IN THE READING FAMILY COURT

Neutral Citation Number: [2024] EWFC 351 (B)
Case No. RG21P00751

The Family Court at Reading
Friar Street
Reading

Wednesday, 24th April 2024

Before:
HIS HONOUR JUDGE GREENFIELD

B E T W E E N:

W

and

J

MR PYE appeared on behalf of the Respondent Father
DR C PROUDMAN appeared on behalf of the Appellant Mother

JUDGMENT
(Approved)

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.

HHJ GREENFIELD:

1. This is a permission to appeal hearing. I will give an *ex tempore* judgment because it seems to me there is some urgency in this case of resolving matters as swiftly as possible, not least, for the benefit of the parties and also the child involved. It is a two-pronged hearing. If I grant permission on the grounds sought by the appellant, the appeal hearing should follow on from that decision. The prospective appellant is the mother represented by her counsel, Dr Proudman today; the prospective respondent, Father, represented by his counsel, Mr Pye. The case is all about the parties' child P.
2. I will give a brief background. The case concerns a decision made by District Judge Harrison at the final hearing on 12 February 2024. The learned judge's decision was handed down on 22 February and that judgment starts in the bundle which I have read at page 391. The appeal notice was filed on 23 February 2024. That is at page 407 of the bundle. A copy of the final order being appealed is at 387. The appellant seeks that the final order is set aside and that the Court makes an order for the final order to be reheard again, with some consequential directions. The contact provisions within that order are at paragraphs three and four and the schedule to the order by way of recitals, at paragraph seven and also provision for no further application by the father in respect of any DAP course at paragraph nine as part of that recital.
3. The appellant's notice came before my colleague, Her Honour Judge Gibbons who gave preliminary directions on the appeal; the judges directions are at 425, and also dealt with an application by the appellant to stay the order. The stay was refused but there was an amendment made to the contact provision.
4. On 17 June 2021, now some time ago, the proceedings started in the Family Court with the father's application for child arrangements order in respect of P. Father was seeking to spend time with P. I should also say the parties met in July 2017 and they separated in March 2019. It appears that the non-contentious part of the proceedings is that there is a live with order for P to live with the appellant mother and that is reflected in paragraph two of District Judge Harrison's order.
5. The mother filed a response to the father's application in 2021, that is on 26 June, with a C1A with schedules of allegations and that is at page 74 of the bundle. There was a First Hearing Dispute Resolution Appointment before District Judge Parker. The father contested the allegations in the mother's schedule and a fact-finding hearing was directed. I understand that the mother was not represented during that hearing due to the case not qualifying for a qualified legal representative. The mother's questions were presumably put through the judge. I do not have a transcript of that hearing but the fact-finding hearing took place over 14 and 15 December 2022 and the judge made serious findings against the father. A section 7 report was ordered and that was filed on 13 April 2023. On 19 June 2023, there was a Dispute Resolution Appointment before District Judge Harrison and the mother was not represented at that hearing. The final hearing was listed on 12 February 2024. From that brief chronology, it is clear there has been some delay in this case which is unfortunate.
6. The law, briefly, in respect of permission to appeal, I remind myself of the following: permission to appeal is made under the Family Procedure Rules, Practice Direction 30A at 4.3 and in accordance with the Family Procedure Rules at 30.3(3)(b) and 30.3(7):

> "Permission to appeal may only be given where:
> (a) the Court considers that the appeal would have a real prospect of success; or

(b) there is some other compelling reason why the appeal should be heard".

7. The first ground is relevant to this application. The "real prospect of success" test that I apply is the *Re R (A Child)* [2019] EWCA Civ 895 test, that there is a realistic and not fanciful prospect of success not based on better than 50/50 or some other mathematical evaluation. Accordingly, therefore, the *Re R* test is the test I apply in evaluating this permission hearing. The appellant seeks permission on five grounds and I will quote from the skeleton arguments filed by counsel for the appellant and respondent. Ground one:

> "The contact order made by District Judge Harrison does not adequately address pursuant to 12J paragraphs 35 to 37 and paragraph 40 the unmanageable risk of harm to the mother and to the child of contact with the father; a convicted rapist who has also raped the mother and coercively controlled her, who begrudgingly accepted the Court's findings through counsel on the morning of the hearing but not before and has not completed a Respect-accredited domestic abuse perpetrator course".

8. The respondent, briefly, in response to that by way of written submissions says:

> "Any potential, continuing risk of harm posed to the appellant and P is not unmanageable. The suggestion there is unmanageable risk in the context of the directed contact is a bare assertion. It is plainly manageable through the directions made by the learned judge at the end of the final hearing and as fully rationalised within the judgment".

9. Ground two, and, again, I quote from the skeleton argument:

> "District Judge Harrison gave too much weight to the views of Cafcass in circumstances where Cafcass changed its recommendations on the day of the trial; never sought a copy of the father's sex offender's registry requirements, his licence upon release or his probation reports and did not follow up on its referral to the Local Authority until after the Cafcass officer's evidence was complete at the final hearing".

10. Again, the respondent says, and I quote from his written submissions:

> "The suggestion that the learned judge gave too much weight to the views of Cafcass in the circumstances is a bare assertion. The appellant has not set out what the appellant asserts was such a material change in the Cafcass recommendations at the final hearing from the recommendations in Mrs Jones' section 7 report. That means the weight the learned judge correctly attributed to the professional views was not wrong. On the whole, the recommendations of Mrs Jones at the final hearing remain as per her recommendation contained within the section 7 report available at the time of the DRA hearing on 19 June 2023. The change in Mrs Jones' recommendations was now that access to a DAP is available in an area approximate to the respondent's home before a progression of contact, for example, for contact at the respondent's home and overnight stays. The respondent is to complete a DAP course and the respondent is willing to complete a DAP".

11. Ground three, again, I quote from the written submissions:

> "It was procedurally improper and unfair to prevent the mother from cross-examining the father after the Cafcass officer changed her

evidence and expressed concerns about the father's reluctant and last-minute acceptance of the Court's finding through counsel".

12. Again, from written submissions on ground three, the respondent says:

> "This is a bare assertion by the appellant. The decision of the learned judge to not have a cross-examination of the respondent was well within the learned judge's discretion and case management powers. The learned judge had read the section 7 report, heard detailed evidence from Mrs Jones whom both the parties had the full opportunity to cross-examine, read the detailed statements from both parties directed in preparation for the final hearing and had the benefit of hearing oral evidence from both parties at the fact-finding hearing. The appellant has not set out what material difference such cross-examination would have made to the learned judge's decision-making process, the decision reached and the directions made. It is submitted that given the respondent's acceptance of the Court's findings made against him, such cross-examination would have made no material difference".

13. Ground four, again, I quote from the written submissions:

> "It was procedurally improper and unfair to prevent the mother from giving evidence about the Cafcass officer's changed evidence and the effect on her of facilitating contact with her rapist".

14. The respondent says and, again, I quote from the written submissions on ground four:

> "This is a bare assertion by the appellant of the decision of the learned judge not to hear from the evidence. Further, the oral evidence of Mrs Jones was well within the learned judge's discretion and case management powers".

15. Ground five, again, I quote from the written submissions:

> "Having refused permission for the parties to give evidence, the Court did not give sufficient weight to their written statements, particularly the mother's where she describes the traumatic effect of the father's abuse and proceedings and also P's vulnerabilities".

16. The respondent responds in his submissions:

> "This is a bare assertion by the appellant. The learned judge has evidently, within the comprehensive written judgment provided, sufficiently weighed into the balance what the parties have said within their respective final statements and considered this in the holistic welfare analysis undertaken in respect of P and consideration of Practice Direction 12J in reaching the decisions made".

17. My discussion and evaluation of that is this: ground three and ground four are challenges to the Court's case management powers and the judge's decision as to the format of the final hearing. This was against a backdrop of a judge who had considerable knowledge of the case and had conducted the fact-finding hearing although I accept the nature of the evidence at a fact-finding hearing is clearly not the same as the evidence and considerations of a subsequent welfare hearing. That is because a fact-finding hearing is focused on courses of conduct, the welfare hearing, of course, any appropriate order, with the paramountcy principle and the Welfare Checklist to be considered.

18. At the final hearing, the judge did not hear evidence live from the parties but was evaluating the case on full written statements and the evidence of the Cafcass officer with the parties having the opportunity to cross-examine the officer, the final statements of both the parties.

The father's is at 283 and the mother's at 264 and they are full statements about the issues for the fact-finding hearing.

19. I also must assume the learned judge had knowledge of the law even if it is not specifically mentioned. The learned judge, District Judge Harrison, is an experienced family judge and, in my view, was alive to the mother's concerns and her position which was, as to no contact. She was seeking a no contact order within her statement filed for the final hearing. The judge, in my view, was also alive to the father's non-acceptance of the findings or, indeed, any culpability in respect of his conduct up to the day of that final hearing.
20. The case management direction was to get evidence from the Cafcass officer, Mrs Jones, and also that the parties should file written statements which they did and the judge would hear submissions from the parties as well. From a due process point of view, that is a direction made by the judge following the fact-finding hearing in preparation for the final hearing. There was no appeal of that case management decision. I understand though the appellant was a litigant in person at the time prior to the final hearing.
21. On that point though, her counsel at the final hearing renewed the application during that hearing, twice, I understand, in view mainly of the father's apparent change in position on acceptance of the findings and also the apparent change of position of the Cafcass officer in respect of progressing contact from her section 7 report with essentially no DAP course being recommended to a 12-month DAP course. Also, the issue about the effect on the mother of the situation. The mother's case is that the respondent should have been called for the judge to assess his position on his acceptance of conduct given it had recently changed and also that the mother should be called to explain the effect on her of the proposed order.
22. My starting point in respect of that is the overriding objective under Part 1 of the Family Procedure Rules and also Part 22. Part 22.1 is the power of the Court to control evidence:

> "(1) The Court may control 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 the document in respect of which that party has failed to comply with the requirements of this Part.
> (4) The Court may limit cross-examination".

23. Part 22.6(1). 22.6 says "Use at the final hearing of written statements which have been served". As a written statement on which a party wishes to rely, a witness should be called to give oral evidence unless the Court directs otherwise or the party puts a statement in as hearsay evidence.
24. I am also mindful of the overriding objective. Under Part 1.1. The overriding objective is

> "(1) …the objective of enabling the Court to deal with cases justly having regard to any welfare issues involved.
> (2) Dealing with cases justly includes, so far as is practicable:
> a) ensuring that it is dealt with expeditiously and fairly;
> b) dealing with the case in ways which are proportionate to the nature, importance and complexity of the issues;
> c) ensuring that the parties are on an equal footing;

d) saving expense; and
e) allotting to it an appropriate share of the Court's resources, while taking into account the need to allot resources to other cases".

25. Dr Proudman for the mother today tells me that the decision not to hear from the parties was wider than the case management decision. It went to the fairness of the hearing due to the changes in position by Cafcass and the father. The Court's approach to an appeal against the case management decision was considered by the Court of Appeal in *Re TG (A Child)* [2013] EWCA Civ 5, which again, is in the bundle and I have read through carefully to refresh my memory of that. In that case, the Court of Appeal re-emphasised the importance of supporting first-instance judges who make robust but fair case management decisions. However, it must be understood that in cases of appeals from case management decisions, the circumstances in which an Appeal Court can interfere are limited.
26. The Court of Appeal, and that is this Court, sitting as an Appeal Court can only interfere if satisfied that the judge erred in principle, took into account irrelevant matters, failed to take into account relevant matters or came to a decision so plainly wrong that it must be regarded as outside the "generous ambit" of the discretion entrusted to the judge. To quote from that case, "The judge dealing with case management is often better equipped to deal with case management issues". In this case, the learned judge was well acquainted with the proceedings because she had dealt with the previous interlocutory applications and had a knowledge or feel for the case.
27. Also, from *Re TG*:

> "The circumstances in which this Court should or can interfere at the interlocutory stage with case management decisions are limited. Part of the process of family litigation in the modern era is a vigorous case management by allocated judges who have responsibility for the case which they are managing. This Court can intervene only if there has been a serious error, if the case management judge has gone plainly wrong; otherwise, the entire purpose of case management which is to move cases forward as quickly as possible will be frustrated because cases are liable to be derailed by interlocutory appeals…
>
> A judge making case management decisions has a very wide discretion and anyone seeking to appeal against such a decision has an uphill task".

28. I am also referred to the case of *Mother v Father* [2022] EWHC 3107 (Fam). That is a more recent case. In fact, I have read all 509 pages in the bundle and also the accompanying case law. I have listened very carefully to both counsel. I read their submissions and looked at each ground separately and together from an Article 6 point on the fairness of the hearing before District Judge Harrison. Both parties were heard by the judge via statements and an opportunity to put questions to the Cafcass officer. It was a final hearing and the Court has a wide discretion as to how it conducts it and how evidence should be received.
29. The change in position point by the father; the section 7 report at paragraph 20 of her report at 368, again, read by the judge, and I will quote from that:

> "I had to explain to F that the findings had implications on his contact with P. If F does not accept his behaviour is domestic abuse, then there is a high risk he will continue to be abusive. P must not be exposed to domestic abuse as it will have a significant negative impact on her mental health, her social and emotional development and her

> ability to form safe relationships in the future. Due to this risk, I cannot recommend P currently has staying contact with her father. I recommend that F completes work that explores his past behaviours and his relationships to build on his self-awareness and reduce the risk of future harm".

30. The father's late acceptance of this and the history of him contesting it was known to the learned judge. There is a presumption of live evidence at the final hearing but that is just a presumption subject to the fairness of the proceedings that the judge was alive to, the Cafcass position, the mother's circumstances and considered her no contact point within her statement. There was a cross-examination of the father over the issue of acceptance of behaviour was not, in my view, a matter that needed the mother to give live evidence on. It was again in the position statements and fully set out.
31. Again, the history of the father's position was, again, well set out in the statements before the learned judge. The judge heard from the Cafcass officer and the parties could cross-examine on the apparent changes of position. The judge's case management decision on grounds three and four did not allow the parties to be called but that did not go, in my view, outside the wide discretion that the judge had and it is not a serious error under the *Re TG* test, in my view, or procedurally unfair. Therefore, I consider on grounds three and four that there is not a real possibility of success on those two grounds. Therefore, I refuse permission to appeal on ground three and ground four.
32. On ground two, the judge gave much weight to the Cafcass officer, having prevented cross-examination of the parties. There is just no evidence of this. The judge considered all the parties' views via their statements and had a long involvement with the case at the DRA and the fact-finding hearing. The issue of the referral by the Local Authority was considered. The issue of not seeking the probation or any police assessments of the father's notification requirements and also the police records, the learned judge was aware of those issues. I understand that there was one arrest when the father had failed to sign on but there appears to be no breach of his notification requirement, and later, I think, the document provided along with the standard notification condition did not add anything new.
33. There is one reference of notification requirements. Given the father's long sentence for the rape in 2011, I think it was a sentence of nine years, that produced an indefinite restriction on the father's notification requirements, essentially, if he is present in the property for more than 12 hours with a child under 18. How that would factor in the father's position for overnight weekend stays and holidays with his daughter and possibly with other children was not evaluated in the learned judge's judgment.
34. Specifically, though, on the weight given to the Cafcass officer over and above the parties' views from their extensive filed statements, ground two I consider, has no real prospect of success in relation to the conduct of the hearing by the learned judge. Therefore, on ground two, I refuse permission to appeal that ground.
35. Grounds one and five: ground one is about consideration of Practice Direction 12J, paragraphs 36(1), 36(2), 36(3) and also paragraph 37[?]. It is essentially concerning the order as a final order with the father having contact in the community on alternate Saturdays for seven hours a day and not moving onto unsupervised contact at his home or overnight stays or holidays. In examining that, fundamentally, the Court starts from a position of no order under the no order principle under section 1(5) of the Children Act 1989. In addition, the Court needs to consider that any order it makes is an interference with the child and the parties' Article 8 rights and any interference with those rights needs to be necessary and proportionate to secure the welfare of the child.

36. Also, as the judge mentions in her judgment, I think at paragraph 16 onwards, under section 1(2A) of the Children Act, there is a presumption that in respect of each parent to presume unless the contrary is shown that the involvement of that parent in the life of the child concerned will further the child's welfare. Also, section 1(2B): "'Involvement' means some kind of either direct or indirect but not any particular division of a child's time". Accordingly, the start point is that there should be no order or restrictions. In this case, though, there are restrictions; restrictions that there can be unsupervised contact with the father, restricted in the community unless he completes a DAP course. That is due to the father's perceived risk to the mother and the risk of the child being exposed to domestic violence by the father.
37. The fact-finding hearing found three allegations of rape of the mother and also, after the end of the relationship, a finding of non-consensual sexual activity instigated by the father against the mother. Also, allegations of coercive behaviour. The father has a conviction for rape in 2011 which resulted in a lengthy custodial sentence and that being subject to the notification requirements I mentioned earlier. Again, due to the length of that sentence, these are indefinite notification requirements although they are subject to review by the police and the Courts potentially in the future.
38. Also, the father, from the Level 2 checks was involved in an allegation of an incident with a female in a car in 2019 although the Cafcass officer says 2020, although no charges or convictions resulted from that. There is also the issue of the requirement of notification of the father being present with children under the age of 18. The safeguarding letter from Cafcass considered that a specialist psychological assessment of the father may be appropriate. In the final hearing, the section 7 reporter considered a DAP programme outside these proceedings may be appropriate. There was an issue over the availability and whether the course needed to be 12 months clear of proceedings for the father to commence the start. No particular course appears to have been sourced or information obtained. Therefore, in reality, there is still an unassessed risk of the father towards the mother and P.
39. There is no risk assessment in this case save for the evaluation by the section 7 reporter. The order proposes the risk element is considered outside the proceedings by the father self-referring to a DAP course. This is relevant, of course, because after the fact-finding hearing, Practice Direction 12J from paragraphs 32 to 34 is engaged in respect of assessment of risk. Practice Direction 12J, 33(a) provides for a wide range of safety reports and psychiatric and psychological reports, those reports to address the relevant factors in paragraphs 36 and 27 of 12J. Also, Practice Direction 12J, at paragraph 35:

> "When deciding the issue of a child arrangements order, the Court should ensure that any order for contact will not expose the child to an unmanageable risk of harm and will be in the best interests of the child".

40. The best interests of the child starts under section 1(2)(a) that there should be involvement by both the parents. The order restricts the time that the father spends with P due to risks that are not fully clear at the moment. The DAP course and the conclusion have been obtained but there is no other assessment save for the section 7 report. The future of the order as made by District Judge Harrison has two scenarios: the first is that Father completes a DAP course in his own time and pays outside these proceedings. Thereby, it follows from his statement which was filed at the final hearing, that he would expect substantial contact with P. If not agreed by the mother, then the matter would come back to court. This would, in effect, affect the mother because there would have to be some negotiation and some pressure that unless she agreed to the father's proposals having completed this course, that

the matter would come back to court, and also, possibly on P as she gets older of prolonged court proceedings starting again.

41. The second scenario is that the father never applies or cannot successfully complete an out-of-proceedings DAP course for several reasons: one, he may fail to apply, he may not be eligible due to lack of admissions of behaviour which was an issue at the fact-finding hearing or, indeed, the issue of the rape conviction. It may well be that there is a course that is not suitable for him to attend or complete. In addition, the course may require an expert evaluation before allowing him to go on the course and complete the course.
42. In the event the contact continues with the father wanting more contact, the mother will be concerned about whether the father could eventually complete the course and that is going to be hanging over and affecting her welfare with that unknown. The child, P, may ask as she gets older why she cannot go on holiday or go to her father's house. It may well affect her in respect of that rather indefinite situation and I question if that is in her best interests.
43. It also places future events in the control of the father against the backdrop of the findings the Court has made in respect of his behaviour towards the mother. At paragraph 36(1) of Practice Direction 12J, the Court having found domestic abuse occurred "should apply the individual matters in the Welfare Checklist after the findings have been made with reference to the abuse which has occurred" and also with reference to the expert risk assessment that may be obtained. I cannot see how that is going to happen on a DAP course outside the proceedings once they have concluded, and they clearly have concluded from that final hearing.
44. The learned judge also applies the law at paragraphs 16 to 20 of the judgment. The Welfare Checklist, I think I can infer is in the judgment and section 1(3). I am not clear that the Welfare Checklist is considered after the findings at the fact-finding hearing in accordance with paragraph 36(1). Also, there is no expert assessment of the pattern of behaviour, in particular, considering the rape conviction in 2011 and the Court's finding of rape on the mother on the three occasions found at the fact-find and also the inappropriate sexual conduct and also the incident in 2019 which I know is disputed, involving an allegation of rape of a female in a car by the father.
45. In the round, although the learned judge discusses unmanageable harm in respect of the contact order, I cannot really see within the judgment how the order is a final order with a DAP course outside the proceedings which may or not complete that furthers the best interests of the child under paragraph 35. Any DAP provider would need some disclosure of the evidential base in these proceedings. Otherwise, it is difficult to see the value of any such course and the reassurance of the mother.
46. The proceedings have concluded though and that may require a potentially contested disclosure application, in any event, to release documents from the proceedings to any DAP providers. The judgment does not appear to consider the parameters of disclosure of information to any third-party provider. The learned judge details how the father has a close bond with P and that the contact regime has been continuing now for over seven months at the time of the final hearing. That is important. However, it is still a relatively short time over the period from now until P turns 16 or ends her majority. The order exists with a high potential of these parties being involved in proceedings again over the uncertainty of the DAP course. This leaves an open-ended position outside these proceedings after a final order with a recital for a course that may or may not start or be completed.
47. The Cafcass offer does change position from her report at page 370, paragraph 29, stating, "A progression of contact to unsupervised, to home or overnights, will progress if contact is successful". I am not clear how that success would be measured and who would do the measuring. Also, a condition that there will be no aggression or concerning behaviour.

Again, I am not quite sure of the measure of that condition and, again, who would do the measuring.

48. To the recommendation to complete the DAP course in 12 months out of proceedings, there appears to be a limited analysis of this change of position. The Cafcass officer goes essentially from no course and essentially, "Time will tell if nothing happens" to a course in 12 months. It appears to be a solution for expediency with due respect to the learned judge rather than a factoring in of Practice Direction 12J, paragraph 32 right through to paragraph 40. The learned judge does not appear to weigh this change of position as to whether it undermines the section 7 report and consideration of Practice Direction 12J, paragraphs 36 and 37. Also, no consideration of any other risk assessment that might be achieved sooner which may be appropriate in this case save for the inconvenience of the letter of instruction between the parties and the possible costs.
49. As there is no consideration at paragraphs 32 to 34 of Practice Direction 12J on the risk assessment save that to keep contact static pending further events, primarily due to the apparent not wholly accepted position by the mother that contact is beneficial to the child. It is essentially a non-final limbo position that there is an expectation that something may happen in the future or not. However, it is uncertain. That delay and uncertainty has an effect on P and also the mother which is not clear on the analysis that the judge factors in the effect of that situation from that final order.
50. I consider that on grounds one and five which interlink as potentially complex risk assessments of the risk factors in play in this case, and the effect on the mother of such an order with that uncertainty, given the situation as noted by her GP letter at 339, the NHS Talking Therapies letter at 281 and her statement at page 264. I have to consider the high hurdle for interfering with a final order from an experienced district judge. An appeal also is not a second go from an order that a party may not like. I should again, also not impose my findings over those of the learned district judge. Again, I think, in summary, I should be slow to interfere.
51. However, considering Family Procedure Rules 30.12(3)(b), the case may be unjust because of a serious procedural irregularity in the proceedings in respect of the final order made of an unresolved issue of the assessment of risk to the mother considering Practice 12J paragraphs 32 to 40 and whether the final order is made in the best interests of the child in those circumstances under Practice Direction 12J paragraph 35.
52. The mother, on her case, may have a real prospect; that is a realistic and not a fanciful prospect of success in respect of grounds one and five. Therefore, I grant permission in respect of those two grounds.

End of Judgment.

Transcript of a recording by Acolad UK Ltd
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Acolad UK Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

This transcript has been approved by the judge.