Case No: FA-2024-000129

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION
ON APPEAL FROM THE FAMILY COURT AT LUTON
(HER HONOUR JUDGE KUSHNER)

NCN: [2024] EWHC 2258 (Fam)

The Royal Court of Justice
Strand
London
WC2A 2LL

Friday, 9 August 2024

BEFORE:

SIR JONATHAN COHEN

BETWEEN:

LA

Applicant

- and -

KA

Respondent

MS C BISHOP (instructed by Family Law Group) appeared on behalf of the Applicant
MS S FOREY (instructed by Abbott Solicitors) appeared on behalf of the Respondent

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JUDGMENT
(Approved)

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.

1. SIR JONATHAN COHEN: This is an appeal against an order of HHJ Kushner sitting in the Family Court at Luton on 26 April 2024. It concerns the time that the father will spend with his two children, C aged 7 and a half and L, aged nearly 5. They are the two children of the family and their parents have been engaged in litigation for some three and a half years since they separated on a date which is not provided in the chronology.

2. The history of the litigation makes the most unedifying reading. It is unnecessary to say much by way of background save that there was a fact finding hearing held before the Justices which concluded with a finding that on one occasion in November 2018 and on another in September 2020, the father put his hands around the mother's neck and sought to minimise his actions as being playful. That, of course, engages the principles of PD12J.

3. As I understand it, the mother sought much greater findings of fact and the court has never held a fact finding hearing in respect of those allegations and there are no plans to hold a further fact finding. I imagine that it would now be disproportionate.

4. The father says that he has had to fight every step of the way to obtain contact. It is unnecessary to recite much of the history which has included the preparation of a section 7 and a section 37 report.

5. On 3 January 2023, the matter came before the Justices who ordered the provision of a section 37 report. The mother sought to appeal. At that stage, there was supervised contact taking place as had been ordered in December 2021. The order of 3 January 2023 recited that the contact could become unsupervised after four sessions.

6. The mother's appeal against the section 37 report order came before HHJ Kushner on 6 July 2023 and all hearings since then have taken place in front of her. She dismissed the appeal of the mother and set the next hearing for 12 October 2023. That was an important hearing. The judge conducted the hearing as a DRA and her order contained the following recital:

> "Upon the father being in agreement there should be a final lives with order in respect of the mother and a final spend time order in respect of school terms only in terms that were agreed between the parties."

7. The order recites that there was significant disagreement between the parties as to what should happen in school holidays and the court directed that the Easter school holidays should be divided equally between the father and the mother, so that presumably would have given each of them about ten days. There were handover arrangements made. All sorts of other matters were recited and the father's direct contact was set up to be in graduated steps so that from 1 March it would progress to three overnight contacts on alternate weekends from after school on Friday until drop off at school on Monday. It said this contact should occur every term time as a final order.

8. The order concluded with these words:

> "Next hearing. This matter should be listed for a further DRA hearing for one hour on 17 April 2024. This hearing will consider the issue of school holiday contact and any issue in respect of costs." _

9. I have to say in relation to that order the repeated use of the words "final order" is somewhat unhelpful. Orders are not final in respect of children, particularly children of such a young age.

10. The hearing fixed for the 17th was adjourned administratively to the 26th because of the judge's availability and took place on that day. It is that order which is the subject of this appeal.

11. Notwithstanding what appeared to be the limited remit of the hearing, the judge determined to hear all the matters that were in dispute between the parties. I have sympathy with the judge. Having seen the parties in court today, and noted particularly the hostility of the mother towards the father but also the animosity from the father towards the mother too, it seems to me there may not be a lot to choose between them and their feelings towards one another. I can see the mother strongly disagreeing with me as I give my judgment. It is not really very helpful during the course of judgment.

12. The order of 17 April said this: First of all, under the heading of a lives with order, the children shall spend time with the mother and the father by way of final order. In fact there is no lives with order at all, provided for by the judge. It is not clear to me why this was, but "lives with" was not a matter that was on the agenda for the hearing as being in issue between the parties.

13. A child arrangements order for term time was ordered lasting until after school on Friday until drop off at school on Wednesday every fortnight. Again, this was not something that was on the agenda when the parties were at court.

14. They had managed to agree half term holidays so I need say nothing about that. The summer holidays were on the agenda and the judge decided to divide them equally between the parties in two three week blocks, such division to be agreed. The Christmas holidays were to be shared equally with the Christmas period alternating between the mother and the father.

15. There were more arrangements for handovers which appear to have remained contentious. That deals with the main parts of what was ordered.

16. The mother appealed. The matter was put before Cusworth J. He stayed the order in so far as it provided for an increase in contact. His order is to be found at page 47 of one of the two bundles I have been provided with and he gave his reasons as follows:

> "The judge did not in her judgment appear to explain or justify her decision to allow for increasing contact during term time by reference to the welfare interests or by reference to any supporting evidence."

Secondly:

> "Whilst the judge has a discretion to take such steps to advance arrangements for the children in accordance with the overriding objective, there is insufficient evidence that she considered the children's wishes and feelings or the matters referred to in PD12J."

17. It is not to the credit of the parties, and I look particularly towards the mother, that the provision that had been agreed for the May half term for the children to be with their

father was not complied with and instead, the mother had them for the May half term. The father feels understandably aggrieved because he was looking forward to celebrating his engagement to his girlfriend with the children. The mother has offered the October half term in return. The father, effectively, has no choice but to accept that. I am disheartened to hear that for the whole of the first three weeks of this summer holidays the father has not had contact.

18. The mother's counsel says on behalf of her, "There is correspondence in which we made an offer." I have not seen any of the correspondence. It is obligatory, it seems to me, that the mother should have made arrangements for the father to see the children because at no other time of the year does he have three weeks without contact with the children. It is lamentable that this is what has happened.

19. The points made by the mother against what happened on that day are a mixture of procedural and substantive. Procedurally, she says this. First, this case was listed on FDA. It was inappropriate for the judge to make orders about matters in deep conflict when the case was listed purely for an FDA. Secondly, there was an agenda which the judge herself had drawn up which the hearing was to deal with, namely the issue of holiday contact. The mother effectively says, "I was ambushed when I found that other matters were being dealt with." Thirdly, she says that there was no reference in the judge's judgment to PD12J and the results of the fact finding which she says are relevant to the contact arrangements, in particular, as the dispute now emerges, to the handover arrangements. Fourthly, she says the changes that the judge made were very significant changes when they were already the subject of a "final" order. Fifthly, the judge had no evidence before her from the parties of the current state of affairs as neither had filed evidence since the end of 2022 and so all that she had was counsel's submissions. Counsel for the mother says that she was about to ask at the end of the hearing for the judge to make case management orders when instead, the judge launched into judgment.

20. I think some of these points have more merit than others. I do not give weight to the argument that the judge did not go by rote through the welfare checklist. I am told and accept that the judge repeatedly referred to the children's welfare during the course of

the hearing and I regard it as implausible that this experienced judge did not have the provisions of section 1(3) of the Children Act 1989 fully in her mind.

21. I am more sympathetic to the argument that it was not proper for the judge to engage in the extent of decision making that she did on what was listed for DRA and I have been referred to the decision of MacDonald J in *P v F (Dispute Resolution Hearing)* [2023] EWHC 2730 (Fam) and I gratefully adopt what the judge said in his determination. I refer in particular to the passages that appear at paragraphs 38-44:

Taking the first two grounds of appeal together, I am satisfied that the judge was wrong to make a final Child Arrangements Order at a Dispute Resolution Hearing when the father was clearly not consenting to a final order for no direct contact being made and that, in circumstances where the applicant did not agree to an order providing for no direct contact and challenged the CAFCASS report, the hearing was conducted in breach of his right to a fair trial under Art 6(1) of the ECHR and the procedural protections afforded by Art 8 of the ECHR.

This court, of course, has the considerable benefit not only of a transcript of the Dispute Resolution Hearing, but the benefit of time to consider carefully, and with mature reflection, the content and evolution of the discussion between the Judge and the father. By contrast, the Judge had to deal in the moment with a difficult and developing discussion with a litigant in person in what was, no doubt, a busy court list. Nonetheless, I am satisfied that it is clear that at no point during the exchanges between the judge and the father did the father indicate he consented to a final order for no contact being made, such that the judge was in a position making a final order for no direct contact at the Dispute Resolution Hearing. Indeed, whilst I accept that the exchanges with the father were at times confused and confusing, it is clear that the father sought both to dispute the contents of the Cafcass report and sought the opportunity to advance at a final hearing his case that there should be direct contact between himself and the children.

The judge made clear to the father at the outset of the hearing that if the dispute could not be resolved at the Dispute Resolution Appointment then "you go to a final hearing". The father made clear in turn that he did not accept the report of the Family

Court Reporter, which he described having "loads of flaws", nor what he described as the "false allegations" concerning his behaviour. Whilst it is the case that at one point the father states that "I give up" and, later, that he would accept the view of the judge that a final order is a better option than a trial, it is clear that these statements took place in the context of the father being confused about whether a trial and a final hearing are the same thing. More fundamentally, it is further clear that throughout the exchanges the father continued to seek direct contact with the children. The penultimate exchange indicates that, in that context, the father was still seeking a final hearing when he says "So we'll just go for a final hearing. It's exactly the same thing, isn't it?" and "OK, we'll just go for whatever's next then, the next thing to do in line. Can I speed it up? Speed it." During the final exchange, it is clear that the father and the judge were by then speaking at cross purposes. The judge was talking about a final order. The father, however, was still talking about a process that would enable him to see the children, the father stating "I think that's the next thing, isn't it? To do a final, make a final order so I can see my kids" and "I'll have to wear my hearing aid next time I come in, because I can't hear a word you're saying sometimes".

In these circumstances, the judge made a final order providing for no contact between the father and the children at the Dispute Resolution Appointment even though the father had at no point indicated in clear terms that he consented to such a course and, moreover, had indicated that he did not accept the report of the Family Court Reporter, on whose recommendations the terms of the final order made by the judge were based, nor the allegations concerning his behaviour. Whilst a judge undertaking a Dispute Resolution Appointment is required to consider the extent to Ih the remaining issues between the parties can be resolved at that hearing, and to assist the parties to do so with a frank evaluation of the evidence, this cannot extend to making final orders where it is clear that a party continues to contest the matter and to seek a different outcome. Where a party continues to dispute the outcome of the proceedings at the Dispute Resolution Hearing, PD12B provides a clear way forward, either in the form of hearing evidence at the Dispute Resolution Appointment in order to resolve or further narrow the issues or in the form of final case management directions towards a final hearing. Given the contents of the Cafcass report in this case, the judge was entitled to express the views he did regarding the difficulties faced by father on his case. However, in circumstances where it was apparent that the father disputed the

recommendations of the Cafcass report, continued to seek direct contact with the children and, albeit in somewhat opaque terms, sought a final hearing, the proper course was to make tight case management directions to a short final hearing, in particular identifying and specifying the key issues to be determined at that final hearing and on which the court would wish to hear limited evidence.

In circumstances where the judge made a final order at the Dispute Resolution Hearing without the father having the opportunity to dispute the contents of the Cafcass report and to place before the court his arguments for direct contact with the children, I am further satisfied that the Dispute Resolution Hearing was conducted in breach of his right to a fair trial under Art 6(1) of the ECHR and the procedural protections afforded by Art 8 of the ECHR.

PD12B makes clear that at a Dispute Resolution Appointment the task of the court is to resolve or narrow the issues between the parties in proceedings under Part II of the Children Act 1989 concerning orders with respect to children in family proceedings, in this case the arrangements for contact between the father and the children. In the circumstances, a Dispute Resolution Appointment is plainly a hearing at which a parent's civil rights may be determined, and in particular their right to respect for private and family life under Art 8 of the ECHR. In the circumstances, it is equally plain that a party's Art 6(1) right to a fair trial and the procedural protections afforded by Art 8 will be engaged at a Dispute Resolution Appointment.

At the Dispute Resolution Appointment, for the reasons I have set out, the father indicated to the judge that he disputed the contents and conclusions of the Cafcass report, made clear that he continued to seek direct contact with the children and at no point indicated that he consented to a final order for no contact. Notwithstanding this position, the judge proceeded to make an order providing for no contact. This deprived the father of the opportunity to present his evidence and argument with respect to the content of the Cafcass report, which the judge had repeatedly indicated during the course of the Dispute Resolution Hearing provided the evidential foundation on which he based the final order made. In the circumstances, the father was deprived of the proper opportunity to comment on the key piece of evidence on which the court based its decision and to make submissions on the proper outcome of the proceedings more

widely. In these circumstances, and considering the course of the Dispute Resolution Hearing as a whole, including the outcome of that hearing, I am satisfied that the process was not a fair one having regard to the demands of Art 6(1) of the ECHR. I also conclude that, in circumstances where the Dispute Resolution Hearing would have led, and did lead, to measures of interference in the father's right to respect for private and family life, the approach adopted also contravened the procedural protections afforded by Art 8.

22. I, like MacDonald J in that case, have great sympathy with the judge. The differences between the parties were not as great as they have appeared during the course of counsel's argument in this case. HHJ Kushner had been well versed in the extent of the dispute and I can well understand why she wanted to bring the arguing between these parties to an end. Nevertheless, it is plain that the mother, at least, did not consent to a final order being made. It is clear to me that she, at least, did not come to that hearing expecting matters other than what was on the agenda to be determined. She anticipated that if an agreement was not reached, the matter would go off to another hearing with evidence being filed.

23. So although I understand the judge's eagerness to get this case dealt with and commend the time that she gave to it in a crowded list, I think that there are aspects of the order which simply cannot stand and that I would have no choice but to remit the matter to another judge in that Family Court.

24. That said, it would be wrong if I was, to put it in the vernacular, to throw the baby out with the bath water; if I was to shut my eyes to the relative narrowness of the dispute that has gone on and to simply send the matter back so that the father would have no order – because this would be the result of what the mother is seeking – no provision for summer holiday contact whatsoever, when plainly, as the mother accepts, there must be some provision.

25. Let me deal with the issues in dispute. I am dealing with them only, of course, for this year; I am not looking at the future years. I have expressed my dismay that the father has had no contact during the summer holidays. The mother says, "I am prepared to let him have 11 days," that having been her proposal before the judge, "between 15 and

26 August." That is for 11 days of the total holidays. She is going away on 30 September and, of course, the children must be back with her in good time for that to happen.

26. The children are currently with their mother. The order that I am proposing to make is that the father should have the children with him from 4.00 pm on 13 August. That permits that them to have their dentist appointment on the Tuesday morning. They will remain with him for two weeks until 27 August. That is less than he would like. It is less than I would have liked. But they must be back in good time to have their short holiday with their mother and I cannot put the clock back three weeks to give him the contact that I would like him to have had in the first half of the school holidays.

27. There is a dispute about where the pick up and drop off should be during the school holiday periods. The judge said it should be in a public place. The problem with that is that it means the parents coming, potentially, into contact. The mother wants the pick up and drop off to be at some friends of hers where pick up and drop off have currently been taking place. I understand that the father says that he is unwilling to go to the mother's home. It is where there has been trouble before and I respect his views on that. It is an uncivilised arrangement when the children have to be taken somewhere else for collection and delivery but if that is the best the parties can devise, then so be it.

28. What I shall order is that the pick up will take place in the public place that the judge has identified and drop off will take place by the father or his fiancée – it is a matter for them which of them it will be – or both of them, dropping the children outside the Lambs' home. They are not to go up to the doorway. They are to remain outside the curtilage.

29. Christmas. I cannot deal with that today and I do not propose to. The father has set out what dates he would like this year, between 20 and 29 December, to take them to Romania where the father's fiancée comes from and where she has family. The mother must consider her position and come back with her reply. It is not unusual at all for Christmas holidays to alternate between parents but equally, sometimes different

arrangements are made. I do not have to determine that today because I would hope the parties will be back in front of a judge long before then.

30. It was not clear to me until I heard the parties today that the dispute was not as to whether the term time contact should be extended from three days a fortnight to five days a fortnight. The judge went with the father's proposal that it should be Friday to Wednesday, so it would be five days. What I could not see in the papers provided to the court was that it was the mother's proposal that it should also be five days a fortnight but divided as to three days one week and two days the following mid-week period.

31. These parents are at daggers drawn. I do not think that it is sensible to go with the mother's proposal. The mother says that five consecutive days is far too much for the children. It is difficult to tally that with what the mother herself is proposing for the holiday arrangements. But being, as it were, as she would put it, bounced into these matters being dealt with at a hearing in the way that she had not been expected, I really have no alternative but to try and do my best to hold the fort until someone can look at this again with evidence being provided. What I am going to do is to say that every alternate weekend, the father should have contact from the Friday through to the Tuesday, so he will have four days in one go and I will not make provision for the mid-week contact in the other week, which the father does not want in the light of the difficulties between them. If he wanted to say that there should be one day mid-week, I would consider that but that has not been said to me.

32. These are just holding orders and I am entitled to make holding orders in these circumstances until the matter gets back before the court. I am not saying that the judge's orders are not the best outcome for the children. I am not saying that they are wrong either. But I do think that the mother, and for that matter the father, should be given the opportunity to put their cases properly in evidence and for the judge to consider it in that way on a final hearing.

33. So the items that remain on the agenda for further dispute seem to me to be summer holidays after this summer, Christmas and how that is to be divided, pick up and drop off venues and term time contact and the duration of it. Those should be recited

as the four issues that remain to be determined. That means the parties must direct their statements which I am ordering them to file limited to those four issues.

34. I am not going to order a welfare report unless both parties think it would be helpful. If they both do, I will consider what they have to say. But it seems to me, the difference between the parties is not enormous and does not require outside expertise.

35. I will direct that the matter be heard on the first available date on a one day hearing before a judge in the Family Court at Luton, not HHJ Kushner.

(After further submissions)

36. The children shall live with the father on the days specified in this order and they shall live with their mother on the other days. That will be issue 5 to be reconsidered at the next hearing.