

IN THE OXFORD FAMILY COURT

Neutral citation number [2023] EWFC 73 (B)

St Aldates
Oxford
OX1 1TL

Tuesday, 10th January 2023

Before:
HER HONOUR JUDGE LLOYD-JONES

B E T W E E N:

E

and

G
& CHILD X

THE APPLICANT appeared In Person
THE FIRST RESPONDENT appeared In Person
MS L PEACOCK (instructed by Reeds Solicitors) appeared on behalf of the Child through
their Guardian

JUDGMENT
(For Approval)

This Transcript is Crown Copyright. It may not be reproduced in whole or in part, other than in accordance with relevant licence or with the express consent of the Authority. All rights are reserved.

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court..

HHJ LLOYD-JONES:

1. This is an application brought by the child's Guardian, on behalf of the child, an application for committal of the father, G. The mother is E. The child is X, who was born on 27th June 2009. The parents split up in the first couple of years of her life, and extremely sadly, she appears to have been the subject of litigation for most of the time since then. I have not seen it, but I understand there was an order made by District Judge Payne in 2012 when she was only three years old, and that obviously would have been at the end of a process before the Court.
2. There was another order of Her Honour Judge Cushing sitting as a Deputy Circuit Judge in 2016, which provided that the child should spend nine nights out of 14 with the mother, and five with Father. There are then further orders made and it is not entirely clear to me whether these are the same proceedings or different proceedings; the case number seems to vary, but there are other orders made by District Judge Buckley-Clarke in 2020, which provided for X to spend time with both parents, albeit a greater period each fortnight with mother. That order was suspended by District Judge Buckley-Clarke in these proceedings in 2021 when she ordered that contact be more limited and supervised when X was spending time with father.
3. Following that, Father refused to take up the contact directed by the Court but continued to create opportunities for seeing X outside the framework provided by the court order. That led ultimately to a fully-contested hearing in May and the first day of June this year when Recorder Hocking ultimately reinstated the long weekend contact with Father, with no supervision. I have considered his very careful judgment about that and he is very clear that a 50/50 split of contact is not appropriate, not in the child's interests, but that having a clear order for there to be some contact was. He also made a section 91(14) order inhibiting applications to the Court until X was 16.
4. There have been no appeals against any of those orders. Nonetheless, Father's position is that the only order he would accept would be an order providing for X to spend 50% of her time with him and 50% with the mother.
5. Mother's position throughout has been that she wants Father to have contact with X, or more particularly, that she wants X to be able to spend time with father, but that it has got to a point now where she cannot cope with what is going on.
6. X, certainly, has shown, in the earlier years, that she wanted to see both parents, that she enjoyed spending time with her father, but according to what Mother says, now that position is more nuanced, more difficult.

7. That is the background to the application but the immediate issue now before the Court is that Father has continued to seek to see the child outside of the provisions of the orders, to see her when he wanted to see her, not when the Court had ordered it, and to see her, in his mind, when X wanted to see him.
8. He has also continued to insist on wanting X to see the judge, although she has done so once already. That offer is of course there, but it is not something that should be forced upon X. The advice the Court has received is that she doesn't want to because she has done it once already and it is important that father understands that such a meeting would not be a chance for X to express her views to the Court at all; that is not the purpose of it.
9. Father continues to believe that other people, adults, mother, possibly the Guardian, are preventing X from first of all seeing the judge and also from seeing him when she wants to. However, it is important that I do not stray at this point into issues of welfare. The issue before the Court in this hearing is Father's breaches of the orders and the application for his committal.
10. The application was made by the Guardian in October last year and was followed by a further application supported by an affidavit to rely on further evidence because of breaches which had occurred, the Guardian said, after the application was made, and I granted permission so that all matters could be dealt with this week rather than coming back again.
11. The underlying problem is that father does not accept the order, he does not appear to accept the authority of the Court, and he does not appear to see anything wrong with ignoring the court order. He has been served with the papers when they were issued in October and served again in November, and I understand again on 1 December. He has been handed the application which sets out the breaches, and the further application, together with the evidence which sets out the breaches that continued after the first application was made.
12. I am mindful of how unusual this case is. Counsel, and I am sure with assiduous research, has not been able to uncover any reported cases which are of any great assistance to the Court. It is not only that it is unusual for there to be committal proceedings in a family case, but it is also unusual for the alleged breaches to be not by the resident parent refusing to allow the child to spend time with the non-resident parent, but in this case the non-resident parent refusing to take up the contact that has been ordered and seeking to spend time with the child outside the order.

13. It is perhaps less surprising to find that part of the application for committal includes the non-resident parent taking and retaining the child outside the time ordered that she should be spending time with him.
14. I have been mindful from the start of the case of *Re L (A Child)* [2016] EWCA Civ 173 which sets out some guidance for the Court in making sure that such applications are dealt with properly. I have also had referred to me the case of *Borg v El-Zubaidy* [2017] EWFC 48 and *Emoni v Atabo* [2020] EWHC 3322 (Fam) which gives some further comment on how to proceed in these applications, although the circumstances are very different and the outcomes of limited assistance.
15. It is important that the Court and the parties, in particular the defendant, is clear from the start about what allegations form the foundation of the breaches, and I am satisfied that that is met in the applications and in the further affidavit filed after the application. Father has been served with both applications and the affidavits, and indeed the original order. He was present in court when it was made. He does not dispute that the original order has a penal notice attached to the relevant paragraphs. The further order made by myself on 1 August also has a penal notice attached to the relevant paragraphs.
16. He has been offered the opportunity to seek legal representation. At a very early stage of these proceedings he was represented. He has declined that. He has made clear admissions of breaches of the orders in spite of being reminded that he does not need to say anything at all, that he does not need to incriminate himself. I find no reason at all why I should not be hearing this case. It is appropriate that it is heard by the judge who made the order in the first place. I appreciate that the order of 1 June was made by Recorder Hocking, standing in effectively for myself to whom this case was allocated in order to avoid delay. I am content that it was appropriate for me to hear it.
17. Father has been reminded of his right to remain silent, and indeed he has not filed a statement for this hearing, but he did choose to give evidence and has been permitted to do that. Of course, I must be mindful of the fact that the allegations must be proved beyond reasonable doubt.
18. I have been greatly assisted by Ms Peacock on behalf of the Guardian, and the Guardian herself for having made this application, but of course the direct evidence of the breach comes from Mother and from Father himself. Father has given his evidence to the Court and made his own position crystal clear.
19. The breaches are of an order dated 7 June 2022 and made by Recorder Hocking, and my order of 1 August 2022. Those orders both allowed the child to spend time with the father, but were very clear in restricting any contact between the child and the father outside the terms of the

orders. Both orders contain prohibited steps orders preventing that further contact. The reason for that was to prevent X from feeling overwhelmed by continually being approached by her father when it was not properly planned and to try and prevent her feeling torn between her parents. It has been said that she has found it very difficult to say no to her father.

20. Father , before this week, admitted breaching the order dated 7 June, and all direct contact was suspended by the order of 1 August as a result. As I have said, all the relevant paragraphs are endorsed with penal notices.
21. I have explained to father yesterday that he is at risk of custody, and that he has the right to silence and to seek representation, all of which he has declined. He has been cross-examined by counsel for the Guardian and briefly by Mother, who appears in person, as does he. He frankly admits a number of breaches. It is a very sad situation in that it ought to be perfectly possible for the child to spend time with both parents without this level of conflict. Indeed, in the past, the Court has taken the view that she should spend time with both parents. The difficulty is father's insistence on doing so on his own terms, and it is that which puts the child in an impossible position. It is self-defeating because it has led to this application.
22. The welfare of the child is the Court's paramount consideration, but if a party wilfully and consistently defies order of the Court, it becomes impossible to manage and a line must be drawn.
23. With that as background, I turn to the breaches that are alleged, reminding myself again that the test is that the breaches must be proved beyond reasonable doubt. If there is a reasonable excuse offered for the alleged breach, then it will not be proved.
24. Specifically, on 11 July, father met X from school and took her home, and then to London on 12 July to get a second passport. It was a Monday and Tuesday. There is no provision in the orders for X to spend any time with her father on a Monday or a Tuesday. He had no permission from Mother to take X home with him, and no permission from the school to take her out of school. That breach is proved.
25. The argument that the Embassy requires people to attend within office hours on a Monday to Friday does not begin to excuse that behaviour. It is possible that father took X on that day in retaliation for Mother keeping her at home on 6 July because of X's grandfather's funeral on 7 July. The funeral of a grandparent is, by definition, a rare event. In a civilised situation, it should have been agreed to so that the child could attend that important occasion, and indeed Mother offered 8 July as an alternative, but there was no response.

26. Mother admitted lying to father and perhaps more importantly to the Court about whether X went to school on 6 July. The Court does not condone that. It is entirely unacceptable and it betrays a lack of understanding of the significance of lying to the Court. However, I do accept two things. First of all, I suspect Mother was driven to it by the situation she found herself in, and secondly, that is not the subject matter of this application. It might go to the mitigation presented by Father in the sense that it means that Mother does not come to Court with clean hands herself.
27. What father does say is that X was happy to come with him. He knew Mother would refuse for X to go to London with him on the 12th. His solution was just not to ask Mother. That shows total disregard for the court order and worse, it tears X apart between her parents. It is something that father has done, not mother.
28. On 21 July, which is the subject matter of the second breach, it was the end of term. It was a Thursday. Father agreed that the order was crystal clear; on the Wednesday night, X was due to spend time with him overnight. That in itself was not a problem. Counsel on behalf of the Guardian acknowledged some doubt about the time of return on the Thursday, the time when X should have been returned to her mother. I do not regard that as significant because of course in the event, she did not return at all on 21 July. That is not what the argument is about. Indeed, she did not return on the 22nd either, until Mother's intervention.
29. Father's response to that was to say, "It's my mistake". That is not something I can accept. You cannot make a mistake about the fact that the child was meant to spend one night with you and then keep her for two nights by mistake. It does not make sense. It is an example of father simply doing what he wanted. The situation was only brought to an end by Mother attending and being assaulted by father, in respect of which he has been arrested. That breach is also proved. None of the reasons given by father are persuasive. It was another completely gratuitous ignoring of the court order.
30. The next allegation is of 30 August where father accepts he bumped into X in Waitrose. I accept that that was a chance meeting; there is no evidence to say otherwise. However, instead of waving and going the other way, as it was suggested he should have done, he approached her, he engaged in conversation, as he set out in his own email to the Guardian on the same day, and as Mother described X reported to her. There is a consistency about what was said, by Mother and by Father, namely that he asked X about seeing the judge again. Mother's evidence was also that X was very upset after that incident and that again is supported by Father, who said that she started crying. We do not know why she was crying; each of them blames the other. It does not matter. She was upset. The order does not permit this sort of conversation. There was an alternative which was simply to wave, to smile and go away.

That breach is also proved on the basis of mother's's evidence and father's own acknowledgement of what happened.

31. On 4 September, there is a further allegation that father bumped into X at the local festival. She was there with her mother and with some friends of her mother. I agree with father that there was no reason why he should not be there, no reason why X should not be there. It was a local festival. The sensible approach might have been to agree different times. I do not know how the festival worked and whether that was possible. However, once they were both there, again, he should have waved, smiled from a distance, not deliberately approached and engaged with her. That incident was exacerbated by his throwing beer over one of the people with her. All of that he acknowledged. He does not deny it, and it is proved beyond reasonable doubt.
32. On 15 September, 16 September, 3 October and 4 October, it is alleged that father placed himself on the route to school and was observed there by mother who photographed him. He attempted to deflect that allegation by suggesting it was inappropriate for her to have taken a photograph whilst driving. That is simply absurd. Obviously, she did not. That was her evidence and I accept it. He did not deny that he was present and was photographed and shown in the photographs that I have seen with the name of the road also showing. Y Road.
33. The order of 1 August precludes father from being on X's route to school and is made by reference to times when he knows, as he acknowledged, that she will be going to school and returning. That order was strengthened in the order of 5 October so that it named specific times, between eight and nine, and three and four. However, he admitted frankly in relation to the earlier order that he knew the times when she would be going to school and that he had flexibility in his own work. When it was put to him that he was deliberately looking for a meeting with X, he said, "I would not deny it".
34. The further instances are set out in the Guardian's second affidavit and relate to the order of 5 October, and they occurred on 18 October, 1 November and 4 November. Again, allegations that he bumped into and spent time with X.
35. On 18 October and 4 November, the allegation is made that on the basis of his email saying that he had seen her and indeed in relation to the incident of 18 October, he says that nothing will stop him from doing that. He says to the Court today and yesterday that he only speaks to X in order to reassure her. He fails to see that he is creating the conflict by doing that, and he is causing the problem.

36. On 1 November, he again acknowledges and accepts, and it is proved beyond reasonable doubt, as are the instances on 18 October and 4 November, that he handed her a letter. That letter she has apparently still not read. It is not a child-centred letter. He does not deny it. He does not deny any of those meetings in October and November. He admits them, and those allegations are proved on the basis of his own evidence as well as that of mother, supported by the Guardian.
37. He also adds that he saw the child again on 14 November and gave the child a copy of the letter and some biscuits. That is not the subject of one of the allegations.
38. Father's approach appears to be that it is somehow helpful to X to do that. I am finding it very difficult to see that it is in the interests of her welfare, but it is right that the Court should consider the mitigation that he offers for his behaviour. Some credit is due for the fact that he has freely admitted all of these breaches. The trouble is that whilst admitting that he is in breach of the order, he does not appear to accept that there is actually anything wrong in what he has done. He appears rather to say that he is the only person who is behaving correctly, who has made a correct analysis of the situation. I accept that he believes that X wants to see him. That does not alter the existence of the court orders.
39. He said, in terms, that he did not consider going to Waitrose was a breach. It was. He said he did not consider retaining the child on 21 July was a breach. It very clearly was. He is seeking to replace the court order with his own view, and Mother not cooperating with what he wants to happen, as he sees it, entitles him, as he sees it, to do as he pleases.
40. In the incident on 21 July, he sees retaining the child as being justified because the mother is somehow at fault, but he asks professionals to rely, not on speaking to the child to check that she is okay, but on his assessment that she is okay. When Mother goes to try and reassure herself, he assaults Mother. I cannot see any basis on which that can be said to be mother's fault rather than father's.
41. He talked today in terms of needing to protect the child, but then raised some doubt as to whether he had actually read the order from 7 June, which does not provide for supervised contact but rather would have allowed him to see the child over the weekend, every other week, without difficulty. It appears that he is seeing X regularly now. Mother gave evidence that after 5 October, the child asked to be allowed to walk to school normally, and it appears, on what father told the Court, it is not the subject of my decision, that he is finding a way of meeting her now. It draws attention to the Guardian's concern that this situation is affecting the child socially because before that she was having to be driven to school.

42. All the breaches that have been alleged are proved and they are proved beyond reasonable doubt on the basis of the evidence of mother , the Guardian and father's own evidence; he admits them. The excuses that he offers amount to a refusal to obey court orders.
43. I have considered the sentencing options and whether a fine would be sufficient to penalise father and to mark the Court's displeasure. However, the extent of the breaches, the persistence of the breaches and father's approach to the breaches, admitting they have occurred and yet not admitting that there was any fault in them means, in my view, that a custodial sentence is necessary. I bear in mind that the Court's powers are to sentence up to two years.
44. Turning to the specific matters for taking the child to stay with him on the 11th and 12 July without any justifiable cause and keeping her out of school, I sentence father to six weeks' imprisonment. For retaining her beyond 21 July until 22 July and exposing her to that altercation, I sentence him also to six weeks' imprisonment, to run concurrently with the first six weeks. For deliberately approaching her outside the terms of the order on 30 August in Waitrose and 4 September at the festival, I sentence to three weeks each, to run concurrently with each other but consecutively to the six weeks above.
45. For the breaches on 1 November and the attempts to meet on 18 October, 4 November, 15 September, 16 September and the 3rd and 4 October, I sentence to a further three weeks, those to run consecutively in relation to the nine weeks already imposed. That gives a total of 12 weeks' imprisonment. It is imposed mindful of the fact that this is the first time these breaches come before the Court in this form, but they represent the deliberate and consistent refusal to comply with the order. There is a complete failure to respect the authority of the Court, a contempt of Court in fact. It also represents a very distressing situation for the child. It is very damaging and it is totally unnecessary.
46. I believe there is acrimony between the parents and on both sides, but not that mother will prevent contact in accordance with any order made. It is unnecessary and very saddening.
47. I have taken the view that a custodial sentence is necessary, but I must also consider whether it is appropriate to suspend that sentence. I take account of the fact that the severity of the breaches is reflected in the penalty, but it is also the first time that it comes before the Court. As I have said, it is very unusual for the non-resident parent to be the one breaching the order in this way, but it is still the first time that father has been found to be in breach, and it would, in my view, be wrong to sentence him to an immediate custodial sentence. That is a view also expressed in the case law with was put before me at the beginning of today.

48. Therefore, father will not go to prison immediately, but he must know there is a sentence of imprisonment hanging over him. It will be suspended for a period of one year. If any further breaches of the order occur, it will be brought back to court. The order, if those breaches are confirmed, will become effective and father will go to prison for 12 weeks. A summons will be issued, or a warrant will be issued when the Court is made aware of it. If the breach is proved, the sentence imposed today will follow whatever additional sentence is imposed at that time.
49. Everyone involved in this should be absolutely clear, but most particularly father, that this has nothing to do with mother or the child. Most particularly X must understand that it is not her fault. This is nothing to do with anything she has done. This is a decision made by the Court because of a number of breaches of orders the Court has made. It is unacceptable for court orders to be ignored and overruled by what a litigant considers to be their better view. There is a process and that needs to be followed. The consequences of failing to follow the order in the future will be that the order I have just made will become effective.
50. We do not perhaps know exactly what X wants now, except that she is fed up with court proceedings. Father thinks she is upset because she cannot see him. Mother says actually, she is much less upset now. Those are matters we are going to come to this afternoon. Either way, she is clearly torn between the impossibility of pleasing the father and working within the court order. The solution lies in removing that conflict. The solution lies in Father complying with the orders that there are and that will be made in the future, probably this week.

End of Judgment.

Transcript of a recording by Ubiquis
291-299 Borough High Street, London SE1 1JG
Tel: 020 7269 0370
legal@ubiquis.com

Ubiquis hereby certify that the above is an accurate and complete record of the proceedings
or part thereof