Case No: FA-2024-000012
Neutral Citation Number: [2024] EWHC 2509 (Fam)

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION
ON APPEAL FROM THE FAMILY COURT AT WATFORD
(HIS HONOUR JUDGE MCPHEE)

The Royal Courts of Justice
Strand
London
WC2A 2LL

Thursday, 23 May 2024

BEFORE:

MRS JUSTICE JUDD

BETWEEN:

RQ

Applicant

- and -

TS

Respondent

MR J CLEARY appeared on behalf of the Applicant
MR N BAYLIS appeared on behalf of the Respondent

JUDGMENT

(Approved)

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(Official Shorthand Writers to the Court)

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.

1. MRS JUSTICE JUDD: This is an application for permission to appeal with appeal to follow if permission is granted. The order under appeal is one which HHJ McPhee directed the surname of the child with whom I am concerned, U, should be changed from that of her mother to that of both her mother and father.

2. These parties have been involved in litigation about their daughter for a substantial period of her young life. In 2020, there were proceedings in which a formal application was made by the father to change her name. This application culminated in an agreement that it should be dismissed. The Cafcass officer at the time had recommended that the name change should occur, but for reasons which are not entirely clear the father did not pursue it at that time and the application was dismissed with the agreement of both parties. Proceedings about child arrangements, however, continued. U's name surname registered at birth was that of her mother.

3. The Grounds of Appeal here are set out in a document prepared by the mother herself. She also prepared a skeleton argument which has been very helpfully supplemented now by counsel appearing on her behalf, Mr Cleary, who helpfully distilled the grounds of appeal to three in number. First, there was no proper application before the court for a change of name. Second, there was no proper evidence before the court about a change of name. Third, the reasons the judge gave were inadequate to explain his decision.

4. This has been a relatively short hearing and it is about a short, albeit very important point. I will therefore summarise the arguments of each of the parties briefly.

5. First, Mr Cleary submits on behalf of the mother that the process was unfair. The father made an informal application. Whilst the mother had some notice that the father was going to raise the issue of a change of name, this was in a position statement only. It is submitted that this had several consequences. First, the fact that the father wished to resurrect the application to change U's surname was not brought to the attention of the Cafcass officer and so no analysis of this was included in either of the two reports that were prepared for the hearing. It was only raised by the judge during the hearing when the father was about to cross-examine the Cafcass officer. In response to questions about it the Cafcass officer gave some generIc answers about changing a

child's surname. Those answers were to the effect that it is normal and generally in a child's best interests to have a surname from both parents, followed by some other comments about foreign travel. The mother then stated to the judge that the application for a change of name had been made before and dismissed to which the judge responded, "Okay." As a result, the mother did not believe she needed to ask the Cafcass officer questions about the potential change of name, especially the evidence that the Cafcass officer had just given, and did not do so.

6. Mr Cleary also argues that there is no reference in the judgment to the principles to be applied to a change of name following the decision of the House of Lords in *Dawson v Wearmouth* [1999] UKHL 18, and no analysis of the child's wishes and feelings. He submits that the judge was wrong to rely on what the Cafcass officer said in such generic terms. Finally, Mr Cleary submits the judge was not entitled to deal with an issue under section 13 of the Children Act 1989, which is the provision which relates to the change of a name of a child, where there is a child arrangements order, of its own motion.

7. The judge dealt with the question of the change of name in three short paragraphs in his order. First of all, he said this:

> "Sometimes travelling abroad, if both parents' names are part of the surname, it is rather easier for the child to travel."

8. The basis of this assertion is unclear and Mr Cleary says there was no analysis of how often U was likely to travel abroad, still less whether those countries she may travel to would be assisted by seeing parents' names in the surname. In any event, he said it does not constitute an analysis of the welfare interests of U changing her surname.

9. The judge did say that it would provide U with a sense of identity. It could be said that this constituted an assessment the welfare interests of U, but if so, it was inadequate. It was a generic statement that could have applied to any child, with no attempt to look at the specific circumstances of this case. The judge stated that the clear message from Cafcass was that "This is usual order I ought to make." Mr Cleary says this was not the clear message of Cafcass. The issue had not been considered in any of the reports to

the hearing and the fact that something might be thought to be a usual order is not a basis upon which to make a decision as important as changing a surname.

10. In response to the submissions made on behalf of the appellant mother, Mr Baylis argues as follows. First of all, there are two routes by which a party may seek to change a child's surname where that issue is contested. The first route is under section 8 of the Children Act by means of a specific issue order. The second route, where a child arrangements order is already in force, is pursuant to section 13 for an order lifting the statutory restriction preventing anyone from causing a child to be known by a new surname. Mr. Baylis argues that section 1(4) of the Act provides that where the court is considering whether to make, vary or discharge a section 8 order, it shall have regard to the welfare checklist set out at section 1(3) of the Act. Under s13, there is no such obligation albeit it does not make a material difference to the way in which a judge should approach the decision, as the paramountcy principle applies in any event. So does section 1(5) (the no order principle).

11. Mr Baylis submits that the judge was entitled to consider the application without specific reference to the child's wishes and feelings. The judge had the parties before him for two days and heard evidence from both of them and the Cafcass officer. He took time to consider and deliver his judgment which is detailed, well thought through, and analytical about these parents and the past. He says that the judge was entitled to deal with it even though no formal application had been made, in the wise discretion he retains as to case management. Whilst the judge dealt with the issue shortly he did so carefully, saying this:

> *"There were three issues, I think, that I needed to deal with. The ongoing time that U should spend with her father and the parameters of that. The father's application to enforce and the father's application to change U's name, which had been raised at an earlier period and which certainly was an issue at the final hearing and about which the Cafcass officer gave evidence. The essential case, as I say, involves three issues. The amount of time the father should spend with U and how that should be managed and when staying contact should start; for how long it should start and what should happen in holiday periods. Secondly, name change, and third, application to enforce. The guardian [by which I think he must have meant the Cafcass officer] maintained that it was a view of Cafcass that when things started to move on, the*

mother would raise difficulties, as here with hunger, as here with wet underclothing, to prevent contact from moving on. I was impressed with the evidence given to me by [the Cafcass officer] because she clearly read all of previous input from Cafcass to be examined."

And then at paragraph 92, my attention is drawn to this:

"Cafcass officers have recommended a name change of U. They have recommended a name change of [U to that of her mother and father]. The mother suggests that was concluded when the father did not progress with that hearing of that much sooner in the proceedings. I think without a judgment that it was impossible for that to be determined. However, I have heard argument in respect of the matter in this case. It seems to me that Cafcass has advised, again, consistently, there should be a change. There are a number of reasons for it. Sometimes travelling abroad, if both parents' names are retained in the surname, it is rather easier for the child to travel and to persuade various border forces it is your child where the name matches at least in part. It also provides U with a sense of identity, that she is an equal child of equal parents and that forms part of her history, her understanding and her name. Therefore, with a clear message from Cafcass that it is a usual order that I ought to make it, I am considering making a name change order. However, I do think that U has [had her current name] now for seven years and I do think that [her mother's name] should form the second part of a hyphenated name. Therefore, I give leave for her name to be changed to [that of both her mother and father]."

12. Mr Baylis reminds me that in coming to this decision, the judge not only considered the Cafcass officer's evidence carefully, but also he did not blindly follow it. He looked at the situation from the position of this child, demonstrating amply that he considered it carefully, and from the position of U herself, not generically.

13. When determining first of all whether to grant permission to appeal, the court is bound by Rule 30.3(7) of the Family Procedure Rules;

"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."

14. Rule 30.12(3) provides:

> "An appeal may be allowed where the decision of the lower court was:
>
> (a) wrong; or
>
> (b) unjust because of a serious procedural or other irregularity in the proceedings."

15. As the House of Lords held in the case of *Piglowska v Piglowski* [1999] 2 FLR 763, the party who contends that the decision of the lower court was wrong does not begin the appeal with a clean sheet. The appeal court is required to bear in mind the advantages the trial judge had of seeing and hearing the witnesses. Furthermore, there is a discretion vested in the trial judge and the court dealing with an appeal must resist the temptation to substitute its own discretion for that of the trial judge.

16. In the case of *GK v PR* [2021] EWFC 106, Peel J summarised that:

> "The court may conclude a decision was wrong or procedurally unjust where:
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> (i) an error of law has been made;
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> (ii) a conclusion on the facts which was not open to the judge on the evidence, has been reached;
>
> (iii) the judge has clearly failed to give due weight to some very significant matter or has clearly given undue weight to some matter;
>
> (iv) a process has been adopted which is procedurally irregular and unfair to an extent that it renders the decision unjust; or
>
> (v) a discretion has been exercised in a way that was outside the parameters within which reasonable disagreement is possible."

17. I am also reminded as to the principles which a court must apply when considering a change of name, and that is the case of *Dawson v Wearmouth* [1999] UKHL 18. Also,

the case of *Re W, Re A, Re B (Change of Name)* [1999] 3 FCR 337 and the principles are these:

(1) On any application, the welfare of the child is paramount and the judge must have regard to the section 1(3) criteria.

(2) Among the factors to which the court should have regard is the registered surname of the child and the reasons for the registration, for instance, recognition of the biological link with the child's father. Registration is always a relevant an important consideration but it is not itself decisive.

(3) The relevant considerations should include factors which may arise in the future as well as the present situation.

(4) Reasons given for changing or seeking to change a child's name based on the fact that the child's name is or is not the same as the parent making the application do not generally carry much weight.

(5) The reasons for an earlier unilateral decision to change a child's name may be relevant.

(6) Any change of circumstances of the child since the original registration may be relevant.

(7) In the case of a child whose parents were married to each other, the fact of a marriage is important. There would have to be strong reasons for changing the child's surname from the name with which the child was registered.

(8) Where the child's parents were not married to each other, the mother has control over registration. Consequently, on an application to change the surname of a child, the degree of commitment of the father to the child, the quality of contact that occurs between father and child and the existence or absence of parental responsibility.

18. Lady Hale stated in *Re R (A Child) (Surname: Using Both Parents')* [2001] 2 FLR 1358;

> *"Generally, therefore, the court is dealing with balancing the long term interests of a child and retaining an outward link with the parent with whom that child is not living against what are often shorter term benefits of lack of confusion, convenience, lack of embarrassment and the like ... In my judgment, parents and the court should be much more prepared to contemplate the use of both surnames in an appropriate case because that recognises the importance of both parents."*

19. Taking into account all the material before me, including all the documents and the written and oral submissions, and applying the legal principles I have set out, I am satisfied that the test for permission is made out in this case and that the appeal should be allowed.

20. Whether or not a judge has the power to consider an application of its own motion under section 13 of the Children Act 1989, he should take care when dealing with an application such as this when made informally. Here both the parents were acting in person. An application for a change of name from that which is registered at birth is an important matter and in such circumstances a judge must ensure that the process is fair.

21. Here the fact that an application was not made formally had some serious repercussions. The Cafcass officer did not consider it in her report or in her addendum. Her evidence about it was necessarily about most children rather than this child. The Cafcass officer had been considering the welfare of this child in relation to enforcement in child arrangement orders, but not in relation to the issue of change of name.

22. What is more, the mother plainly did not appreciate that the judge was going to consider the question of the name change. That is apparent from what the mother said to the judge in the transcript and the judge's response, "Okay," and her decision not to ask the Cafcass officer any questions. She would undoubtedly have done so had she been made fully aware, and the fact that she was not fully aware was a result of the lack of a formal application and the judge's response saying to her when she told him that the previous application had been dismissed by consent.

23. Further, the mother did not give evidence about the change of name nor, as far as I understand it, did the father. In my judgment, this was a serious procedural irregularity and for this reason alone the order must be set aside.

24. The result of all that happened was that the judge did not have the mother's case on the change of name and he should have done so. He therefore did not consider her arguments about it which principally related to the child's wishes and feelings. What those are and the weight to be attached to them is a matter for determination at a later stage. There are cases where a child's wishes and feelings could be important, whether the judge is statutorily required to apply the welfare checklist or not. The judge did not specifically know about how this child would feel about a name change although he did know quite a lot else about the case.

25. In those circumstances, I do not need to go on and consider the further arguments in this case about the judge's decision, although it is clear that as he did not have the mother's arguments about it, he was not able to balance what she would have said in his determination. I am not saying in every case that a judge needs to set out the law in comprehensive detail or to give a long judgment in relation. It depends on the facts of the case. But the fact that he did not do so combined with the procedural error that I have underlined, adds to the strength of this appeal on the other grounds as well.

26. For all the reasons I have set out I grant permission to appeal, and allow the appeal itself.

27. Finally I should say that I have very great sympathy for the judge in dealing with this case. His judgment in relation to the child arrangements was very careful and conscientious. He set out the litigation history in this case, which is lamentable so far as this child is concerned. I am very conscious that the effect of this decision will be to prolong it. I would urge the parties to consider the effect of further disagreement on their daughter and to see whether it is still possible to compromise. What happens ultimately will not be a matter for me but I express the hope that the issue of the proposed name change does not form too much of a distraction in what is the really important issue here, and that is the father's relationship with the child.

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This transcript has been approved by the Judge