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IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION
[2021] EWHC 3846 (Fam)



No. ZC19P00236

Royal Courts of Justice
Strand
London, WC2A 2LL

Wednesday 7 July 2021

Before:

MRS JUSTICE JUDD

(In Private)

B E T W E E N :

FLORENCE

Applicant

- and -

(1) F

(2) M

Respondents

DR C PROUDMAN (instructed by Beck Fitzgerald) appeared on behalf of the Applicant.

MR M JARMAN (instructed via Direct Access) appeared on behalf of the First Respondent.

THE SECOND RESPONDENT appeared in Person

J U D G M E N T

(via Microsoft Teams)

MRS JUSTICE JUDD:

- 1 This is an application by a young person who I shall call Florence for a child arrangements order permitting her to live with her mother for the majority of the time. Florence has been living with her father for just over five years and although she loves him very much she says she misses her mother and sometimes feels isolated.
- 2 There is nothing at all unusual about a young girl wishing to live with her mother. Many, if not most girls of her age (15) do. Nor should such a wish, on the face of it, be seen as implying anything wrong with her relationship with her father. This, however, is a case with a long history. The parents separated in 2014 when the father left the family home and Florence remained with her mother. The separation was acrimonious and there were a lot of difficulties around contact which repeatedly broke down.
- 3 In 2016, District Judge Gibson found that the father had slapped the mother on one occasion, pushed past her into the house on another, and held Florence down and shouted at her when she had a tantrum. There is reference in the documents to the mother going to slap the father once on the face during another argument (she does not accept this). District Judge Gibson believed the mother harboured a great deal of anger against her father and that she wanted contact between him and Florence to cease.
- 4 Florence was seen by Dr Berelowitz, consultant child psychiatrist, and he noted that she spoke to him about adult issues such as saying that her father lied to her mother and also that his parents were self-centred. Dr Berelowitz thought that the problems with contact were because of the mother's distress and unresolved angry feelings about the breakdown of the relationship and this was being communicated to Florence. The judge concluded that the mother saw no merit in Florence spending time with her father and that she was not giving Florence permission in an emotional sense to enjoy a relationship with him. So she made an order that Florence should live with her father.
- 5 Over the next few years, there were a number of incidents whereby the mother sought to challenge the decision that Florence should live with the father. For example, she called the police to say that Florence was being ill-treated and kept her behind after a contact visit. This led to the launch of care proceedings and the making of an interim care order placing Florence in the care of the paternal grandparents. This is something that Florence has said she still remembers as being traumatic. This order was successfully appealed but because there were ongoing proceedings, she was not moved at that point. At another final hearing, HHJ Pearl decided that Florence should go back to her father. At the same time as making that order, it was provided that the parents should engage with work at the Anna Freud Centre with a view to prompting change and working towards a shared care arrangement.
- 6 Over the following years, the issue of where Florence should live did not go away. The mother would say she was acting on Florence's wishes but I think perhaps a calmer person would have encouraged Florence to settle down with her father, focus on enjoying the time they had together, and waited till she was older rather than subjecting her to repeated proceedings. I think the mother found it difficult to stop herself challenging the order. As it was, the mother issued an application very shortly after the expiration of the supervision order and Florence, at the age of 12, was taken to see a solicitor by the maternal grandparents just afterwards. There were applications for Florence to be separately represented which were refused.
- 7 Over the course of the next two years, there were repeated applications and appeals as to whether Florence could be separately represented. There were occasions when Florence

was not returned after contact. Indeed, Judge Meston made an order preventing further applications for a period of two years because he was so worried about the effect of all this upon her.

- 8 The issue still would not go away, however, and in early 2020, Florence made an application to bring proceedings. This was refused by HHJ Oliver. The decision was appealed to this court. I granted permission to appeal on the grounds that it was arguable the judge should have permitted Florence's solicitor to file a statement in support of her application and given consideration to permitting the legal team to see the documents.
- 9 I also noted that Florence had been living with her father for a number of years now and it might be time to consider her wishes and feelings given how consistent they have been in recent times. In the event, the father, to his great credit, recognised that as every day passed Florence was becoming more mature and accepted that the appeal should be allowed. He agreed she should be permitted to make this application.
- 10 So it has come about that I have heard the case. I heard it over two days with evidence from the guardian, the mother, and the father. Florence has filed three statements and has been present throughout the proceedings. She has not given evidence but she came to see me on the first day of the hearing with her legal team. As well as hearing oral evidence, I have read all the documents in the bundle for this hearing and a supplemental bundle containing many of the documents and judgments in the previous proceedings.
- 11 During the application, Florence was represented by Dr Proudman and the father by Mr Jarman. I would like to pay tribute to them both for the sensible, moderate, and skilled way they have each conducted this case on behalf of their respective clients. Everyone was conscious of Florence being present and doing their utmost to ensure that she suffered as little as possible by going through the process. In an ideal world, no child should have to sit through contested proceedings like this but sometimes it happens.
- 12 Florence is turning into the most impressive young woman. She is hard-working, motivated, and excelling at school. She has good friends and is enjoying her life. Despite her obvious successes, (I hope she does not mind my saying this), I can say she does not display any arrogance at all or any hint, unlike some teenagers, that she thinks she knows it all. She is unassuming, engaging, and intelligent. She is a tribute to her parents and of course to herself.
- 13 It is not by chance that Florence is turning out so well. Although the credit must go to her, the parents are also impressive people. The father's evidence was a model of thoughtfulness for his daughter and restraint as well. For reasons that are all too understandable, he is very worried about his daughter going to live fulltime with her mother for, in the past, including quite recent past, there have been some unsubstantiated allegations made about the care he has given her and a fear of undermining of the relationship.
- 14 The mother gave evidence well too. She plainly adores her only daughter and it is her greatest wish to have her living with her. I think it is a testament to her skills as a mother that she has maintained a very close relationship with Florence despite not being her main carer, which many would not have been able to do.
- 15 On the other hand, I can see the mother has struggled with strong emotions and this can be hard for her to hide. I think one example of how she can become overwhelmed by her feelings was her response last year to the refusal of Florence's application for permission to bring proceedings. She was so distressed with the judge's findings that Florence was acting

under her influence that she determined not to see Florence at all, indeed giving her the message that she would not see her again until she was 16. She packed some of her things. I do not think the mother's behaviour was deliberate but it is instructive that she was simply unable to stop herself doing this, if only for a few weeks. Thankfully, she began to see Florence again not long afterwards.

- 16 Florence's case is that she has wished to live with her mother for years and that this wish has endured despite living with her father since 2016. At the age of 15, she should be allowed some autonomy and for her heartfelt wishes to be respected. On her behalf, Dr Proudman says that the refusal to accede to these wishes risks damaging her relationship with her father and will cause her emotional harm. Additionally, she submits that the father has been rigid in his adherence to contact orders and arrangements, which has meant she has not been able to see her mother in a flexible way. The mother supports the case being put on behalf of Florence.
- 17 The guardian has had the immense benefit of having been involved in these proceedings since 2016. She knows the parents well and she has the advantage of having seen Florence develop and grow up. It was put to her that she was not in the best position to judge Florence having only seen her intermittently over the years and only once in recent months. However, I consider the guardian has been careful not to be too intrusive given all the background circumstances and that she has a good measure of the situation.
- 18 The guardian recommends a shared care arrangement whereby Florence lives with her father one week and her mother the next, with the holidays being equally divided. She argues that this will enable Florence to continue to spend routine and quality time with her father without the relationship being squeezed out by other activities that Florence will be involved in in the next months and years. She also notes, and I accept, that the time she spends with her father is happy and relaxed and somewhat less intense than it is with her mother.
- 19 The father has taken on the guardian's recommendation and supports this as the way forward. On his behalf, Mr Jarman points to the long and complex history to this case and the emotional damage that the mother has caused and may cause to Florence by her lack of support of the relationship with him and a belief that she has had that he cannot care for her, that perhaps he is a lesser parent.
- 20 On behalf of Florence, Dr Proudman argues that the week on/week off arrangement is simply too disruptive and that Florence will not feel settled. She wishes to have a main base and should be allowed to do so.

THE LAW

- 21 In coming to any decision about the upbringing of a child, her welfare is the court's paramount consideration and the court must take into account all the matters set out in the welfare checklist which I am not going to recite here but I do have them in mind.
- 22 The test to be applied between the competing residential care regimes on offer is the one likely to deliver the best outcome for the child during her childhood and the home where she may reach her best potential. If a court does not follow the recommendations of the guardian, it should give reasons for doing so.

DISCUSSION AND CONCLUSIONS

- 23 This is a sensitive and difficult decision which for this family comes after years of litigation. By this time next year, Florence will be 16 and the parties are agreed that the order should not go beyond the end of the school year in 2022. Whatever order I make today, by this time next year, from the perspective of the court, Florence will be able to choose her own living arrangements.
- 24 The emphasis given to different elements of the welfare checklist will differ from case to case and child to child but in relation to a young person aged 15, the first consideration of the welfare checklist, that is her ascertainable wishes and feelings in the light of her age and understanding, will carry very significant weight. In the case of Mabon v Mabon & Ors [2005] EWCA Civ 634, Thorpe LJ observed that:
- “...we must, in the case of articulate teenagers, accept that the right to freedom of expression and participation outweighs the paternalistic judgment of welfare.”
- 25 He was, of course, considering the participation of the child in proceedings rather than the making of a child arrangements order but, nonetheless, it underlines the respect that the court should go to the views of a child or young person who, after all, must live by the order that has been made. Here, it is clear that Florence strongly wishes to live with her mother. These are not her mother’s feelings but her own and they have endured.
- 26 I do not doubt that Florence does identify with her mother and her mother has encouraged her to do that but if Florence really wished for something else, I think she could have expressed it as she is secure in her father’s care. In fact, I think it shows her security with her father that she is able to say that and know that his love for her is unconditional.
- 27 Although all are agreed that the order I make should not last beyond this time next year, it is right that I look at Florence’s physical, emotional, and educational needs beyond that and into her early adulthood. In her father’s care, she has been physically well and has thrived educationally. It is difficult to concentrate and do well at school if you are in a state of emotional turmoil and although the father is different to the mother and Florence may not be able to discuss her feelings easily with him, it does seem to me that he has provided her with emotional stability to excel in her life. The mother has also provided for Florence emotionally for Florence is close to her and able to confide in her.
- 28 Over the coming years, Florence needs to be able to move forward in her life and to be able to be given the freedom to think independently and not be responsible for the feelings or well-being of her parents. She should also not have to worry about any sort of competition between them or that she will cause real distress to one if she wants to spend time with the other.
- 29 Whatever order I am invited to make today will be a change in circumstances for Florence. She has not lived with her mother since she was 10 and that is a long time.
- 30 I wish to say to Florence directly, you are really longing to live with your mother but as for anybody, young or old, you cannot really know what it is like until it happens. It may not be quite what you expect. Although your mother adores you, it is possible you will find it overwhelming. Sometimes you might find it a bit much. Teenagers need emotional space as well as support from their parents. You may miss your father more than you realise.

Luckily, your parents live close by and there will be no need for you to move schools or change friends.

- 31 Florence has undoubtedly suffered harm over the last few years by being embroiled in these proceedings and exposed to adult feelings which ought to have been kept from her, although I think all young people know that adults do have feelings.
- 32 Looking to the future, it seems to me that the risk of harm, whatever my decision, I can only look into a crystal ball and do my best. If I accede to the recommendation of the guardian, supported by the father, Florence will yet again feel she is not being listened to and her own wishes and feelings not given the respect they deserve. I really do think she will feel this and it will make her identify with her mother more than ever. I also think she will feel that moving house each week is disruptive. Most people would.
- 33 Embedded in her wish is a desire that she should have a main base with her mother. On the other hand, there is a risk that a move to her mother will damage her relationship with her father because her mother's feelings about him have been strong. They are genuine too even if they are misguided and subjective. There is also a risk that Florence will be stifled if her mother's emotions become too strong. However, all parents have failings and all parents have good qualities. Each of these parents has excellent qualities as I set out above. They both care very much about Florence and I saw them both think about how they might have done things differently in the past. I suspect the father is more able to put his own feelings aside than the mother is but everyone has strengths and weaknesses. The mother's long-standing difficulty is she has sometimes been unable to put Florence first so far as her relationship with the father is concerned. Even if she thought Florence would be better living with her, for the sake of giving Florence a settled childhood, I think she should not have allowed a situation to develop where there were so many applications to the court and referrals to the police. It would have been better to have waited until about now but I think now is the right time.
- 34 In coming to my decision, Florence's welfare is my paramount consideration. There is no right answer here. I have come to the conclusion that I should allow her to move her main base from her father to her mother, albeit I think it is very important that it is still described as a joint lives with order.
- 35 I think it is right that I accede to Florence's wishes and feelings given her age, intelligence, and how long they have endured. Although there is only a year to go before all agree she can decide, I think that year is likely to be marred by distress and possibly resentment if she is not allowed to do what she really longs for now. I think it could cause damage to her relationship with her father. I am conscious that there is a risk of damage to her relationship with her father if she moves but in contrast to the situation when she was 10 or even 12, she now has her own relationship with him. She has spent a lot of time with him on her own with him and living in his house. I think she has experience of him which is very much her own and is separate from her mother. It is going to be difficult for anyone to put a spin on the relationship or to change it because Florence and her father knows what their relationship is. If it is not embedded now another year will not make a difference but in fact I think it is. I think their relationship will weather over the next few years.
- 36 I differ from the Cafcass officer only that I think that Florence's time with her mother should be weighted so it can be described as her main base. I do not see that as a very significant divergence from her recommendations but, to be clear, I do it for three reasons. First, I give a little bit more weight to Florence's wishes. Second, I think that the week on/week off is disruptive. Florence feels it is disruptive and she has to live it. Third, I think

that a good block of time with her father every fortnight should allow her to have the experience of living in that home which is not very significantly different to the week on/week off. It is just weighted slightly differently.

- 37 As I said at the beginning of this judgment, I consider that during term time, Florence should spend from Thursday after school every other week until Monday morning at school with the father. I think she should have supper and possibly stay the night with him on a weeknight on the intervening week. At the moment, I think that that date should probably be set so that everyone has an expectation of what that day is going to be.
- 38 I think this gives Florence good, relaxed, and quality time with her father and enough time for them to spend together despite the inroads that are inevitable in the relationship given school activities, friends, and such like. That always happens with teenagers. I suspect that the time she spends with friends and such like will happen when Florence is with each of her parents but I hope she will still make time for them as well and I am sure they do.
- 39 There are holidays on top of that as well and holidays at times like this are extremely important. I know that Florence is very much looking forward to going to Spain at the end of summer.
- 40 I want to say it is absolutely vital for the good working of this order that the mother remains living in the same area and Florence continues going to the same school. It is vital that the distance between the two homes that Florence is going to have is small so that she can go easily between the two of them.
- 41 I sincerely hope that in making this order, some peace may come to this family, particularly to Florence herself. The aspiration is that she will be able to choose freely where to go when she comes back from university in a few years and that when she grows up special days are not marred because she is worrying about her parents being together in the same room. That is something to work for. All parents have their faults but both of them are doing their very best for her. I hope this works out, and I wish the parties all the very best in the future.
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CERTIFICATE

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Official Court Reporters and Audio Transcribers
5 New Street Square, London, EC4A 3BF
Tel: 020 7831 5627 Fax: 020 7831 7737
civil@opus2.digital*

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