In The Supreme Court of Bermuda

APPELLATE JURISDICTION
2010 No. 9

BETWEEN:

E. F.

Appellant

-AND-

DIRECTOR OF CHILD & FAMILY SERVICES

Respondent

And

J. F. **Party affected**

Date of Hearing: Wednesday, 17th November 2010
Date Judgement Delivered: Friday, 15th July 2011

Mr. Paul Harshaw, Harshaw & Co. for the Appellant
Mr. Leighton Rochester, Attorney-General's Chambers for the Respondent

1. This is an appeal against a decision dated the 23rd of February 2010 and 8th March 2010 of the Magistrates' Court (sitting as a Special Court – the Family Court).

2. The subjects of this appeal are J who was born on 6th September 1995 and R who was born on 3rd October 2002. The parents are divorced and the mother has custody care and control of the children pursuant an Order of the Supreme Court. The father has remarried and lives overseas.

3. The Director of Child and Family Services applied for a care order under Section 25 of the Children's Act 1998 in respect of the two children J & R.

4. On 23rd February 2010 the Magistrates' Court (sitting as a Special Court, called the "Family Court"), made a further care order for 12 months pursuant to section 25 of the Children's Act 1998 in respect of the two children, J and R. This order did not specify the date of any previous order. However, the evidence shows that previous care orders were made in respect of each of the two children.

5. On the 8th March 2010 by an ex parte order; the Family Court varied the order which was made on 23rd February 2010 by requiring the mother to deliver up R's medical vest, which is used for treatment of Rs cystic fibrosis, to the Department of Child and Family Services. This order states that failure by the mother to comply with the terms of this order will be deemed contempt of court punishable by 7 days imprisonment.

6. On the 8th April 2010 unopposed this Court granted the Appellant an enlargement of time to file and serve her notice of appeal in respect of the orders dated the 23rd day of February and the 8th March 2010.

7. In her affidavit dated the 23rd March 2010 the mother stated that both of the children have been the subject of Family Court orders for a number of years. In her absence Mrs. [ ] of Child and Family Services met with Dr. [ ] the children's pediatrician and a decision was taken that "R" be hospitalized. She complains that at no time was she given an opportunity to voice her concerns. During the hearing she was asked if she had anything to say, having just seen the order she could not "digest it", to have anything meaningful to say.

8. By Notice of Appeal dated 23rd March 2010, the Appellant, mother appealed against the decision of the Family court dated 23rd February 2010, and 8th March 2010. The notice of appeal lists nine grounds of error. It alleges that the Family Court erred in law/or in principle in making the care order:

    (1) As there was no or no proper or sufficient evidence of significant harm within the meaning of the Children's Act 1998 properly before the Family Court at the time of making the order; which is a necessary pre-condition for the making of a Care Order.

(2) As it failed and/ or refused to give any or any proper statement of the plan for the children's care contrary to section 31(2)of the Children's Act 1998;

(3) In that it failed and/or refused to give the reasons for its decision;

(4) As the order was based on the Care Order of 3 March 2009, which Care Order was spent and could not be revived;

(5) In purporting to require the Appellant to comply with the report of Dr. Brownell dated 20 January 2008 in circumstances where there was no or no proper or sufficient evidence as to how such compliance would be beneficial to the children or either of them or that such compliance was reasonably necessary more than 2 years later for the benefit of the children or either of them;

(6) In purporting to find as a fact (if it did so) that the children or one or more of them required medical treatment to cure, prevent or alleviate physical harm or suffering and that the Appellant does not provide, or refuses or is unavailable or unable to consent to services or treatment to remedy or alleviate the harm contrary to Section 3(e) of the Children Act 1998 in that there was no or no proper or sufficient evidence before the Family Court to support any such finding;

(7) In that the court failed to give any or any sufficient or appropriate weight to the law, including but not limited to the right of respect for life, of Bermuda;

(8) In circumstances where there was no genuine urgency necessitating or justifying an ex parte application by the Respondent;

(9) In circumstances where there was not genuine reason necessitating or justifying an ex parte application by the Respondent without notice to the Appellant, thus denying the Appellant an opportunity to be heard prior to an order being made that she be (summarily) committed to prison.

Background

9. There are two children of the family. The brief facts of the case were that J and R have been the subject of Family Court Care Orders for a number of years.

10. R is eight years old and has been diagnosed with cystic fibrosis since birth. She had been living with her mother for 5 ½ months preceding the application before the court.

11. R recently attended Boston Children's Hospital for a follow up appointment the report shows concerns with her weight gain and questioned if she was receiving the medical regime as prescribed. A meeting has held with mother who when questioned reportedly said that she is doing the best that she can but she is only one person.

12. J is 15 years old and resides with his foster parents with whom he has been for over 3 years and with whom he has developed a strong connection. He experienced the sudden death of his foster father in the latter quarter of 2009. His foster mother is not enjoying good health. Family Services is contemplating a temporary placement at [ ] in order to give the mother some respite.

13. The mother's evidence is that she was instructed to and attended a hearing at the family court on 3rd February 2010. Neither she nor her children J & R had any legal representation. During the course of the hearing the social worker presented her with a document called "A Care Order Review" she was not given an opportunity to read, digest, ask any questions or take any legal advice in respect of the document.

14. During the course of that hearing she learnt that it was determined that R should be hospitalized based on the recommendation of a social worker from the Department Child & Family Services following a meeting and discussions, in her absence, between the social worker and Dr. [ ] the child's pediatrician.

15. The minute of the Family Courts order of 23rd February 2010 states:-

> "*1) The court is satisfied to order a further 12 month Care Order for J and R.*
>
> *2) The Court orders that the Plan of Care dated 23rd February 2010 is to be implemented and that the mother is to comply with Dr. Brownell's report dated 20th January 2008 as per the order dated 3rd March 2009.*
>
> *3) Review on 6th July 2010 at 2:30 p.m."*

16. She says she does not know what part of Dr. [ ] report she is supposes to comply with. Further, she does not understand why she is now being ordered to comply with a report that is more than 2 years old.

17. She denies that she is "unable to confirm compliance with all the medication or twice daily use of the medical vest" in the way in which it was presented in the Care Order Review.

Court

18. In so far as the appeal of the order of the 8th March, that the Appellant should deliver up F's medical vest or be held in contempt of court and be imprisoned for seven (7) days if she fails to comply is concerned, Counsel for the Respondent accepts that the court acted in excess of jurisdiction; and that the order should be set aside as this order was made ex-parte without any notice to the Appellant. The terms of the order have been complied with. Nevertheless, the Appellant is seeking the courts guidance for the future as to the circumstance in which the Respondent can properly apply to the Family Court "in secret for an order" in respect of her and or her children.

19. There is no need for the court to set aside the order of 8th March 2010 as the Respondent conceded the Order cannot stand. However, in so far as guidance is concerned a court errs in law if it makes an order which exposes a person to the risk of imprisonment for failure to comply with an order when that person was given no notification that such an application was being made, and without the opportunity of being heard. Contempt of Court proceedings is governed by the Administration of Justice (Contempt of Court) Act 1979. By section 5 of this Act failure to comply with an order of the Court is contemptuous and this disobedience or failure to comply may result in the person being arrested and brought before the Court and being exposed to the risk of incarceration for the breach. In my judgment the provision of the 1979 Act must be followed before exposing a person to incarceration for contempt.

20. Each ground of the nine grounds of appeal complains of errors of law. It is implicit the grounds as formulated that it is being contended that the errors of law made by the court resulted in the care orders being made consequently the care order of the 21st February 2010, should be set aside. On the face of the record some of the criticisms of errors are unanswerable. For example in ground (3) it is contended that the Family Court failed to give the reasons for its decision; and ground (9), there was no genuine reason necessitating or justifying an ex parte application thus denying the Appellant an opportunity to be heard prior to an order being made that she be (summarily) committed to prison.

21. In my judgment it is implicit in the grounds of complaint as formulated that it is being contended that, based on the evidence before it, the court could not be reasonably satisfied that J and R were likely to suffer significant harm if returned to the mother's care. The Learned Magistrate gave no reason for the Court's decision to put J in the care of a group home and thereafter return him to his foster parent; nor did he give reasons for making a Care Order in respect of R. The overriding question, in my view, goes to the mother's capacity to parent these children and the likelihood that they would suffer significant harm while in her care.

Counsel for the Appellant's Submissions

22. Counsel for the Appellant submitted that the relationship between the mother and the Child Care Officer has improved and they are now having meaningful dialogue.

23. Mr. Harshaw stressed that this is not an academic appeal as it deals with the principle namely, the right to separate children from families pursuant to section 25 of the Children's Act. From 3rd September 2009 to 23rd February 2010 no care order was in place and no explanation was before the court why a care order was now needed, while nothing had been in place for the prior 5½ months.

24. Section 25 (2) stipulates that the court may only make a care order or supervision order if it is satisfied that the child concerned is suffering, or is likely to suffer significant harm. To establish harm, the court ought to have before it sworn evidence in order to satisfy itself. Counsel referred to the House of Lords decision in the case of *Re H and others [1996] 1 ALL ER 1* where, Lord Nicholls addressed the standard of proof required in family proceedings, having regard to the expression "likely to suffer significant harm" which appears in the English Act, as it does in the Bermuda Act. Having referred to the fact that the power of the court to make a care or supervision order only arises if that court is 'satisfied' that the criteria stated in the section exists, Lord Nicholls carried on to say (page 16)

> "*The expression 'if the court is satisfied', here and elsewhere in the Act, envisages that the court must be judicially satisfied on proper material. There is also inherent in the expression an indication of the need for the subject matter to be affirmatively proved. If the court is left in a state of indecision the matter has not been established to the level or standard, needed for the court to be 'satisfied'.*
>
> *To my mind the use of the words, "judicially satisfied on proper material" means satisfied on the basis of sworn evidence. It was urged upon me that the proceedings in the Family Court are necessarily more informal than in other courts. And I do accept that too great a level of formality may be inappropriate in cases where the court is striving for consensus in a non-contentious matter. But cases concerning the removal of children from their home will likely always be contentious, and in such cases the evidence given to the court should always be sworn evidence. As Lord Nicholls carried on to say in Re H.*
>
> *Family proceedings remain essentially a form of civil proceedings. Family proceedings often raise very serious issues, but so do other forms of civil proceedings.*
>
> *It does also seem to me that having witnesses give their evidence on oath, with an opportunity for cross-examination and re-*

examination would help to bring some form of structure to the proceedings, which the notes, particularly those in respect of some of the later hearings, suggest has not been present."

25. Mr. Harshaw argued *inter alia* that a care order can only be made where the child concerned is suffering, or is likely to suffer, significant harm and that harm or likelihood thereof is attributable to the care given or expected to be given by the parent. In summarizing the current position in relation to each of the children at page 3 of the Care Order Review, there is no suggestion of harm in relation to JF at all. There is discussion as to his current circumstances in foster care, but no reason put forward at all as to why he cannot return to live with his mother.

26. As regards R the Care Order Review reiterates that she has been living with mother for over one year. The Review notes that that mother accompanies R to Boston Children's Hospital for observation when no one from the Respondent's Department is available to accompany her. This situation is entirely inconsistent with any significant harm or threat of harm.

27. Mr. Harshaw said that the Review mentions that mother is 'unable to confirm compliance with all the medication or twice daily use of the medical vest' but the meaning of this observation is unclear.

28. Section 3 of the Act provides the meaning of significant harm and there must be credible evidence, properly admissible and admitted of significant physical or emotional injury to the child, simply not being satisfied with or having doubts or concerns about the care provided is not enough.

29. Mr. Harshaw maintained that even if the court is satisfied that the two part test under section 25 has been satisfied and proper account has been taken of the matters set out in section 24, before the court can go on to make a Care Order or Supervision order it must obtain and consider a plan for the child's care prepared by the Director in accordance with section 31 of the Act. Mr. Harshaw complains that the care plan did not properly comply with the requirement. The Learned Magistrate had a duty not only to the mother but also to the children who were entitled to early determination of their future plan. Additionally, even if Section 31 is properly complied with, the court is still not in a position to make a Care Order (or Supervision Order) because the court must also give reasons for its decision including a statement of the evidence on which the court bases its decision and where the order has the effect of removing or keeping the child from the care or custody of the parent, a statement of the reasons why the child cannot adequately be protected while in the care or custody of the parent and state the date of the order.

30. Again, on the face of the record this is another complaint that is unanswerable. Section 31 of the Act requires the Court to consider a plan of care for the child before making a care order.

31. Section 31(2)(b)(i) and (ii) require the court to give reasons for its decision; and where the order has the effect of removing or keeping a child from the care or custody of the parent, a statement of the reason why the child cannot be adequately protected while in the care or custody of the parent.

32. In section 31(2) Parliament has stated the prerequisites which must exist before the court has power to make a care order. These prerequisites mark the boundary line drawn by Parliament between the differing interests. On one side are the interest of parents in caring for their own child, a course which prima facie is also in the interest of the child. On the other side there will be circumstances in which the interest of the child may dictate a need for his care to be entrusted to others. In s 31(2) Parliament has stated the minimum conditions which must be present before the court can look more widely at all the circumstances and decide whether the child's welfare requires that a local authority shall receive the child into its care and have parental responsibility for him. The court must be satisfied that the child is already suffering significant harm. Or the court must be satisfied that, looking ahead, although the child may not yet be suffering such harm, he or she is likely to do so in the future. The court may make a care order if, but only if, it is satisfied in one or other of these respects.

33. I think there is force in this submission. It is vitally important for a court dealing with this matter to give reason for their decision; this was not complied with and rendered the Family Court in breach of this requirement – plainly an error of law.

The Respondent's Submissions

34. Mr. Rochester on behalf of the Respondent argued that regard must be had to the welfare principle prescribed by section 6 of the Act which commends that in the administration and interpretation of the 1998 Act the welfare of the child shall be given paramount consideration. While not openly accepting that there were technical breaches he called on the court to dismiss the appeal as there has been no miscarriage or substantial miscarriage of justice. He relied on the authority of *A.W. – v – Director of Child and Family Services, Appellate Jurisdiction 2008: No 16* where at paragraph 58 Justice Bell relied on the approach of Kawaley J when considering Appeals from the Family Court under the terms of the Appeal Act and the effect of the section 18(1) proviso of the Appeals Act on such appeals.

35. Section 18(1) in part reads:

> "*...provided that the Supreme Court, notwithstanding that it is of opinion that any point raised in the appeal might be decided in favour of the appellant, may dismiss the appeal if it appears to the Court that no*

substantial miscarriage of justice in fact occurred in connection with the criminal proceeding before the court of summary jurisdiction."

36. Kawaley J found that Section 18 of the 1998 Childrens's Act clearly applies to appeals such as the case at Bar. It confers the same rights of appeal, to persons dissatisfied with Family Court decisions made pursuant to the 1998 Act, as persons convicted of a criminal offence by the Magistrates Court. References to "criminal proceeding" must be read as reference to civil proceedings and reference to sentence on conviction read as "order" Therefore, the Supreme Court may apply the proviso in a Family Court Appeal, as it would in a Criminal appeal from a Magistrates' Court, and dismiss the appeal were it to satisfied that "no substantial miscarriage of justice occurred". Always, regard must be had to the provision of section 6 of the 1998 Act, and the requirement that the child's welfare should be the paramount consideration. Consequently in the appellate context it would seem that "the circumstances will be rare where a decision which is not clearly inconsistent with the interests of the child and /or not fundamentally flawed will be interfered with by the Court."

37. Mr. Rochester refereed to remarks made by former Chief Justice Sir Austin Ward, JA that the advancement of technical points should not be encouraged where the result would be to provide more delay (and distraction) and would defeat the ends of justice (*Royal Gazette* 23rd June 2010, page 23).

38. Mr. Rochester continued, the Family Court at Bar acted properly and in accordance with the provisions of the Children Act 1998 to protect the children J and R from harm and to ensure their welfare as it is statutory responsibility of the Director under the Act for all children under the age of 18 years. The purpose of the Act is to protect children from harm, to promote integrity of the family and to ensure the welfare of the children.

39. The order of the 23rd February 2010, ordered a 12 month Care Order for the 2 children; that the plan of care is to be implemented, and that the mother needs to comply with Dr. [ ] report dated 20th January 2008 as per the order dated 3rd March 2009. To date there is no evidence that the Appellant has complied with that order.

40. The Order of 23rd 2010 also makes reference to two other comprehensive reports dated 31st August, 2007 and 3rd March 2008. These are attached in the Bundle.
    - The Final Report – Pulmonary Clinic Note 015 – F. R. -223-27-44.
    - The Family Centre Report 15th February, 2010.
    - Edgewood Pediatric Services 03/08/2010.
    - Order dated 8th March 2010.
    - Children's Hospital Boston 30th December 2008
    - Medication Summary R. F. – Cystic Fibrosis
    - Peoples Pharmacy Patient IRS Statement March 2010 (Period 04/01/09 to 03/26/10)

41. Therefore the granting of the said Orders was made after the court considered the weight of the evidence before it. Mr. Rochester further submitted that the grounds of the Order were made pursuant to section 31 of the Act; the Court shall, before making a Care Order … obtain and consider a plan for the child's care prepared in writing by the Director.

42. Section 31 of the Act was complied with as a plan of care was before the Court. The evidence shows that the Appellant assigned the plan of care acknowledged by her handwriting thereon. The children were lawfully removed from the Appellant.

43. Mr. Rochester continues, the vest plays a critical and vital role in R's ongoing treatment for her cystic fibrosis. That is evident from the facts of her local pediatrician. The vest was a medical requirement and at the time it was requested we submit that the Appellant was unreasonable in retaining it – thereby adversely her daughter R's welfare. There is a history of inappropriate parenting which lead to the original order being made in the first place and both children were then and now removed lawfully from the Appellant. There is no evidence before the court of wrongful removal.

44. It is incontestable that the Family Court had before it some five reports from social workers, doctors, team leaders, counselors and specialist of the Family Centre which reports clearly and comprehensively detail the acute concern in all those involved in R's physical, emotional, medical and intellectual welfare. Therefore it is our submission that this appeal should be dismissed.

The Court

45. The first limb of section 31(2)(a) predicates an existing state of affairs: that the child is suffering significant harm. The relevant time for this purpose is the date of the care order application or, if temporary protective arrangements have been continuously in place from an earlier date, the date when those arrangements were initiated. This was decided in *Re M (a minor) (care order: threshold conditions)[1994] 3 All ER 298 [1994]2 AC 424*. Whether at that time the child was suffering significant harm is an issue to be decided by the court on the basis of the facts admitted or proved before it. The balance of the probability standard applied to proof of the facts.

46. The same approach applies to the second limb of section 31(2)(a). This is concerned with evaluating the risk of something happening in the future: yes or no, is there a real possibility that the child will suffer significant harm? Having heard and considered the evidence, and decided any disputed questions of relevant fact upon the balance of probability, the court must reach a decision on how highly it evaluates the risk of significant harm befalling the child, always remembering upon whom the burden of proof rest.

47. In my view I agree with this analysis. The overriding question goes to the mother's capacity to parent these children. Could the Judge be reasonably satisfied that J and R were likely to suffer significant harm if returned to the mother's care? The learned Magistrate gave no reason for his decision to put R in the care of group home. This failure could put the reviewing tribunal in a difficult position as it deprives this court of significant assessment as to how the decision is reached. It is also an abandonment of the duty required by section 21 of the Summary Jurisdiction Act 1930, namely that the reason for the decision be provided.

48. The overriding question goes to the mother's capacity to parent these children. Could the Judge be reasonably satisfied that J and R were likely to suffer significant harm if returned to the mother's care? The Learned Magistrate gave no reason for his decision to make a care order.

49. It is vitally important for the court dealing with this type of matter to give reason for its decision. It is worth repeating that this failure would put the reviewing tribunal in a difficult position as it deprives it of significant assessment as to how the decision is reached.

50. Was the court able to evaluate the risk of something happening in the future: is there a real possibility that the child or children would suffer significant harm?

51. These two young children were before the court for a care order. The court had a number of reports before it. Section 31 of the 1998 Act required the Court to consider a care plan. This was complied with as there was a plan of care prepared in writing and presented to the court by the Director.

52. In evaluating the risk of something happening in the future the Court had the reports enumerated in paragraph 40 above.

53. Based on the evidence before the Court it concluded that a further 12 weeks care order for J and R was appropriate.

54. It is clear that based on the history the Court made a finding that the care order sought by the Director was appropriate. The burden of proving the criteria pursuant to section 31(2) lies on the Director.

55. The Director presented revised material upon which it sought to persuade the Court that the threshold criteria were met.

56. Based on this evidence the Court made the order but without stating the reasons for its decision.

57. In my judgment, the Learned Magistrate was entitled on the evidence presented to the court to find that the care order should be made.

58. The seed for a complaint was planted when the court gave no reason for its decision. The Family Court has had conduct of the matter for a number of years based on the material before the Learned Magistrate it is beyond dispute that the making of the care order was in the best interest of the children. For the above reasons, I would apply the proviso and dismiss the appeal against the care order and encourage the Director to strictly adhere to the provision of section 31 of the 1998 Act in the future.

59. In so far as the Learned Magistrate's failure to comply with the requirement of section 21 of the Summary Jurisdiction Act and did not have a written judgment I would seek to persuade the Magistrates in future always to give written reasons for their decisions. As there was no substantial miscarriage of justice I apply the proviso to this defect and dismiss the appeal.

60. I purpose to make no orders as to cost of this appeal unless Counsel seeks to persuade me otherwise.

Handed down on 15th July 2011.

Corrected on 3rd August 2011.

WADE-MILLER, J