



Neutral Citation Number: [2021] EWCA Civ 806

Case No: B4/2021/0767

**IN THE COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM THE FAMILY COURT AT DERBY**  
**Her Honour Judge Williscroft**  
**DE20C00299**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 28 May 2021

**Before :**

**LORD JUSTICE PETER JACKSON**  
**LADY JUSTICE SIMLER**  
and  
**LORD JUSTICE PHILLIPS**

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**M (Children: Applications by Email)**  
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**Karen Kabweru-Namulemu** (instructed by **Eddowes Waldron Solicitors**) for the **Appellant Mother**

**William Horwood** (instructed by **Derby City Council**) for the **Respondent Local Authority**

**Nicholas Howell-Jones** (instructed by **Bhatia Best Solicitors**) for the **Respondent Father 2**

**Kathryn Moran** (instructed by **Timms Solicitors**) for the **Respondent Children by their Children's Guardian**

and (by written submissions only)

**Deborah Seitler** (instructed by **Cartwright King Solicitors**) for the **Respondent Father 1**

**Anne Williams** (instructed by **Elliot Mather Solicitors**) for the **Respondent Uncle and Aunt**

Hearing date : 25 May 2021  
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**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 Friday, 28 May 2021.

**Lord Justice Peter Jackson:**

1. This is a case management appeal arising from an order made by Her Honour Judge Williscroft on 14 April 2021, by which she discharged a direction that a psychological report was to be prepared in relation to the Appellant mother. At the end of the hearing we informed the parties that the appeal would be allowed and that the direction would be reinstated, allowing further time for it to be complied with.
2. The judge’s order was made in a rapid exchange of email correspondence. The appeal illustrates the problems that can arise when this convenient but relatively informal means of communication is used as a means of making applications and orders.
3. The case concerns four young children who have not been cared for by their mother since last year. The eldest child, who is now 5, moved to a maternal uncle and aunt in January 2020 and the younger three followed in August 2020. The local authority started proceedings in September 2020. The main issue is whether the children can return to their mother or whether they should remain with their uncle and aunt. If the latter, the further question is what the mother’s role in their lives should be.
4. The mother has extremely low cognitive functioning and difficulties with reading and retaining information. A cognitive assessment on 30 November 2020 assessed her memory, reading level and comprehension skills at the 9-year-old level. She has been assigned an advocate to support her and she has the benefit of an intermediary in these proceedings.
5. In the light of the cognitive assessment, the local authority issued an application on form C2 seeking a psychological assessment. The application was carefully presented, with a statement in support and a draft letter of instruction. The statement explained in detail why the assessment was required, concluding:

“38. Bearing in mind [the mother]’s history, her cognitive functioning, her mental health, the parents relationship history, and domestic violence between them, the Local Authority is of the view that an expert assessment of [the mother] is not only necessary but essential in order to assist both the parties and the Court in planning for the future care of the children. The information provided by the expert will not only assist in identifying the appropriate long-term placement for the children but will also assist in identifying appropriate input and support to ensure that their needs can be addressed, and any placement can be sustained.”
6. On 21 December 2020, the application came before the court at a case management hearing. It was heard by District Judge Gillespie, to whom the case is allocated and who had conducted the first directions hearing in November. She granted the application without opposition and fixed the Issues Resolution Hearing before herself on 21 May 2021 (putting it back from March because of the psychological assessment). The named expert, Dr D, was to report by 15 April 2021 and appropriate directions were given for the letter of instruction to be sent by the children’s solicitor in January, for the disclosure of the case papers, and for Dr D’s fee. The report was said to be

‘necessary’ to assist the court to resolve the proceedings (as is required by Section 13 (6) Children & Families Act 2014) because:

“1. The mother has a history of repeatedly engaging in relationships featuring domestic violence.

2. The children may remain in family placements and the impact of the mother’s psychological functioning on her parenting will impact on her ongoing relationships with the children.”

7. The case management order was also concerned with a number of other issues. It included the following standard direction, which speaks for itself:

“Compliance warnings

All parties must immediately inform the allocated judge as soon as they become aware that any direction given by the court cannot be complied with and to seek in advance an extension of time to comply.”

8. There were other standard orders in these terms:

“20. Any application to vary this or any other order is to be made to the allocated judge on notice to all parties.”

“21. An application to vary this or any other order may be made by email to the allocated judge provided the party seeking variation seeks the prior agreement of the other parties and when seeking the variation must submit a draft order and confirm whether:

- a. the proposed variation is agreed; and, if so
- b. to what extent the proposed variation would affect the timetable for the proceedings.”

These orders allowed for applications to be made by email, but they had to be made (a) to the allocated judge, and (b) accompanied by information about the position of the other parties. The reference to an application to vary an order clearly includes an application to discharge an order.

9. Dr D was duly instructed and she offered the mother an appointment on 29 March 2021, which was accepted.
10. District Judge Gillespie made a further order administratively on 27 January 2021.
11. Up to this point, the history was unexceptional and procedurally impeccable. Unfortunately, matters then started to go wrong.
12. On 29 March, the children’s solicitor received an email from Dr D’s assistant, stating that the mother had not attended the appointment and asking whether the parties wanted her to attempt a further appointment. The children’s solicitor circulated this email to

the other parties immediately, asking whether the parties were agreeable to a further appointment being offered and asking the mother's solicitors to find out why the mother had not attended.

13. The mother's solicitors replied on 30 March. Their instructions were that the mother had forgotten about the appointment and that she would like it to be rearranged if possible. The children's solicitor responded the same day saying that she would ask about a further appointment and whether the missed appointment would impact on Dr D's filing date of 15 April.
14. On 31 March, Dr D contacted the mother's solicitors, offering a further appointment on 7 April and asking for early confirmation.
15. On 1 April, unbeknown to the parties' representatives at the time, the mother's mother became ill and the mother had to call the ambulance to take her to hospital, where, sadly, she died on Easter Sunday, 4 April.
16. On 7 April, the mother's solicitors wrote to Dr D, informing her that they had written to the mother and had left a voicemail message asking her to contact them, but had received no response. Dr D offered three further potential appointments on 12, 14 and 25 April. She confirmed that she would require an extension of time for filing her report if one of these appointments was to be confirmed.
17. On 9 April, the children's solicitor emailed the mother's solicitors to ask whether any updating instructions had been obtained from the mother. The mother's solicitors replied on the same day that they had not heard from the mother but had written to her and left voicemail messages.
18. On 12 April, the children's solicitor emailed all parties informing them that if contact could not be made with the mother the court should be told that Dr D's report could not be filed by 15 April. The children's solicitor also informed the parties that she intended to take instructions from the Guardian as to whether she sought the discharge of the assessment direction altogether. The mother's solicitors responded on the same day that they would continue to chase her and would inform the other parties if they received instructions.
19. At this point, the position was that the mother had failed to attend her booked appointment and had not responded to efforts to fix a replacement. The date set for Dr D's report was looming and it had been apparent for some time that it could not now be met.
20. On 13 April at 1.37 pm, the children's solicitor wrote to the other parties informing them that she was instructed by the Guardian to write to the court to seek for the direction granting permission for the instruction of Dr D to be 'vacated'. The Guardian's view was that any further delay would impact upon the timetable for the proceedings and she could not be confident as to when the mother would respond to her solicitors.
21. On 14 April at 9:48 am, the local authority wrote to the other parties, informing them that the social worker had just been notified that the children's maternal grandmother had died on 4 April, and that this may account for the mother not responding to her

solicitors. The mother's solicitors responded at 12:20 pm asking for the social worker to ask the mother to make contact with them. The children's solicitor then sent an email at 12:47 pm stating that they had already written to the court to seek the direction for the psychological assessment to be vacated and that if their client did not agree they could write to the court. In fact the letter to the court had been dictated but had not yet been sent. Nonetheless, the children's solicitor sent a further email at 1:47 pm stating that "the letter is being sent today".

22. At 3:49 pm the children's solicitor sent the dictated email in unamended form to the court, addressed "FAO HHJ Williscroft" and copied to the other parties. The email set out the history of the missed appointment and the lack of communication from the mother and it invited the court to vacate the direction for a psychological assessment. The email stated that the children's solicitor had "received no objection to the Children's Guardian's application", that a draft order was enclosed, and that the sum of £50 should be deducted from the children's solicitor's account.
23. Having received this email, the mother's solicitors immediately emailed the court at 4:04 pm referring to the recent death of the maternal grandmother and stating that this had occurred at the time they were attempting to speak with the mother about the assessment. Their last instructions were that she wished to complete the assessment and opposed the discharge of the order. They had written to offer their condolences and to urge her to contact them, but they did not wish to 'cold call' her at a very difficult time. They invited the court to fix a directions appointment to consider the timetable further.
24. Taking stock:
  - (1) There was, first and foremost, an obligation upon the mother's solicitors to bring to the court's attention a development that impacted on the timetable. The children's solicitor was observing the 'compliance order' and following good practice by engaging with the other parties about this, and in drawing it to the attention of the court before a deadline was breached.
  - (2) However, the making of an application to discharge the order was evidently a step beyond what the compliance order required. It is far from clear why the Guardian considered that the assessment as a whole should be scrapped without some better understanding of the mother's position. It is clear from the sequence of events that she formed her view before she knew of the mother's recent personal difficulties, and that she did not revise it when that information was given by the local authority. There is no information about whether or not the children's solicitor took the Guardian's further instructions about making an application after that further information came to light.
  - (3) It is in any case unfortunate that the children's solicitor's message was not amended in the light of the information that became available after it was dictated and once it became clear that the application was opposed by the mother. The message to the court did not set out these matters as it should have done. Nor did it explain that on 7 April Dr D had offered the mother another appointment on 25 April.
  - (4) Further, an application made by email must confirm whether the proposed variation is agreed. The position of the other parties (the local authority, the children's fathers

and the uncle and aunt) was not stated, if indeed it was known at all to the Guardian and the children's solicitor.

(5) By allowing requests to vary orders to be made by email, the court had used its power to dispense with the requirement for an application notice. In doing so, it had ordered that any such application was to be made to the allocated judge. We asked why this application had been made to Judge Willisroft, who is the Designated Family Judge and had had no previous dealings with the case, and not to District Judge Gillespie, the allocated judge. We were told that this is because the DFJ takes a close interest in the timetabling of cases in her area. That is as it should be, but it does not justify parties approaching a DFJ to make orders in cases allocated to other judges, unless there is some special reason why that should happen in a particular case.

25. Returning to the narrative, the judge emailed the parties at 5:05 pm (an hour after the email from the mother's solicitors was sent):

“I have granted the order. I am sorry to hear the mother's news.”

26. The order was in the form of the draft order that had been submitted:

“Upon consideration of a letter dated 14th April 2021 from [the children's solicitors]

1. The direction made on 21st December 2020 for the instruction of an expert clinical psychologist, [Dr D] to prepare an assessment of the Mother and file her report by 15th April 2021 is vacated.”

27. So it was that the assessment was cancelled on the same day that the mother's bereavement was discovered. So far as the court was concerned, the entire procedure consisted of three emails sent and received within a period of an hour and a quarter.

28. Not surprisingly, the mother's solicitors contacted the court. On 21 April, they wrote:

“Dear Judge,

We represent the First Respondent mother in the above matter.

We have been instructed that she would still wish for the expert assessment directed by this Honourable Court on 21st December 2020 to be undertaken.

The court is aware of our client's circumstances and the passing of her mother. She has confirmed it was unexpected and that this has been a difficult time for her. In light of her instructions we will need to consider the recent case management decision made by Your Honour on 14th April 2021 and advise our client as to her options.

In light of those discussions, we would be most grateful if Your Honour could provide us with her full reasons for the decision made resulting in the order dated 14th April 2021.”

29. On 23 April, the court responded:

“The judge has provided reasons as follows:

“The expert assessment was an important appointment for the Mother to attend. Forgetting is troubling as is the lack of response to queries about another appointment. I consider, difficult though her circumstances might have been, a single response to an enquiry could have been possible. As a result I cannot be confident she will now take part in the assessment and consider it should no longer proceed.””

These reasons appear to be based entirely upon the contents of the emails sent by the children’s solicitor on 14 April and the mother’s solicitor on 21 April. It is not possible to tell what other information, if any, the judge had about the case.

30. On 30 April, the mother applied for permission to appeal on a variety of grounds. On 7 May, Baker LJ granted permission to appeal on 7 May, with the following observations:

“Although this was a case management decision, the appellant has a real prospect of successfully establishing that the decision to discharge the order previously made under Part 25 was wrong and/or irregular because it was made:

- (a) summarily and without a hearing;
- (b) without a notice of application;
- (c) without giving the appellant any or any sufficient opportunity to oppose the application;
- (d) without any or any sufficient regard to her circumstances and acknowledged vulnerabilities;
- (e) without providing a judgment or sufficient reasons for the decision.”

31. On 17 May, I granted a stay of the proceedings, including of the IRH on 21 May, until the hearing of the appeal, and on 18 May I granted permission for the grounds of appeal to be amended in line with Baker LJ’s observations.

32. We received written submissions from all parties and oral submissions on behalf of the mother, the local authority and the Guardian.

33. For the mother, Miss Kabweru-Namulemu submitted that the errors in this case speak for themselves. The decision went far beyond anything that could be characterised as robust case management. Even if there was no formal application on form C2, procedural fairness still had to be observed. The mother had no chance to be heard. The court did not have the views of the other parties. The judge proceeded as if she

was making a consent order. The decision was announced without explanation and, when reasons were given, they were wholly inadequate. Given the mother's learning difficulties, the decision was wrong, and it will leave a gap in the evidence.

34. The local authority, through Mr Horwood, did not seek to argue that the judge's reasons were sufficient, or that the way the application was dealt with was procedurally fair. However, by a Respondent's Notice, it sought to uphold the decision on the entirely different ground that a psychological assessment of the mother is no longer necessary. In support, it referred to an occasion on 2 March when the police were apparently called to an incident between the mother and the father of the younger children, despite the mother having told the court in her 'response to threshold' document last October that their relationship was over. It also alleged that the mother had told the social worker later in March that she wanted the children to remain with their current carers. There was no application for us to admit this as fresh evidence and we would in any event have refused to admit it. The local authority knew all this before the mother's missed appointment, but it did not suggest at the time that the assessment should not go ahead. In the light of our views about this, Mr Horwood accepted that, if the appeal succeeded, it would be preferable for us to re-timetable the assessment than to remit the question of whether it should go ahead to the allocated judge.
35. The younger children's father, through Mr Howell-Jones, supported the appeal. The older child's father, and the uncle and aunt, were neutral.
36. For the Children's Guardian, Ms Moran expressed neutrality about the appeal, but in the end she did not seek to contest the arguments made on the mother's behalf, and she addressed the question of whether the matter should be remitted in the same way as Mr Horwood.
37. In my view the judge should not have made this order and she certainly should not have made it in the way she did. As Miss Kabweru-Namulemu, says, what happened here might have been appropriate on an application for a consent order, but this was not a consent order. Clearly the mother's failure to keep the original appointment had led to an unsatisfactory situation, but the court was bound to take account of her difficulties, which had made the assessment necessary in the first place, and of her exceptional family circumstances. Unfortunately, it did not do that. It did not hear argument from the parties. It did not consider the mother's solicitors' request for a hearing or explain why a hearing was not appropriate, as the rules require. It did not give any reasons for its decision. In consequence, the decision was, I regret, arbitrary. As Black LJ said in *Re B (a child) (interim residence order)* [2012] EWCA Civ 1742; [2013] 1 FLR 963:

“Robust case management... very much has its place in family proceedings but it also has its limits.”
38. The mother's solicitors' request for reasons offered the court the opportunity to reconsider, but it did not do so and the reasons then given do not begin to justify the decision. As I have said, it is not clear how much the judge knew about the case beyond the scanty information contained in the three emails. It is hard to believe that she would have described the mother's forgetting as troubling if she had read the cognitive assessment and she had no sound basis for concluding that the mother might not attend another appointment if she was given the chance. There is no balancing of the factors that mattered, nor any explanation for why an assessment that the court had considered



necessary had become unnecessary. Maintenance of the statutory timetable is always an important factor, but the children are in a family placement and delay was not the driving factor. This process fell short of what is required in a case concerning the futures of four young children.

39. There were a number of other courses the court might have taken. It could, and in my view should, have referred the matter to the allocated judge, who had heard the case three times and was about to hear it again. Or, if there was some reason for the judge to make any order herself, she should first have ensured that she had enough information to allow her to determine whether the application could be decided without a hearing. Or she could have set it down for a short remote hearing. Instead, there has been a time-consuming and expensive appeal, at which the Guardian and the local authority have neither defended the decision nor conceded the appeal.
40. For these reasons, I conclude that the order was wrong and unjust for serious procedural irregularity: indeed, the error in the order was the direct result of the errors in the procedure. The appeal will be allowed and the order will be set aside. The overall circumstances speak in favour of a revision of the timetable, and not for remittal. The original order will revive, with revised dates and (because Dr D is no longer able to report in time) a different expert, who has been identified. The order will record that the mother has promised to attend her appointment and I know that those supporting her will help her to do that; if she fails without good reason, she can expect the order to be discharged. I hope she will be assessed, because even if the child cannot return to her care, the report will be of value in planning for their future, as identified in the District Judge's original order.
41. Finally, I make these observations about the procedure for making applications without the filing of an application notice.
42. Rule 18 of the Family Procedure Rules 2010, which is in similar terms to rule 23 of the Civil Procedure Rules, concerns applications made within existing proceedings. The respondents to an application are the parties to the proceedings (rule 18.2). Rule 18.4 reads:

*Application notice to be filed*

18.4

(1) Subject to paragraph (2), the applicant must file an application notice.

(2) An applicant may make an application without filing an application notice if –

(a) this is permitted by a rule or practice direction; or

(b) the court dispenses with the requirement for an application notice.”

Rules 18.5 – 18.8 concern the service and contents of an application notice. Rule 18.9 reads:

*“Applications that may be dealt with without a hearing*

18.9 (1) The court may deal with an application without a hearing if –

(a) the court does not consider that a hearing would be appropriate; or

(b) the parties agree as to the terms of the order sought or the parties agree that the court should dispose of the application without a hearing and the court does not consider that a hearing would be appropriate.

(2) ...”

43. This framework allows the court to accept and consider applications made without a formal application notice and to make orders without a hearing. It is desirable, at a time when the courts are under considerable pressure of work and where remote case management hearings have become common, for these powers to be used flexibly in the interests of justice and, in the Family Court, in the interests of children. To this end, the court must distinguish applications that can appropriately be made without an application notice from applications that should, because of the importance of the issue or for some other reason, be made by formal notice. The fact that it has given a general permission for applications to be made by email obviously does not prevent it from requiring an application notice to be filed in a specific instance.
44. Similarly, the court must discriminate between those applications that require a hearing and those that do not. The default position is that there should be a hearing, as the court can only make an order without a hearing if it does not consider that a hearing would be appropriate. It should be on solid ground if it makes an order without a hearing when, as the rule contemplates, the parties agree that a hearing is not required, or where the order is agreed. It may also decide to dispense with a hearing in other circumstances, for example where the issue is not of particular importance, or where the proper order is obvious, or where the documents contain all the information and arguments and a hearing is unlikely to add much. There will be other reasons why an application can be fairly dealt with without hearing – it is all a matter of judgement.
45. The essential point is that, whatever form an application takes and whether or not there is a hearing, the same standards of procedural fairness apply. The fact that an application is made by email or decided without a hearing does not mean that it should receive less careful scrutiny. On the contrary, a judge considering an application on the papers must be alert to ensure that the rules and orders of the court have been followed and that the process is as procedurally fair as if the parties were present in person.

**Lady Justice Simler**

46. I agree.

**Lord Justice Phillips**

47. I also agree.