Neutral Citation Number: [2024] EWHC 1669 (Fam)

Case No: FA-2023-000275

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION
ON APPEAL FROM THE FAMILY COURT AT BARNET
Recorder Searle
ZW20P01007

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/06/2024

Before :

MS JUSTICE HENKE

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Re: A (A Child: Appeal: Case Management Decision: Identity of Expert)

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Dr Charlotte Proudman (instructed under the **Direct Access Scheme**) for the **Appellant**
Sabuhi Chaudhry (instructed by **Rayden Solicitors**) for the **Respondent**

Hearing dates: 15-16 April 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 4 July 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives, following the handing down of the draft version to the parties on 28 June 2024.

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MS JUSTICE HENKE

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.

Ms Justice Henke :

Introduction and Basic Background

1. This is an appeal against a case management direction made in private law Children Act proceedings.

2. The parties are the parents of a boy who I shall call A. He is now aged 12.

3. The Respondent has made an application for a child arrangement order in relation to A. That application is pending before the Family Court. It is to be heard together with an application for a non-molestation order made by the Appellant. In the interim and since 3 November 2020, A has lived with the Appellant, his mother, and has contact with the Respondent, his father, which since August 2023 has included five consecutive nights each fortnight (Wednesday-Monday alternate weeks) and an equal sharing of the school holidays.

4. The application was set down for final hearing by HHJ Jacklin KC on 9 August 2023. On that occasion HHJ Jacklin KC heard a part 25 application made on behalf of the Respondent. The application was to instruct Dr Hessel Willemsen to undertake a global psychological assessment of A and his parents. HHJ Jacklin KC granted the father's application and directed that Dr Willemsen's report should be filed by 3 November 2023. The Appellant, who was a litigant in person at that time, did not appeal that direction. However, by a C2 application dated 27 September 2023 the Appellant applied for an "urgent hearing, this week" to discharge or vary the direction made on 9 August 2023 permitting the instruction of a psychologist and seeking a finding of fact hearing. She did not raise any objection to the psychologist based on his sex. The Appellant's application were listed to be heard on 4 December 2023, after the date by which Dr Willemsen was to report. Accordingly, by C100 application issued on 12 October 2023 the Appellant applied for an "urgent same day hearing or without notice order" to prohibit the child being taken to see the psychologist, Dr Willemsen, pending determination of her C2 application above. On 16 October 2023, she filed a second C1A containing allegations dating from 2019 to October 2023.

5. In the event, the Appellant's applications came before Recorder Searle on 18 October 2023 via CVP. At that hearing the Appellant appeared in person. The Respondent was represented by Counsel. Recorder Searle refused both applications. It is the refusal of both applications that Appellant wishes to appeal. On 24 October 2023, the Appellant lodged her notice of appeal in which she sought permission to appeal the order of 18 October 2023 and a stay of the order permitting a psychological assessment of A and his parents. She put her application for a stay succinctly. She argues that without a stay, "*the appeal would be academic and the harm already done, as the assessment would have been carried out and is due to start imminently in coming days*".

6. The application for a stay came before me for consideration of the papers. On 25 October 2023, I stayed the direction for assessment. I did so for two reasons:

    a. Given the timescales for the assessment, without a stay, the appeal would become academic; and

b. The final hearing was not listed until June 2024, thus there was still time for an assessment depending on the outcome of the appeal.

7. On 25 October 2023, I gave directions to further future consideration of the Appellant's application for permission to appeal. Those directions included the obtaining of the transcript of the hearing that took place on 18 October 2023.

8. The directions I gave were complied with. That enabled me on 12 February 2024 to determine on the papers the appellant's application for permission to appeal. I granted permission to appeal on grounds, 1, and 2 and a modified ground 3, namely:

> **Ground 1:** The Judge was wrong to order Dr Willemsen to carry out a global psychological assessment of the family in a context where mother stated she would feel traumatised during and following an assessment with a male psychologist after suffering rape and other forms of male violence. As a result, the mother will not be able to give her best evidence during the assessment process contrary to Part 3A and PD3AA FPR 2010. The Judge was wrong to dismiss mother's application to instruct a female psychologist.
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> **Ground 2:** The Judge failed to identify that the mother was a vulnerable person pursuant to the Domestic Abuse Act 2021 and Part 3A and PD3AA FPR 2010, as a complainant of domestic abuse (as identified in her C2 application and throughout the bundle). Accordingly, the Judge was wrong not to implement participation directions for the mother, a litigant in person to ensure she could not see the father by directing him to switch off his camera, as such mother's ability to participate in proceedings was likely hindered.
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> **Ground 3 as modified:** the judge was wrong to refuse a fact-finding hearing; and wrong in failing to apply PD12J.

The Hearing Before Me

9. The appeal came before me on 15 April 2024.

10. At the hearing before me the Appellant was represented by Dr Proudman and the Respondent by. Ms Chaudhry. In order to determine the appeal, I have received skeleton arguments prepared on behalf of both parties, a position statement prepared on behalf of the Respondent, and I have heard oral argument. I am grateful to each for the focused manner in which they made their submissions.

11. I reserved judgment.

The Arguments

12. The Appellant says that she has been a victim of domestic abuse and coercive and controlling behaviour by the Respondent; the Respondent denies the allegations.

13. The Appellant's allegations were before Recorder Searle who was being asked amongst other matters to set the case down for a fact-finding before the assessment in

question in this appeal is conducted. Despite the court having knowledge of the allegations, no participation directions were put in place for the Appellant at that hearing. Thus, on behalf of the Respondent it is accepted that the hearing was procedurally irregular, but it is argued it was not unfair. I have been taken to Peel J in *GK v PR* [2021] EWFC 106 and Judd J in *K v L and M* [2021] EWHC 3225. The Respondent seeks to distinguish them on the basis that they considered the failure to consider participation directions in advance of a fact-finding hearing. In this instance, the court was dealing with purely case management issues and the outcome was not unfair to the Appellant, applying *PF v LE* [2023] EWHC 2009 (Fam).

14. It is argued on behalf of the Respondent that a fact-finding hearing in this case is not necessary because:

    a. It was agreed as long ago as November 2020 that there was no need for a finding of fact hearing;

    b. The limited recent allegations in support of the Appellant's non-molestation application would be before the court in any event and would be determined;

    c. A was already having extensive staying contact with the Respondent and a fact-finding hearing would not be necessary nor proportionate - *K v K* [2022] EWCA Civ 468; and

    d. In the past, an independent social worker has been able to carry out an assessment of the family dynamics without a fact-finding hearing and nothing has changed to cause such a fact-finding exercise to be necessary now.

15. The Respondent says that there has been protracted litigation between the parties about A over many years. In summary, it is said on his behalf that the Appellant has taken unilateral action on occasion which has disrupted contact. The current arrangements which have been in place since August 2023 were agreed between the parties but only after the father had commenced proceedings because the mother had yet again stopped contact. On behalf of the Respondent, it is said before me that within the current proceedings the Appellant's case at first instance has been "*evolutionary*" and that the same can be said of the Appellant's argument on appeal. It is common ground between the parties that the Appellant first raised objection to being assessed by Dr Willemsen on the basis that she is a victim of male violence and the psychologist instructed was a man whilst making oral submissions before Recorder Searle. After the learned Recorder had given judgment, I am told that the Appellant then told the court of significant further male sexual, physical, and emotional abuse that she had sustained at the hands of a third-party males (not the Respondent) during her lifetime. Those abusive experiences include, the Appellant tells the court, sexual abuse by a consultant paediatrician when she was a teenager. The Appellant's case is that the level of detail she felt compelled to give to justify not wishing to be seen by a male psychologist caused her such distress that she was not able to put her case forward as she wished. This was, it is said, compounded by the failure of the Recorder to implement any participation directions in accordance with the rules.

16. The Appellant tells this court that she is currently seeing a female psychotherapist and that she has only ever received mental health support from females because of her history of being a victim of male violence. The Appellant has no objection to undergoing the assessment as ordered by HHJ Jacklin KC but argues that given this is to be a single joint instruction then the assessor appointed by the court should be female. Otherwise given her history, she is unlikely to be able to participate fully and give her best evidence when being assessed.

17. The Respondent argues that this appeal is a backdoor appeal against the original directions made by HHJ Jacklin KC in August 2023. Accordingly, it is substantially out of time, and it is argued on behalf of the Respondent that I should not extend the time for bringing any appeal. It is said that I should read the facility to extend the time for appealing in the context of the overall need to avoid delay. Allowing the Appellant to appeal the order of Recorder Searle which upholds the directions of HHJ Jacklin KC allows the Appellant to circumvent the rules applying to appeals and render the provision for time limits nugatory. Further on his behalf I am taken to May LJ's judgment in *Jones v MRN A Bank* [2000] EWCA Civ 514 in which he said at paragraph 54 that a party cannot normally seek to appeal a trial judge's decision on the basis that a claim which could have been brought before the trial judge, but was not, would have succeeded if it had been brought. It is not simply a matter of efficacy, expediency and costs. It is a matter of substantial justice. Parties are entitled to know the case against them (where they stand) and the basis upon which they are conducting the litigation. There is a need for finality and certainty. However, "*there may be exceptional cases in which the court would not apply the general principle …*".

18. On behalf of the Respondent, it is said that this is not such an exceptional case. The Appellant raised for the first time in oral submissions her application to being assessed by a female psychologist. It is said she had had ample opportunity to do so before that not just before HHJ Jacklin KC but also in the written documents she put before the court in support of her October applications.

19. I have been reminded by the Respondent that the appeal before me is a case management appeal and have been taken to Mrs Justice Lieven's decisions in *Mother v Father* [2022] EWHC 3107 (Fam). Accordingly, I have reminded myself of what the Court of Appeal said in *Re TG (A Child)* [2013] EWCA Civ 5. The passages from [24] to [38] are particularly relevant, but I only set out [35] to [36]:

> *"35. (4) Fourth, the Court of Appeal has recently re-emphasised the importance of supporting first-instance judges who make robust but fair case-management decisions: Deripaska v Cherney [2012] EWCA Civ 1235, paras [17], [30] , and Stokors SA v IG Markets Ltd [2012] EWCA Civ 1706, paras [25], [45], [46] . Of course, the Court of Appeal must and will intervene when it is proper to do so. However, it must be understood that in the case of appeals from case management decisions the circumstances in which it can interfere are limited. The Court of Appeal can interfere only 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: Royal & Sun Alliance Insurance plc v T & N Limited [2002] EWCA Civ 1964, paras [37]-[38], [47] , Walbrook Trustee (Jersey) Ltd v Fattal [2008] EWCA Civ 427, para*

[33] , and Stokors SA v IG Markets Ltd [2012] EWCA Civ 1706, para [46]. This is not a question of judicial comity; there are sound pragmatic reasons for this approach. First, as Arden LJ pointed out in Royal & Sun Alliance Insurance plc v T & N Limited [2002] EWCA Civ 1964, para [47]:

> *"Case management should not be interrupted by interim appeals as this will lead to satellite litigation and delays in the litigation process."*

Second, as she went on to observe:

> *"the judge dealing with case management is often better equipped to deal with case management issues."*

The judge well acquainted with the proceedings because he or she has dealt with previous interlocutory applications will have a knowledge of and 'feel' for the case superior to that of the Court of Appeal.

36. Exactly the same applies in family cases. Thus in Re C Thorpe LJ and I dismissed the appeal notwithstanding what I said was the "robust view" His Honour Judge Cliffe had formed when deciding to stop the hearing. And in Re B I refused permission to appeal from an order of Her Honour Judge Miranda Robertshaw involving what I described (para [16]) as "appropriately vigorous and robust case management." I said (para [17]):

> *"The circumstances in which this court can or should interfere at the interlocutory stage with case management decisions are limited. Part of the process of family litigation in the modern era is 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 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."*

As Black LJ very recently observed in Re B (A Child) [2012] EWCA Civ 1742, para [35]:

> *"a judge making case management decisions has a very wide discretion and anyone seeking to appeal against such a decision has an uphill task."*

20. Both the Appellant and the Respondent have referred me to *In N (A Child), Re (Instruction of Expert)* [2022] EWCA Civ 1588 (06 December 2022). In that case the father brought an appeal against an order permitting the parties to instruct a female ISW to carry out a s.7 welfare report. The father suggested that the assessment should be carried out by a male social worker, and that the order for a female social worker to conduct the assessment made was an infringement of his human rights, particularly in respect of his religious views. The Court of Appeal refused his appeal. It is said by the Respondent that the appeal before me is on all fours with the appeal in *N.* However, on behalf of the Appellant I am taken to paragraph 45 wherein Baker LJ stated that:

> "*In these circumstances it is not necessary to say whether it could ever be right to specify an expert of a particular gender. I do not, however, rule out the possibility that such an order could be justified. As ever, all will depend on the circumstances. Justice requires the court to adopt a procedure which pays due respect to persons whose rights are significantly affected by its decisions*."

21. Further the Appellant relies upon paragraphs 58-63 of *N* in which King LJ highlighted that it is necessary for a party to give their best evidence and that that does not only involve the giving of oral evidence but also the party being able to effectively participate in expert assessments. I simply set out herein, for the purposes of this judgment, paragraph 58 which states:

> "*58. Those who drafted the Children Act 1989, and the judges at all levels who have sought to interpret it, have been conscious that in order to achieve the best possible outcome for children, whether in private or public proceedings, their parents and carers must be placed in a position so as to enable them to give their best evidence by encouraging frankness and the importance of encouraging people to tell the truth in cases concerning children*."

22. On behalf of the Appellant I have also been reminded that FPR r.3A.4 and r.3A.5 specifically require a court to consider *"whether the quality of evidence given by a party or witness is likely to be diminished by reason of vulnerability"*.

23. Finally on behalf of the Appellant, I was referred to in *Re A (Sexual Abuse: Disclosure)* [2012] UKSC 60, [2013] 1 FLR 948 (para 36), wherein Baroness Hale referred to the flexibility inherent in family proceedings and said that "*The court's only concern in family proceedings is to get at the truth. The object of the procedure is to enable witnesses to give their evidence in the way that best enables the court to assess its reliability*".

My Reasons and My Decision

24. When I granted permission to appeal, it was permission to appeal the order of Recorder Searle not the order of HHJ Jacklin KC made in August 2023. At that time, I considered that the Recorder was determining an application to set aside or vary the order of HHJ Jacklin KC and that the proposed appeal was against his refusal to do so. I did not consider that this appeal was a backdoor attempt to appeal the August 2023 order of HHJ Jacklin KC. However, the Respondent has maintained that argument before me and accordingly I have revisited it.

25. I agree with the Respondent's argument that the litigation stance of the Appellant at first instance has evolved over time as indeed has the manner in which she put her case to the lower court and to this court. That has led to confusion and frustration. However, that said, I remain of the view that the application before Recorder Searle was an application to set aside or vary the order of HHJ Jacklin KC. The application before the learned Recorder was actually expressed as an application to discharge or vary the order of HHJ Jacklin KC. Fresh argument was raised before Mr Recorder Searle and that evolved further in the oral hearing. In my judgment, this was not a backdoor appeal against the decision of HHJ Jacklin KC in August 2023. The learned

Recorder was wrong to consider that it was. In my judgment, his conclusion about that influenced his consideration of the Appellant's objection to Dr Willemsen on the basis of his sex. In relation to that issue, the learned Recorder simply said at paragraph 6 of his judgment that:

> "*It is also suggested that because of his sex, because he is male, he should not be dealing with this sort of assessment. I am not sure the basis intellectually of that argument, and it is also argued that […] the costs estimate is far too high.*"

26. The approved order made by the Recorder at the conclusion of the hearing sets out his reasoning for the orders he made in summary form. At paragraph 9(a) and (b) he reiterates his view that this was a back door appeal and that there were no grounds for varying or discharging the order for assessment made by HHJ Jacklin KC noting that no new information had emerged about the proposed expert since the August 2023 hearing which tended to undermine the fitness to practice of the identified expert and that an email received did not substantiate the Appellant's case. Then at paragraph 10 he stated this:

> "*The [Appellant] asserted post-judgment that the court had not addressed her objection to being assessed by a man based on her previous experience of abuse. The mother asserted that the court had not correctly addressed her objection to being assessed by a male psychologist due to past traumatic experiences and abuse she suffered and expressed that it was necessary for her to be assessed by a female psychologist. The court indicated that it had done its best to address the [Appellant's] main arguments in the time available. It was informed by the father that this was not a ground of objection raised by the mother on 9.8.2023 and noted it was not a ground raised in the mother's C2 application and supporting documents.*"

27. I have reminded myself that Recorder Searle was dealing with this case management issue in what I suspect was a busy list and that he had little time to deal with the Appellant's arguments and the way she put them. I accept that the objection raised had not been presaged on the application form before the court at first instance nor in any of the evidence or argument filed in support by the Appellant. The objection based on sex was raised at the eleventh hour orally by a self-representing party who the order records was emotionally upset during the hearing.

28. I take into account that it is accepted by both parties that the Appellant ought to have had participation directions in place during the hearing before Recorder Searle and that their absence was a procedural irregularity. As Mrs Justice Lieven said in ***Bf v Le*** [2023] EWHC 2009 (Fam) at paragraph 77 - "*The case law is clear there is a proactive duty on judges to consider whether special measures are required. The fact that an alleged victim does not request them, even if represented, does not relieve the judge of that proactive duty".* That, however, does not lead to an automatic conclusion that the decision made by Recorder Searle was unfair and ought to be set aside without more. The context in which the decision was made needs to be considered. The relevant context in this case is that Recorder Searle ought to have known that the Appellant was raising allegations of domestic abuse against the Respondent because they were the evidential foundation of the application for a non-molestation order before the court. I have asked myself whether the failure to put in place participation

directions in this instance amounted to a breach of natural justice, see paragraph 80 of *Bf v Le* (above) applied. In this case, I considered that it did. The Appellant was an alleged victim of domestic abuse. The Recorder himself states in his judgment that the Appellant was clearly emotionally upset in the hearing before him. The Appellant's reason for objecting to an assessment by a male psychologist was her experience of sexual, emotional, and physical abuse by third party males. She says that on the remote link she was inhibited from revealing that abuse by the lack of protective measures in place; in particular by being able to see the Respondent. It led to her blurting out her reason after judgment was given and the case all but concluded.

29. I fully accept that the consequence was that the Recorder had to deal with an unexpected and unheralded argument as he was bringing the case to a close. Further, I take into account the reality of dealing with case management issues at first instance and that it is "*vital for the Court of Appeal to uphold robust, fair case management decisions made by first instance judges*". However, having studied the transcript of Recorder Searle's extempore judgment and the recitals on the order he approved, I consider that his engagement with the Appellant's argument based on the sex of the psychologist was, at best, superficial. In particular, it failed to weigh in the balance that the Appellant would not be able to participate in an assessment by a man by reason of the past trauma she had suffered which included past abuse by a male medical professional. Consequently, I consider that his decision-making on the issue was wrong.

30. For the reasons I have given, I have decided to grant the appeal in this case on Grounds 1 and 2.

31. However, I do not consider that the modified Ground 3 of appeal is made out. Recorder Searle dealt with the issue of a fact-finding hearing at paragraphs 9- 11 of his judgment. Therein he identified the correct legal test and applied it to the facts as they were presented to him. He did not mention PD 12J specifically but the manner in which he reached his decision and the fact that he recorded it on the face of his order in accordance with paragraph 18 of PD 12J indicates to me that he had it well in mind when he made his decision. Thus, having read his judgment and reasons carefully and taking into account the exigencies of daily court life - that this was a case management decision and that the judgment was truly ex tempore - I consider that Recorder Searle cannot be said to have been wrong when he refused to direct a fact-finding hearing.

32. Having decided that the appeal should be allowed on Grounds 1 and 2 alone, I now consider what should follow. I am conscious that this appeal process has been protracted and that any delay is contrary to the welfare of the child. I am aware that the case at first instance is now listed on first available date after 8 July 2024 with a time estimate of 3 days. The parties have permission to apply for directions on receipt of this judgment. That court is likely to have up to date evidence in relation to the welfare of A and what has happened in his life since October 2023. That court will be better placed to determine the timescale of the assessment and its interaction with the timescales for the child and that of the court. Indeed, it may well be that the psychological assessment which was considered to be necessary and proportionate in August 2023, is no longer needed at all. Accordingly, I remit the issue of whether or not the assessment direction should be varied or discharged to the court at first

instance to be considered afresh. It will be for the judge hearing that issue to exercise their discretion which I do not fetter. That said, I conclude this judgment by reminding myself and the reader of what Lady Justice King stated in *Re N (A Child)* above at paragraph 63, namely:

> "*The need to obtain the best possible evidence applies equally to that part of the proceedings which takes place before the hearing, whether in the form of assessments or the commissioning of experts reports.*"

33. On the facts of this case, I consider that the Appellant has put forward good reason why a female psychologist should be used. Again, on the facts of this case, I consider that the best possible assessment evidence will be obtained by appointing a female psychologist to undertake the assessment. Thus, the Article 6 rights of both parties will be observed. In particular, the Appellant, who is a victim of third-party male violence, will have the best opportunity to participate in the assessment process and give of her best during the assessment. The appointment of a female psychologist is most likely to engage this Appellant in the assessment process. It would also limit the opportunity for any further objection to the assessment and thus any further delay.

34. That is my judgment.

35. The parties are asked to submit a draft order for approval within 7 days of receipt of this judgment together with any written submissions they wish to make in relation to costs or any other matters arising from this judgment. Any such written submissions shall be limited to 4 pages of A4 pt 12 Times New Roman line spacing 1.5. The submissions shall be submitted simultaneously with the draft order for approval.