

Case No: FA-2023-000261

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION
ON APPEAL FROM THE FAMILY COURT AT LUTON

NCN: [2024] EWHC 2233 (Fam)

Royal Courts of Justice
Strand
London
WC2A 2LL

Thursday, 15 August 2024

BEFORE:

SIR JONATHAN COHEN

BETWEEN:

AA

Applicant

- and -

BA

Respondent

MS S HAIDER-SHAH (instructed by Family Law Group) appeared on behalf of the
Applicant Mother

MR R BUDWORTH (instructed by Carpenter Singh Solicitors) appeared on behalf of the
Respondent Father

JUDGMENT
(Approved)

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(Official Shorthand Writers to the Court)

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This judgment was delivered in public. 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.

1. SIR JONATHAN COHEN: This is an appeal by a mother from an order made by the circuit judge (“the judge”) on 29 September 2023. In that order, by way of summary, the judge decided that the contact which the father was having to the parties' daughter, at that stage aged nearly 5 and now aged nearly 6, should be extended from indirect contact to direct contact. The order was swiftly stayed by Russell J.
2. There followed substantial difficulty and confusion about the obtaining of a transcript of the judgment and the matter came to me when Russell J retired, she having struck out the appeal for non-compliance with the filing of documents which, it became apparent from subsequent inquiry, was certainly not deliberate but was caused by the delay in obtaining the transcript and a lack of proper communication between the Appeals office and the mother's solicitors. I accordingly reinstated the appeal.
3. Amongst orders that I made on 5 July were that each party should file a statement limited to five pages, in the mother's case setting out what contact there had been and in the father's case limited to the work that he had undertaken to deal with various issues raised in the judgment of the judge. The mother duly filed a statement. The father has failed to file any statement at all. He has not even attended today, saying that he is in bed with a condition which he has had for the past six months which he would rather not disclose to the mother and because he has not told her, I do not know what it is either. It is quite extraordinary that he should fail to engage in this appeal in any meaningful way whatsoever.
4. It is necessary to give some history. This case was the subject of a fact finding hearing which took place before the judge. The findings that the judge made were significant. She found that the father had been repeatedly abusive of the mother, indeed, to the extent to describe some of what she heard as:

"An unimpressive tirade, again vile in his abuse and in his tone
and I use the word vile very carefully."
5. She found that there was pushing and shoving on both sides. She found that the father had misused drugs and alcohol within the home. She found that the father threw a pillow in the direction of the child, although not aimed at the child, while she was

asleep. She found that the from about the time of Covid, the father became an increasingly powerful figure within the home and:

"The mother's position was demeaned and undermined and confidence was lost."

6. The father is apparently a big man and a powerfully built man and the mother is much smaller than the father. In February 2021 the judge found that the father grabbed the mother by the neck and squeezed it hard. She found that the father had slapped the mother upon her face. At paragraph 90, she says that the father has been vile towards the mother and highly abusive and highly threatening.
7. The judge also found that in January 2021 the father had threatened the occupants of the grandparents' car, being the maternal aunt and the child, with a hammer.
8. For all those reasons, the judge made an order that there should only be indirect contact. At paragraph 106, she said that the concerns that the mother rightly had about alcohol and drugs could be resolved by the father taking the appropriate steps and she said this:

"The father needs to find a way of reassuring the mother [in the context of alcohol and drugs] and I am very, very clear about that."

That was a judgment that was delivered on 27 April 2023, some five months before the matter came back before the judge.

9. The judge ordered a section 7 report from Cafcass. That should have been before the judge at the hearing on 29 September. It included this at paragraph 8. The father reflected, "on his intense criminal history," and that was expanded upon somewhat at paragraph 23 where the report says that the father:

"... is a concerning character as he has an extensive criminal history of public disorder offences which pose a risk to the child and the impending prosecutions of criminal damage and witness intimidation. He appears to be a repeat offender of offences although apparently expressing some remorse."

10. At paragraph 12 of the report, I read that the mother:

"... reports to be very fearful of father and feels conflicted in promoting any direct contact as he has previously become aggressive on calls."

11. The reporter sets out that the father had not engaged in any courses or programmes to address any of the concerns and at paragraph 26 the reporter says that while she acknowledges that his criminal history and substance misuse do not bar him from having contact with the daughter, the pending convictions/prosecutions and unknown level of substance misuse need to be balanced against the child's welfare and safety.
12. At paragraph 28 through to paragraph 40 the reporter explains why Cafcass recommended that there should be weekly video contact rather than direct contact. Then the report continues that he can apply again to the court in a year's time should he feel able to demonstrate that not only was he consistent with the indirect contact, but that he had accessed courses to support his understanding of abuse and enhance his parenting capacity, that he had continued to be abstinent from drugs and alcohol and that he had distanced himself from any criminal activity.
13. The parties attended at court on 29 September. Both parties were represented. The judge had a very long list --and I sympathise with the judge trying to do the best for the parties in very difficult circumstances. The judge called in the advocates in a gap in her list and in an agreed note of the discussion, the judge said this:

"I heard both parties [obviously referring back to the fact finding hearing]. I heard their evidence. There were problems on both sides. I ordered Cafcass to tell me how to progress these inquiries. What inquiries have you [the mother] made? She cannot put conditions on his contact and she will not hold this court to ransom."

Those were strong words and would with respect have been better not said when the judge, as it transpired, had not even seen the Cafcass report, let alone heard submissions.

14. The judge then later that morning heard counsel and gave judgment and produced an order which I will come on to in a moment. But it is clear from the reading of the judgment that the promotion of the relationship between father and daughter was at the

forefront of the judge's reasoning for making an order and there is no reference to the findings that the judge made at the fact finding hearing to which I have already referred. The judge said that she fundamentally disagreed with Cafcass and that contact could start and work in tandem with the courses and programmes which Cafcass recommended, notwithstanding the father's lack of engagement with them to date.

15. The order provided for the father to have supervised contact with the child in a contact centre every week, at a time and location to be agreed and that it should start after the father's work with probation in respect of domestic abuse or anger work had started. I interpose to say there is no evidence that he ever started any course other than a short statement in a position statement filed on his behalf saying that he had done 50 hours with probation, but there is no report from probation confirming that and no detail about what work he says that he has done.
16. The judge went on to direct that contact should be weekly until it can be extended in duration to longer periods when it would become longer and move to fortnightly. At paragraph 20 the order provided that the father should undertake a hair strand test for alcohol and drugs from a court appointed provider to include cannabis, cocaine and opiates to cover the period of the last three months. That has never been provided. That order for provision of the hair strand tests was one to which the father had consented. The order also provided for a statement or report to confirm that the father had undertaken it. No statement has ever been provided.
17. These orders were made against the background of the court noting that the father had recently been sentenced to 25 weeks of RAR work and 80 hours' unpaid work at Maidstone Magistrates' Court for breaches of the non-molestation order made for the protection of the mother.
18. I have to say that there seems to me to be great force in what is said on behalf of the mother, that the judge failed properly to consider the provisions of Practice Direction 12D and 12J. The issue of domestic abuse in this case is one of seriousness and it simply did not receive consideration from the judge. Even without what had happened recently, this appeal would have to be allowed.

19. The father, for the first time, produced a report on drugs and alcohol just a few days ago. It reported that there was consistent use of cocaine, excessive alcohol and codeine and this was in addition to what the father had declared, namely his use of ecstasy. The position statement on behalf of the father, drafted by his solicitors who apparently have had great difficulty getting instructions, said that but for the stress of these proceedings and the father deciding to enjoy himself on a recent short holiday, none of this consumption of drugs or alcohol would have taken place. Any court would be bound to look at that with considerable scepticism.
20. So contrary to the judge's expectations, there has been no proven abstinence from drugs and alcohol, there is no evidence of him undertaking any courses and there has been a failure to engage with his solicitors for this appeal. His absence today on the basis of some undisclosed condition adds no confidence whatsoever to the suggestion that he can undertake the contact which the judge ordered either in a way that would be safe for the child or for the mother.
21. I accordingly allow the appeal and I set aside paragraphs 6 to 17 of the judge's order making provision for direct contact. Contact will remain indirect and the matter will be remitted to the Family Court at Bedford to a different judge to be allocated by the Designated Family Judge.
22. There is to be a transcript of this judgment at public expense to be provided by no later than 29 August.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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This transcript has been approved by the judge