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[2024] EWFC 121 (B)

IN THE FAMILY COURT



No. SD24C50069

Royal Courts of Justice
Strand
London, WC2A 2LL

Thursday, 18 April 2024

IN THE MATTER OF THE CHILDREN ACT 1989

Before:

MR JUSTICE WILLIAMS

(In Private)

B E T W E E N :

A LOCAL AUTHORITY

Applicant

- and -

(1) A (Mother)

(2) B (Father)

(3-4) X & Y (CHILDREN)

(via their Children's Guardian)

Respondents

RE X and Y (DOMESTIC ABUSE: PARTICIPATION DIRECTIONS: OBLIGATION TO CONSIDER)

A P P E A R A N C E S

MISS C HARRIS for the Local Authority.

MR C BARNES for the Mother A, First Respondent.

MR D LANG for the father B Second Respondent.

MRS D MINOPRIO for the Children, Third and Fourth Respondents via their Guardian.

J U D G M E N T (G I S T E D)

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MR JUSTICE WILLIAMS:

- 1 I am dealing with care proceedings relating to 2 children X & Y brought by A Local Authority. Their mother is A, and their father is B. The children X and Y are represented by a Guardian. On 18 April 2024 I made an interim care order. This judgment addresses only one procedural aspect of the case relating to how participation directions were dealt with and is a 'gisted' version of the judgment I delivered ex tempore and supplemented in the transcribed version. [Permission to appeal the decision was sought and refused by the Court of Appeal on 24 May 2024.]
- 2 The ICO was made at the conclusion of a part-heard interim hearing which took place over the course of 1 day on 12 April 2024 and ½ a day on 18th of April 2024. I gave a judgment on 12 April 2024 dealing with an intermediary application Re X & Y (Intermediary: Practice and Procedure): [2024] EWHC 906 (Fam) [The neutral citation is incorrect as the case is proceeding in the Family Court not in the Family Division of the High Court]
- 3 The threshold included allegations that the children had been exposed to domestic violence and conflicted relationships perpetrated by the mother and by the mother's former partner to her. Overall, it is broadly accepted by the mother that that relationship was punctuated by incidents of domestic abuse, some of which the children were exposed to.
- 4 The mother's position at the hearing on 12 April, when she was represented by Ms Taite was in terms that she accepted that the interim threshold was met, but she did not accept that the threshold for separation of the children from her was met,
- 5 At that point the matter came before me with a time estimate of one day and all parties agreed that the matter should be dealt with on submissions alone. The volume of

documentary evidence, even at that first hearing, was extensive. I suppose that is now more and more a product of the pre-proceedings process, which encourages a far more detailed evaluation of the family's situation prior to the issue of proceedings than was the case some years ago, when, at first interim care hearings, the evidence might be in relatively limited form. The range and extent of the evidence feeds into the decision on whether to hear oral evidence or submissions; it both affected the nature of the hearing that was capable of being undertaken but also the fairness of a hearing on submissions alone. Clearly where there was a significant and diverse evidence base available with a range of factual and opinion evidence available the fairness of a submissions only hearing is easier to achieve.

- 6 Having heard those submissions towards the end of Friday, I gave a short judgment; a precise decision effectively, with short reasons and adjourned the application part-heard to today. What I concluded at that stage was that, as matters stood before me then, the evidence clearly established that the children had and were continuing to suffer significant harm in the care of the mother which would continue. There were a number of areas though which seemed to me to have the potential to be addressed, which might ameliorate that level of harm across a number of those domains which had been identified. And so I adjourned on the basis that when we resumed a far more robust plan could be put in place which addressed those matters, and that the decision on whether the children could remain at home or needed to be removed would be taken today in the light of that.
- 7 Mr Barnes who has replaced Ms Taite has brought a new dimension to the case in that he has submitted that the court should not proceed on the basis of submissions only and that this is a case which requires to be heard with evidence, in particular from the guardian and the social worker and a child carer. He also identifies a concern in relation to the mother's ability to participate fairly in the proceedings as a consequence of her being a vulnerable individual within the meaning of FPR 3A, she being a victim of domestic abuse, perhaps

most obviously in relation to her former partner, but also, (having myself) dug into the private law papers, there is an allegation that there was controlling behaviour by the father in relation to the mother, or emotionally abusive behaviour, and in conjunction with the mother's said diagnosis of ADHD and trauma, that the court should not have proceeded, on the 12th, and should not proceed today, without there being in place appropriate participation directions to support her in understanding the process.

- 8 FPR 3A.2A sets out the 'Court's duty to consider making participation directions: victims of domestic abuse'. That rule identifies that "*where it is stated that a party... is, or is at risk of being... a victim of domestic abuse carried out by a party...or a witness in the proceedings, the court must assume that the following matters are diminished (a) the quality of a party's evidence ; (b) in relation to a party, their participation in the proceedings* " Where the assumption applies the court must consider whether it is necessary to make one or more participation directions. As I pointed out in the course of submissions, at the hearing on 12 April it was not raised (stated) that the mother was a victim of domestic abuse carried out by the father (a party) and so the assumption did not arise. The Threshold contained allegations of domestic abuse by the mothers former partner who is neither a party or a witness and the mothers experienced legal team (including her solicitors who continue to act for her) did not either 'state' (in submissions or in written documents) that fact which would have generated the assumption or make a Part 18 application as provided for by FPR3A.10.
- 9 Requiring such an application to have been made may not be practical where an Urgent hearing is listed but in this case the hearing was listed for 12th April either shortly before or shortly after the Easter break and so plenty of time had been available to make it, had it seemed an appropriate application to make or at least to flag the issue in advance of the hearing so that screens or separate waiting areas etc might have been considered. Whilst I do not doubt that the court has an independent duty to consider issues of diminished ability or vulnerability the FPR identify the primary means by which the court comes to consider

these. They are contained in FPR 3A.2A where the fact which engages the assumption must be “*stated*” or within FPR 3A.10 where an application is made in the application form initiating the proceedings or where a Part 18 application is made; in either case they must contain the matters set out in PD3AA.

- 10 There will of course be cases – particularly with litigants in person – where the court will need to be alert to the need to consider of its own motion the domestic abuse assumptions in 3A.2A or the vulnerability issues in 3A.3 and participation under 3A.4 and giving evidence under 3A.5. FPR 3A.11 identifies that the duty applies throughout the proceedings and provides a procedure for the court to follow where it is doing so of its own motion.
- 11 However whilst the court is under an obligation – as in every case – to provide a fair hearing which takes account of matters which diminish a party’s ability to participate and to give evidence, where a party is legally represented the obligation to consider how a party will participate fairly lies firstly, both temporally and procedurally, on the legal team. That is both good practice and I think in accordance with professional duties (as is use of the Advocates Toolkit etc) but also is the route FPR3A provides. That the issue was not raised on the 12th April 2024 did not come as a surprise to me given the father was not then identified (stated) as a possible perpetrator of domestic abuse towards the mother and what I had read in the papers about the mothers level of understanding and ability to engage (when so minded) with professionals, the court and lawyers; for further details see the judgment on Intermediaries.
- 12 One can contemplate situations where a legal team has not stated a fact so as to engage 3A.2A or has not applied formally under 3A.10 or even informally in a Position Statement or orally , that the court will be alerted to some matter which causes it of its own motion to undertake its duties under 3A.2A, 3A.3, 4, 5. But that is not an obligation to undertake that in every case regardless of what legal representatives have applied for and where there is no obvious red flag which can reasonably put the court on notice that domestic abuse or

vulnerability is an issue that needs to be addressed. [The court is entitled to assume that a represented party's lawyers are satisfied they can participate fairly if the issue is not raised.]

- 13 Where there have been earlier hearings, and in particular where the issue has specifically been considered and ruled upon the court does not have to start the process afresh or with a blank canvas but can proceed on the basis that it has been addressed unless it is clear to the court that the situation has materially changed so as to require the court to re-evaluate the issue. Each hearing is not an opportunity to a party to re-visit a decision previously taken; appeal is the correct route to a challenge to a decision which a party disagrees with. Only if there is good reason to consider that the issues have been overlooked or the situation has changed will the judge need to reconsider previous decisions on the need for participation directions. [What is necessary in a case management hearing or a hearing on submissions may well be different to what is necessary where evidence is to be taken from a 'vulnerable' party or where evidence from an alleged perpetrator is to be heard]

- 14 As the Rules contemplate – reaching decisions about vulnerability and in particular the participation directions that are necessary is an evidence-based process leading to a reasoned determination; not an automatic response to a keyword being mentioned. I am therefore not persuaded that the process on 12th April 2024 did not enable the mother to participate fairly because her ability to participate had been diminished either through the 3A.2A assumption or by reason of vulnerability. Throughout the hearing the mother actively engaged both via her counsel and through her own audible observations. The issues under 3A.2A and vulnerability and participation directions may need to be considered on further evidence in due course.

15 At 20.23 on the 17th April 2024 my clerk received an email stating

I write in advance of the hearing at 2pm on 18/4 before Mr Justice Williams. I believe previous Counsel had raised in her Case Summary that special measures are requested on behalf of my client, the mother, given the allegations of abuse perpetrated by Father. My client would seek screens and a separate waiting room and I simply reiterate that position prior to the hearing and, if it were possible for the Court to accommodate this, I should be grateful.

16 My clerk responded at my direction

His Lordship wanted me to convey on his behalf that the previous Position Statement did NOT seek special measures (and His Lordship is surprised they do not know what the PS they filed said) it said instructions would be taken from M on whether any were sought. No application was made for any. Can they clarify the basis on which special measures are sought; the Threshold identifies allegations of abuse by the mother and by [her former partner] but does not refer to the Father? Therefore, it may not be possible to accommodate the separate waiting room although parties are welcome to attend early to see if they can secure one in the Queens Building.

17 Having looked into the private law papers it emerged that the mother had made allegations of emotional abuse – which amounts to domestic abuse if proved – against the father and so the assumption became operative after the 18th April but not before as the fact had then been stated. There was also some evidence that the mother may have been diagnosed with PTSD and ADHD and so these may have been matters relevant to vulnerability under 3A.3 and ability to participate under 3A.4 and would fall to be considered as part of the 3A.7 matters as being under 3A.7((b)(i) ‘*a mental disorder...*’ although not I think ‘*otherwise has a significant impairment of intelligence or social functioning*’ (at least I did not understand Mr Barnes to put it that way) ; or under 3A.7(f) the understanding of the mother; or under 3A.7(j) a characteristic of the mother. Having read much about the mother and her ability to understand and engage I did not consider, particularly as the case was based on submissions, that she had not been able to participate fairly because of possible vulnerability arising from possible PTSD or ADHD.

- 18 Following receipt of the email unfortunately the court was unable at that time to secure separate waiting rooms or even to put in place a screen. I did not consider this to have rendered the 12 April hearing unfair as the mother was very actively engaged during it or to make proceeding today inappropriate given nature of the allegations, the fact that the mother was represented by solicitor and counsel, that witnesses were not being heard and that the offer to re-arrange the court room to allow the mother to sit away from and out of sight of the father was not taken up. The application of the assumption results in an obligation to consider ‘...*whether it is necessary to make one or more participation directions.*’
- 19 I handed down a judgment today dealing with the intermediary issue in which I identified a number of matters which seem to me to require consideration in relation to the assertion that the mother required an intermediary to assist her with the court process as, whilst there is material in the form now of, a letter from a doctor saying that the mother has ADHD, and whilst there is, a letter from [a hospital] saying that the mother has had treatment for trauma, the issues relating to the mother’s participation are much more nuanced and require much more careful consideration before one can reach any conclusions in relation to any of the components which are relied upon. Although the mother has participated with a number of legal teams in the private law proceedings the issue of participation directions, either based on domestic abuse or vulnerability as a result of a medical condition, has not been raised, and there is, as I have identified in the intermediary judgment, material within the expert and the independent social work arena which does not suggest that the mother has substantial difficulties with communication or understanding, which leads me to conclude that there is not any impediment to these proceedings continuing today on the basis of the mothers ability to participate.
- 20 Further consideration will have to be given to directions in relation to screens or otherwise as well as whether an intermediary is required for any purposes once there is a better

evidential foundation on which those decisions can be made, but I am satisfied that the availability of lawyers, and indeed the evidence from everybody else who has been involved with the mother to date, does not suggest that it would be unfair to the mother to proceed today to make a decision.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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