Neutral Citation: [2023] EWFC 14 (B)

IN THE FAMILY COURT
SITTING AT MEDWAY

Date: 07/02/2023

Before :

RECORDER SAMUELS KC
- -

Between :

M **Applicant**

- and –

F

Respondent

- -
- -

Barry McAlinden for the mother, instructed by way of public access
Helen Pomeroy for the father, instructed by Charles Russell Speechlys LLP

Hearing dates: 6 and 7 February 2023
- -

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Re O (Children) (Privilege against Self-Incrimination)

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Recorder Samuels KC

This judgment was delivered in private. The judge has given permission for this version of the judgment to be published. This version of the judgment may be published only on condition that the anonymity of the children and their family is preserved and that there is omitted any detail or information that may lead to their identification, whether on its own or in conjunction with other material in the judgment. This includes, but not exclusively, information of location, details of family members, organisations such as school or hospital, and unusual factual detail. All persons, including representatives of the media, must ensure that this condition is complied with. Failure to comply will be a contempt of court.

1. I remain concerned with 2 children, C who is aged 7 and F who is aged 2. Their parents are M and F.

2. In June 2022 I conducted a fact-finding hearing over 3 days. I handed down a written judgment on 14 July 2022. In that judgment I made significant findings against the father, principally of physical abuse of the mother. I said, towards the conclusion of that judgment, that:

> *"The picture is clear. There was considerable violence inflicted by the father upon the mother in the course of their relationship putting both children at risk of physical and emotional harm. There were also additional elements of coercion and control, the father's warning to the mother that the children would be removed if social services became aware of what was happening and his denigration of her as a mother in the course of these incidents. These are all issues which I consider to be directly relevant to the welfare decisions I will need to make in due course in relation to any unregulated or unmonitored time for the father with his sons."*

I then added:

> *"I would urge the father not only to consider carefully what I have said but to reflect upon it and to 'reset'. These cases undoubtedly focus on the worst aspects of behaviour, but this father also has many positive attributes. I set out below the observations of Ms K… which clearly endorse much that is positive about the father's parenting. He undoubtedly has the potential to be a good parent to his children and the mother's warm description of his children's love for him will, I hope, act as a catalyst for reflection and change. His children deserve not only to have a full relationship with each of their parents, but to be brought up in an environment free from violence or significant conflict and where each parent is able to respect and appreciate the positives of the other. The father has much to do and to think about, but also much to gain."*

I concluded the judgment by saying:

> *"The principal risks going forward centre on contact between the parties and the risk of arguments and, potentially, violence. However, there is also a potential risk of the father denigrating the mother to the children or of he or his family undermining her in their discussions with the children. I must also bear in mind the findings that I have made about the father's loss of temper, that he has placed the children at risk of physical and emotional harm, and that he has physically chastised C. These are all risks that will need to be managed carefully and proportionately. A factor in any future consideration will clearly be the father's response to this judgment."*

3. Since that hearing contact has taken place between the father and both children as agreed between the parties and, where agreement has not been possible, as determined by me. The current arrangements are that the father sees the children for 8 hours on alternate Sundays. Handovers are monitored by a third party, currently the children's former childminder, and the father then spends 4 hours in the community with the children unsupervised and 4 hours at home supervised by the childminder. The father also sees the children alternate Wednesday afternoons. Again, handovers are supervised as is time spent by the father with the children in his home. Additional contact by video takes place once a week and on alternate weekends when the father does not otherwise see the children. In December 2022 I made provision for additional contact over the Christmas period.

4. At the conclusion of the fact finding hearing I directed that there should be a s.7 report from a Cafcass Family Court Adviser available by 9 December 2022. I listed the matter for a final welfare hearing this week, in February 2023, with a time estimate of 3 days.

5. Following the fact finding hearing the father completed a course run by 'Caring Dads'. This had been agreed by the parties as an appropriate course for him to attend given the findings that I had made and the absence of any Cafcass approved courses following the decision to cease to make any new referrals to the Domestic Abuse Perpetrator Programme from 30 June 2022. The father also attended the Triple P parenting course and the Separated Parents' Information Programme. In his written statements to this court he says he has benefited greatly from the courses he has undertaken. He understands the need to be respectful to and about the mother and the impact of domestic abuse on children. He has spent some time in his most recent statement highlighting the parts of the Caring Dads course that he has benefited from which has reinforced his wish to build a stronger and more secure co-parenting arrangement with the mother. There remain, however, issues between the parties as to what, if any, benefit the father has derived from his attendance at these courses. Those issues could only be determined by me after hearing evidence from the father himself.

6. On 8 December 2022 the s.7 report was filed. The Family Court Adviser rightly identified that *"To feel reassured contact progression could be safe for C and F, the court needs to be satisfied the father has changed his behaviour otherwise the children will be placed at risk of significant harm."* However, she was hampered in addressing this issue directly in discussions with the father because *"the father was not prepared to discuss the court findings with me, he said due to advice from his solicitor and the ongoing criminal proceedings."* As a result, she said she was not able to support any progression of contact *"until the father has demonstrated a reflection of his behaviour and undertaken therapy to change this, where he will no longer perpetrate domestic abuse on intimate partners."*

7. At the DRA on 15 December 2022 the final hearing was confirmed. However, on 26 January 2023 (6 working days before the hearing) I received an email from the father's solicitor seeking an adjournment of the final hearing. I was informed that the father had recently been charged with assault and controlling and coercive behaviour against the mother. He has entered a not guilty plea at the Magistrates' Court and the proceedings have been transferred to the Crown Court. There is to be a directions hearing in February with a trial date anticipated to be listed for the end of 2023 or the beginning of 2024. I was informed that the criminal court, may, in the meantime, impose bail conditions upon the father. If he is convicted of these offences he has been advised that he may face an immediate custodial sentence. The email continues,

> *"The father is concerned about his ability to participate in the family proceedings given the privilege against self-incrimination, which undermines his ability to put his case in the family proceedings and/or to answer any questions at all about your findings. This issue - he says - is already evident in the CAFCASS report. His ability to give evidence is hindered further now that he has been charged and the criminal proceedings are formally underway. Both parties are agreed that in those circumstances a final hearing where both parties give oral evidence cannot take place."*

8. I was told that the parties were agreed that the final hearing should be adjourned and relisted for a one day hearing in March or April 2023. It was agreed that the current child arrangements should, broadly, remain in force pending that hearing. However, the parties were not agreed as to what should happen at the adjourned one day hearing. The mother's position was that this should operate as the new final hearing date whereas the father's position was that this should be an interim hearing at which the court could take stock of any bail conditions imposed by the Crown Court and could give further directions for an adjourned final hearing to be listed after the criminal trial (and sentencing) had concluded. Immediately on receipt of that email I attempted to list the case for an urgent directions hearing, but no date could be found suitable to the parents and their representatives in the limited time available. As a result, I said I would leave the matter listed and directed skeleton arguments to be filed on the issue of any proposed adjournment. I commented that *"I am not clear why the matters raised on behalf of the father necessitate an adjournment of these proceedings, which have already been running for a considerable period of time. I would wish to hear further argument on that and consider any authorities relied upon."*

9. I have heard from Mr McAlinden on behalf of the mother and Ms Pomeroy on behalf of the father. I have read their detailed and helpful skeleton arguments filed. By agreement between the parties I have not heard any oral evidence either from the Cafcass Officer or from the parents.

10. The parties' agreed position remains that the current child arrangements should, broadly, stay in place during the pending criminal proceedings. They spent most of the day yesterday discussing, with the assistance of Mr McAlinden and Ms Pomeroy, possible variations to those arrangements. They were able to reach agreement on all matters apart from the limited issues as set out below. I commend the parties for their engagement in that process and hope that this can work as a template for them to resolve their disputes in the future without the involvement of the court.

11. That leaves the question of whether the arrangements are to be reflected in a final order or an interim order.

12. The father's position is that his *"privilege against self-incrimination prevents him providing any evidence whatsoever – whether in his own statement or via questions put to him – in response to the findings made by the court. The result is that he is not able to challenge either CAFCASS report on M's position which accords with it"*. As is clear from his written evidence, the position he would wish to advance is that there should be a shared care arrangement in place with respect to his sons, not the limited and regulated arrangements currently directed. As in the email from his solicitor, he says that the final hearing should be relisted once the criminal proceedings have concluded. The advantage of this, from the father's perspective, would be that his case would be 'in the system' and he would not have to reissue proceedings and wait months for the case to pass through the FHDRA and DRA processes. The court should reconsider the interim arrangements once the outcome of the criminal hearing later this month is known and, in particular, whether any bail conditions have been imposed.

13. The mother's primary position is that I should make final orders today. As a secondary position she says that there should be a short purposeful adjournment to await the outcome of the criminal hearing *"to factor in any bail conditions that impact on child arrangements"*. Any longer adjournment would represent an unacceptable burden to the children but also to her. The father's position means that there is, effectively, no substantive issue for the court to determine. There is therefore no benefit to any adjournment of these proceedings.

Analysis

14. It is worth just stepping back and considering the procedural history of this case. The parties' relationship ended in May 2021. The mother's application for the court to determine the arrangements for these children was issued on 19 October 2021. On 23 December 2021 District Judge Thomas conducted the FHDRA and determined that a fact-finding hearing was necessary. There was, however, insufficient court time available to enable any further issues to be determined, including the scope of the fact -finding hearing and the issue of interim contact, both of which were highly contentious matters. The parties were then provided with the next one hour listing

date available, which was in November 2022, almost 12 months later. When the parties complained they were given a hearing in March 2022 before me. At that point I reserved the proceedings to myself which has enabled matters to proceed as swiftly as is possible. Nonetheless, it has taken over 15 months to get to this point, which is a very long time particularly in the lives of two young children.

15. This case has already occupied 5 days of court time for the fact-finding and then this final hearing. I count that there have been 6 additional hearings. Although notionally listed for 1 hour each, inevitably such hearings take up considerably more court time than is allocated.

16. The father invites me to list the matter for a further day in March or April 2023 on the basis that the criminal court will then have determined his bail conditions pending the trial. The father also invites me to adjourn these welfare proceedings for a further final hearing. If I accept that invitation, I will need to find another 4 court days for this case, one in the next few months and then a further 3 days towards the end of 2023 or the beginning of 2024. Logically, any delay in the anticipated progress of the criminal process would then require me to further adjourn these proceedings.

17. The starting point for the father's submissions is that he has a privilege against self-incrimination, following the decision of the Court of Appeal in *Re P (Children) (Disclosure)* [2022] EWCA Civ 495. The mother agrees that he has such a privilege.

18. In *Re P* the father had been the subject of findings within private law children proceedings of serious criminality against the mother. In advance of the subsequent welfare hearing he sought an order to provide that any statements or admissions made by him in the continuing private law proceedings would not be disclosed to the police, or by extension to the CPS. The essence of his argument was that the private law children proceedings would not be fair unless he was given this protection. Hayden J refused that application ([2021] EWHC 3133 (Fam)) and this decision was upheld on appeal. In the Court of Appeal, the father submitted that he was facing an unfair binary choice. The father's silence would leave an evidential gap on the important issue of whether the father recognised and had insight into his conduct. As such, it was argued, the proceedings would not operate in the best interests of the children.

19. The Court of Appeal held that the judge had been correct not to entertain a pre-emptive and blanket application for protection from onward disclosure. The Lord Chief Justice (delivering the judgment of the full court) said that any potential incriminating admissions by the father were, at that stage of the proceedings, entirely hypothetical. The father was not entitled to *"a blank cheque"* and the judge had been right *"to decline to embark on such an unsound exercise"*.

20. Furthermore, the Court of Appeal did not accept the submission that the father in that case had in fact been faced with a binary choice:

> *33. Moreover, we do not accept that the father has a binary choice of the sort he suggests, namely involvement or staying silent. Putting the case in that way is apt to confuse the scope of the privilege against self-incrimination which the father enjoys in these private law proceedings. He is a party to the proceedings and has made an application for contact with his two children. He responds to the mother's counter application. In pursuing his application, he is engaged in the proceedings and has assumed an evidential burden. His privilege against self-incrimination entitles him to refuse to answer questions when giving evidence in court that tend to incriminate him. The privilege extends to refusing to answer such questions from a Cafcass officer because his answers would be admissible in the family proceedings. He would also be entitled to avoid making incriminating statements in any written evidence he produced in the proceedings. The privilege does not entitle a witness or party to refuse to engage at all. In simple terms, a witness would not be entitled to say that he or she refuses to answer any and all questions."*

21. The Lord Chief Justice concluded his judgment by saying:

> *"42. We see nothing unfair in expecting the father to make his case in the family proceedings to secure the outcome he desires and, if he considers it to be the case, to seek to persuade the judge that contact is in the best interests of his two children. He played a full part, including giving evidence, in the fact-finding hearing. If he has decided that his evidence in that earlier hearing was untrue and wishes to qualify or change it there is nothing unfair in letting him choose to do so. We observe that even section 98 of the 1989 Act provides no protection in the case of perjury. The Strasbourg Court generally looks at the totality of proceedings before determining whether they have been fair for the purposes of article 6. It does not exclude the possibility that a single step may render them unfair. Yet it is inconceivable that the refusal of a pre-emptive blanket order of this sort could amount to a violation of article 6. We are satisfied that the approach to disclosure from the family proceedings found in Re EC (Disclosure of Material) (see para. 17 above) provides appropriate protections and ensures that the family law proceedings would, in this respect, be fair."*

22. The father in the present case is in a similar position to the father in *Re P*. As in *Re P* the court has made significant findings against him. As in *Re P* the father argues that his right against self-incrimination places him in an unfair position. Either he waives his right or, alternatively, he finds himself unable to challenge the position adopted by the mother as supported by the Family Court Adviser. In short, he says that he cannot provide the mother, the FCA or the court with any detailed reassurance that he accepts the findings made against him without thereby incriminating himself and risking disclosure of any admissions to the police and / or CPS. Prevented by *Re P* from seeking a pre-emptive order to prevent disclosure should he decide to make such

admissions, he is therefore driven to invite the court to delay these private law children proceedings until the criminal process has concluded.

23. However, as is clear from the passages I have quoted above from the judgment of the Lord Chief Justice in *Re P*, such a submission is based upon a misunderstanding of the scope of the privilege against self-incrimination. The father is engaged voluntarily in these proceedings and 'has assumed an evidential burden'. He has played a full part in the proceedings to date and if he wishes to persuade me to make a contact order different from that advanced on behalf of the mother he has every right to do so. If he wishes to qualify or change any part of his evidence within the fact-finding hearing there is nothing unfair in letting him do so. If in the course of such evidence he decides to waive his privilege against self-incrimination, or any part of it, then *Re EC* will provide him with the appropriate protection to ensure that these private law proceedings remain fair. In other words, at this final hearing there is available to him a fair process to resolve the outstanding issues relating to the welfare of his children, notwithstanding his privilege against self-incrimination.

24. What the father's argument loses sight of is that the lives of C and F cannot be put on hold pending the outcome of these criminal proceedings against their father. Arrangements for them need to be agreed between their parents or else determined by the court. As Section 1(2) of the Children Act 1989 makes clear, there is a general principle that delay in determining those arrangements are likely to prejudice their welfare. There need to be good welfare reasons to justify delay. Whilst unfairness to one parent in the court process could provide such a reason, there is no such unfairness to the father within these private law proceedings.

25. In my view, therefore, the father's case as set out in his solicitor's correspondence and in Ms Pomeroy's submissions is overstated. His privilege against self-incrimination does not prevent him from advancing his case in the normal way, including giving evidence himself and / or by challenging the evidence of others. He cannot, however, be compelled to give evidence which marks the distinction between private and public law children proceedings and also marks the importance of the provisions of s.98 Children Act 1989.

26. As I have said, these proceedings have been ongoing for 15 months. The adjournment sought on behalf of the father would result in significant additional delay for these children and for these parents. The criminal proceedings are at their very earliest stages. They may take a year or more to reach a conclusion. These proceedings cannot just wait 'on hold' for the criminal process to reach a conclusion.

27. Moreover, to adopt such a course would encourage an unnecessary and counterproductive dependence upon the court. An expectation that, hearing by hearing, the court will resolve issues between the parents as they arise. These proceedings have already generated a multiplicity of issues including disputes as to

the children's names, their nationalities, who should hold their passports, their schooling, as well as the finer detail of the contact arrangements. It has not been necessary for me to determine all of these, but they have been ventilated before me both in writing and orally. As I said during the course of submissions, these parties need to find a better way to resolve their disputes, only returning to the court process where such efforts have been tried and failed.

28. The father's application to adjourn relies to some extent upon the proposition that it would be unfair to him, or to the children, to require him to restart proceedings should further welfare issues arise. I do not agree with that proposition. This case is no different from many other private law disputes. The court process is designed to ensure that cases are resolved, where possible, without the need for lengthy hearings and that each case is allotted an appropriate share of the court's resources. This final hearing has now concluded with the issues that had been identified through the case management process having been resolved by agreement or determination. There is no need to allot further time or court resources to it.

29. Finally, I do not agree with the suggestion that my determination of the appropriate child arrangements for this family should be subject to review once the criminal court has considered the bail arrangements for the father. This court and the criminal court perform different functions. Neither has any priority over the other. The arrangements set out within this court's order have been approved or directed by me because I consider them to be in these children's best interests. If they cannot be implemented (for whatever reason) then it is incumbent on the parties to agree arrangements that can be implemented or else to seek to restore the matter to court. No doubt, as a matter of practice, child arrangements that have been ordered and very quickly prove to be incapable of implementation (for reasons outside of the control of the parties) are unlikely to be treated as entirely fresh applications. However, in my view it would be wrong to anticipate that such a problem will arise in this case or to delay decision making in the expectation that it might.

30. Accordingly, I refuse the father's application to adjourn these proceedings and make final child arrangements orders.

Determination of remaining Welfare Issues

31. I then turn to consider the remaining matters in dispute between the parties.

32. I agree with the father's proposition that minor changes to the detail of the order can properly be dealt with by way of submissions. I do not need to hear oral evidence from the Family Court Adviser or from the parents to resolve these limited issues.

33. The father seeks additional periods of contact with the children during the school holidays. Following detailed negotiations, the parties have agreed that where the

father's weekday contact falls within a school holiday (including half terms) the contact should be extended to be for the full day. They have also agreed that there will be an extra day of contact at Easter and at Christmas.

34. The father wishes to add an additional 3 days of contact during the school summer holidays and an additional day for each half term. That is opposed by the mother.

35. In determining this issue, I bear in mind the serious findings that I have made against the father and also the risks that I identified going forwards, including the risk that the father will denigrate the mother to the children, that he will lose his temper with them and that he has in the past physically chastised C. There is also a risk, particularly at handovers, that contact between the father and the mother will lead to arguments and possibly to violence leading to a risk of physical and emotional harm to the children. It is those risks that have led to the requirement of supervision both during handovers and at the father's home.

36. However, I also bear in mind the positive comments about these children's relationship with their father which come from the mother as well as from third parties. As Ms Pomeroy points out there is no criticism of the quality of the contact between the father and the children to date. Ms K is an independent social worker who supervised the father's contact with his children and who gave evidence before me in June 2022. Her description of that contact was extremely positive. The children enjoy their time with their father and missed him when they did not see him. The father demonstrated lots of warmth and care and, overall, a good capacity to parent these children. The parents were able to work well together in her experience. In her S.7 report the FCA said that the children might welcome a progression of time with their father and would enjoy that time with him but cautioned against the impact on the children of the father having even one incident of a loss of control.

37. It seems to me that, as the mother has recognised, some gradual progression of contact is appropriate, particularly bearing in mind that I am making final orders which will set in place the arrangements now for the foreseeable future. Even with the mother's concessions as to weekdays, this still means that the children will only be seeing their father one day a week, even during the long summer holiday. I consider that this is insufficient time for them given the quality of their relationship with him. I agree with the father that there should be additional contact during the school summer holidays and this should be for an additional 3 days.

38. In so far as half terms are concerned, the mother's concessions as to weekdays may result in an additional day with their father, but may not do so depending on the week in which the weekday contact falls. It seems to me appropriate that there should be that additional day, whether or not half term falls on the right week.

39. However, the protection against the risks I have identified, namely the involvement of the third party in these arrangements, must remain in place for these additional periods of contact as well as those already agreed. I note the father seeks to reduce the period of time that his contact is supervised, but I do not agree with that proposal. It is a matter for the mother to judge whether she is prepared to agree to any variation in that regime whether as a one-off event or more generally. There is nothing to prevent the variation of any part of my order by agreement, but I do not think it helpful to build into the order any expectation that such variation will take place.

40. I agree with Ms Pomeroy that there is no need to vary the provision in the order as to identification of the third party who is to supervise the contact and handovers. This was the wording the parties have agreed previously, is understood by them, and appears to have worked to date.

41. Finally, the father seeks a recital in the order to record the mother's position as to the receipt of therapeutic input. This issue is complicated both by the trauma the mother has undoubtedly suffered as a result of the father's abuse, but also now the pending criminal proceedings. Beyond encouraging the parties to find, outside of continued litigation, a method of communication to enable them to exchange information about their children and discuss any issues that arise, that is not a matter for this court to engage in. I do not propose to add recitals to this order save to record any matters, separate from the order, that have been agreed by the parties.

Recorder Samuels KC