[2020] EWHC 3532 (Fam)

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION
ON APPEAL FROM THE
FAMILY COURT AT NOTTINGHAM

No. FA-2020-000116

Royal Courts of Justice
Strand
London, WC2A 2LL

Wednesday, 18 November 2020

Before:

MRS JUSTICE JUDD

(**In Private)**

B E T W E E N :

F — Appellant

- and -

(1) M
(2) – (4) CHILDREN
(via the Children's Guardian) — Respondents

MR R. JONES (instructed by Hanne & Co Solicitors) appeared on behalf of the Appellant Father.

MR J. JEFFERS (instructed by Hawley & Rodgers) appeared on behalf of the Respondent Mother.

MS K. TAYLOR (instructed by Family Law Group) appeared on behalf of the Second, Third and Fourth Respondents.

J U D G M E N T

(via MS Teams)

(Judgment delivered via MS Teams recording, with occasional instances of loss of sound)

MRS JUSTICE JUDD:

1 This is an appeal by a father against a decision of His Honour Judge Lea, dated 25 May 2020, in which the judge declined to order direct contact with the father's three children, aged 10, 9 and 7. Orders were made for the children to live with their mother and have direct contact with their father by means of letters, cards, gifts and photos not more than four times a year.

The Background

2 The parents met in 2008. Initially, they all lived in Germany, albeit there is a dispute as to whether they lived together. By 2014, the parents were certainly separated and the father issued an application for contact in Germany. In April 2015, the mother moved with the children to live in England, breaching a contact order made by the German court. The father brought Hague Convention proceedings in this country for the children's return, which were unsuccessful. He then brought this application for contact, pursuant to Art.21 of the Hague Convention.

3 In the early stages of the proceedings, the mother refused to engage, not attending two court hearings which she had been specifically ordered to attend. A bench warrant was issued and she was finally arrested and brought before Keehan J. She gave an undertaking to him to comply with court orders and was released. The proceedings were transferred to the local court. In fact, the mother breached an undertaking she had given to Keehan J and committal proceedings were commenced. The mother made a number of serious allegations against the father and a fact-finding hearing was listed and heard in May 2018. None of the

findings sought by the mother were made and the court positively found that the father had not abused the mother in any of the ways she alleged nor had he sexually abused the eldest child. The court joined the children as parties and appointed a guardian to act for them.

4 Immediately after that hearing, the mother threatened to abduct the children abroad to a non-Hague Convention country and a prohibited steps order was made. After the fact-finding hearing, orders were made as to indirect and direct contact but for reasons which cannot all be laid at the mother's door, this did not take place until February 2019. The youngest child spent more than two hours with the father, the middle child would not enter the room and the eldest child remained only briefly.

5 In March 2019, the final hearing was adjourned so that Dr Kennedy, Consultant Child Psychiatrist, could be instructed to advise in this case. The mother did not agree to present the children for the first two appointments with Dr Kennedy, but she did so for the third one on 6 June 2019, which was just under two weeks before a committal hearing. At that meeting, the two youngest children had contact with the father, although the oldest would not engage.

6 During the summer of 2019, the mother removed the children to Nigeria without notifying the court. This meant there was a delay in progressing the case for a few months. After the return of the children in September, the local authority was ordered to prepare a section 37 report and to recommend as to whether or not public orders should be applied for.

7 In October 2019, the social worker tried to arrange contact between father and the children, but the children said they did not wish to see him.

8 Following that, directions were made for the filing of statements and the setting down of a final hearing, which took place over a number of days in April and May 2020.

9 The father has made a number of committal applications during this period relating to the mother's failure to abide by court orders. Some findings have been made, but consideration of any sanctions has been adjourned until the conclusion of proceedings and I believe will be listed after this appeal, whatever the outcome.

The Judgment

10 In his judgment, the Judge set out the background of the case in some detail, followed by the recommendations of Dr Kennedy and the author of the section 37 report, the position of the parties, and the oral evidence. He also set out the history of committal proceedings (which he said could be a blunt instrument and somewhat counterproductive as the mother had told the children that the father was trying to get her sent to prison), the law, and then his analysis. He recorded the various breaches of orders by the mother and commented that the father had not always helped his own his cause. One example of this was that he had not been able to attend the contact arranged in November 2018. I note here that the Judge said the father failed to attend, although it seems from other documents that the father had informed everyone of his difficulty with the arranged date a month in advance. Another example was the father making inappropriate comments in front of the children when he saw them, and a further one an angry and abusive e-mail he sent to the social worker after receipt of the s.37 report.

11 The Judge went on to say that there was little to be achieved by an in-depth analysis of the mother's behaviour to decide whether or not this was a case of parental alienation. He stated that putting a particular label on her conduct did not provide an instant remedy or open up

an obvious pathway for the father to achieve a positive relationship with his children. Also, the judge said this was not a case where the father had a positive relationship with the children in the first place. Given their age at the time of the separation and the subsequent difficulties, he has never really had a relationship with them at all and was having to build it up from scratch.

12 The crux of the Judge's decision is encapsulated in paragraph 25 of his judgment, where he identified the issue as being whether the emotional harm to each child by continuing with efforts to establish a relationship and enforce contact with their father outweighed the long-term emotional harm of a cessation of direct contact altogether.

13 The judge turned to consider the welfare checklist, and in coming to his conclusion he decided it would be extremely difficult to establish direct contact. The more time that passed the harder it would be. Putting aside all the practical difficulties, he concluded that to force face-to-face contact on these unwilling children, who knew their mother's wishes, would not be in their welfare interests. The judge asked him himself whether work could be done to help, but accepted that CAMHS would be unlikely to assist given the heavy demands on their service. Accordingly he refused to order direct contact although he accepted earlier in the judgment that this would likely mean the end of the children's relationship with their father during their childhood and, foreseeably, permanently.

The Appeal

14 The father, through his counsel Mr Jones (who did not appear below), appeals on a number of grounds. I think they can be distilled to some key essentials following the decision by Cohen J to grant permission. First, Mr Jones argues that the judge gave insufficient weight to the long-term consequences for the children in ceasing all contact, second he submits that

the judge should have given more consideration to the option for enforcement of orders, and third that he had failed to give weight to the contact that had taken place with Dr. Kennedy. When the youngest children saw their father for the purposes of his assessment, contact had successfully taken place, albeit in unconventional circumstances.

15 In his oral submissions and skeleton argument, Mr Jones further stressed that the Judge had given too much weight to short-term and practical issues and argued that there had not been a sufficient strategy for trying to make contact work in this case. For example, although committal proceedings have taken place, there have been no sanctions imposed. In fact the committal proceedings were postponed until after the substantive contact hearing. He argued that some of the Judge's analysis was wanting. By way of example, the paragraphs dealing with the effects upon the children of ceasing contact stated this:

> "The Guardian accepts in principle that emotional damage may result in the longer term if the children have no direct contact with [father] but insists that at present the children do not exhibit any signs of emotional damage from being denied a relationship with [their father] and does not see it as inevitable that they will."

And, also:

> "The Guardian was opposed to the instruction of Dr Kennedy submitting that already enough had been done to try to build up contact between [the father] and the children; she is even more of that view now."

16 Mr Jones also criticised the Judge's unwillingness to ascribe the label "alienation" to the mother as he said it was incumbent upon judges dealing with cases to properly describe the underlying factual matrix underpinning the court's findings and decision.

17 On behalf of the mother, Mr Jeffers properly pointed out that this judge had the benefit of long involvement with this complex case, one in which there are no easy answers. On the last occasion had heard evidence over several days. Unless this court is clear that the

Judge's decision was wrong, the appeal should be dismissed. Mr Jeffers submitted that the decision was neither wrong nor unjust. He submitted that it was plain that the Judge was acutely aware of the long-term consequences for the children of the cessation of a relationship with the father and also that he had considered the enforcement options.

18 On behalf of the guardian, Ms Taylor argued that it was clear not only from the judgment but also from questions the judge had posed to the guardian during the hearing itself that he was concerned about long-term effects of the children of cessation in contact. She stated that the judge was entitled to accept the views of the guardian who had been involved in the case for some time and that it would be more harmful to the children to persist with attempts at contact against their mother's wishes and their own express wishes than to bring an end to it. It was pointed out that, in reality, it was not possible to define what long-term harm the children were at risk of suffering as a result of not having contact with the father and whether or not that harm would manifest itself in a way that would cause emotional distress. Finally, Ms Taylor argued that the judge had manifestly considered all the options available to the court.

19 At the end of the submissions, I asked counsel if they would be able to prepare a chronology for me, setting out the various court orders that had been made with respect to the mother and actions that had been taken for breach. I am very grateful indeed for them for preparing this document overnight and I have found it of great assistance.

Discussion and Conclusion

20 In coming to my conclusions, I am very much aware of the deference that should be accorded a trial judge, especially this judge who had considerable experience of this case,

heard evidence over several days and was quite obviously troubled about the difficult decision he had to make.

21 In the case of *Piglowska v Piglowski* [1999] UKHL 27; [1999] 3 All ER 632; [1999] 1 WLR 1360; [1999] 2 FCR 481; [1999] 2 FLR 763; [1999] Fam Law 617 (24 June 1999), Lord Hoffman stated as follows:-

> "In *G v G (Minors; Custody Appeal)* [1985] 1 WLR 647, 651-652, this House, in the speech of Lord Fraser of Tullybelton, approved the following statement of principle by Asquith LJ in *Bellenden (formerly Satterthwaite*) [1948] 1 All ER 343, 345 [1947] 1 All ER 343, 345, which concerned an order for maintenance for a divorced wife.
>
> > 'It is, of course, not enough for the wife to establish that the court might, or would, have made a different order. We are here concerned with a judicial discretion, and it is of the essence of such a discretion that on the same evidence two different minds might reach widely different decisions without either being appealable. It is only where the decision exceeds the generous ambit within which reasonable disagreement is possible, and is, in fact, plainly wrong, that an appellate body is entitled to interfere.'
>
> This passage has been cited and approved many times but some of its implications need to be explained. First, the appellate court must bear in mind the advantages which the first instance judge had in seeing the parties and the other witnesses. This is well understood on questions of credibility and findings of primary fact. But it goes further than that. It applies also to the judge's evaluation of those facts. If I may quote what I said in *Biogen Inc. v Medeva Ltd* [1997] RPC 1:
>
> > 'The need for appellate caution in reversing the trial judge's evaluation of the facts is based upon much more solid grounds than professional courtesy. It is because specific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made upon him by primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualifications and nuance...of which time and language do not permit exact expression, but which may play an important part in the judge's overall evaluation.'
>
> The second point follows from the first. The exigencies of the daily court room life are such that reasons for judgment will always be capable of having been better expressed. This is particularly true of an unreserved judgment such as the judge gave in this case but also of

> a reserved judgment based upon notes, such as was given by the District Judge. These reasons should be read on the assumption that, unless he has demonstrated the contrary, the judge knew how he should perform his functions and which matters he should take into account."

22 Nonetheless I am clearly persuaded that the decision made by this judge to cease attempts at contact was premature and therefore wrong. Standing back and looking at the case overall, it is absolutely true that proceedings have been going on for a long time and that the case has been bedeviled by delays. This is (at least in part) because the mother has failed to comply with orders to file statements and because she went abroad for some months. Also, there was a fact-finding hearing which took time to arrange and the outcome assessed. Looking at the detail and the chronology of court orders, however, it seems to me that within these lengthy proceedings the attempts at arranging contact (both indirect and direct) have not played a significant part.

23 There have been some orders for indirect contact, and, indeed, some indirect contact itself, but this does not seem to have formed part of an overall strategy or to have been sustained, although I do appreciate there have been attempts at telephone calls, as well as letters and cards.

24 As to direct contact, I am struck by what happened at the contact arranged with Dr Kennedy and will quote Dr. Kennedy's words directly, (as the judge did himself):

> "I went down to the waiting room to collect the children. [X, the youngest] was happy to do and was going to rush off. [Y, the middle child] and [Z, the eldest] said they did not want to go."

> "In fact, I just didn't take no for an answer because I felt I needed to take the matter in hand very clearly and so I just simply [said] no we are going up and I scooped them up and [Y] and [Z] followed [X] up

> to my room. [The father]…was very emotional and a bit over the top and I did actually suggest he was a little less over the top for a bit. [Z] went straight to his father's lap and also soon went to the toys. He was very happy to see him. [Y] and [Z] went to the door and wanted to leave and I made a decision that I would not accept this and I stood by the door to stop them leaving and I said no I don't think you should leave and I think you need to see your Dad. Therefore, [Y]'s attitude changed and both the youngest children were enjoying being with their father. The oldest child [Z] did not change in her attitude and stood at a distance."

Dr Kennedy was unfortunately not able to attend the trial and give evidence. At a later stage when one of the children was being spoken to by the Guardian, he put his thumb down when asked about contact generally but his thumb up when specifically asked about the contact when Dr Kennedy was present.

25 The Guardian (although not the judge) criticised Dr Kennedy for holding the children against their will in a room and "scooping" them up, whatever that means. I remind myself that the two youngest children were only very young at the time of that meeting with Dr Kennedy. What is being described by Dr Kennedy seems to be little more than being directive towards children and I do struggle with the notion that his actions were inappropriate. There is a difficulty with simply asking a very young child whether they want to do something or not if they are coming under pressure from one of their parents, and, as Dr. Kennedy himself said, it would have been different if the children were really distressed.

26 The success of that contact so far as the younger children was concerned is an important factor in this case. It strongly shows that the children's wishes and feelings are more nuanced than an answer they might give when asked the simple question. It also shows that attempts at contact are far from doomed.

27 There has, I think, been only one further attempt to organize contact between the children and the father by the social worker. The children stated that they did not want to go and,

although they were given encouragement, they were not told what to do. There have been no further orders for direct or indirect contact.

28 I recognise that the issue of contact is stressful for the children because their mother is so set against it. This is a case, however, where the professionals and, in turn, the court has to be prepared for difficulties in the short term. I have come to the conclusion that there had not been sufficient attempts to see whether such difficulties could be overcome and that the judge should not have stopped then. This was the view of Dr Kennedy.

29 I have also come to the conclusion that the judge here did not give enough consideration to the enforcement options. Committal proceedings have never led to any sanction; indeed, the consideration of sanctions was left until after the final welfare decision. Of course they are a last resort but the main aim in a case like this is to obtain compliance with court orders. Although the mother has disobeyed some orders, she has obeyed others. Notably she made the children available to see Dr Kennedy in June 2019, two weeks before a committal hearing. Also the court can make orders pursuant to sections 11A to 11P Children Act 1989 for contact activity directions, monitoring and enforcement, although the judge should not be criticised for this in the absence of submissions being made to him about their use.

30 The focus of the submissions to the Judge and his decision was based upon the harm to the children of their mother being imprisoned or threatened with imprisonment and the fact that a change of residence was not an option, rather than the broader menu of options available to him.

31 The judge was plainly aware of the long-term consequences for the children of the cessation of contact, but I do consider that he may have given the short-term difficulties, (as did some of the professionals), too much weight given the significance of this particular decision. I

do not think enough has been done to try and see if the inevitable difficulties which there will be now can be overcome and contact can be made to work. To quote Mr Jones, I think there is room for a "more focused" strategy. Although the judge did not find it particularly helpful to ascribe the label 'alienation' to the mother in this case, he considered her to be implacably hostile to contact and that it was she who was responsible for the children's expressed hostility. Thus there is no real doubt about the mother's conduct.

32 The judge was entitled to find that the father's behaviour had sometimes have been wanting, but this is something which is very much within the contemplation of section 11A and is something that the father can work upon. As I understand it, he has already attended one course, although, of course, I do not know the outcome of that.

33 In his skeleton argument Mr Jones quoted from the judgment of the former President, Sir James Munby, at para. 57 of the case of *Re M* [2017] EWCA Civ 2164, saying this:

> "'...judges should be very reluctant to allow the implacable hostility of one parent (usually the parent who has a residence order in his or her favour), to deter them from making a contact order where they believe the child's welfare requires it. The danger of allowing the implacable hostility of the residential parent...to frustrate the court's decision is too obvious to require repetition...'"

34 I consider that is apposite in this case. For all the reasons I have set out the appeal is allowed and I will the case for further hearing. I consider that it should be transferred back to the Family Court in the local area and, therefore, for the Designated Family Judge there to consider how further to allocate the case.

CERTIFICATE

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