



Neutral Citation Number: [2024] EWHC 1697 (Fam)

Case No: FA-2024-000074

**IN THE HIGH COURT OF JUSTICE**  
**FAMILY DIVISION**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 02/07/2024

**Before :**

**SIR JONATHAN COHEN**

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**Between :**

<b>PP</b>	<b><u>Appellant</u></b>
<b>- and -</b>	
<b>JP</b>	<b><u>1<sup>st</sup> Respondent</u></b>
<b>- and -</b>	
<b>T</b>	<b><u>2<sup>nd</sup> Respondent</u></b>
<b>- and -</b>	
<b>B</b>	<b><u>3<sup>rd</sup> Respondent</u></b>

**Mr Phillips** (instructed by **Buckles Solicitors LLP**) for the **Appellant**  
**Ms Couper** (instructed by **Shepherd Harris & Co**) for the **1<sup>st</sup> Respondent**  
**Mr Veitch** (instructed by **Smith Partnership Solicitors**) for the **2<sup>nd</sup> & 3<sup>rd</sup> Respondents**

Hearing dates: 24 June 2024

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**Approved Judgment**

This judgment was handed down remotely at 10.00am on 2 July 2024 by circulation to the parties or their representatives by e-mail and by release (after anonymisation) to the National Archives.

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SIR JONATHAN COHEN

This judgment was delivered in public. 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.

**SIR JONATHAN COHEN :**

1. I am dealing with an application for permission to appeal an order of the recorder (“the judge”) sitting in the Family Court at Derby with the appeal to follow. I grant the application for PTA and turn to the merits of the appeal.
2. There are two children of the family with whom I am concerned. They are B now aged 14 and T who is nearly 13. Their parents separated in 2018 but they have still not concluded their divorce and the financial matters remain outstanding. They have lived with their mother since separation, spending alternate weekends and half the holidays with their father.
3. By the time of the separation the children had been removed from the primary school at which they attended to be home-schooled. Thus it is that since 2017 the only school attendance of either child has been B attending sporadically at a school between September 2021-October 2022.
4. Following the separation of the parties the father instituted proceedings in 2019 for an order that the children live with him as well as a specific issue order regarding their education. Those proceedings were concluded in February 2020. The District Judge decided that the children should live with their mother and have regular contact with the father. He determined that they were well settled with their mother and that there was insufficient evidence to conclude that they would be better off in mainstream education as the father hoped rather than the home-schooling which had previously been agreed. The other findings are helpfully set out at paragraph 8 of the judgment under appeal.
5. In April 2022 the father renewed his application for the children to return to mainstream education and accordingly in the absence of agreement from the mother he initiated proceedings for a variation of the existing child arrangements order so that the children live with him and spend time with their mother. It was that application which came before the court towards the end of 2023.
6. The hearing commenced on 1 December 2023 but due to circumstances beyond anyone’s control were not concluded until the judgment which was delivered on 7 March 2024. During the hearing the recorder heard evidence from both parties, the children’s Guardian and an independently instructed single joint expert consultant psychologist.
7. Both the expert and the Guardian supported the father’s case and recommended that the children live with their father. The mother opposed the application with a fallback position that the older child B should live with his father in accordance with B’s wishes, but that T should remain living with her.
8. Shortly before the hearing began in 2023, on a date that I was not able to discover, the mother conceded that the children should cease to be home-schooled. Thus the argument was about which parent could better meet the needs of the children. The geographical distance between the parents’ respective homes meant that inevitably they would live with one parent and spend only weekend and holiday contact with the other.

9. The key questions before the court were as follows:
  - i) Did the mother treat or present the children as if demonstrating traits of ASD with consequential harm to their emotional development?
  - ii) as a result of her avoidant coping style did she behave in a way that was consistent with alienating behaviour towards their father and so as to discourage the children's relationship with him?
10. It was common ground between the parties that the children had indeed suffered emotional harm as a result of the continual and long-lasting conflict between their parents.
11. On the Guardian's application, permission had been given to instruct a consultant child psychologist. Dr Matthews, a very experienced child psychologist who frequently appears in such cases, was selected. The letter of instruction to Dr Matthews included the following:
  - i) Please provide a full psychological assessment of the parents.
  - ii) Please comment upon any identified issue that either of the parents may have and thus their ability to meet their children's identified needs.
  - iii) Please comment upon the parents' understanding of the professional concerns in relation to the emotional well-being of both children and their ability to identify and prioritise the children's emotional welfare.
  - iv) Please provide a full psychological and cognitive assessment of the children having particular regard to their developmental functioning, using any assessment tools and measured measures that you consider appropriate for their age.
  - v) Please describe both children's needs in light of your assessment in relation to (a) the nature of the caregiving they require (b) their contact needs with the non-resident parent (c) their education (d) any treatment in the short and long term they may require.
12. These instructions rightly are expressed in wide terms. It would have been wrong for the remit of the report to have been limited. These were all matters properly within the expertise of a consultant child psychologist.
13. In judgment the judge dealt first with the concern that the boys, despite not being diagnosed, were viewed by the mother as having autism/ASD traits. Dr Matthews acknowledged that she had not conducted an autism assessment of the boys which would have been necessary to confirm a diagnosis or its absence, but said that the children did not fulfil the criteria for ASD.
14. The judge criticised Dr Matthews as arriving at her conclusion based upon a relatively short interaction with them in which she says she did not observe any relevant ASD traits during her interview. It was, said the judge, from that premise that Dr Matthews went on to conclude that the mother has therefore diagnosed the children with a need that they do not have and treated them accordingly.

15. The mother told the judge that she had seen autistic traits in the children and that unsurprisingly in the light of advice from the GP and the school's report she had sought for these traits to be investigated further. The judge said it was wholly unfair for the mother to be criticised for this. She did not accept that the mother had labelled the boys as autistic or viewed through the lens of having special needs. She said that there was no evidence that that the mother had presented her views of their condition to the children in a negative way or not given them positive messages about their own abilities.
16. It was agreed by both parents that B is anxious. This had been observed by the school, and the GP had supported the mother in getting an assessment.
17. The judge dismissed the concerns of Dr Matthews about the children's restricted social life, putting that down to the home-schooling which they had experienced.
18. The judge also dismissed what Dr Matthews expressed as her concerns about the of the mother's avoidant coping style and at paragraph 38 of her judgement she said this:

“I do not consider that Dr Matthews' views on the risk of harm to the children by continuing to be in the mother's care are in fact supported by the evidence.... I also note the following difficulties with Dr Matthews reports and recommendations, firstly, having considered the letter of instruction, Dr Matthews went outside the remit of her instructions when she gives an opinion that the boys do not have traits of ASD”.
19. The judge criticised the expert for proffering a view on the issue of ASD, saying that either she had carried out an assessment or had not. If she had, it was without her instructions permitting it, and if she had not she should not have expressed an opinion.
20. At paragraph 40 of the judgment the judge criticised Dr Matthews for expressing an opinion as to which parent the children should live with. She said that at the most Dr Matthews should have limited comment to the ability of the parents to meet the children's needs. It would then be for the Guardian and court to consider her advice and how it fitted in all with the issues that the court had to determine.
21. In consequence the judge made it clear that she gave no weight to the report and evidence of Dr Matthews.
22. The Guardian had relied significantly on Dr Matthews. It therefore followed, said the judge, that the Guardian's evidence was likewise to be given minimal weight. She was criticised for not conducting a welfare analysis.
23. In my judgment the recorder was wrong to write off Dr Matthews in the way that she did. Dr Matthews is a very experienced child psychologist and whilst not an expert on ASD has had significant experience in dealing with it. She was entitled to tell the court that she saw no evidence of ASD traits in either child. In doing that she was not going beyond her instructions.
24. It was also wrong of the judge to say that there was no evidence of the mother presenting the children as potentially having autism or ASD traits. During her interview with Dr Matthews the mother spoke to her about the boys' autistic traits as

if they had been diagnosed and referred to consulting a professional diagnostic manual and stating that she felt that the children presented with a high number of diagnostic criteria.

25. The mother told Dr Matthews that B's difficulties were more severe than B himself rated them and that he would be anxious and might need a device to be able to communicate with Dr Matthews when he met her. In the event when B met Dr Matthews he presented as socially able, engaging and without any difficulties socially or in regard to communication.
26. T said to the Guardian when asked if there was anything else that she thought was important "mum says that B is autistic and I might be".
27. Dr Matthews accepted that it was reasonable for the mother to express her concerns to the GP about B's anxiety, but what the mother told the GP resulted in a letter that said "this certainly highlights areas of sensory problems, social communication and social imagination which are consistent with ASD traits". This was the mother reporting to the GP, and, as Dr Matthews said, was not consistent with her experience of talking to and spending some time with B.
28. Dr Matthews' concern was that B was parented in a way that revolved around the idea that he had autism when the diagnosis was that he actually had anxiety.
29. All this appears to demonstrate that the mother had formed the view that the children – or at least B - had traits of ASD.
30. One of the features of the children's life with their mother was the absence of friends. Both boys told Dr Matthews that they did not have friends outside the family. This was a concern to Dr Matthews as children need to have a range of social experiences to learn from and support them through their future. The judge discounted this concern as being the inevitable consequence of home-schooling which the parents had once agreed upon. But, it is hard to see their involvement with an organisation which caters specifically for children with disabilities and for which the mother had signed up the children, as providing a rounded social experience.
31. In my judgment the issue of whether the mother had an avoidant coping style so as to undermine the children's relationship with her father was a less important issue, and it is not necessary to spend time on it. There were multiple examples of the mother expressing the view that the father was dangerous to her and the children. Those views were expressed to adults, principally professionals so far as I can tell, as opposed to the children. Nevertheless it is clear that the children retain a close relationship with their father, as indeed they do with their mother. I am not aware of any evidence that the mother has sought to interfere with the children's contact with their father.
32. The Guardian supported the father's application for a change of residence. She had long experience of this family, having acted in the first round of the proceedings in 2019. She had met the children on a number of occasions in both sets of proceedings. In the course of her evidence the Guardian set out her analysis and reasons justifying a change of residence. Thus, for the judge to describe her evidence as being wholly

reliant on the report and evidence of Dr Matthews was not fair to her. That does not mean that her evidence had to be accepted but it should have been given weight.

33. I am left with the clear impression that the judge was led into error by her approach to Dr Matthews' assessment. Dr Matthews' opinion was largely based upon the content of her interviews with the family members and the assessments that she conducted. Instead the judge provided an over-focus on the underlying factual basis of the assessment and an under-focus on the factors which led to Dr Matthews' findings. It was the assessment itself that was the basis of Dr Matthews' recommendations rather than the underlying factual matrix.
34. In the course of her oral evidence, Dr Matthews was specifically asked about the risks to the children staying in the care of each of their parents and the ability of the parents to meet the children's needs. I have already expressed the view that this was a proper area for Dr Matthews to report upon but having been asked questions in evidence, weight had to be given to answers.
35. I am very conscious that the trial judge had the advantage of seeing the witnesses and assessing their evidence. I do not have that experience. It is not open to me to substitute my own discretion for that of the trial judge. Only if a judge has exceeded their own reasonable band of discretion, come to a plainly wrong conclusion, taken into account irrelevant matters, or failed to take into account material matters will the appeal court interfere.
36. I am however satisfied that the court's treatment of the evidence of Dr Matthews and the Guardian did not give them proper weight and wrongly rejected their evidence for wrong reasons. That does not mean that the conclusion would necessarily have been different, but it may have been. I therefore have to allow the appeal. The matter must be reconsidered.
37. This case has taken too long to be determined. The children have been the subject of litigation for most of the last 6 years. After judgment was given a notice of appeal was filed on 26 March 2024. The urgency was not spotted so that the application for permission to appeal was not put before me until 5 June 2024. I gave directions immediately and the matter was heard three weeks later but it is regrettable that there has been any delay.
38. Delay has come into sharper focus by the fact that the mother has in the last week or so obtained a place for the children in a local grammar school. As I understand it the father does not at the moment have places for both children. I shall need to hear submissions as to what should happen in respect of the children's education in the time between now and a rehearing and what directions should be made, either by me or whoever will next hear the matter in Derby, to progress the matter as quickly as possible. There are no winners in this situation only losers, above all the children who have been out of mainstream schooling for far too long.