

IN THE GRAND COURT OF THE CAYMAN ISLANDS
FAMILY DIVISION

CAUSE NO: FAM 64 of 2017

BETWEEN:

SF

Applicant

AND:

FJ

Respondent



Appearances:

Mr. Graham Hampson of Hampson and
Company for the Applicant
Ms. Lynne McDonagh of Ritch & Conolly for the
Respondent

Before:

Hon. Mr. Justice Richard Williams

Heard:

16 June 2017

Date of Judgment:

16 June 2017

Circulation of transcript of Judgment: 21 June 2017

HEADNOTE

Application to permanently relocate with child out of the jurisdiction - Application by mother to appoint expert instead of Department of Children and Family Services welfare officer - Procedure and guidance for application to appoint expert evidence - Section 5 of the Children Act Advisory Committee Handbook for the Best Practice in Children's Act cases (CAAC, 19997) - Evidence from Independent social worker.

TRANSCRIPT OF EX TEMPORE JUDGMENT

Application

1. SF, the Petitioner mother ("the mother"), applies by her C1 Form filed on 9 March 2017 for a residence order, defined contact orders and a Schedule 1 financial provision order in relation to the parties' four-year old son who was

born on 22 October 2012. She also applies for an order granting her leave to permanently remove the child from the jurisdiction to enable them to relocate to England. FJ, the Respondent father (“the father”), opposes the application.

2. This Ex Tempore Judgment is given at the end of today’s case management hearing and deals with the mother’s application for leave to instruct an expert to report on the Children Law applications. No formal application by Summons has been filed and no separate affidavit in support of the application has been filed.¹ At the first appointment hearing on 5 May 2017 the prospect of instructing an expert or independent social worker was raised. No order was made in that regard and the issue has again been brought to the fore by an email by the mother’s attorney dated 2 June 2017.

Background

3. The parents are not married. The parties formed a relationship in around 2011. The relevant child was born in October 2012. The parties separated in around April 2014 when the child was about 18 months old. The mother was made redundant from her then employer in January 2015, but found permanent employment again in April 2015. In November 2015 the mother submitted an application for permanent residency and is still awaiting a decision. In December 2016 her employment came to an end but she has since found new employment which pays only two thirds of her previous salary.

¹ Although the affidavit sworn on 9 June 2017 contains some evidence relevant to the application, particularly at paragraphs 19 to 21.

4. The mother is a British citizen, aged 47, and she came to the Cayman Islands in 2007.
5. The father is a Cayman national, aged 47. He is a Civil Engineer.
6. Following their separation, the parties attended mediation in August 2014, but unfortunately this was unsuccessful. Children Law proceedings were initiated in the Summary Court in 2015. On 30 September 2015 a comprehensive Consent Order, which is still in place, was approved by the Summary Court. In that order the parties agreed a shared parental responsibility, a shared residence order defining the times when the child will be staying with the father. The order also includes child maintenance provision and other more general provisions.
7. Although the earlier proceedings were brought in the Summary Court, the current proceedings involve an application to permanently remove the child from the jurisdiction and they have been correctly issued in the Grand Court.
8. The matter came before the Grand Court for a first appointment on 5 May 2017. There was discussion at that hearing about whether the assessment and 'welfare' report in relation to the applications should be conducted and prepared by an expert other than a social worker employed by the Department of Children and Family Services ("the DCFS"). The mother contends that prior to that hearing it had been agreed between the attorneys that each side would request leave to instruct separate experts. At the hearing I expressed my concern that this was an



unusual approach and one which I was at the time not willing to agree to for a number of reasons. I highlighted my concern about separate experts with one eye on Lord Woolf's report *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales (stationery office, 1996) chapter 13* in which he stated that:



"The traditional English way deciding contentious expert issues is for a judge to decide between two contrary views. This is not the best way of achieving a just result."

Also in *Re B (Sexual Abuse: Experts Report) [2000] 1 FLR b871*, Lord Thorpe where the Court of Appeal highlighted that instructions to an expert should be impartial, wherever possible, joint and agreed with the other side stated at 873:

"A unilateral appeal to an expert for a partial report is something which should have disappeared from the litigation scene many years ago."

In light of my indication, the parties after the hearing unsuccessfully explored whether a single joint expert could be agreed.

9. At the end of the first appointment hearing I directed that the wife file affidavits by 9 June 2017 and that the husband file affidavits by 7 July 2017. Leave was given to the wife to file an affidavit in reply by 21 July 2017. I gave leave to the parties to set down a final hearing with an agreed realistic time estimate. I was unable to set the time estimate at the hearing as it was unclear how many

witnesses would be called, who the expert would be and what the issues of fact might be.



10. At today's hearing the mother seeks an order giving her general leave to appoint an expert to conduct the assessment and report in this case. It appears that the reason for seeking a departure from the normal course of instructing the DCFS to prepare a report is due to a concern of bias. In her affidavit sworn on 9 June 2017 she relies upon her concern about the father contacting the DCFS and social workers then promptly preparing a report on the child for the Summary Court Proceedings without contacting her and without any referral to them being made by the Summary Court. In her affidavit the mother states that the Magistrate highlighted the inappropriateness of the approach taken by the social worker and the DCFS and she refused to allow the former to play any role in the proceedings. The mother's concern is exacerbated as she says that when, at the bequest of her counsellor, she made a report to the DCFS they refused to get involved.
11. It appears that in the Summary Court proceedings the parties instructed a jointly appointed expert, presumably with leave of the Court. It is unclear on the papers before me whether the proper procedure was followed in relation to that appointment and upon what information the discretion to grant leave was exercised. The mother also has a concern because she says that the father was requesting the expert to involve the DCFS officers in the Summary Court

assessment and the mother feels that the trial in relation to the child in the Summary Court proceedings was “*derailed*” due to the father “*vehemently disagreeing*” with the conclusions of the single joint expert. In his email of 2 June 2017 the mother’s attorney asserts that “*in these sorts of cases there is usually an independent welfare report so as to assist the court.*” That is not an assertion that I can accept as being accurate.

12. The father’s position is set out in the position statement filed by his attorney for this hearing. He does not seek the appointment of a single or jointly instructed expert. He contends that the normal procedure whereby the referral for an assessment and report is made by the Court to DCFS is the most appropriate and the correct approach. He contends that any perceived bias could be met by directing that the Reporting Officer be one who has not dealt with the parties or the case before.
13. In support of his request for a DCFS report, the father relies upon s.9 of the Children Law (2012 Revision) which provides:

“The court considering any question with respect to a child under this Law may ask the Department to arrange for a social worker, or such other person as the Department considers appropriate, to report to the court on such matters relating to the welfare of that child is required to be dealt with in the report.”



Guidance and The Law In relation to Expert Evidence

14. There appear to be little or no reported guidance concerning the appointment of experts in children cases in this jurisdiction. It is evident that, in the past, leave may have been given to instruct experts in children cases without proper consideration about the suitability of that specific expert. With this in mind I intend to set out some general guidance herein which may be of help in this and in future cases.



15. The Court has the jurisdiction to grant leave to the parties for the appointment of a suitably qualified expert to give evidence on matters calling for expertise. Pursuant to GCR Order 40 the Court may appoint an independent court expert to enquire into and report upon any question other than one of law or construction. The parties would ordinarily nominate the expert and agree the questions to be addressed, if they are unable to do that the Court may do so. In instances where each party wished to instruct their own expert, the Court still has discretion to direct that a single joint expert be instructed instead. There may be merit in appointing a single joint expert in a case when the parties have agreed on that expert's suitability, especially if a proper assessment could be completed and the resultant report be provided in a timelier manner than could be achieved by the DCFS. If the parties cannot agree on a single joint expert, if one is required, family courts have in the past selected experts from a list provided by the parties and have required the parties to prepare a jointly agreed letter of instruction. This approach is encouraged where such an expert is necessary, as the

instruction of only one expert reduces costs and promotes impartiality. GCR Order 40, r 6 allows a party to call, with leave, their own expert to give evidence on the question reported on by the court expert. However, such leave is not frequently granted, as the Court should consider the circumstances of the case to be “*exceptional*.”



16. Pursuant to Rule 3.18(1) of the Children Law (Grand Court) Rules 2013 leave is required for a child to be assessed for the purpose of the preparation of expert evidence for use in the proceedings. Pursuant to Rule 3.23(1) the Children Law (Grand Court) Rules 2013 a party must have the Court’s permission to disclose documents to an expert.²

17. When considering whether to grant leave to a party to instruct an expert the Court must have regard to the delay that that might cause and, to a lesser extent, the cost to the public purse. The cost of obtaining the evidence and any delay that may be incurred as a result of the expert being involved must be proportionate to the benefit to the child of the evidence being available. If the issue is a difficult one and it lies within the recognised discipline of the expert then leave to instruct an expert may be justified, especially if it is a joint instruction. This means that the Court should identify cases where expert evidence is actually required, rather than merely helpful. The party or parties

² The Rule specifically provides that a guardian ad litem and a welfare officer may review the documents without leave.

seeking leave will have to properly define the issue that the expert is required to address.

18. The Court when controlling the instruction of experts should also have regard to the need under Article 9 of the Bill of Rights to protect the privacy of the parties and the child by preventing unnecessary disclosure of information to third parties.



19. In *Re M and R (Child Abuse: Evidence)* [1997] 2 FLR 195 at 2015 Butler Sloss L.J. stated the following:

“In cases involving children, expert medical and psychiatric evidence from paediatricians and allied disciplines is often quite indispensable to the court. As Parker LCJ said in Director of Public Prosecutions v A and BC Chewing Gum Ltd[1968] 1 QB 159, 165A, when dealing with children, the court needs ‘all the help it can get’. But that dependence in no way compromises the fact that the final decision in the case is the judge’s and his alone.

...So the passing of the [Civil Evidence] Act should not operate to force the court to, in Wigmore’s words, ‘waste its time in listening to superfluous and cumbersome testimony’ provided that the judge never loses sight of the central truths: namely that the ultimate decision is for him, and that all questions of relevance and weight are for him. ...The modern view is to regulate such matters by way of weight, rather than admissibility.”

20. The Headnote in *Re G (Minors (Expert Witness))* [1994] 2 FLR 291, a case in which Wall J. examined the practice and use of evidence in children cases, helpfully provides:

“(1) The judgments in Re M (Minors) (Care Proceedings: Child's Wishes) and Re MD and TD (Minors) (Time Estimates) were based upon a number of assumptions. These included the propositions that leave was required before the papers in a public or private Children Act case could be shown to an expert and that the court had a proactive role in the granting of leave.

(2) It was the duty of the court to keep a tight grip on every child case. It was for the court to give directions and it was inappropriate for the responsibility to be delegated to the parties. At the first substantive hearing in May 1993, the judge had not set a timetable for the local authority assessment, and the court had deprived itself of the opportunity to take procedural control of the case, which was in grave danger of drift. The court should have specified a timetable at the time the assessment was ordered.

*(3) Generalised orders giving leave for the papers to be shown to an expert or experts should never be made. The expert or area of expertise should be identified in the order granting leave.*³

(4) As part of the process of granting or refusing leave, either for the child to be examined or for papers in the case to be shown to an expert, the advocates had a positive duty to place all relevant information before the court, and the court had a positive duty to inquire into that information.

(5) Where the court exercised its discretion to grant leave for the papers to be shown to a particular expert, the court should, wherever possible, go on to give further directions as to the timescale, the disclosure of the report to the parties and other

³ My emphasis by underlining.

experts, discussions between experts and the filing of further statements. If it was impracticable to give these directions at the time that leave was granted, the court should set a further date for directions.

(6) Where it was necessary to consider the estimated length of the hearing at a directions appointment, the number of expert witnesses and the likely length of their evidence should be carefully considered.

(7) Advocates who sought the leave of the court to disclose papers to an expert had to apply their minds at an early stage of the proceedings to the issues in the case to which medical evidence would be relevant. Applications for leave to instruct experts should be made at as early a stage in the proceedings as possible, commensurate with the state of the evidence. Advocates must be prepared to satisfy the court as to the need for expert evidence of the specified type sought at the directions hearing.”

21. When a party is seeking leave to instruct an expert in proceedings relating to children the party should make enquiries with the desired expert so that the Court can be provided with sufficient information to enable it to properly exercise its discretion whether to grant leave. That expert would need to be given sufficient information by the party to enable him to determine whether he would be in a position to accept the instructions. The disclosure of that limited information would not breach the rules restricting disclosure of information about the case.



22. The type of information that should be provided to the Court when seeking leave to instruct an expert application is:

- (i) the name of the expert;
- (ii) the availability of that expert in relation to the assessment, reporting and attendance at Court;
- (iii) the relevance of that expert's evidence to the issues to be determined;
- (iv) whether the evidence would be better addressed by the parties jointly instructing one expert; and
- (v) if a Legal Aid case, the fees to be charged including the hourly rate and estimated number of hours required to read the papers, carry out any interviews and assessments and to prepare the report as well as the fee for attending Court.



23. Parties, when seeking leave, should take the time to read the *Children Act Advisory Committee Handbook of Best Practice in Children Act Cases (CAAC, 1997), Section 5* which provides extensive guidance upon expert evidence in children proceedings. As time does not permit me to fully analyse that section in this ex tempore ruling, I have provided a copy of Section 5 from the Handbook to the parties today. Therein guidance is provided on (i) the decision to use expert evidence; (ii) the application for leave to instruct an expert witness; (iii) the order granting leave to instruct an expert witness; (iv) the letter of instruction; (v) the expert's duties; (vi) the expert report; and (vii) preparation for the hearing.

24. What is clear from the Handbook is that the Court has a duty to conduct a proactive enquiry into the information provided by the party who seeks leave to instruct an expert. The Court should never make a generalised order for leave to disclose the papers to an expert. If the Court grants leave to instruct an expert then the order, which should be provided to the expert along with the letter of instruction, should contain the following:

- (i) identify the parties responsible for drafting a letter of instruction and providing documents to the expert;
- (ii) the issues which the Court requires to be addressed and the questions upon which the expert is going to be asked to give his opinion;
- (iii) clarify whether the expert has leave to examine or interview the child;
- (iv) the timetable within which the report is to be prepared, filed and served;
- (v) details about the disclosure of the report to the parties (and any other expert if there is one);
- (vi) if there is more than one expert, provision for the experts to meet and to thereafter prepare a statement of agreed and disagreed issues; and
- (vii) the requirement for the attendance of the expert at Court for the hearing.



25. In children proceedings before the Grand Court evidence may be received from an independent reporter who will normally have social work training. These persons are often called independent social workers. As set out in *Children Law and Practice, Hershman and McFarlane*, the following practice is usually to be applied in such circumstances:

- (i) *No person (other than a party who instructs the independent reporter) is under any obligation to discuss the case with, or be interviewed by, the independent reporter.*
- (ii) *Where the child is a ward of court, the independent reporter should not interview the child without the leave of the court.*
- (iii) *The independent reporter may not see a report by the court welfare officer if this is confidential to the parties and the court.*
- (iv) *The court welfare officer may not discuss the case with the independent reporter, unless authorised to do so by the court.*
- (v) *Where the court has ordered an enquiry and report from a court welfare officer, the court should not depart from the usual practice of relying on that report, or of ordering a further report by a different court welfare officer."*



Conclusion

26. In the matter before me the application by the mother is for there to be no referral made to the DCFS for it to allocate a social worker employed by the Department, nor for leave to instruct a joint expert. The application by the mother is for leave to be given to both parties, if they wish to do so, to instruct their own independent expert. The separate reports are sought as the father did not agree to the appointment of one of the mother's suggested single joint experts. The mother has three possible experts in mind. They have not been approached by the mother concerning this assessment/report and with details of this case. The Court is unable to determine their expertise in dealing with the



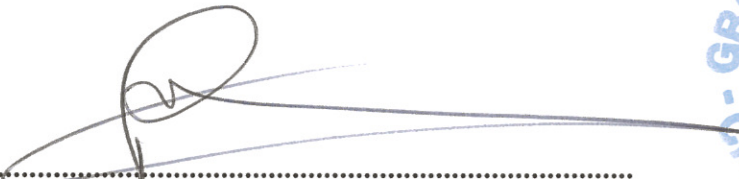
types of applications before the Court. There is insufficient information before the Court to enable it to grant leave to the mother to instruct an expert. As I have already indicated, it is not appropriate to give general leave to locate and instruct an expert in a children case.

27. One part of the application for consideration today is whether the Court should not make a referral to DCFS for one of its social workers to be appointed to carry out the assessment and file a report. To make a determination that the Department should not be instructed to prepare a report because it and all of its officers are biased, or because there is a perception of bias, in a particular case must not be made lightly. To form a view that the whole of the DCFS is biased without proper investigation and not grounded on a firm factual basis would fundamentally undermine the role that DCFS plays.

28. It may be appropriate in certain cases for the Court to direct that a social worker who has been involved in a case should play no further part in the case. I am conscious that such applications are unusual and not lightly to be granted. In this case, having regard to *Practice Direction No. 10/2014 Court Welfare Officer's Reports*, I am satisfied that it is appropriate for the DCFS to allocate a social worker employed by it to carry out the assessment and to provide the report on the applications before me. To that end I will, following this hearing, draft the normal referral form which can be found at Appendix 1 to the Practice Direction, and thereafter provide a copy to the parties.

29. In the referral report I will direct the Department to ensure that the allocated reporting social worker and/or supervisors are not conflicted, were not involved in any manner with these parties' Summary Court proceedings and are not connected with either party. Having regard to the fact that the mother has the offer of employment in England commencing in October, I direct that the report be filed by 18 August 2017.

30. Now turning to directions to trial. I order that the parties have leave to obtain a hearing date in relation to all of the mother's applications, with a time estimate of 4 to 5 days. When the trial date is allocated, the parties are to fix a mention hearing on a mention day no later than 10 working days prior to the final hearing date. I order that any affidavits not covered by existing directions are to be filed and served no later than five working days prior to the mention hearing, No further affidavits can then be filed without leave of the Court.


.....
The Honourable Mr. Justice Richard Williams
JUDGE OF THE GRAND COURT



The judgment was delivered in private, but the Judge hereby gives leave for it to be published.

The judgment in this matter is being distributed on a strict understanding that in any report no person other than the attorneys (and any other person identified by name in the judgment itself) may be identified by name or location and in particular the anonymity of the child and the adult members of their family must be strictly preserved.