



Neutral Citation Number: [2023] EWHC 3170 (Fam)

Case No: NN20P01197

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/12/2023

Before :

MRS JUSTICE LIEVEN

Between :

MS X

Applicant

and

MR Y

Respondent

Ms Kirsty Day (instructed by Family Law Group) for the Applicant
The Respondent did not attend and was not represented

Hearing dates: **13 November 2023**

Approved Judgment

This judgment was handed down remotely at 10.30am on [date] by circulation to the parties or their representatives by e-mail and by release to the National Archives (see eg <https://www.bailii.org/ew/cases/EWCA/Civ/2022/1169.html>).

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MRS JUSTICE LIEVEN

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.

Mrs Justice Lieven DBE :

1. This case concerns an application by Ms X, the Mother (“M”), for a number of orders concerning two children, N and B, twin girls aged just 7. Mr Y is the Respondent Father (“F”). The case includes some important lessons about the management of highly contentious private law proceedings.
2. The Mother was represented before me by Ms Kirsty Day. The Father was not represented and did not attend the hearing. He is currently detained in HMP Wandsworth. The hearing had been fixed for a number of weeks, a Production Order had been made and he had been served with the bundle. However, on the morning of the hearing he refused to get onto the prison van saying that he was “ill”. For reasons that I explain below I decided not to adjourn the hearing.

The background facts

3. The parents are both in their late 30s and started a relationship in 2013. The M has an older child, Z, who is now 13 years old. Both parents are Hungarian but have lived, or have family, in Serbia. It is not clear precisely how long the F has lived in the UK, but the M believes at least 10 years. The M moved to the UK in 2015 to live with the F.
4. The history of the relationship is contentious, both in respect of the alleged incidents but also the behaviour of the parents. However, in my view entirely correctly, HHJ Handley ruled that a fact-finding hearing was not necessary. I set out below a neutral version of the relevant incidents in the relationship.
5. The twins were born in late 2016. In April 2017 the M alleged that the F raped and physically assaulted her. She reported this to the police and she and the children moved to a refuge for a period. The F was arrested and charged with rape and assault. In August 2017 the M and children moved back into the rental family home.
6. In January 2018 both parents and the children travelled to Serbia to see an aunt who was ill. The M claims that the F then stranded her and the children in Serbia. The F denies this and says that he assisted in getting the children passports so that they could return to the UK.
7. In any event, on 26 March 2018 the M and children did return to the UK. On 29 March the M applied for a “lives with” order, a non-molestation order and an occupation order. There was a hearing before HHJ Handley on 6 June 2018 at which the M asked to withdraw her application for a non-molestation order on the basis that both parties give undertakings. The Judge ordered that the children live with the M and will spend time with the F at a contact centre.
8. It was agreed that the parents would travel with the children to Serbia on 7 July 2018. The M alleges that the F assaulted her at her parents’ home in Serbia and took her mobile phone. The F denies this. The M reported the assault to the Serbian police and the F was prevented from having any contact with the M by the police.
9. The M returned to the UK with the children in August 2018. When the F returned he started to have regular contact with the children.

10. On 8 November 2018 a final order was made by DDJ Flood by consent. This provided that the F would have contact with the children three times per week. The M says that she was coerced into agreeing this order by the F.
11. In practice the contact then stopped. The M said that this was because she was frightened of the F and because of the criminal proceedings. Importantly, the F has not seen the children since late 2018, when they were two years old.
12. In October 2020 the M filed an application to vary the Child Arrangements Order made on 8 November 2018. It is this application which is now before me and it thus follows that these proceedings alone have now been going on for more than 3 years. A large part of the delay of these proceedings stemmed from the F's criminal charge and ultimately conviction for coercive and controlling behaviour against the M.
13. In March 2021 the M's solicitors served a Scott Schedule with a series of allegations including physical assault, rape and coercive and controlling behaviour. The F replied on 20 April denying the allegations. Further statements were then served and various orders made for police disclosure. A year passed during which further police disclosure was made; a fact finding hearing was listed and then adjourned, and in effect the case hardly moved forward at all.
14. In May 2022 the F was convicted in the Crown Court of controlling and coercive behaviour to the M. He was acquitted of two counts of rape. On 14 July 2022 he was sentenced to 30 months imprisonment.
15. On 3 August 2022 HHJ Handley found, with the agreement of both parties, that no fact finding hearing was necessary in the light of the F's conviction. Cafcass were ordered to complete a s.7 report by 21 December 2022. A directions hearing was listed in January 2023 but then adjourned at the request of the F's solicitors. Cafcass were then ordered to file an addendum s.7 report. The case was set down for a final hearing on 19-21 July 2023. That hearing was then vacated due to the unavailability of the Cafcass officer and relisted on 4-6 October 2023. The M sought to bring this date forward as it was after the F's anticipated release date, however the Court retained the date as there were no dates available before the release date.
16. On 11 August 2023 the M applied for the removal of the F's parental responsibility in the light of the Cafcass report.
17. The F was due to be released on 19 August 2023. However, he was served with a Stage 1 deportation notice and then detained under immigration powers. It appears, although this is not entirely clear, that he was then recalled to prison because of safety concerns about the M and his current partner, and breach of licence. It appears that he is now serving the rest of his 30 month sentence, but he may also be subject to immigration detention. However, for the purposes of this case, the basis on which the F is currently incarcerated is largely irrelevant, particularly as he is currently also due to be deported.
18. The final hearing was listed for four days before DJ Glassbrook on 4-6 October 2023. On 26 September the F's solicitors wrote to the Court to request permission to come off the record. It was suggested that the F would request an adjournment pending the outcome of his criminal appeal.

19. The hearing on 4 October was adjourned because the F had not been served with the bundle and the F's solicitor's application was only made a few days before the hearing. I understand at that hearing the M's counsel suggested the case should be set down for 8 days.
20. At that point the case was transferred to me as the Family Presiding Judge for the Midlands. I held a case management hearing on 13 October 2023. At that hearing I set out directions that the time estimate would be reduced to one day given that there was to be no fact finding element and the nature of the reports that had been produced. The only witnesses would be the M, the F and the Cafcass officer, at which point one day was perfectly sufficient. I ordered that if the F wished to ask the M any questions he had to send those questions to the Court and that the M's most recent statement and the court order should be translated into Hungarian and served on the F. This was done, but the F produced no questions to be asked.

The evidence

21. The M filed two witness statements setting out her allegations of the F's physical assaults, rape on two occasions and his coercive and controlling behaviour.
22. The F equally filed two witness statements denying all the M's allegations. Importantly, he denied coercive or controlling behaviour, as well as denying the alleged rapes and assault. He set out how much he loved the children and wanted to have a relationship with them. The M had alleged that he had favoured one child over the other, and had been emotionally damaging to B. He denied these allegations.
23. The reasoning for the judgements I make in my conclusions are to a great extent based on the nature of the convictions, as well as the subsequent probation report and Cafcass reports. I have relied upon the pre-sentence report from the Probation Service to explain the nature of the offence for which the F was convicted and sentenced to 30 months imprisonment. The report refers to the CPS papers stating that between February 2017 and November 2018 the F repeatedly or continuously engaged in coercive and controlling behaviour to the M. this involved emotional blackmail, throwing water or biscuits at her, general humiliation, verbal abuse, common assaults or spitting at her. The papers refer to the F leaving the M and the children stranded in Serbia whilst he kept their passports. He forced her to continue a relationship when he was aware that she no longer wanted a relationship and that his behaviour would have a serious effect on her.
24. The report refers to a conviction for assault occasioning actual bodily harm in 2015. This offence was not domestic related but it did involve controlling behaviour, and an element of sexual humiliation of the victim. The report refers to the F having breached his bail conditions not to contact the M. He was arrested for this offence but was released because of a lack of evidence.
25. On 10 February 2023 the Court ordered the Probation Service to produce a report setting out the F's convictions, any work or progress the F had made during his custodial sentence and an updated risk assessment. This report was produced but unfortunately is not dated. It seems it was produced between March – July 2023.

26. In relation to convictions, the report cites information from Serbia that: *“The a/m person is known to our police records for criminal offence of robbery and unlawful production, keeping and circulation of narcotics, aggravated theft, theft, fraud, domestic violation, serious bodily harm, light bodily injury and maltreatment and torture”*. The F denies this information and says there was a case of mistaken identity.
27. The report outlines the nature of the offence of coercive and controlling behaviour. It includes the following:

“Prior to court date F threatened M via text/ FB/VIBER that if she didn’t withdraw her statement from Court he would not provide the passports. He attempted to coerce M to withdraw allegations as Court dates approached then became more abusive when she refused. An intelligence check made with the Police Domestic Abuse Unit also details that there were a number of domestic related incidents since this offence was committed. The Respondent (F) appeared at the Magistrates Court on May 18th 2021 after being arrested for breaching his bail conditions not to contact [the M]; however, he was released with the same conditions after a lack of evidence was provided to the Court. These incidents involved F attending the accommodation, accompanied by another male, in the early hours of the morning 01.00, following M in the town centre and entering the same store, and M receiving an empty envelope pushed under the door of her accommodation.”

‘STREAMLINED FORENSIC REPORT – Audio files found on the phone which are recordings of phone calls made to and from F’s phone were translated. There is material which states that 18/11/18 F forced his way into the flat, breaking the chain on the door.’

‘CURRENT CIRCUMSTANCES – F continues to demonstrate an entrenched pattern of controlling and coercive behaviour. My assessment evidences by prison intelligence is that this is currently directed at his partner and with added concerns around grooming behaviours directed at her youngest daughter. F was heard to enter dialogue with her telling the child that he has reserved her for marriage to him when she reaches the age of 18 years. Children’s Services undertook an assessment of concerns shared and concluded that the risk posed to the children by F is reduced while he is in prison.’

28. The report then refers to an entrenched pattern of coercive and controlling behaviour, including to his current partner. There is reference to him verbally abusing her and seeking to control her actions. This information comes from intelligence from the Prison Service.
29. A concern is raised about the F possibly grooming his current partner’s young daughter. However, it is impossible to assess this material given the F’s non-attendance at court and the lack of any supporting evidence. In those circumstances I gave no weight to that part of the report.

30. The report then states:

“Despite repeated attempts to bring some level of co-operation F continues to resist co-operation with Probation. He veers between minimisation and denial of his offence behaviours save for one interview when he remembered that he had been convicted of “light bodily harm” against someone. He could not remember who, when or where but asserted he was young and he had got into “fisticuffs”. F is highly resistant to working within the confines of any release Licence. This was evident when he was advised Safeguarding checks would need to be undertaken before he can reside, as planned, with his partner and children. He was angry and stated that he will live where he wants to live, and no-one can stop him. He has also planned how he can circumnavigate licence conditions placed upon him to reside as directed. He disagrees with his assessment of High Risk of Harm to ex-partner, current partner, future partners, and children. He is completely adverse to any notion that he has caused harm to M or the children. When challenged regarding his abusive behaviour towards his current partner F minimises his behaviour and attempts to convince staff that this is merely an “argument” and caused by his negative feelings about being in custody.”

31. The overall assessment is of high risk of serious physical, emotional and sexual harm towards the M, his current partner and the public. He is a high risk of emotional harm towards children as a result of witnessing or being caught up in domestic abuse incidents.
32. The Cafcass Court Advisor, Ms Frost, had prepared a s.7 report and an Addendum report and she gave oral evidence. She had interviewed the M and the girls. She had interviewed the F in person before his conviction and held a remote interview with him whilst in prison. At the first interview there was no interpreter, but Ms Frost said that the F had been able to understand and communicate in English. At the interview in prison there was an interpreter.
33. In the s.7 report Ms Frost raised a number of concerns about the F’s conduct. The F did not accept the outcome of the criminal trial and the impact of his behaviour on the M and the children. The F had made false allegations against the M to discredit her. There was no evidence to support the F’s allegations that the M neglected the children.
34. The girls are both happy and very well settled with the M. They are well looked after and there are no issues with the M’s parenting. Ms Frost describes them as lovely children with a close, secure relationship with their M and the older half-sister. The girls have no real memory of the F, not having seen him for almost 5 years. They do not know he is in prison, but believe he is away somewhere. B did say that she would like to meet her F and do fun things with him.
35. Ms Frost was very concerned about the risk that the F posed to the M. She referred to the fact that he had been assessed as a high risk to the M, and his current partner. She supported the F’s parental responsibility being removed so that the M could live without threat from the F and without having to consult him about decisions

concerning the children. She thought this was the only way to safeguard the M and the children.

36. She felt that if the children even had indirect contact with the F they would be at risk of them suffering emotional harm because of the F's controlling and manipulative behaviour.
37. Ms Frost had been told by the Probation service that the F had said that he would attempt to find the M once he was released, and would breach the non-molestation order, in order to gain contact with the children.
38. In her addendum report Ms Frost sets out the life story work that can be done with the children so that they understand who their F is, and their sense of identity is assisted.
39. The Addendum Report also sets out the strain that the M is under from the length of the proceedings, and how she feels the F is deliberately drawing out the proceedings.
40. There is also a very detailed Child and Family Assessment by the Local Authority which sets out very similar concerns.

Conclusions

41. The M applies for the following orders:
 - a. That the children live with her;
 - b. They have no contact with the F, save for "life-story" work as recommended by Cafcass;
 - c. F's parental responsibility be removed;
 - d. The Prohibited Steps Order preventing the F from removing the children from the jurisdiction remains in place;
 - e. Permission for the children's surname to be changed to "X";
 - f. A s.91(14) order be made.
42. The first issue that came before me was whether to adjourn the hearing because of the F's non-attendance. The M strongly opposed such a course. She pointed out that the F had made earlier applications to adjourn earlier hearings, including to await the outcome of his criminal appeal. These had been refused. Further, his solicitors had indicated on 10 November that there would be another application to adjourn on the basis of an appeal against the refusal of legal aid. That refusal was made on 23 September so the F, and his solicitors had had multiple opportunity to proceed with such an appeal much earlier. She suggested that the refusal to get on the prison van was another example of him seeking to control her.
43. On the morning of the hearing the F did not appear in court. When inquiries were made it transpired that he had refused to get on the prison van. The information provided by HMP Wandsworth was a form where the reason given by the F was

simply “illness”. There was no material from the Prison suggesting any medical attention had been needed or given, and nothing from any prison doctor.

44. I determined not to adjourn for the following reasons. Firstly, this case has been going on for three years, since September 2020, and the parents were previously in proceedings for nearly two years. So, the vast majority of the children’s lives have been spent in court proceedings. This has undoubtedly placed a huge toll on the M and doubtless through her has impacted on the children. It would be contrary to the interests of the children for the case to drag on further.
45. Secondly, the Court has copious material both from the parents, various other witnesses and professionals. The professional material includes three Cafcass reports, the Probation Service report of early 2023, the pre-sentence report, and a detailed Child in Need report from the Childrens Trust dated 27 July 2023. The Court therefore has extensive information about the family and all the relevant issues. The F has had every opportunity to set out his case in writing through the proceedings.
46. Thirdly, the F has been convicted of coercive and controlling behaviour towards the M. There have been numerous attempts by the F to adjourn the proceedings previously. Importantly, he did not comply with the order to serve any questions that he wished to ask the M, even though I am entirely confident he was aware that he needed to do so. At the heart of this case lies the F’s coercive and controlling behaviour. I have little doubt that his refusal to get onto the prison van, and therefore belief that the hearing would not proceed, was simply another manifestation of his effort to control the M.
47. If the trial was adjourned there would inevitably be more months of delay and distress for the M. In circumstances where I have all the relevant material, I consider that the F’s fair trial rights can be preserved despite the fact that he did not attend the hearing.
48. Turning to the substantive issues, I have closely in mind the welfare checklist in the Children Act 1989 and the principle in s.1 (2A) of that Act that it is generally in a child’s interests for both parents to be involved in their lives.
49. However, the evidence in this case is overwhelming that for the children to have contact with the F would cause them significant emotional harm. The F has been highly abusive of the M, as is proven by the fact of his criminal conviction and the very significant sentence that that the Crown Court imposed.
50. Further, the probation report makes clear that he has neither shown any remorse for his conduct, nor any understanding of the impact that it has had, and continues to have, on the M and the children. His response appears to be to deny that he committed the offence and have no insight into his conduct. There is strong evidence to show that if released in the UK, or perhaps even if deported, he will seek out the M despite the non-molestation order which is in place. There are numerous references in the papers to him having breached bail conditions, although he was never convicted of this offence.
51. The Probation Service has assessed the F as being a high risk both to the M and to his current partner. I place great weight on their assessment, given that they will have had extensive contact with the F both before and during his imprisonment.

52. I also place great weight on Ms Frost’s assessment that the F having any contact with the children would be emotionally damaging to them, given his past and present conduct.
53. For all those reasons I conclude not merely that the children should live with the M but that the F should have no contact, whether direct or indirect with the children. I have very little doubt that if I ordered indirect contact the F would use that to find the M and then to try to manipulate or frighten her into giving contact with the children. The negative impact on the M would, on the facts of this case, be harmful to the children.
54. The M and Ms Frost seek for the F’s parental responsibility to be removed. The correct approach to this issue is summarised in The Red Book 2022 [2.199[5]] which outlines the key principles as follows:

“(a) the significance of parental responsibility is the contribution to a child’s welfare that status confers on the adult concerned. The concept of parental responsibility describes an adult’s responsibility to secure the welfare of their child which is to be exercised for the benefit of the child not the adult;

(b) if the circumstances are such that the court would not conceivably make a parental responsibility order where one does not already exist, then the circumstances are likely to indicate that parental responsibility could be properly terminated (Re P (Terminating Parental Responsibility) [1995] 1 FLR 1048;

(c) the court should consider that it is appropriate to terminate parental responsibility where there is no element of the bundle of responsibilities that make up parental responsibility which the father could in present or foreseeable circumstances exercise in a way that would be beneficial for the child (CW v SG (parental responsibility: consequential orders) [2013] 2 FLR 655);

(d) where the Art 8 rights of a parent conflict with the Art 8 rights of a child, it is the rights of the child that take precedence (Yusuf v The Netherlands [2013] 1 FLR 2010).”

55. In *D v E (Termination of Parental Responsibility)* [2021] EWFC 37 MacDonal J said at [52]:

“The authorities set out above make clear that the court must ask itself whether, were the father now to be applying for an order conferring parental responsibility for G on him, an application for parental responsibility would be granted. In seeking the answer to this question the court will consider, amongst other factors, evidence of attachment and a degree of commitment, the presumption being that, other things being equal, a parental responsibility order should be made rather than withheld in an appropriate case. I also have regard to the fact that the removal of parental responsibility from a parent is [a] serious step that must be justified on the available evidence and proportionate. However,

these factors must all be considered with a view to answering that the fundamental question for the court, namely whether it can be said to be in G's best interests for the father to have parental responsibility for her, taking her welfare as the court's paramount consideration."

56. I have reached the view that it is appropriate to remove parental responsibility in this case. The facts of the case are exceptional, albeit by no means unique. Although coercive control is not itself exceptional, the scale here is, as is shown by the very lengthy prison sentence. The nature of the control has created real fear and intimidation of the Mother and any further involvement of the F in her or the children's lives will only perpetuate that fear.
57. The F has given absolutely no indication that he has learnt from the prison sentence and his past experience. The probation service report makes that clear.
58. Importantly, the children have no real or substantive attachment to the F, having had no contact with him for almost five years. This is not because of the delays in the court process, although doubtless that has not helped, but rather because of the F's criminal conduct and conviction.
59. Given the F's conduct and the professional reports, and his very limited involvement in the children's lives, it is effectively "inconceivable" that parental responsibility would be granted. In my view the children's Article 8 right to a private law and a secure home, conflict with any Article 8 rights of the Father, and therefore should take precedence.
60. I have considered whether some lesser step, such as removing any obligation to consult or inform the F about medical or educational decisions, would be more proportionate. However, in practice once I have removed these rights and he has no contact with the children, in reality parental responsibility is diminished to such a point it has little meaning.
61. Ms Frost was concerned to ensure that the children had knowledge about who their father was, for the sake of ensuring a sense of identity. She considered, and I concur, that this can be done through the use of life story work and an appropriate way of storing information about the F for the children, if and when they wish to know about him.
62. For those reasons I consider it proportionate to remove his parental responsibility.
63. The M also sought for the Court to allow her to change the children's surnames to X. There is no application for a specific issue order, but Ms Day asked for me to use the power under s.10 Children Act 1989 to make such an order without an application.
64. In my view there is no sensible basis for such a change and it will merely serve to confuse the children about their identity. I might support the application if it was part of securing the M, and through her the children's, safety. However, the F is well aware of the surname X, so changing the name will play no part in the M being able to hide from the F. The children are old enough to know their surname is S, and if the name was changed now I think it would serve no useful purpose but would undermine

the life story work in terms of understanding who their father is, and their own sense of identity. It is not possible to simply “air-brush” the F out of their lives.

65. I am further asked to make a s.91(14) order preventing the F from making applications concerning the children without the permission of the Court. The tests for making such an order are set out in the Red Book at 2.333(2) 2023 Edition and the case of *Re A (Supervised Contact) (s.91(14))* [2021] EWCA Civ 1749.
66. I do not consider it would be justified to make an order for the entirety of the children’s minority, particularly as the F has not made multiple previous applications. However, in the light of his conduct and the fact that the children have been subject to proceedings for so long, I consider an order for 5 years to be proportionate. That will allow the M to have a complete break for that period, and for any future court to consider whether the F has changed his understanding of his behaviour and of his actions once released from prison, whether deported or not.
67. I therefore make these orders.

Case management

68. Finally, a comment on case management. As is well known, there is massive pressure on the family justice system at all levels, and it is essential that we use our precious resources well, in order to improve the outcomes, and the speed of outcomes for children within the system. One of the ways that can be done is through effective and proportionate case management. In “the Road Ahead” [2021] the President of the Family Division (Sir Andrew McFarlane) said:

“43.If the Family Court is to have any chance of delivering on the needs of children or adults who need protection from abuse, or of their families for a timely determination of applications, there will need to be a very radical reduction in the amount of time that the court affords to each hearing. Parties appearing before the court should expect the issues to be limited only to those which it is necessary to determine to dispose of the case, and for oral evidence or oral submissions to be cut down only to that which it is necessary for the court to hear.”

(note this was quoted by Cobb J in *BY V BX* [2022] EWHC 108 at para 9).

69. The following points emerge from the facts of this case. Firstly, in a case where the Father is serving a custodial sentence of significant length for domestic abuse, it is unlikely to be necessary to conduct any further fact finding. In this case there were at least three written reports which were relevant to the welfare of the children and the information the court needed. Therefore, the need for oral evidence was extremely limited.
70. Secondly, there is no right in Family Court proceedings to cross examine a witness pursuant to Article 6. That right exists under Article 6(3)(b) in respect of criminal charges, not other proceedings. The duty under Article 6 in respect of Family Court proceedings is to ensure that all parties have a fair trial. How that is achieved is for the

Judge exercising their case management powers. Pursuant to FPR22.1 the Courts has the power to control the evidence it hears’:

“22.1

(1) The court may control the evidence by giving directions as to –

(a) the issues on which it requires evidence;

*(b) the nature of the evidence which it requires to decide those issues;
and*

(c) the way in which the evidence is to be placed before the court.

(2) The court may use its power under this rule to exclude evidence that would otherwise be admissible.

(3) The court may permit a party to adduce evidence, or to seek to rely on a document, in respect of which that party has failed to comply with the requirements of this Part.

(4) The court may limit cross-examination.”

71. Thirdly, it is essential that courts list cases with short and proportionate time estimates. The exhortation to “Make Cases Smaller” applies just as much if not more in private law cases as in public law ones. The time estimates must focus on the issues in the case and not the amount of time that the parties, and/or their advocates wish to take. There is a duty on the advocates to assist the court in focusing on the real issues in the case and setting a proportionate timetable.
72. Once the F’s conviction was made then the case only justified at the most, fairly short evidence from the mother, father and the Cafcass officer. In fact it was not necessary to call the Mother or the Father given their written statements and what was obvious from the papers. One day was the appropriate time estimate in this case.