

IN THE FAMILY COURT SITTING AT CANTERBURY

The Law Courts
Chaucer Road
Canterbury
CT1 1ZA

BEFORE:

HER HONOUR JUDGE SARAH DAVIES

BETWEEN:

KENT COUNTY COUNCIL

- and -

X (The Mother)

- and -

Y (The Father)

- and -

Z (A Child)

APPLICANT

FIRST RESPONDENT

SECOND RESPONDENT

THIRD RESPONDENT

Legal Representation

Victoria Roberts of counsel for the Applicant,
instructed by the Local Authority

Stephen Bartlet-Jones of counsel for the 1st Respondent
(instructed by Moss Beachley Mullem & Coleman, Solicitors)

Phillipa Thomas, Solicitor, for the Second Respondent (Child)
(appearing on behalf of Davis, Simmonds & Donaghey, Solicitors)

Other Parties Present and their status

None known

Judgment

Judgment date: 6th July 2017
Transcribed from 15:29:00 until 15:59:12

Reporting Restrictions Applied: Yes – Adoption and Children Act 2002

“If this Transcript is to be reported or published, there is a requirement to ensure that no reporting restriction will be breached. This is particularly important in relation to any case involving a sexual offence, where the victim is guaranteed lifetime anonymity (Sexual Offences (Amendment) Act 1992), or where an order has been made in relation to a young person”.

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Her Honour Judge Sarah Davies:

1. This case concerns a little girl called Z who was born on the 1st April 2017. The Applicant is Kent County Council and X is the mother and the father is Y. This matter came before me on the 24th April. I was told, on that date, that there was a Production Order that the mother had not been produced, no-one seemed to know why. I was told that since the 21st March the mother had been a serving prisoner at HMP Bronzefield and Z was born at St Peter's Hospital in Ashford on the [a date in] 2017.
2. The matter was brought before the Family Court at Medway on the 21st April for directions on issue and allocation and the Local Authority were seeking an Interim Care Order. The Court approved time for service to 1pm on the 21st April despite the Mother being in prison and listed the matter at 10am on the 24th April before me, the next working day, the 22nd and 23rd April being a weekend. At that time, I was told that the Mother had not been given a place in the mother and baby unit. There was nobody else willing to have Z and that she was, at that stage, able to be released from hospital and a foster family had been brought.
3. Despite some misgivings about the Mother not being present, I was concerned that this was a baby, a new-born baby, in hospital with quite specialised needs who had been ready for release from hospital and, as far as I could see, needed consistent reliable care and, on that day, I made an Interim Care Order. Subsequently, it was brought to my attention that the Production Order was wrongly drafted by legal advisors and did not have the standard wording and, I think, made provision for the Mother's solicitors to pay for her production which, of course, is completely wrong.
4. On that basis I do set aside the Interim Care Order, dated the 24th April, because I can see it was profoundly unfair in respect of the Mother. The Father at that stage, I do not think had been served but, in any event, I can see that it was unfair to the Mother. I have been asked to consider the form of the Production Order which should be made for future hearings. I have read the skeleton argument of counsel for the Mother and I should say that that is of a very high quality and it sets out the law very plainly. I will deal with the Production Order subsequently.

5. I will first deal with the question of whether there should be an Interim Care Order. The Mother's position is that she will be released from prison and I am told that she will be sent, or bailed because she will be on licence because this is an early release, and she will be sent to a bail hostel. She accepts at this stage that she cannot look after Z because she is in prison and there may, subsequently, be an application by her. But, in any event, at this stage it is really far too early for her to say where she will be living and the arrangements where she will be living and whether she will be in a position to look after Z, even if assessments said that she was able to.
6. So, on that basis, Mother says that she is able to give agreement under Section 20 of the Children Act and that I should consider proportionality as to whether there should be an Interim Care Order. It is said by the Local Authority and the Guardian that the Father has parental responsibility because he is on Z's birth certificate and he has indicated that he does not agree with the Local Authority's concerns about him. Those are that he has taken drugs, that he has not been reliable or consistent and there are questions over his mental health.
7. He says that he wants to care for Z and it is considered by the Local Authority and the Guardian that, even if the Mother gives agreement under Section 20, for Z to remain in Local Authority care, that the Father would be able to say that he did not agree and ask for Z to be returned to him. The Father was notified of today's hearing. He told the social worker that he was at work and would be unable to attend, although it seems he has been in phone contact with the social worker this morning and this afternoon and he saw the Guardian in the last few days, I think yesterday.
8. The Local Authority's plan was, and is, for Z to remain in foster care with the same foster carer that she was originally placed with. I have considered the Local Authority's reasons for seeking an Interim Care Order, as set out in the social worker's statement, which I have read. That is dated on the 20th April. That set out the background to the case and the reasons why the Local Authority was applying for an Interim Care Order.

9. It is said that she was born with an addiction to Class A drugs. Following referrals that were made in September 2016 from Turning Point, the drugs agency, that X was approximately three months pregnant and was using heroin and crack cocaine on a regular basis and was buying illicit Buprenorphine and Benzodiazepines. It is said that she had sporadic engagement with the Turning Point drugs service and her drug tests, when she did attend, were positive for cocaine, crack and heroin and those were on the 19th September, 6th October and 3rd February.
10. She was, it said, informed by the Turning Point drugs service that the harm she could cause to her unborn baby by using Class A drugs and had not shown any insight. It is said, that both parents had denied access to the social worker to their flat and they had made no preparation for Z's arrival. There were no baby items evident, no clothes, bottles or sterilisers. It is said, that during the pregnancy X failed to take her daily medication which was a substitute for heroin and, therefore, her unborn baby has experienced withdrawal symptoms.
11. Further, it was said that X had not accessed antenatal care for Z and she had missed several medical appointments and, whilst she was concerned about smoking tobacco during the pregnancy, she was not concerned about the impact by using Class A drugs. So that is the background to the case and I am considering this afresh as to whether I should grant an Interim Care Order.
12. I have had regard to the Court of Appeal decision in *AA -v- NA and Kab* [2010] EWHC 1282 which restated the tests for an Interim Care Order as set out in various previous decisions of the Court of Appeal:

“The question must be approached in two stages. Firstly, under Section 38.2 of the Children Act 1989, the Court must be satisfied that there are reasonable grounds for believing that circumstances with respect to the child are as mentioned in Section 31.2. Section 31.2 of the Children Act provides that a 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 and that the harm, or likelihood of harm, is attributable to the care given to the child, or likely to be given to him or her, if the order were not made, not being what it would be reasonable to expect a parent to give to her.”

13. I remind myself that:

“The interim hearing must be properly confined to control immediate interim until the Court can hold a full trial.”

That is the case of *Re: H (A Child) (Interim Care Order)* [2002] EWCA Civ 1932. Bearing that in mind, I have taken into account such of the evidence as seems reasonable to rely on at this stage.

14. In my judgement, there are reasonable grounds for believing that Z is suffering, and is likely to suffer, significant harm. Namely, the fact that she was born, it is said by the Local Authority, suffering from withdrawal symptoms from Class A drugs. Further, the mother is currently in prison and unable to care for her and there is no other person, at this stage, who can care for her. Whilst the father has said that he wishes to care for her he has not attended Court today, despite being told by the social worker and reminded this morning. So I am satisfied that the threshold, which are the reasons why the Local Authority made an application for an Interim Care Order, have been met.
15. The second stage is to go on to consider whether to make an Interim Care Order. I remind myself that Z's welfare is paramount consideration and I have had regard to the Welfare Checklist as set out in Section 1.3 of the Children Act. In this case, whilst removal of a child from a parent is a very significant and serious matter and is only to be ordered if the child safety demands immediate separation, I consider in this case that Z's safety does demand immediate separation because the mother cannot look after her because she is in custody and there are no other family members able or willing to do so.
16. The father, whilst speaking to the Guardian, has not come forward and offered himself for assessment. He accepts that he uses recreational drugs and there are concerns about his mental health. Whilst the removal of a child is a serious interference with their rights and the parents' rights under Article 8, and is only justified if it is necessary and proportionate, in this case I have weighed these matters up and, in my judgment, Z's welfare demands her immediate removal from her parents' care because of the risks to her from the following matters.

17. Those are drug use, the fact that the father has not been assessed and there concerns about his mental health and the mother, whilst she is going to be released from custody shortly, does not have accommodation identified at this stage and because of the drug issues and the need to have drug tests before Z could be placed in her care and, also, psychiatric tests because she has had mental health issues.
18. I have considered whether it is proportionate to make an Interim Care Order where a parent has agreed Section 20 consent. In this case, because the father has not agreed to that and I can see that the Local Authority require to share parental responsibility, and whilst, of course, the mother can delegate parental responsibility, because of the issues in this case and the father's presentation, I am not sure whether he would agree the Section 20. He has not attended Court and, on that basis, I do think it is proportionate to make an Interim Care Order.
19. What I would say to the mother is that there are many parents in this position who manage to get clean and keep their child and I would say to her she should co-operate with social services as soon as she is released, with probation services and do all that is required of her. So I make an Interim Care Order until the final conclusion of these proceedings and I approve the plan for removal to foster care.
20. I am also asked to give a judgment in relation to Production Orders and the correct drafting of the Production Order. I have seen the Production Order produced and counsel has kindly provided a copy of the order that, I think, all parties accept should have been used. Counsel helpfully sets out the law in relation to this matter and it is set out in the Crime (Sentences) Act 1997, Schedule 1, Part 1, paragraph 3, which replaced Section 29.1 of the Criminal Justice Act 1961.
21. It states that:

“The Secretary of State may, on the application of any person remanded in custody in any part of the United Kingdom in connection with an offence or serving a sentence of imprisonment in the UK, make an order for his transfer to another part of the United Kingdom, to be remanded in custody pending his trial for the offence, as the case may be, to serve the whole or any part of the remainder of his sentence and for removal to an appropriate institution thereof.”

22. Section 3.1 says that:

“If the Secretary of State is satisfied, in the case of any person remanded in custody in any part of the United Kingdom in connection with an offence, the person serving a sentence of imprisonment in any part of the United Kingdom or somebody detained in a prison, that the attendance of that person at any place in that, or any part of, the United Kingdom, is desirable in the interests of justice or for the purpose of any public enquiry, the Secretary of State may direct that person to be taken to that place.”

23. I have considered the case of *R -v- Secretary of State for the Home Department (ex parte) Wynne* [1991] 2 All ER 315. So, in short, the authority for the production of prisoners lies with the Home Office, supervised by the Administrative Court. That authority is delegated to Prison Governors who, in turn, delegate it to prison staff. I accept the submission of counsel that the Court cannot short-circuit matters, as it too frequently seeks to do, by making an order binding the Prison Governor and, instead, must make a formal request for production and that the Courts and parties appearing before them are bound by prison policies and procedures determining production and in relation to the cost of production.

24. I accept the submission that, consequently:

“Any Production Order should be drafted in such a way as to provide maximum assistance to the Prison Governor or his delegates to understand the issues in the case, why the cost of and security risk of production is justified and what form of production is justified, whether by phone, video link or in person and whether the case is frivolous.”

On that basis, I am happy to say that I commend the Production Order drafted by counsel and I fully accept that to expect a party’s solicitors to be personally liable for a Production Order, or indeed any order, is wrong unless there is a Waste of Costs Order and the Production Order used was incorrect.

25. I accept that the correct procedure for the Prison Service deciding whether a prisoner should be produced in civil proceedings is set out in the Prison Service Order 4625 of the 12th February 2002:

“The order must be held by or made available to all staff who are involved in the consideration of requests for production to Court in civil proceedings [as these are] and made available to all prisoners. All staff involved in considering requests for production must be aware of, and take into account, Article 6 of the Human Rights Act 1998 and decide cases on their own merits. The primary consideration when dealing with a request to produce a prisoner to attend at a civil hearing must be whether it is in the interests of justice that he or she should attend. A prisoner’s ability or willingness to pay for production must not be a factor in deciding whether the prisoner is produced at Court. The decision must be based solely on whether it is in the interests of justice that the prisoner attend the proceedings, balanced with security constraints. When a decision has been made that the interests of justice require production at Court, the normal security considerations must be taken into account.”

26. Counsel helpfully sets out the interests of justice, what that means. Relevant factors include:

“Does the prisoner want to attend. Do they have an interest in the proceedings. If they are unwilling to, does the authority or individual requesting production still wish the prisoner to attend. Do they need to obtain a subpoena or Court order which must be served on the prisoner before production can be arranged.”

27. Consideration of what is the nature of the case:

“The nature of the case may determine how important it is that the prisoner attends.”

And there are certain categories where it is usually desirable to produce the prisoner:

“Where there are arrangements for children are to be made or cases involving a prisoner’s finances, such as bankruptcy or any other family case such as divorce or Restraining Orders. The Prison Service has to be careful, under Article 6, that any decision to prevent a prisoner from attending Court, when the case is against the Prison Service or the police, whether it can be justified...”

And there are further considerations about whether the prisoner needs to attend if they have legal representation.

28. But it is clear in family cases, such as this, that it would be necessary for a prisoner to attend, either personally or by video link and that, of course, depends on the stage of proceedings. At a final hearing, it is perhaps more important that a prisoner attends live rather than by video link where witnesses are going to be called and there might be a time constraint on the video link.
29. I accept that it is the Governor’s discretion whether to produce the prisoner and it is at the Governor’s discretion as to the issue of costs and I fully accept, on the 22nd April, that the Production Order was not in the correct form and I am happy to approve the long form of Production Order that was sent to me, and I think agreed by the other parties, as being in the correct form. I would urge the Court to use this form rather than the form it used which I have found to be wrong on the 22nd April. I direct that there should be a transcript of this judgment at public expense and that it should be on www.bailii.org, which is where judgments are published for public consumption.

This Transcript has been approved by the Judge.

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IN THE FAMILY/COUNTY COURT SITTING AT [COURT]

Case No. [#]

In the matter of the [ACT]

B E T W E E N :

[Applicant Name]

Applicant

-and-

[Respondent Name]

Respondent

REQUEST FOR PRODUCTION OF [PRISONER NAME]
(PRISONER NUMBER [#]) AT HMP [PRISON NAME]

BEFORE [Judge's name] sitting on [date]

UPON [application from the prisoner/the court's own motion],

THE COURT DIRECTS THAT:

1. The Governor of Her Majesty's Prison [Prison Name] is hereby requested to produce [Prisoner Name] (prisoner number [#]) at the [Court Name and Address] by no later than [time by which parties are to attend] for a hearing of [family/civil] proceedings under case number [#] to which [s]he is a party.
2. The hearing is estimated to last [time estimate] and the prisoner is expected to be present throughout the hearing.
3. The court considers that the production of the prisoner at the hearing is desirable in the interests of justice.¹

Representation

4. The prisoner [has the benefit of legal aid and] is represented in these proceedings by [solicitors' details]. [OR: The prisoner is not represented in these proceedings.]²

Issues

5. The issues affecting the prisoner to be determined in the proceedings overall are [e.g. whether a care order is made in respect of his/her children and whether they are placed for adoption].³
6. The issues affecting the prisoner to be determined at the hearing on [hearing date] are [e.g. whether his/her children are placed in the interim care of the local authority].⁴
7. The prisoner's Article [e.g. 8] rights are relevant to the question of whether to produce the prisoner because the proceedings relate to [his right to a family life]. The prisoner's Article 6 rights are engaged by the need for him to be able to participate in the court process.⁵

Need to attend

8. The court does not consider that the prisoner can participate adequately in the proceedings by providing submissions in writing because [e.g. the other parties will be attending court to negotiate and make oral submissions, and the prisoner must be able to participate and/or respond].⁶

¹ Crime (Sentences) Act 1997 s.41 and Schedule 1 Part 1 paragraph 3.

² PSO 4625 para 2.3, third bullet point, and para 3.2, fifth bullet point.

³ PSO 4625 para 3.2, fifth bullet point.

⁴ PSO 4625 para 3.2, fifth bullet point.

⁵ PSO 4625 para 2.3, first bullet point.

⁶ PSO 4625 para 2.3, fifth bullet point.

9. The court has considered whether the hearing could be listed as a telephone hearing but has decided to list an oral hearing because [e.g., of the complexity of the issues/number of parties].⁷
10. The court does not consider that the prisoner's position in the proceedings is frivolous.⁸
11. The court does not consider that the prisoner can, without attending in person, participate adequately in the proceedings through his/her representative alone because [e.g. it is the nature of these proceedings that the parties are likely to raise new arguments or factual assertions at or shortly before court hearings, or change their positions at court, and instructions will need to be taken for the prisoner's representative to be in a position to represent him. The urgency and/or strict time limits on proceedings mean that such issues often cannot be adjourned to a later hearing.]⁹

Videolink

12. The court considers it desirable for the prisoner to attend by video link because [e.g. of the short duration of the hearing/the victim of his/her offence, who is also a party to proceedings, will be in attendance at court and attendance by video link will avoid them coming into contact.]

OR

13. It is necessary for the prisoner to attend in person because [e.g. of the length of the hearing / he/she is expected to give evidence at the hearing].

OR

14. The court is content for the prisoner to attend either in person or by video link, but if he/she will attend by video link the prisoner's solicitors or the prison must make arrangements with the court by no later than 14 days before the hearing.

⁷ PSO 4625 para 2.3, fifth bullet point.

⁸ PSO 4625 para 2.3, fourth bullet point.

⁹ PSO 4625 para 2.3, third bullet point.



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Applicant

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[Respondent Name]

Respondent

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