



Neutral Citation Number: [2020] EWHC 576 (Fam)

Case No: FA-2020-0010

IN THE HIGH COURT OF JUSTICE
FAMILY COURT ON APPEAL FROM
HHJ TOLSON QC SITTING IN THE CENTRAL FAMILY COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/03/2020

Before :

THE HONOURABLE MRS JUSTICE JUDD DBE

Between :

M
- and -
F

Applicant

Respondent

Alexander Laing (instructed by **Dawson Cornwell**) for the **Appellant**
The Respondent appeared in person

Hearing dates: 7th February 2020

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

THE HONOURABLE MRS JUSTICE JUDD DBE

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.

1. This is an appeal from an order made by His Honour Judge Tolson QC at a First Hearing Dispute Resolution Appointment, a “FHDRA” which took place at the Central Family Court on 15th January of this year.

Background

2. These are proceedings for a child arrangements order, under section 8 of the Children Act 1989. They concern the parties’ daughter, A, who is 10 years old. Her parents have been married for about 20 years. Their relationship has, to put things neutrally, been unhappy for a number of years, and ended towards the end of 2018 although the father did not move out of the home until spring 2019. In October 2019 the mother issued an application for a child arrangements order, stating that she sought a ‘live with’ order for herself and for the respondent to have staying contact with A for one night on alternating weekends and for the holidays to be shared equally.
3. The mother’s application appears to have been triggered by a dispute between herself and the father as to the extent of weekend contact between father and daughter, the father seeking contact from Friday to Monday every other weekend and the mother proposing Saturday until Sunday.
4. Some five days after the mother issued her C100 application in October there was a telephone conversation between the father and A, during which the mother alleges that the father screamed at A for a prolonged period, something which was witnessed by the nanny. After the call, the mother says that A shook and cried uncontrollably, and that she slept in her mother’s bedroom that night. She performed badly in an exam the following day.
5. As a result of the telephone call, the mother said that A did not want to see her father without someone else there. Although the father did not accept that he had screamed at A, he acknowledged that during the conversation he raised the subject of the dispute over the number of weekend nights she was spending with him, causing her to be uncomfortable. The parties agreed an interim way forward, pending the FHDRA, that contact between the father and A should be supervised by an independent social worker. There were three or four such sessions.
6. The effects of the telephone call (as she saw it), led to something of a sea change in the mother’s attitude towards contact between the father and A. For some time, the mother had made allegations that she was subjected to bullying and verbal abuse from the father. Some six years ago she sought assistance from her GP, telling her that the father’s behaviour was causing her to suffer from low mood and tearfulness. The GP diagnosed an adjustment disorder with depressive symptoms. The mother has suffered from this condition, with anxiety, over a substantial period of time and she consulted a psychiatrist in 2018, who referred her to a clinical psychologist. In December 2018, after an episode where the mother suffered a panic attack, as a result she believes of an outburst of anger by the father, she contacted the psychiatrist to ask if she could suggest a therapist who specialised in domestic violence recovery, including emotional abuse and coercive behaviour. She said that someone who specialised in survivor recovery was what she needed most.
7. During the first half of 2019 the father and A spent time together, for example he took A to skiing in February, and to Asia in April.

8. In May 2019, what Mr Laing, counsel for the mother described in his position statement for the hearing before Judge Tolson as ‘the promised physical violence’ arrived. The mother alleged that the father had kicked and assaulted her at home. The police were called and the father held in custody overnight before being released. After this the parties physically separated.
9. From May until October 2019, the father and A had contact on numerous occasions, including for two holidays in Europe. These holidays, like the ones in the early part of the year were successful and enjoyed by both father and daughter. As described earlier, however, there were some disagreements about contact, particularly as to weekend arrangements which led to the mother’s application to court.
10. After the October phone call, the mother stated that A no longer wished to have unsupervised contact with the father. In order to avoid contact ceasing altogether the parties agreed that contact should take place supervised by an independent social worker (“ISW”), Ms Lawal-Pettifor. She was present during several contacts which took place both at the father’s home and on outings. She prepared reports of the contact which I have read, and which were available to Judge Tolson. The notes demonstrate that contact went very well, and that the father was warm, loving and nurturing towards his daughter. She in turn was relaxed and happy. The relationship was good between them and natural too despite the presence of a professional.
11. There were some occasions during the contact when the father put pressure on A to tell the ISW how much she had enjoyed the holidays she had had with him. That pressure made A uncomfortable, as is clear from the notes.

The FHDRA

12. The FHDRA or First Hearing Dispute Resolution Appointment, is usually the first court hearing after the issuing of an application for a child arrangements order. Pursuant to Practice Direction 12B (the Child Arrangements Programme, which arises when there is a dispute between separated parents about arrangements for their children) paragraph 14, it is intended to provide an opportunity for the parties to be helped to understand the issues that divide them, and to reach an agreement, if it is in the interests of the child and safe to do so.
13. Practice Direction 12J applies to all cases in which it is alleged or admitted, or there is other reason to believe, that the child or a party has experienced domestic abuse perpetrated by another party or that there is a risk of such abuse. It sets out comprehensive guidance as to the manner in which such cases should be managed.
14. The amount of evidence that the court will have before it at the FHDRA is limited, including the application (which includes any allegations of domestic abuse), the response, and a safeguarding report from Cafcass. If there are issues upon which the parties cannot agree, the court will make case management orders to enable them to be resolved. If there are allegations of abuse, then the court will consider whether or not to order that there should be a separate fact-finding hearing, and what evidence will be required to make that effective. A section 7, Cafcass report is likely to be ordered as well, although in many cases (but not all) it will await the outcome of the fact finding. If there is to be no fact finding hearing the court may also order a section

7 report, and or further evidence, and list the matter for a dispute resolution appointment before a final hearing where welfare issues are determined.

15. The court is also required to consider whether there are any interim orders, for example for contact, which may usefully be made. Where there are allegations of domestic abuse which remain undetermined, the court should not make an interim child arrangements order unless it is satisfied that it is in the interests of the child to do so and that the order would not expose the child or the other parent to an unmanageable risk of harm (bearing in mind the impact which domestic abuse against a parent can have on the emotional well-being of the child, the safety of the other parent and the need to protect against domestic abuse including controlling or coercive control).
16. When this case came on for the FHDRA on 15th January, it was in the middle of an extremely busy list for the judge. He had approximate eight such hearings before him that day, and took this case over the lunch hour. It demonstrates his extremely high workload. The bundle in the case for that hearing is not huge, but it would have required an hour's reading as it contained not only the documents described above, but the parties' respective position statements and detailed reports from the supervised contact visits which had taken place since the end of October.
17. Both sides were represented. The mother's case was presented on the basis that she had been subjected to a decade of aggression, verbal abuse, criticism, gaslighting and then an episode of physical abuse in May 2019. Over the years it was said that the mother had had to seek treatment for PTSD and an anxiety disorder because of the father's behaviour. It was in the light of this pattern of behaviour that the father's episode of anger towards his daughter over the telephone in October was so serious. The mother said that it caused A very significant distress and put her in fear of her father, such that the mother had sought assistance from a consultant psychologist. It was argued, in accordance with PD 12J, that the matter should be set down for a fact finding hearing and that in the meantime contact should continue to be supervised.
18. On the part of the father it was denied that he had been aggressive or abusive to the mother. He denied screaming or shouting at A during the October phone call, although he did accept that he had queried her about whether or not she only wanted to spend one night the following weekend with him. He said he realised straight afterwards he should not have done this, and that he had planned to apologise to her for causing her distress. Whatever had happened in October, it was argued that it was not sufficient to lead to a refusal of anything other than unsupervised contact. The contact until that date (including the holiday in Europe just a week earlier) had gone very well and the reports of supervised contact between October and January were 'glowing'. The court was invited to decline to order a fact finding hearing, or indeed any further investigation at all, and to allow the father to resume staying and unsupervised contact.
19. The reports from the independent social worker noted the good relationship between father and daughter but also that the mother's allegations were serious and as yet unresolved. A said she preferred contact to be supervised, and therefore that should remain the case whilst further assessments were carried out. There was a safeguarding letter from Cafcass which recorded the mother's concerns about contact

(she had not been able to get hold of the father) including that A had been scared by his behaviour and wished for contact to be supervised. The safeguarding letter recommended that a section 7 report should be ordered and that a prohibited steps order should be considered to prevent A from being removed from the jurisdiction.

20. After hearing brief submissions from the parties, the judge gave an extempore judgment. The judge set out the case being put by each side. He said that the mother's case would have to be investigated and that there should be a fact finding hearing, but after the section 7 investigation. He stated that his decision was about interim contact. He remarked that the case was pitched 'very high' on behalf of the mother and that there were a lack of specific examples, but also acknowledged that when controlling behaviour is alleged, that is not the whole picture. He noted that the mother was suffering from anxiety (as he described it) and that there would be a need to consider how A's views were coming about – whether they were based on the words and actions of her father or whether she was picking up on actions, words and attitudes of the mother.
21. The judge acknowledged that there is always a balance to be struck when determining interim contact and before the truth of any allegations can be determined. He directed himself to PD12J and in particular reminded himself that any arrangements for contact must not produce an unmanageable risk to the child. He reminded himself not only as to the potential harm to the child, but also to the mother, and said that overall the matter was governed by s 1, namely the welfare of the child. He stated; "In my judgment, it should never be that simply making an allegation of domestic abuse produces automatically a cautious approach to child arrangements. There are grave dangers in that, because the imposition of restricted arrangements upon a child can itself be damaging to the child's welfare and can make a difficult situation even more complicated and harder to resolve in future".
22. The judge then said that he could not conclude that there was any danger in A spending generous amounts of time with her father, as she had spent generous amounts of time with him before without any ill effects. The mother herself acknowledged that in her application to the court in October (before the phone call), and moreover, supervised contact had already been tried, the reports were very positive, and it was time to move on. He supported the proposals put forward on behalf of the father and it was time to return to normality. The risks of not doing this were greater than doing it, as the child might become caught up in a highly conflictual situation. Another ski trip was planned and the child should not miss out on that, and also it would be good to test this all out from a forensic point of view.
23. After delivering his judgment, counsel for the mother asked the judge if he had considered the mother's PTSD as he had referred to 'anxiety' twice. The judge said he had done so. He was also asked about taking into account A's wishes and feelings, and he said he had done so in accordance with the ISW report.

The drafting of the order

24. Following the hearing, as expected, counsel drafted the order. It appears that they had both taken the view from what the judge had said about supporting the proposals put forward on behalf of the father in his position statement (which were for a long term, final order), that he intended to make a child arrangements order in precisely those

terms. Having said that, it was clear to counsel that the judge had disagreed with the father's proposal that there should be no further investigation, and the draft accordingly included the ordering of a section 7 report. There was some disagreement as to whether the judge intended to order a fact finding hearing now to take place later, or to defer the decision about a fact finding hearing until later. Given the time limitations (not least because the contact was due to start imminently and the mother wished to appeal) counsel were both under pressure to finalise the draft and present it to the judge.

25. The judge himself was clearly under pressure too, because he must have had to make decisions and approve orders in the many cases he had heard that day (and no doubt on other days too). When the order was submitted to him for approval, he made some amendments and also included in the body of the order his reasons for making his decision because he knew it was going to be appealed and that there might not be time for counsel to agree a note of his judgment. I have the benefit of seeing these reasons, drafted by the judge, as well as the transcript of the judgment. The judge did not amend the child arrangements order, which included arrangements for the long term, including the Christmas, Easter and summer holidays, and beyond that as well.

The appeal

26. The mother expressed her intention to appeal, and sought an immediate stay to prevent unsupervised contact taking place that week. There were two grounds of appeal, namely that the judge should not have made the order at a FHDRA, and that in any event, the order was not in A's best interests. A skeleton argument was produced at speed by Mr. Laing, who has represented the mother at all stages. A stay of the order was granted by Lieven J on 17th January and the matter was listed before Mostyn J who granted permission on 23rd January. Mostyn J also ordered that there should be unsupervised contact between father and daughter for a few hours over the following weekend. The appeal was listed before me on 7th February.
27. Mr Laing has filed a very well-prepared skeleton argument, and represented the mother with great skill before me. The father appeared in person, but he had the benefit of an excellent skeleton argument prepared by Ms Lister who had represented him at the FHDRA.
28. The mother's case is first that the judge should not have made a final order at a FHDRA. He simply did not have the evidence to do so; and on many of the matters, such as removal from the jurisdiction holidays, birthdays etc etc no submissions had been made at all. Secondly, the order was not in A's best interests. The child's wishes had not been considered, when they should have been 'front and centre' of his analysis. The effect on the mother had not been taken into account – she was not suffering from 'anxiety' as the judge had put it but from complex post traumatic stress disorder.
29. Additionally, the sheer amount of contact ordered by the judge was frequent, including three night weekends (which she had not had before), mid week contact and half term contact. This was not a 'return' to anything that A and her father had been having before, it was much more than that.

30. The father argues that the judge's order was plainly not a final one, and that he was entitled, on the evidence before him, to order the contact that he did. The chronology of events made it clear that the mother's allegations against the father did not prevent her agreeing extensive contact for A (including several holidays) until October 2019. Only the disputed phone call made a difference to the mother's views. The father had acquiesced to the mother's demand that contact be supervised between October and January and the sessions (fully reported on by the ISW) demonstrated that whatever had upset A during the phone call could be 'got over'. The judge had heard comprehensive submissions from each party on 15th January and had taken a balanced and informed view, taking into account
- (a) The contact that had been taking place and the quality of it;
 - (b) The contact which should be taking place in the interests of the child with reference to PD12J and s 1 Children Act 1989;
 - (c) The impact on the child of a delay in the restoration of contact, as opposed to a further period without contact or with restricted/supervised contact;
 - (d) The timing of a fact finding hearing, if indeed one was needed after consideration of the s7 report;
 - (e) Given the quality of the contact to date, the danger of allowing the case to escalate into a much more complex case than it was.
31. It was also pointed out on behalf of the father that His Honour Judge Tolson was not the only experienced judge to order unsupervised contact; as Mostyn J had ordered a period of unsupervised contact when setting down the case for appeal.

Discussion

32. The principal difficulty in this case is that the child arrangements order, as drafted and submitted by counsel, and then amended and approved by the judge, is not consistent with the judgment or the other parts of the order. The judgment makes clear that the judge intended to make an interim order pending a return to court in April, with the benefit of a report from Cafcass, to consider the way forward (including the likely listing of a fact finding hearing). The order as to child arrangements, starts off (at paragraph 14.1) by stating 'in the interim the mother shall make sure that the child spends time with her father' but then settles arrangements for contact until December 2020 and beyond, allowing for Christmas and Easter Days to be alternated between the parents annually, and for birthdays and other festivals .
33. I suspect that the enormous work pressures on all involved lie behind the order being drafted in the way it was and then amended and approved by the judge. The focus on the proposed appeal and the need for a stay meant that the order had to be drafted and approved quickly and a note of the judgment prepared. The judge did his best to assist with this by setting out his reasons on the face of the order, but in addition what looked to all intents and purposes to be a final child arrangements order was approved. Whether this was in error or not, it was too soon for a such a comprehensive order to be made.
34. In these circumstances the order cannot stand in the terms that it is drafted, and for that reason it seems to me that all the provisions which relate to child arrangements after the next hearing should be set aside.

35. The more difficult question is what should happen to those parts of the child arrangements order which pertain until the next hearing. In fact, before getting to that stage, it is not entirely clear what the judge intended to order here either. He certainly intended that contact should be unsupervised, and that it should be regular and generous. In his judgment he referred to the need to get back to normality, but there was ambiguity in the information that was presented to him as to what normality actually was. Some of the paperwork suggested that A had been having regular contact every other weekend for two nights as well as the holidays. This was not in fact the case. There had been some weekend contact, but (for reasons which are not clear) it had been a little sporadic, or 'on and off'. The holidays had, however, definitely happened. But in preferring the proposals put forward by the father the judge was actually sanctioning a significant amount more contact than had hitherto been taking place. I do not believe that he was fully aware of that.
36. So far as the judge's justification for ordering unsupervised contact, including overnight contact is concerned, as I have noted above, he did refer himself to PD12J and the test to be applied, namely whether or not the contact would pose an unmanageable risk to mother or child. He was entitled to take into account the good quality of the contact as viewed by the independent social worker, and the fact that A had had unsupervised holiday and other contact before the October incident which had gone very well. His reference to the mother suffering from anxiety is difficult to criticise because the report from the GP says just that. The judge also properly took into account the harm to A of not having unsupervised, regular contact with her father.
37. The judge was exercised by the fact that the mother had originally been willing to agree to unsupervised and staying contact despite alleging that the father was aggressive and bullying to her (and physically violent in May) but subsequently took such a restrictive stance after the telephone call and then at the FHDRA.
38. In his reasons, the judge stated that there was no evidence to support the 'very different basis upon which counsel put the case' at the FHDRA, as compared to the way it was put in the C100 application. The focus on this, I believe, led him to give insufficient weight to the allegations that the mother had made in the C1A, and developed at the hearing. It was right that at the point she filed it that she was proposing that A had staying contact with her father at weekends and for half of all the holidays. That might be because the allegations she was making were exaggerated or even untrue, but equally it might be because at that stage she had not appreciated the risk of this behaviour to A as well as herself and only did so later. There are situations where a parent who is or has been abused does not believe that the abuse would be turned upon the child but then realises that it might, when, for example, there is an episode such as is described here, where the father is alleged to have shouted at his daughter over the phone for a prolonged period. It might also take time for a parent to appreciate the emotional consequences for the child of witnessing one parent abusing another.
39. Taking into account the fact that the judge was not fully apprised of the quantity of contact that A had been having with her father before the incident in October, that the amount of contact that was ordered was substantial given what had taken place beforehand, and the lack of weight he gave to the potential significance of the

mother's earlier allegations, I have come to the conclusion that his decision as to what contact should take place between the FHDRA and the next hearing must also be set aside. Even if the judge was not wrong to have ordered some unsupervised contact (as subsequent events show), given the background and the child's expressed wishes and feelings, it would have been better to consider a more gradual introduction to test it out, to see how A felt about it.

40. Having set aside the orders as to child arrangements, the question remains as to what is the right interim order to be made now and until the next hearing. At the hearing on 23rd January, Mostyn J, having heard submissions from the parties, ordered a period of unsupervised contact pending the appeal (which went well). Happily the parties are now in agreement that unsupervised contact should now take place, every other weekend.
41. In considering whether to approve the arrangements, PD12J requires me to scrutinise the proposed order to ensure it is in the child's best interests and does not expose her or her mother to an unmanageable risk of harm, bearing in mind the impact which domestic abuse can have upon the emotional well-being of the child, the safety of the mother and the need to protect against domestic abuse which includes controlling or coercive behaviour. Here I am satisfied that the arrangements are in A's best interests and do not pose a risk for her or her mother which cannot be managed. The father has moved out of the family home and there have been no reported incidents of any sort since October. Safeguarding checks have been completed. The mother is represented by highly experienced solicitors who will have been able to discuss things carefully with her. All agree that this is a father who very much loves his daughter, and that (whether the allegations are true or not) his motives in seeking contact are genuine, and not as happens in some cases, a means to harass or control the mother. He has been observed to be loving and nurturing in contact visits, and A is relaxed and happy with him. He has not shown any signs of impatience or temper in the supervised contact. Father and A show each other spontaneous affection, and A will gently tease him too. The father is prepared to go to family therapy with A and also to complete an online questionnaire as part of the Freedom Programme. Although he has not made any admissions, he accepts that it will be of reassurance to the mother at the very least.
42. For her part the mother has sought assistance and treatment for herself and A; indeed A is seeing a psychologist once a week. The Cafcass officer is preparing a report for which she will speak to A to assess her wishes and feelings, and also the mother and the father. A and the mother are thus being well supported and any concerns about the father's behaviour can be picked up quickly and referred back to the court. The proposed visits are relatively short. The matter will return to court for a further hearing after Easter and at a later stage, if there is no agreement as to the way forward, the court can determine the factual issues, and determine what order is in the best interests of the child.