 25 application issued by any party on its merits in the light of the decision of this court and of her overall strategy for progressing this case.

Lord Justice Moylan

25. I agree.
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