Case No: FA-2024-000160

[2024] EWHC 2085 (Fam)
IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand
London WC2A 2LL

Wednesday, 3 July 2024

BEFORE:

SIR JONATHAN COHEN

BETWEEN:

LT

Appellant

- and -

(1) RT
(2)&(3) THE CHILDREN
(Through their Children's Guardian)

Respondents

MS J JULYAN SC (instructed by Ashby Family Law Practice) appeared on behalf of the Appellant
The First Respondent Father appeared in person
MS R CROSS (instructed by Lichfield Reynolds Solicitors) appeared on behalf of the Children through their Children's Guardian.

JUDGMENT
(As Approved)

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(Official Shorthand Writers to the Court)

1. SIR JONATHAN COHEN: This is a case involving two boys aged respectively ten-and-a-half and nearly eight. They are the children of the parents; the mother is the appellant and the father is the first respondent. It is an appeal against a transfer of residence order made in private law proceedings by way of an interim care order made by a Circuit Judge on 5 June 2024.

2. The mother and the father separated in January 2020 and, since the separation, the boys have been living with their mother. Contact to the father has been problematic, to put it at its lowest, and he says that orders for contact that were made have repeatedly been breached by the mother, if not in the sense of her active non-compliance with them, but in the sense of saying things to the boys, either against their father or which cause them to misbehave with him, so as to make contact an unpleasant and very difficult experience for him. It was in March 2024 that he issued his application for an enforcement order in respect of contact.

3. The last time the matter was before the court prior to 5 June, was on 28 March when the district judge made an order which timetabled the matter through to a DRA. The judge recorded that the parents had agreed the provisions in respect of interim family time, save for the arrangements for the father collecting the children on Friday evenings, and provided that his application for an enforcement order should be adjourned generally in the light of that agreement, with liberty to restore. He made an order providing for each filing evidence from doctors, school and the local authority by 20 May, to provide to the guardian copies of the parenting assessment of both the father and the mother and for the guardian's solicitor to serve on each parent the following day. He further directed that the guardian should file a final analysis in preparation for the DRA on 11 July 2024. That order was intended to govern what would happen until the DRA.

4. The local authority had been involved for some time with this family. The guardian's involvement, I am told, is very much more recent. Indeed, the only time she met the children was once at school on 17 April and I do not think that she has met the parents for more than one occasion each.

5. The parenting assessment was duly prepared, but it was not served on the parents. It went to the guardian who was anxious that it recommended a transfer of residence from the mother to the father and, says counsel for the guardian, the guardian's concern was how a transfer could be managed in the absence of an interim care order and that, unless the court took immediate control, "the mother would say something that would poison the children against the father". That was what the guardian perceived as the risk that presented itself.

6. The risk in this case is not one of physical harm or sexual harm, but of emotional harm and, says the guardian and the local authority and of course the father, the children have already suffered emotional harm by reason of their disruption in their relationship with him and the feeding to them by the mother or by the babysitter (as she has sometimes been called) or the nanny or the teacher (all the same person) of expressions of dislike and hostility towards the father.

7. The children's guardian was concerned about how any transfer was to be managed under a child arrangements order, which was what the local authority were suggesting. She took out a C2 summons, which was not shared with the parents and asked the court to urgently list the matter. She filed her assessment, sometimes known as a rule 16A risk assessment, and she asked too that that should not be served on the parents. So that on 5 June, the parents arrived at court having received a notice that their case was listed for urgent directions. They had not the faintest idea that what lay in store for them was an application by the local authority and children's guardian for the removal of the children from living with their mother to their father. I do not think it is an exaggeration to describe it as an ambush.

8. I am told the timing was this. At about 1.30 pm the children's guardian's analysis was emailed to the parents. Ms Julyan SC, who appears on behalf of the mother (and I want to express my gratitude to her and her solicitor for appearing pro bono), says that the mother received it, according to her mobile, at 1.50 pm. Reading those sorts of reports on a mobile phone is not very easy for anybody, let alone somebody who is understandably emotionally impacted upon when the contents of the report are seen. The mother, but not the father, was then required to hand in her mobile phone to the court because there was a fear on the part of the local authority that the mother might

use her phone to make arrangements for someone to collect the children from school and thus make the implementation of a collection order very difficult. So, although the timings are slightly different, on both the mother and guardian's account, the mother had about 25 minutes to read this document on her mobile phone, but then had no access to it thereafter. Thus it was that she was deprived of access to the crucial document.

9. The parties went in to court at about 2.15 pm. Following discussion, the parenting assessment was printed off (I am told that took some time) and was then given to the parents. The two assessments come to over 70 pages in length. It is not clear how long the parties had to read them because we do not know when they were actually handed them, but it seems to me very unlikely that it was more than an hour. It may well have been considerably less, and so it was that they then went back into court.

10. Neither parent was represented. The father was on his own, as he is today, and I want to pay tribute to him for the persuasive and sensible way that he has put his case, and I will come back to it later in this judgment. The mother had a McKenzie friend with her, but that cannot in any way be considered as the equivalent of having a lawyer.

11. The judge then heard the parties and made an interim care order to the local authority under section 37 read with section 38 of the Children Act 1989, with the plan for an immediate transfer of the children that afternoon from their mother to their father. It is not at all surprising that this developed into a traumatic experience for both the parents and the children.

12. I have to say that I regard the procedure that was adopted on that day as unfair. I regard it as deeply unsatisfactory that the mother (and for that matter the father) should come to court, unaware that there was any application for their children to be removed from her, and to be deprived of material documents; indeed the Form C2 was never released to the parties that day, and they were given only limited and inadequate opportunity to read the full documents.

13. It is axiomatic that parents must have a proper opportunity to prepare and argue their cases. Of course there are occasions when courts do make orders removing children,

either from their parents or from a parent, in circumstances where proper notice cannot be given. Those cases are few and far between. They are almost invariably cases where children have suffered or there is a significant risk of suffering serious physical or sexual harm. There are cases when the matter cannot wait until a final hearing and they are cases where it is both necessary and proportionate for the children to be removed, but invariably, with a very quick return date. That did not happen in this case. There has been no return date until one fixed for 22 July, some seven or eight weeks after the order was made.

14. The concerns that prompted this course of action were primarily, as explained to me by Ms Cross who acts for the guardian, that the mother would say something that would poison the children against their father, or cause them to behave in such a way that they did not want to go to him. It is fair to say that this was a risk, but I cannot see how it would be a risk that would justify summary removal, let alone in the circumstances that existed in this case. This was a long running dispute between the parents. One might almost describe it as a slow burner that had been going on for too long, but that does not mean that it justifies the sort of precipitous order that was made in this case.

15. The concern was expressed by the guardian and local authority that the mother was a flight risk. I regard the evidence of that as virtually non-existent. She owned her own house in the area, and she was a full-time working teacher. She had a partner and she had two elder daughters, one of whom lived very close by with a granddaughter. There were no threats to leave the country. She had relations in Holland but she had not visited there, so I am told, for 24 years. I cannot begin to see how the question of any flight risk could have presented itself as a justification for the order and, even if that risk was thought to be present, it could easily have been dealt with by an order requiring the mother to surrender her and the children's passports, but that was never suggested to the court.

16. Indeed, at no stage of the proceedings were alternatives ventilated. There could have been a penally endorsed contact order. There could have been a shared care order and, indeed, it was shared care order which the father had been advocating for throughout the proceedings until June 2024. There could have been an unless order, by which I

mean that unless the mother ensured contact takes place, the children were to be removed from her to the father. None of these alternatives were discussed.

17. I recognise that these were not the courses that either the local authority or the children's guardian were advocating, but when confronted with two unrepresented lay parties, it seems to me that it was incumbent on them at least to ventilate them before the court.

18. The order having been made, there was no reference at the hearing whatsoever to a suggestion that the mother could apply for a stay or seek to appeal. Again, in my judgment, when the court is dealing with parents in person and making an order of such significance, it would have been highly desirable for the parents to have had these rights explained to them. It would have avoided harmful delay.

19. It is a very draconian step to transfer residence away from the only person with whom the children have been living, but to do so in the circumstances that pertained on that afternoon seems to me to be a procedure that cannot be justified.

20. The judge made an interim care order solely, and in one sense understandably, so that the local authority could assist with the implementation of the transfer from one parent to the other because, absent the making of that order, the lack of parental responsibility would have been problematic.

21. It was the guardian's view and the judge's that the local authority should have applied for a public law order. They have not done so yet, although Ms Cross told me today that they are intending to do so. As I say, this has not happened yet and it is not a situation which I am presented with.

22. Under the judge's order, the mother has been having supervised contact two times a week for one-and-a-half hours on each occasion. I have read some of the contact notes and I have been referred to one or two passages of them. The situation which is described there and the situation which the father describes is one that is not uncommon in these proceedings. The mother describes in the notes put forward how affectionate the children are to her, how difficult some of the contact meetings are

because of the feeling of loss that inevitably is present in these sort of circumstances. The father says when the children come back home they are their normal, happy selves and I have no reason to doubt what either says about that.

23. I suggested shortly before the luncheon adjournment that it would seem to me obvious that I was going to have to allow this appeal on the basis of the process that was adopted and what seems to me to be the questionable decision which arose as a result of it, and that the parties might consider some form of shared care arrangement. I do not feel it would be right for me simply to set aside all the orders. That would have the result of putting the children back with their mother and away from their father and there is strong ground to reason that what the father says about how the children are doing and how the order has restored his relationship with them might well be right, and I would not want to lose the progress that had been made. So I asked them to consider the possibility of shared care.

24. The mother's response was that she would accept an arrangement whereby the children spent week and week about with each parent with a transfer on Monday mornings when the children start school. One of the redeeming features of this case is that the parents live sufficiently geographically proximate to one another that the children have remained at the same school, the difference being that they are spending their nights and weekends with their father rather than their mother. So, a shared care arrangement of the sort that the mother proposes would not interfere with the children's education.

25. The father and the guardian reject that suggestion. The father, putting it succinctly, says that his concern is that the children will instantly revert to the bad behaviours that they exhibited towards him if returned to their mother, even on a 50 per cent basis, because, he says, the mother simply does not recognise that anything she has done is wrong. She blames the father for everything and has no insight and she is likely, he says, to encourage the boys to be disrespectful and rude to and about their father.

26. I accept that that is a possibility, albeit I counsel the mother that it would be extremely damaging to her own case if she were to encourage in any way the boys to behave in that way. She has to recognise the good in the father and not focus on the bad.

27. The guardian is concerned that the mother would poison the children against their father. The children's guardian pointed out that, even as late as the end of last year, the local authority were advising a shared care order in the section 7 report (dated 24 November 2023) and that earlier this year that was what the father himself was seeking. But, says the guardian, now that the children have been removed, it would be inappropriate to return them. It is far too early, says the guardian, to move on to shared care. Both the guardian and the father rightly remind me, although it is not needed, that children are not ping-pong balls to be batted across the net between the two parents.

28. To my surprise, the local authority are not here at this hearing. They attended before the judge, they know of today, but they have chosen not to attend today. The guardian asked me, when she saw the way the wind was blowing, to adjourn the case for the local authority to attend. It is not my intention to do so, but if the local authority wish to apply, they may attend before me on Friday. I will be happy in those circumstances for the father to attend remotely if he wants, because I know that his working schedule will probably permit nothing different.

29. I am clear that I cannot let the orders made on 5 June stand in the light of the process that was used to obtain them. I will, with counsel and the father in a moment go through the orders as to what part remains and what part goes, but my intention is that come next Monday, the week and week about provision should be implemented. That will remain the position until the matter is reviewed, as it will be, by Lieven J who is the presiding judge for the Midland Circuit, on 22 July.

30. That is the order that I am going to make. I order a transcript of my judgment at public expense as a matter of urgency and to be prepared by a week today, which is 10 July. In the meantime, I am prepared for counsel's note of my judgment to be shared with the local authority.

POSTSCRIPT: No application was made by the local authority.

This transcript has been approved by the Judge