



Neutral Citation Number: [2020] EWCA Civ 763

Case No: B4/2020/0783

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE CENTRAL FAMILY COURT
Her Honour Judge Caroline Wright
ZC19C00732

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16 June 2020

Before :

LORD JUSTICE PETER JACKSON
and
LORD JUSTICE MALES

Re S (Vulnerable Parent: Intermediary)

Anne-Marie Glover (instructed by **Hudgell & Partners**) for the **Appellant Mother**
The Local Authority, the Father and the Children's Guardian did not take part in the appeal

Hearing date: 11 June 2020

Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be at 10:30am on Tuesday, 16 June 2020.

Lord Justice Peter Jackson:

1. This is an appeal from a case management decision in care proceedings refusing an application by a parent with a learning disability for an intermediary assessment and the appointment of an intermediary. It particularly concerns the position of vulnerable individuals taking part in remote or semi-remote ('hybrid') hearings.
2. The background is that the appellant mother, who is in her 30s, has three children. Two of them are in long term foster care. The third, T, was born in November 2019 and is the subject of these proceedings. T has lived with her mother since birth in a mother and baby foster placement under an interim care order. Following assessments, the local authority's care plan is for separation and adoption. The mother opposes this and wishes to care for her daughter in the community with support from professionals and her family and friends. The final hearing will take place between 6 and 8 July before Her Honour Judge Caroline Wright, who has had conduct of the proceedings throughout. There will be a further case management hearing on 25 June to settle the practical arrangements for the hearing.
3. The papers in the local authority's application already run to over 500 pages. The witnesses will include T's social worker, an independent social worker (Ms W) who carried out a parenting assessment and reported on 1 April, and perhaps a psychologist (Dr Hale) who assessed the mother in January. Their recommendations, reflected in a professionals' meeting on 30 April, do not support T remaining in her mother's care. The Guardian's final report is awaited, but she is likely to concur with the professional consensus.
4. The mother has a learning disability. Her capacity to develop her parenting skills and to provide good enough care for T is a central issue in the case. She has also historically experienced depression.
5. There have been two recent psychological assessments. In July 2019, before T was born, the mother was assessed by Mr Mike Crimes. He found her Full Scale IQ to be 65, which is in the extremely low range of cognitive functioning. It places her in the 1st percentile, meaning that 99% of her age group would score more highly. The report indicates that visual and concrete cues are necessary to enable her to understand communication and that her working memory and processing speed affect the amount of information she can be expected to retain and act on, and the time she needs for doing so.
6. In January 2020, a full psychological assessment was carried out by Dr Andrew Hale. Consistently with the advice given by Mr Crimes, his assessment makes these recommendations:

“9.2 The following would prove necessary in terms of providing information to [the mother]:

- a) Ensure that any questions put to [her] use her vocabulary. She is likely to misunderstand a question if it is put to her using a more sophisticated vocabulary or more complex sentence structure (she confirmed this to me in interview).

b) Any questions should be kept brief, preferably no more than about 20 words or so, and should only contain one question at a time.

c) Leading questions should be avoided. Open questions are preferable to closed questions [for example can you tell us what happened next is preferable to and then you did x, is that correct?]

cl) More abstract questions should be avoided as far as possible.

e) It should be made clear to [her] that she must indicate to the court if she does not understand a question put to her; she should be made to feel that she can speak up if she does not understand something.

f) It should also be made clear to [her] that she does not have to give an answer if she is unable; it is important that she be made to feel that it is acceptable if she does not know the answer to a question that is put to her.

3) I would recommend that [she] not be questioned for any great length of time, say no more than 20 minutes at a time; her concentration and reasoning abilities are likely to diminish more rapidly than most adults and there would be an increased risk that she might give less reliable evidence.”

7. Having received the parenting assessment of Ms W, the mother’s lawyers considered that their client might require the support of an intermediary. On 22 April, they asked Dr Hale to advise. He replied on 28 April in these terms:

“Having read the report of [Ms W] (1st April 2020 – Independent Social Worker), it is my opinion that [the mother] would benefit from, and require the assistance of an intermediary at the Issue Resolution Hearing. This is on the basis of the cognitive assessment previously carried out by Mike Crimes (dated 22nd July 2019) in which her FSIQ was measured as extremely low, verbal comprehension - borderline, perceptual reasoning - borderline, working memory - extremely low, processing speed - extremely low. It is also based on my observations of her at the interview on the 8th January 2020 in which she appeared slow, and required additional clarification around relatively straightforward questions. I would also draw attention to my recommendations relating to the presentation of information to [the mother] delineated in my report. ...

Obviously, an Intermediary would not be there to answer on her behalf but to assist her in the overall process of understanding etc. In addition, it will likely be useful for her to

have regular breaks during questioning in order to reduce levels of anxiety that may otherwise impinge on her concentration.”

8. On 4 May, the mother’s solicitors issued an application for an intermediary assessment to be carried out and for an intermediary to be appointed. An experienced registered intermediary was identified and her CV was appended. It was proposed that the intermediary would meet the mother with appropriate social distancing, as had been the case with the ISW. The assessment report, which would cost £640, would be available in two weeks. We were told that if the intermediary attended the remaining hearings, the total costs, including the assessment report, would be in the region of £2500.
9. The application was considered at the Issues Resolution Hearing on 6 May. Ms Anne-Marie Glover, who represented the mother then as now, provided a position statement that addressed the issue in detail. She referred to the relevant Rules and Practice Direction and submitted that the mother falls squarely within the class of persons who are vulnerable. She argued that, given the draconian nature of the orders sought and the range of material to be considered and tested during the final hearing, there is a heightened need to ensure that the mother’s vulnerabilities do not impinge on the quality of her evidence or on her broader participation in the proceedings.
10. The other parties were neutral in relation to the application.
11. The judge’s order contemplates that there will be a hybrid final hearing, with the mother and her representatives attending court, other evidence being given remotely, and with some or all of the other advocates appearing remotely. The detailed arrangements remain to be settled at the pre-trial review on 25 June. The judge gave participation directions in accordance with Dr Hale’s substantive report but she refused the application for an intermediary assessment and appointment.
12. The decision was given in a careful extempore judgement in which the judge reviewed the legal framework and stated her conclusion in this way:

“9. In reaching my decision on this application I have taken into account the following:

a. This is an application for a Care Order, given the Local Authority's final statement and Care Plan, it is likely, subject to approval by ADM, that it will also seek a Placement Order. This is a Draconian order. The Local Authority is likely to seek separation of the child from her family, and for T to be placed for adoption.

b. Within these proceedings the Mother has been assessed by Mr Crimes, Dr Hale and Ms W, an independent social worker; she has been subject to ongoing assessment by the allocated social worker and the Guardian.

c. The professionals met last week and have reached a consensus view that it will be impossible for the Mother to care for T safely. This is due to a combination of her cognitive

functioning, her background and lack of insight. The professionals agree that the Mother could not care for a child safely, the child would need another person to have parental responsibility, and the Mother would need to be in a secondary role. There is no one who can provide that primary carer role for T in the Mother's family.

d. This is an Issues Resolution Hearing. Dr Hale did not recommend an intermediary assessment in his report, but set out a number of participation directions that could be put in place to enable the Mother to participate appropriately when giving evidence. Dr Hale attended the professionals meeting and agreed with them as to the longer-term prospects for T given his own assessment of Mother.

e. There is no issue of capacity in this case. The Mother has filed a statement, and is able to give instructions, she has been able to participate within the proceedings to date.

f. The mother has not yet responded to the Local Authority final statement and Care Plan. The professionals meeting has only just taken place. Although there are long-term concerns about the mother's ability to care for T, at present, given the mother and T are in a mother and baby foster placement, the Local Authority is satisfied that T's safety and needs are not compromised.

g. It is unclear as to whether and to what extent the Mother will challenge the consensus of professional opinion. It is unclear as to what alternative plan, if appropriate, the Mother will put forward at this stage.

h. The mother will need to respond to the Local Authority's evidence and the professional consensus. The Mother has given instructions to her solicitors about a potential way forward, and the Local Authority has agreed to carry out a viability assessment of [a relative].

i. Given the current restrictions in relation to health and safety, I have indicated to the parties that the case can be listed for a hybrid final hearing, with the Mother and her representative attending in person, and other professionals attending remotely if they wish to do so.

10. I am satisfied that the Mother is a vulnerable party. I am satisfied that participation directions as suggested and recommended by Dr Hale in his original report are necessary and appropriate. The mother is represented, there is no issue as to her capacity, she has filed a statement, participated in assessments, and is able to give instructions. The mother has attended court, and can attend the final hearing in person with

her representative. The mother is able to give instructions concerning cross-examination of witnesses, and provide instructions on the evidence.

11. The Mother will file a statement in response to the Local Authority final evidence, Care Plan and likely application for a Placement Order. In the event the Mother is cross-examined, the cross examination will take place in accordance with the recommendations made by Dr Hale, specifically the participation directions suggested. Although I accept the final hearing is likely to be distressing for the Mother, I do not consider an intermediary will assist or is necessary to reduce such distress; the intermediary's purpose is not to provide emotional support but rather to assist with communication difficulties.

12. In all the circumstances I have concluded that an intermediary assessment is not necessary or proportionate, and I refuse the application. I will, however, make the participation directions as recommended by Dr Hale.

13. I am satisfied that the Mother has capacity to give instructions, and has been able to participate in the assessments directed. I am satisfied with appropriate safeguards, the participation directions suggested by Dr Hale, in particular concerning regular breaks, the use of clear and simple language, the Mother will be able to participate appropriately in the proceedings without the assistance of an intermediary. I note that [while] Dr Hale made specific recommendations in his report as to how the Mother could give evidence, he has not recommended that the mother will need an intermediary to participate within the proceedings.”

13. On 12 May, Ms Glover sought clarification of the extent to which the court had considered the distinction between the conduct of an ‘in court’ hearing and a hybrid hearing and the potential for the latter to require greater or different intermediary support. The judge replied that that issue did not justify reconsideration of the refusal of an intermediary assessment.
14. On 20 May, Ms Glover made a written application for permission to appeal, citing the grounds now advanced to us. The judge refused permission to appeal in a fully reasoned decision. The mother applied to this court and permission to appeal was granted by Lady Justice King.
15. The fair trial rights in family proceedings of vulnerable individuals are protected by the rules of court. Part 3A and PD3AA of the Family Procedure Rules 2010, entitled ‘Vulnerable Persons: Participation in Proceedings and Giving Evidence’ provide a specific structure designed to give effective access to the court and to ensure a fair trial for those people who fall into the category of vulnerable witness: *Re N (A Child)* [2019] EWCA Civ 1997; [2019] 4 WLR 154 per King LJ at [51]. In that case, the

absence of an intermediary for a mother who needed one led to a fact-finding decision being set aside.

16. The rules require the court to ask itself these questions:
 - (1) Is a party or a witness a vulnerable person, having regard to the matters set out in Rule 3A7 and PD3AA? – *Rule 3A.3.*
 - (2) Is a party’s participation in the proceedings (other than by way of giving evidence) likely to be diminished by reason of vulnerability and, if so, is it necessary to make one or more participation directions? – *Rule 3A.4.*
 - (3) Is the quality of evidence given by a party or witness likely to be diminished by reason of vulnerability and, if so, is it necessary to make one or more participation directions? – *Rule 3A.5.*
17. Participation directions are defined as (a) a general case management direction made for the purpose of assisting a witness or party to give evidence or participate in proceedings; or (b) a direction that a witness or party should have the assistance of one or more of the measures in rule 3A.8; those measures include the provision of screens, remote links, and intermediaries: – *Rule 3A.1.*
18. A participation direction may provide for a party or witness to participate in proceedings with the assistance of an intermediary or provide for a party or witness to be questioned in court with the assistance of an intermediary: *Rule 3A(1)(d) and (e).*
19. By *Rule 3A.1* an intermediary is a person whose function is to –
 - “(a) communicate questions put to a witness or party;
 - (b) communicate to any person asking such questions the answers given by the witness or party in reply to them; and
 - (c) explain such questions or answers so far as is necessary to enable them to be understood by the witness or party or by the person asking such questions.”
20. *Rule 3A.7* states that the matters that the court must have regard to when deciding whether to make participation directions include:
 - “(a) the impact of any actual or perceived intimidation, including any behaviour towards the party or witness on the part of—
 - (i) any other party or other witness to the proceedings or members of the family or associates of that other party or other witness; or
 - (ii) any members of the family of the party or witness;
 - (b) whether the party or witness—

- (i) suffers from mental disorder or otherwise has a significant impairment of intelligence or social functioning;
 - (ii) has a physical disability or suffers from a physical disorder; or
 - (iii) is undergoing medical treatment;
- (c) the nature and extent of the information before the court;
 - (d) the issues arising in the proceedings including (but not limited to) any concerns arising in relation to abuse;
 - (e) whether a matter is contentious;
 - (f) the age, maturity and understanding of the party or witness;
 - (g) the social and cultural background and ethnic origins of the party or witness;
 - (h) the domestic circumstances and religious beliefs of the party or witness;
 - (i) any questions which the court is putting or causing to be put to a witness in accordance with section 31G(6) of the 1984 Act;
 - (j) any characteristic of the party or witness which is relevant to the participation direction which may be made;
 - (k) whether any measure is available to the court;
 - (l) the costs of any available measure; and
 - (m) any other matter set out in Practice Direction 3AA.”
21. Guidance at *PD3AA 3.1* provides that when addressing the question of vulnerability, the court should consider the ability of the party or witness to -
- “a) understand the proceedings, and their role in them, when in court;
 - b) put their views to the court;
 - c) instruct their representative/s before, during and after the hearing; and
 - d) attend the hearing without significant distress.”

The Practice Direction also provides for a ground rules hearing to take place whenever a vulnerable party or witness is to give evidence, and it specifies the matters to be considered at that hearing.

22. The Rule and the Practice Direction also make provision for protected parties, namely those that lack legal capacity.
23. On behalf of the mother, Ms Glover advanced the appeal on three grounds:
 - (1) The court failed to apply the correct test by confusing the status of a vulnerable party with that of a protected party.
 - (2) The court impermissibly disregarded the opinion of Dr Hale.
 - (3) The Judge's evaluative process was wrong and she reached a decision that was not open to her.
24. I do not accept the first ground of appeal. The judge carefully directed herself in relation to the legal framework for her decision. She did not 'focus on' capacity, as is claimed. She referred more than once to the fact that the mother is not a protected party and does not lack capacity, but she did not treat that as a test, still less the test, that she had to apply.
25. The second ground of appeal does not in my view add much to the third and main ground. True it is that the judge went against the advice of Dr Hale, but that advice was not particularised and it did not relate to a matter that was distinctively within the specialist province of the expert. I accept that the judge was not on strong ground in diluting the strength of Dr Hales advice by referring to the fact that he had not recommended an intermediary earlier, but the real complaint in this case is that her reasons for refusing the application were insufficient, and it is to that matter that I now turn.
26. It is central to my consideration of this appeal that there is to be a hybrid hearing in this case. The hearing will involve quite complex information being considered through more than one medium of communication. Professionals who are having to adapt to these demands have the advantage of repeated exposure to a range of possible formats. Lay parties do not generally have that advantage, but it is to their needs that the court must adapt. Where a party or a witness has a learning disability, the adaptation needs to be sufficient to ensure that they are genuinely able to participate effectively in the hearing, both in and out of the witness box.
27. A particular issue may arise where a witness with a learning disability is being questioned by an advocate who is not physically present. Even assuming that the technology works in an optimal way, the process removes many of the visual cues that are so valuable to individuals with a cognitive impairment. On 22 April 2020, the Equality and Human Rights Commission published an interim report into video hearings in the criminal justice system and their impact on effective participation by defendants who have a cognitive impairment or a mental illness. Such defendants may have difficulty retaining information, have a short attention span, be reluctant to speak up and have extreme anxiety:

“We found that video hearings can significantly impede communication and understanding for disabled people with certain impairments, such as a learning disability, autism spectrum disorders and mental health conditions.”

One of the report's recommendations to government is to consider the use of registered intermediaries to provide remote communications support to such defendants in video hearings.

28. There is of course no direct read-across between a defendant in prison and a party or witness attending court as part of a hybrid hearing. I mention the EHRC interim report only to underpin the fact that the use of remote technology has additional implications for parties and witnesses with a learning disability. Being questioned by someone whose face appears on a screen is not the same as face-to-face conversation and the demands of following a hearing in more than one medium inevitably adds to any existing difficulties in understanding what is being said.
29. In the present case, the mother is someone who was rightly recognised by the court to be vulnerable. She shares a number of characteristics of the subjects of the EHRC report. The judge's conclusion that participation measures did not require the involvement of an intermediary is one that might or might not have been sustainable ahead of a conventional face-to-face hearing, but I do not consider that she sufficiently addressed the additional factors to which a hybrid hearing will give rise. Her decision does not take any account of this factor and on that basis I consider she fell into error. It was, I think, necessary to step back from the detail of the rules and look carefully at the likely experience of this vulnerable parent, attending a hearing in what is for her a complex format with the prospect of the removal of her baby hanging over her. An intermediary can help her to negotiate the process of being questioned remotely and to participate in the hearing to the fullest possible extent. This is support with communication, and not just emotional support, but if it also gives emotional support, all well and good.
30. We are unfortunately disagreeing with a careful and conscientious case management decision, but it seems to me that the difficulty arose because the application for the intermediary was not considered in the context of the arrangements for the hearing, which are not to be finally settled until 25 June. By refusing the application for an intermediary assessment, the judge deprived herself of the advice of the intermediary about any issues that may need to be addressed. She might have deferred a decision about the intermediary's attendance at the trial until she had seen the assessment, but she was I think wrong to have refused to allow the assessment in the light of all the circumstances, including the advice of Dr Hale. I would therefore set aside her decision.
31. As to what order this court should make, the priority must be to ensure that the upcoming hearing is effective and fair. I am satisfied that the criteria for the appointment of an intermediary are met and, as time does not allow for the process to be taken in stages, would make an order in the following terms:

“The registered intermediary, [as named], shall:

1. Interview the Appellant and provide an assessment report in relation to her need for an intermediary no later than 4 pm on 24 June 2020;
2. Participate remotely in the hearing on 25 June 2020 to speak to her recommendations;

3. (Subject to any different order made at the hearing on 25 June) attend the final hearing on 6-8 July 2020 in person in order to assist the Appellant to participate in the proceedings and give her evidence.”
32. I would end by emphasising that the outcome of this appeal does not imply that all parties or witnesses with a similar profile to this mother will require an intermediary, or that intermediaries are likely to be required in all cases where a parent with a learning difficulty may be taking part in a remote or hybrid hearing. All decisions of this kind are case-specific, and must be reached by applying the rules and guidance to the actual circumstances of the individual case.

Lord Justice Males:

33. I agree.
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