



Neutral Citation Number: [2019] EWCA Civ 903

Case No: B4/2018/2357

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT FAMILY DIVISION
The Honourable Mr Justice Hayden
MA16P01150

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22 May 2019

Before :

LORD JUSTICE PETER JACKSON
and
LORD JUSTICE BAKER

IN THE MATTER OF THE CHILDREN ACT 1989
AND IN THE MATTER OF N (CHILDREN)

Between :

A FATHER
- and -
A MOTHER

Appellant

Respondent

The Appellant father appeared in person
Sheren Guirguis (instructed by Stephenson Solicitors LLP) for the Respondent

Hearing date : 22 May 2019

Approved Judgment

BAKER LJ :

1. By a notice of appeal dated 27 September 2018, the appellant sought an extension of time for appealing and permission to appeal against an order made by Hayden J in private children proceedings concerning his two children, his daughter, now aged eight, and son, now aged seven. In the notice, the father stated that he wished to appeal against “the final order of Hayden J dated 3 July 2018 dismissing the father’s application to vary the order of the court dated 14 March 2018”. The skeleton argument filed in support of the application for permission to appeal stated that the father wished to appeal against both the order of 3 July and the order of 14 March. On 6 December 2018, Moylan LJ granted the father an extension of time for appealing and permission to appeal against the order of 3 July 2018. He further directed that “the applications (made informally) for an extension of time and for permission to appeal against the order of 14 March 2018 are adjourned to be heard with the father’s appeal from the order of 3 July 2018. I take this course so that the court is able to deal with these applications in the light of the court’s determination of the appeal from the latter order”.
2. The litigation between the father and the respondent mother concerning the two children has been continuing for nearly 5 years. The parties separated in August 2013 and, in September 2014, the mother applied for a child arrangements order, a non-molestation order and a prohibited steps order. In January 2015, the father pleaded guilty to an offence of harassment by sending abusive text messages to the mother and was subsequently sentenced to a six-month community order together with a fine and order for costs. On 7 March 2016, a district judge made a final child arrangements order providing that the children live the mother but have overnight and holiday contact with the father. In June 2016, the father referred the children to the local authority and informed the police of allegations that the mother’s partner had physically harmed the children. The local authority conducted an investigation under s.47 of the Children Act but found no evidence of physical abuse.
3. Meanwhile, the mother had applied for a variation of the contact order and from July 2016 the father’s contact has been confined to visiting supervised contact only. It is important to record that, despite a number of court findings critical of the father, the evidence broadly suggests that the children enjoy and benefit from contact with him.
4. A final hearing took place over four days in March 2017, at the conclusion of which the circuit judge made an order confirming the child arrangements, including the order for supervised contact, coupled with a non-molestation order and prohibited steps order against the father, who was also ordered to pay the mother’s costs. The father was granted permission to appeal against that order, and the appeal came on for hearing before Hayden J on 19 October 2017. The appeal was dismissed, but the judge gave further case management directions concerning the issue of contact following the parties’ agreement to undergo a psychological assessment. He gave permission to the children’s solicitor to instruct Dr Jaime Craig to carry out the assessment. He further ordered that, in the light of the history, the case should remain in the High Court. With regard to future hearings, the order of 19 October 2017 included (at paragraph 2) a provision that “the application ... is hereby restored for consideration of the future progression of contact following the psychological assessment of the parents”, but also (at paragraph 6) a direction that “the case is listed

for directions before Hayden J on 14 March 2018”, with a further provision that all parties should file brief position statements for that hearing.

5. Dr Craig’s report was filed on 11 February 2018. It is unnecessary for the purposes of this appeal to set out his conclusions concerning the mother, save to note that there were no findings which called into question her capacity to care for the children. So far as the father was concerned, Dr Craig concluded that there was compelling evidence that during times of stress, and in particular when he felt slighted or wronged, the father has reacted with overwhelming levels of dysregulated emotion resulting in aggression and damage to property. There was extensive evidence of longstanding difficulties in anger management, volatility and aggression with dramatic acts and threats of self-harm. These were not thought to be indicative of an acute mental illness but essentially maladaptive coping strategies and other personality traits of fluctuating mood, wilfulness, egocentrism, and lack of remorse. Dr Craig recommended that the father should consider treatment in the form of psychotherapy - either dialectical behaviour therapy or cognitive analytical therapy.
6. The father did not attend the directions hearing before Hayden J listed on 14 March 2018. Instead, he filed a position statement stating *inter alia* that “the father’s position is a very straightforward one, namely that in the interests of the children the court should very clearly and concisely identify all the relevant information concerning the two outlined options namely the dialectical behaviour therapy and cognitive analytic therapy which the father needs to undergo before contact can become unsupervised ... Once the father has received clear information from the court re the two therapies, arrangements will be made for him to undergo the necessary so unsupervised contact can take place after the completion of the aforesaid.”
7. The hearing proceeded in the father’s absence. A transcript of the hearing has been prepared for the purposes of this appeal. After an initial discussion with the mother’s counsel, the judge asked the guardian to give oral evidence. There followed a dialogue between the judge and the guardian concerning arrangements for future contact. The judge expressed scepticism about the father engaging with therapy. The guardian agreed, but added that he thought it was a prerequisite to the children enjoying a full and meaningful relationship with the father throughout their childhood. The mother then gave oral evidence during which the judge again expressed doubts about the prospect of the father engaging with therapy, describing it at one point as “frankly ludicrous”. The judge also expressed confidence that the mother would be able to manage contact in future.
8. At the conclusion of the mother’s evidence, the judge stated:

“Right well I’m going to leave it to your counsel and [the children’s solicitor] to see how best to construct my thoughts to give you an element of discretion. If you want me to reflect that in the order, if you do not I will not, but I’m signalling to you that I’m putting this into your hands to back your judgment... I will give you the framework that you wish, but I want you to use your judgment to keep it afloat knowing that I’m backing your judgment. I am going to not make any order for the therapeutic commitment of the father. If he wants to engage in it that seems to me to be entirely a matter for him. He is far more likely to do it constructively if he is doing it for himself, than to please a judge as part of a court process that will be lipservice, it will not be genuine, nobody ever engages in this

kind of therapy ... for any other reason than they want to ... I am also going to make a 91(14) order to prevent the case coming back before the court without a permission application by the party who wants to bring it back ... That permission application is reserved to me, I am afraid.”

In response to a question from counsel, the judge confirmed that the s.91(14) order would apply to both parents and that the order would last for two years. He added:

“I am just blocking the court process because it is ratcheting up the emotional anti ... Take away the court from it and let us just see if that calms things down a bit.”

9. The order drawn following the hearing included a recital that the court was “satisfied that exceptional circumstances exist for an order to be made pursuant to s.91(14) of the Children Act 1989”; an order that the children should live with the mother; an order that the mother make the children available for supervised contact with the father on dates set out in the order; an order restraining the father from removing the children from the care and control of the mother, or their schools, or the jurisdiction; and, under paragraph 4, an order that

“pursuant to s.91(14) ... the father and mother are prohibited from making any further application for a child arrangements order in relation to the children ... without the permission of the court until 4 pm on 14 March 2020. The father has liberty to apply to vary the terms of this paragraph of the order by no later than 4 pm on 12 April 2018. Any application for permission is reserved to Mr Justice Hayden.”

10. On 12 April 2018, the father lodged an application to vary the order of 14 March. He also then undertook a course of psychotherapy with Ms Elaine Swift, a chartered consultant counselling psychologist qualified in various therapies including cognitive analytic therapy and dialectical behaviour therapy. In a report dated 25 May 2018, Ms Swift reported after 10 sessions of therapy that she found no evidence that the father suffered from emotional distress outside the context of missing his children and frustration with the legal system, and concluded that the recommendations in Dr Craig’s report were inconsistent with how the father had presented to her.
11. The hearing of the father’s application took place before Hayden J on 3 July 2018. A transcript of this hearing has also been produced for the purposes of this appeal. The mother was neither present nor represented at the hearing. It is plain from the transcript that the judge did not have the benefit of any of the papers relating to the proceedings before the hearing, although during the hearing the father provided him with a copy of the order of 14 March and a document from Ms Swift. The transcript refers to two different documents from Ms Swift and it is unclear to me whether the document filed with the papers for this appeal is the version seen by the judge. Without the opportunity to refresh his memory from the papers, it is unsurprising that the judge plainly had some difficulty recalling some of the details of the case. He indicated, however, that he did not find Ms Swift’s report persuasive, describing the quality of her analysis as “very poor” and her reasoning as “highly derivative”. It is clear from the transcript that the father then became somewhat agitated at the way the hearing was proceeding and eventually asked the judge “you tell me what I need to do and I will do it because my kids don’t deserve a continuation of this”.

12. The judge then delivered a judgment in which he stated, *inter alia*, that “on 14 March 2018 I heard the father’s application for contact with his children”. He referred to the order under s.91(14), adding “of course both parties have liberty to apply in relation to it”. He said that now “only a few months later father returns, seeking permission to vary the order”. He described the father’s paperwork as being “entirely in disarray” and stated that that he had not prepared a court bundle, although he acknowledged that litigants in person such as the father face great challenges when preparing for a hearing. The judge then said: “I do however recall key features of this case, which eventually resolved by agreement (and as such did not require a judgment)”. It is not entirely clear to me whether the judge was referring at that point to the hearing in October 2017, when both parties had been present and had agreed to undergo psychological assessments, or to the hearing on 14 March 2018 when the father was not present. If, as seems more likely to me, he was referring to the March hearing, then the judge was of course mistaken in saying that the case had been resolved by agreement.

13. The judge then addressed the issue of therapy in the following terms (at paragraph 6 to 11):

“The recording in my earlier order, which the father has produced, suggest to me now that the father was ambivalent in accepting Dr Craig’s conclusions but perhaps trying, pragmatically, to comply with them in order to find a route to a more relaxed contact regime ... Today the father has produced a document prepared by a Ms Elaine Swift who is described as a consultant counselling psychologist ... Dr Craig had considered that it was necessary for there to be a full course of cognitive analytical therapy in which the father would be required fully to engage. This arose from the extent of what Dr Craig considered to be the father’s significant emotional dysregulation. It is important to record that Dr Craig’s conclusions were not challenged i.e. they were accepted. Ms Swift ... plainly disagrees with Dr Craig’s analysis. I am bound to say that if she had seen the father in this court room this morning she may have had cause to re-evaluate her opinion. Ms Swift not only failed to set out her experience, she also fails to advance any coherent reasoning or to engage, at all, with the fact of the case. Her short document is heavy with the father’s self-report. I am not clear what, if any, documents she has seen. In short, she provides no evidential basis which justifies re-opening the litigation at this stage.”

14. The judge then referred to s.91(14) and added this concluding paragraph:

“As the case law demonstrates, in particular *Re P* [1999] EWCA Civ 1323, orders under this provision are made cautiously and with great procedural care. The underpinning objective here was to provide the mother and in consequence the children with a period of respite from the intense and corrosive litigation. Conflict is invariably inimical to the welfare of children. I make it perfectly clear to the father that everybody would be delighted if he were to identify and commit to the intensive therapeutic programme that Dr Craig has identified. There are no shortcuts nor will there be any success until there is genuine engagement. I hope the father will receive this message: there is a very big prize for him at the end which should serve to motivate him. Even greater will be the benefit to the children of expanding their relationship with their father. Accordingly I dismiss the father’s application.”

The order made following this hearing provided that “the father’s application for leave to vary the order 4 March 2018 is refused.”

15. On 27 September 2018, the father filed a notice of appeal out of time as set out above supported by a skeleton argument prepared by counsel, Ms Lisa Sweeney. The documents set out his grounds of appeal at some length but they can be fairly summarised as follows.
 - (1) He was denied a fair trial at the hearings on 14 March 2018 and 3 July 2018.
 - (2) There was no warning in the order of 19 October 2017 that the court would consider making final orders at the next hearing in the event of any party failing to attend court.
 - (3) He had become emotionally drained by his court experiences and felt unable to face the further directions appointment.
 - (4) The hearing on 14 March 2018, listed for one hour, proceeded in his absence and the court heard evidence, without notice, from the mother and the guardian.
 - (5) The father had no notice of any intention to conclude the proceedings and expected there would be a directions order and a subsequent listing. Instead, an order under s.91(14) was made without notice.
 - (6) At the hearing on 3 July 2018, instead of listing the matter for a further hearing, at which the other parties could be present, the judge summarily dismissed the application to vary the order of 14 March 2018.
16. In her skeleton argument filed in response, the mother’s counsel, Ms Sheren Guirguis sets out the history of the case at some length. She submits that there was no reason for the court not to proceed in the father’s absence on 14 March 2018. He had been warned in the notice of hearing that the court could make orders in his absence. Given the likely length of any therapeutic process, and the fact that proceedings had been ongoing for several years, it was entirely reasonable for the court to proceed as it did. On the specific question of the order under s.91(14), Ms Guirguis cites the guidance in the case law, in particular *Re P, supra*. She points out that there had been multiple applications in the course of the proceedings, that the evidence showed that the children had been exposed to parental conflict, and that Dr Craig’s report indicated that the father needed to undergo a long-term process of therapy and demonstrate change before contact could move on. In the circumstances, it is submitted that the judge was entitled to make the order under s.91(14). It was acknowledged that the father had not been present at the hearing, nor had any notice that such an order might be made, but the judge expressly provided for the father to have liberty to apply to vary that provision.
17. With regard to the hearing in July 2018, the respondent submits that the judge was entitled to dismiss the father’s application in the light of Dr Craig’s report and the absence of any evidence that the situation had changed in the intervening months. In a respondent’s notice, the mother asks the court to uphold the order of 3 July 2018 on

the grounds that, even if the court finds that there were procedural irregularities at that hearing, the father has failed to demonstrate sufficient change for consideration to be given to any variation of the requirement that contact be supervised. In oral submissions, Ms Guirguis developed this argument. She contended that, if the court concluded that the s.91(14) order made by Hayden J should be set aside because of procedural irregularity, it would be open to this court to impose a fresh order under that subsection on the same terms, and that such a course would be appropriate in the circumstances.

18. At the outset of the hearing, we asked the father, who appears in person before us today, to outline his position and update us on what has been happening. Unsurprisingly, he told us that after three years of supervised contact his aim is to move contact to an unsupervised basis. He told us, however, that he has had no contact since the end of January because he has been travelling in Dubai and Singapore with his new partner who has recently given birth to a baby. Prior to January, he had been seeing the children five times a fortnight. We explained to the father, and he accepted, that this court is unable to deal today with the substantive issue of contact. The issue for us is the fairness of the last two hearings.
19. Notwithstanding the terms on which Moylan LJ directed this hearing, I propose to start my analysis by considering the hearing on 14 March 2018, and, specifically, the circumstances in which the s.91(14) order was made.
20. It has been well established for many years that an order under that section should be made sparingly, for the reasons identified by this court in *Re P*. The principles set out in that case are well known and need not be repeated. More pertinent, perhaps, for this appeal, are the observations of Tomlinson LJ in *Re T (A Child) (Suspension of Contact)* [2015] EWCA Civ 719 [2016] 1 FLR 916. Having referred to the guidance in *Re P*, he observed:
 - “50. ... Given the significant implications of this statutory intrusion into a party’s ordinary ability to access justice, it is imperative that the court is satisfied that the parties affected:
 - (1) Are fully aware that the court is seised of an application, and is considering making such an order.
 - (2) Understand the meaning and effect of such an order.
 - (3) Have full knowledge of the evidential basis on which such an order is sought.
 - (4) Have a proper opportunity to make representations in relation to the making of such an order; this may of course mean adjourning the application for it to be made in writing and on notice.
51. These fundamental requirements obtain whether the parties are legally represented or not. It is, we suggest, even more critical that these requirements are observed when the party affected is unrepresented.”

21. In this case, the possibility of the court making an order under s.91(14) was only raised at the end of the hearing on 14 March 2018 by the judge himself. It had not been mentioned by the mother's counsel in the course of argument. So far as this court is aware, it was not raised in any of the reports or preliminary documents filed for that hearing. It follows that, until the judge raised it himself, neither party was aware that the court was considering making such an order. There is no evidence that either party was aware of the meaning and effect of such an order, or the evidential basis for making it. The mother was present and represented and it could therefore be said that she had an opportunity to make representations in relation to the making of the order. But the father, who was not present, certainly did not have such an opportunity. He was, of course, aware of the hearing, and had received a hearing notice which warned that the court could make orders in his absence. But the order of 19 October 2017 had listed the case on 14 March 2018 for directions, not a substantive hearing. There was nothing to indicate to the father, a litigant in person, that the court would be making substantive orders at that hearing in respect of his future contact, let alone any order concluding the proceedings and preventing the parties from making further applications without the court's permission. In short, none of the fundamental requirements identified in *Re T* was satisfied.
22. I can well understand the judge's anxiety that the ongoing proceedings were not serving any benefit and, furthermore, risking further harm to the children's welfare. But in the circumstances the right course would have been to adjourn the matter for a further hearing with appropriate case management directions addressing the question of whether or not an order should be made under s.91(14). The course the judge took – of making the order but giving the father time-limited liberty to apply to vary it – was in my view not consistent with authority. Lest my approach be considered pedantic, it needs to be emphasised that the courts have repeatedly stated that orders under s.91(14) represent a significant interference with a party's right of access to the court.
23. The disadvantages of the course taken by the judge are demonstrated by what subsequently happened. The father duly made an application to vary the March order in accordance with the judge's direction, but his application was not heard for several months. Furthermore, what transpired at the hearing on 3 July 2018 was, to say the least, unfortunate. I am very reluctant to criticise the judge who was obviously fitting this hearing into a very busy court list and was, furthermore, at a considerable disadvantage not having access to any of the court papers, save for the two documents provided by the father. As a result, as is plain from the transcript of hearing and judgment, although he remembered something of the background, the judge had a limited recollection of the hearing on 14 March 2018 which, it seems, he wrongly recalled as having resulted in an agreement between the parties. He therefore approached the issue at the hearing on 3 July 2018 as an application by the father for permission to apply *under* the s.91(14) order. To that end, he scrutinised the further psychological evidence obtained by the father and found it inadequate in various respects, and accordingly made the order in the terms set out above, concluding, as he said in the passage from his judgment cited above, that Ms Swift's report "provides no evidential basis which justifies re-opening the litigation".
24. If the s.91(14) order had been properly made, it might have been appropriate for the judge to have dealt with the father's application in that summary fashion. But in any

other circumstances, his application plainly merited more substantial consideration. In the light of the irregularities in the way in which the s.91(14) order was made, the summary dismissal of the father's application on 3 July was plainly wrong.

25. I regret to say, therefore, that the two hearings together represent an unwarranted infringement of the father's rights to a fair hearing. His automatic right of access to the court was removed without notice and without giving him a proper opportunity to make representations. When he attempted to exercise the liberty to apply to vary that order, his application was misunderstood by the court and dismissed. I reach this conclusion with considerable reluctance, given Hayden J's great experience and the strong sense of his concern for the children which emerges from the transcripts. His assessment that the ongoing proceedings were serving no purpose and not benefitting the children may well have been right. But before imposing an order under s.91(14), there are certain procedural steps which should have been followed but which were unfortunately overlooked in this case.
26. For my part, I am not at all attracted by Ms Guirguis' submission that this court should now consider imposing a s.91(14) order. If the mother wishes to invite the court to make such an order, the procedural requirements must be complied with so that the application can be properly considered by a judge at a future hearing.
27. In the circumstances, it seems to me that the right course, in outline, is to:
 - (1) grant the father permission to appeal against the order of 14 March 2018;
 - (2) allow the appeal and set aside paragraph 4 of the order of 14 March 2018;
 - (2) allow the father's appeal against the order of 3 July 2018 and set that order aside;
 - (3) remit the matter for a further hearing before MacDonald J, the Family Division Liaison Judge for the Northern Circuit.

We will in a moment discuss with the parties the appropriate case management directions. In making this order, I express no view as to the eventual outcome of the next hearing. It may be that MacDonald J decides to give further directions for a substantive hearing. Alternatively, he may reach the same conclusion as arrived at by Hayden J that there is no benefit in the proceedings continuing. That will, however, be a matter for him having considered all relevant matters.

PETER JACKSON LJ

28. I agree.