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IN THE HIGH COURT OF JUSTICE  
FAMILY DIVISION  
On appeal from the Family Court  
Her Honour Judge Earley

No. FA-2023-000198

**[2024] EWHC 934 (Fam)**

Royal Courts of Justice  
Strand  
London, WC2A 2LL

Wednesday, 27 March 2024

Before:

MRS JUSTICE JUDD

**(In Private)**

B E T W E E N :

AA

Appellant

- and -

(1) BB

(2)-(3) C & D, THE CHILDREN  
(Via their Children's Guardian)

Respondents

**ANONYMISATION AND REPORTING RESTRICTIONS APPLY**

MS E TRAUOGOTT appeared on behalf of the Appellant.

MR MILLER appeared on behalf of the First Respondent.

MISS A MUSGRAVE appeared on behalf of the Second and Third Respondents (via their Children's Guardian).

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**J U D G M E N T**

(Transcript prepared without the aid of documentation)

MRS JUSTICE JUDD:

- 1 This is an appeal from a decision of Her Honour Judge Earley dated 22 August 2023 in a very long-running case about child arrangements.
- 2 I granted a stay in early September on a very urgent basis. Mrs Justice Morgan then granted permission on two grounds of appeal on paper and on another two grounds at a renewed oral hearing in February 2024.
- 3 The order of Morgan J, dated 19 December, provided for the filing of a number of documents for the appeal, including previous judgments and documents from earlier proceedings. It also provided for the filing of a chronology, a direction which I do not believe was complied with. In a case with a substantial history such as this, such a document is of great help to the judge and I am sorry this was not done. Nonetheless I have pieced together the history, aided by the fact that this is a case which has been in front of me on previous occasions.

### **Background**

- 4 The case concerns two young children who are of primary school age. The parents were married, but separated in early 2020. Initially following separation the father was having substantive contact which included time unsupervised with the children. This stopped when the mother discovered some digital material about the father's conduct during the course of their relationship. In the proceedings that resulted the mother alleged serious domestic abuse during the relationship including violence to her in front of the children; sexual abuse including rape; and risk taking sexual behaviour with third parties.
- 5 In November 2021 the case was listed for a four day fact-finding hearing. At that hearing the parties came to a compromise which was produced in writing and entitled "The Way Forward".
- 6 The document recorded that the father accepted he had behaved abusively to the mother. He acknowledged having arguments in front of the children where he was the one to have raised his voice. He accepted there was an occasion when he hit her and also when he placed his hand on her throat saying he was stronger than her, causing her to be very frightened. There were a number of further concessions on behalf of the father in the document, which I will not set out here for the sake of brevity. But it is important to say that the allegations that the mother made that he had sexually assaulted and raped her while she was asleep, stalked her by tracking her movements, and locked her in the house/rooms of the house were not included as part of the agreed facts.
- 7 Following the agreement in that document, the case was adjourned for assessments to be carried out. Dr Black, Consultant Forensic Psychologist, was instructed to carry out a risk assessment, and she provided a report in January 2022. I understand that Dr Black did not see any of the source material or statements of the parties when compiling her report. She was given a copy of The Way Forward document and interviewed the parties.
- 8 Her initial recommendation was that both parties should undergo some work – the father to address the abuse and violence that he had caused to the mother, and the mother to help her

deal with past trauma. The father went on to engage in a DAPP (Domestic Abuse Perpetrator Programme).

- 9      Meanwhile, the mother said she was unhappy with The Way Forward document and the concessions she had made in it. She said she had been pressurised to agree to it by her lawyers. She secured new representation and applied for a further fact-finding hearing with respect to the allegations that had been dropped from the original fact-finding hearing. That application was refused by the judge.
- 10     The President of the Family Division, Sir Andrew McFarlane, refused permission to appeal that decision, and on a renewed oral application in February 2022 I refused permission as well.
- 11     Meanwhile, the father continued to attend the DAPP. Contact between him and the children was taking place, but supervised. Dr Black provided two further reports in March 2023 and the DAPP provider submitted a final report in June. The case was then listed for a final hearing before the judge in August 2023.
- 12     Meanwhile the father has been the subject of an ongoing police investigation into allegations of rape, coercive control, voyeurism, inciting prostitution and possession of extreme pornography. I believe that most, but not all, of these alleged offences involve allegations made by the mother. As part of their investigation the police have seized and interrogated some of the father's digital devices. A charging decision is awaited. The father has been interviewed twice, once before The Way Forward document was agreed, and once afterwards. I am told that the second time he was interviewed about some extreme pornography found on either his computer or phone.

### **The hearing below**

- 13     At the hearing before the judge below the father was seeking to spend time unsupervised with the children and for there to be a joint 'lives with' order. He was seeking for his time with the children to be gradually extended so that it moved to overnight stays. He urged the court to list this matter for further review within a short period of time in the hope that the police would soon make a charging decision.
- 14     The mother was seeking a final order for supervised contact which she said should take place in a contact centre. She also asked the court to make a s.91(14) order. The guardian sought a final order for the children to live with their mother and to spend time with the father. It was recommended that contact remained supervised until the outcome of the ongoing criminal investigation was known.
- 15     The Guardian recommended that were the father to be convicted of a criminal offence or offences, a further risk assessment should be undertaken. In the event that the police took no further action, she recommended that supervision should be removed and the father's contact extended. The mother should engage in supportive parenting work.

### **The judgment**

- 16     The judgment is careful and detailed. The case, she noted, had already been going on for over two years. The children had commenced supervised contact with the father, and it had

been going well. The father was child focused, and the children very much enjoyed their time with him.

- 17 The judge found Dr Black's evidence to be very helpful, full and fair. She accepted Dr Black's assessment that the children were not at direct risk of sexual harm from their father, and that the offence of inciting prostitution (if proved) did not increase the risk to the children or mother now the parents had separated.
- 18 Dr Black found the father had made good progress on the DAPP course and that his insight had improved, and concluded that the father did not present a direct risk of further abuse to the mother or children at this time. She said there was a residual risk in relation to the mother's emotional response to contact between the children and their father. Dr Black also said that the link between possession of extreme pornography and sexual offending was unclear and that she did not think that possession of these images increased the risk to them. The judge did, however, record Dr Black as saying that were the father to be convicted, the risk that he poses to adult females would need to be assessed.
- 19 Dr Black also found the mother struggled to identify any positives for the children in having contact with the father, that she had some histrionic personality traits, that she was preoccupied with the abuse, and that she was unable to see the progress that the father had made.
- 20 The judge found that the father's insight had improved, although this was still a work in progress. She found that he accepted that he had caused harm and distress to the mother and children, but he still minimised some things and failed to appreciate the full impact of his behaviour. She found that his motivation to seek contact with the children was not to cause harm or distress to the mother; it was because he wanted to further his relationship with the children. She found that the children had been exposed by the mother to adult conversations and through this had learned that the father had hit her. She also found that the mother was inclined to overthink things, which generates her fear. She considered that the mother really wants the father to disappear. The judge also found, following what Dr Black said, that the father does not pose a sexual risk to the children, and that the father's possession of extreme pornography was not relevant to the issue she had to decide.
- 21 The judge followed the guardian's proposal that the proceedings should come to an end. She made what was effectively an either/or order based upon the progress of the police investigation. In the event the police made a decision to prosecute any of the offences for which the father was under investigation she considered that the father's contact should continue to be supervised and that it should take place every weekend from Sunday 9.30 to 2.30, extended to 9.30 to 6 p.m. one Sunday in four, and then every Wednesday afternoon after school or from 3 p.m. in the holidays until 6 p.m. The supervision was to be done professionally and paid for by the father.
- 22 If the father were to be convicted of criminal offences, she ordered that there should be a risk assessment of the father conducted by a social worker professionally experienced in assessing risk, the cost of which would be paid for by the father. Added to this there were a number of conditions of contact and arrangements for the children to have life story work.
- 23 In the alternative, in the event that the police decided to take no further action, the judge considered that supervision would no longer be necessary, save for contact handovers. She ordered that contact should move to overnight and that it should extend gradually over a few weeks until the children were to stay every other weekend overnight from Friday to

Monday. There would also be midweek contact and extended contact during the school holidays.

### **The appeal**

24 The mother appealed on a number of grounds. The first two grounds are no longer relevant because they have been agreed between the parties and do not relate to the substance of the child arrangements order.

25 On ground 3 for which the mother has been granted leave in part by Morgan J, it is submitted that it was legally impermissible for the judge to increase the contact between the children and the father, at the same time as finding the father continued to lack insight into his abuse and at a time when more serious allegations of abuse and sexual deviance are the subject of a criminal investigation. Serious risks are said to remain about the manageability of the risk of harm to the children and mother. Morgan J granted partial permission on this ground as follows:

“The learned judge may have been wrong to reach concluded views as to the progression of contact as set out in para.12 of her order on a basis which flowed from either conviction or not at the conclusion of the criminal investigation such that it was appropriate to make a final order for contact. Taken together with the requirements of Practice Direction 12J in respect of which permission to appeal on ground 6 has been granted, these aspects warrant consideration by the judge hearing the appeal”.

26 On ground 6 it is alleged that the judge failed to apply PD 12J, paras.35 to 37 when assessing the risk of harm from contact to the children and to the mother. Morgan J gave permission on this ground.

### **The submissions of the parties**

27 In her written and oral submissions, Ms Traugott for the mother submits that the judge was wrong to have come to her conclusions that the father could have unsupervised contact if the criminal investigation concluded with charges being dropped against the father at the same time as deciding that there would need to be a further risk assessment upon conviction. This would mean that a perpetrator of abuse could argue that abuse does not become relevant unless proved to the criminal standard. She also submitted that the judge had failed to ensure that any order for contact would not expose the children to an unmanageable risk of harm and that it would be in their best interests. She stated that there is a significant gap in the risk profile which relates to the material which is under consideration by the police. Added to this, the judge was wrong to extend contact so significantly in the circumstances where the father had still not got a full insight into the impact of his behaviours in the past.

28 On behalf of the father, Mr Miller reminded the court that an appeal must only be allowed where the decision of the lower court was wrong or unjust because of a serious procedural or other irregularity in the proceedings. He submitted that the judge could not be expected to address every single argument in her judgment; nor does she need to recite passages from the authorities for the welfare checklist. The court should not engage in a narrow textual analysis and in particular should not substitute its own view for that of a trial judge who was fully immersed in the case and heard oral evidence from the parties and expert too.

- 29 Mr Miller pointed out that the irony of this case was at the trial the mother had sought a final order and opposed any further adjournment of the case. On behalf of the father he had in fact sought an adjournment of a few weeks until such time as it was hoped a decision would have been made with respect to the criminal charges. Mr Miller said that the judge had been driven by the effect of delay not only for the children but on the parties themselves. She had given reasons for this in her judgment and of course the principles about delay are enshrined in s.1 of the Children Act 1989.
- 30 Mr Miller submitted that the judgment was lengthy and very careful, and that it considered all matters with reference to the welfare checklist and the Practice Direction with care. The judge followed the advice of the instructed expert and made findings that were plainly open to her on the evidence she had.
- 31 Mr Miller stated by virtue of The Way Forward document the parties agreed that they would no longer rely on historic allegations which pre-dated it. He said that to ignore the agreement would be to place the father in an unfair and unjust position of not being able to pursue his allegations against the mother for alienating the children from him. He argued that there were no findings against the father and the court must treat unproven allegations as if they had not happened. He said the mother was still seeking to pursue allegations that she had dropped at an earlier stage and trying to get around a decision that there be no further fact-finding hearing for which she had been refused permission on appeal.
- 32 Mr Miller made a number of detailed submissions about the application by the judge of paras.35 to 37 of PD 12J. By reference to each of the paragraphs, he set out the judge's finding and decision, noting the paragraphs within her judgment where he pointed out that she had gone through the proper exercise. I will not refer to all the submissions here, save to say that they are detailed and helpful and I have read them with care.
- 33 Mr Miller states that the father's position with respect to the criminal allegations is that they are false. The allegations have been made by the mother and the length of time the police have taken to come to a charging decision has put him in a very unfair position. The father had invited the court to make an interim order at the last hearing so he could pursue his aspiration to take over equal shared care of the children, but that now the order has been made he supported it. Mr Miller submitted that it could not be said to be wrong, and that the appeal should accordingly be dismissed. Finally, I should record that a respondent's notice was filed on behalf of the father stating that "I urgently appeal the court not to make any changes to the contact ordered by the judge below".
- 34 On behalf of the guardian, Miss Musgrave, who did not appear in the court below, also submitted that the appeal should be dismissed. She states that it is plain from reading the judgment that the judge was fully aware of and applied the provisions of Practice Direction 12J. She submits that the judge had before her a wealth of evidence to assist her in assessing risk to the mother and children, not only from the expert but also from the NYAS case worker, and there were detailed contact notes too. The judge had considered the case very carefully and gave detailed findings in para.59 of her judgment. She had clearly explained why she considered that the risk to the children was manageable and why contact was in their best interests. She submitted that the judge had engaged with the Practice Direction in an exemplary and sophisticated manner.
- 35 Miss Musgrave submitted that it was entirely appropriate for the court to have considered the potential for matters arising with any future criminal proceedings which resulted in a conviction to change the factual landscape. In so doing she said the court was only

acknowledging the truth, that new issues may arise in the course of those trials which could not be reasonably anticipated in these proceedings. That does not undermine the basis on which risk has been assessed in these proceedings. The judge had before her a variety of solutions, none of which was perfect. Delay was a very significant factor in proceedings which had been going on for years. The court should not interfere and substitute its own view for that of a trial judge in these difficult circumstances.

### **The law**

- 36 Counsel have all made submissions on the law, some of which I have referred to above. Although I will not recite them for the sake of brevity, I have been very much in mind of the *dicta* of the courts in the cases of *G v G* [2022] EWHC Fam 113; *G v G (Minors, Custody Appeal)* [1985] FLR 894; *Re B (Care Proceedings: Appeal)* [2013] UKSC 33; *Pigłowska v Pigłowski* [1999] 1 WLR 1360; *Re F (Children)* [2016] EWCA (Civ) 546; and *Simetra Global Assets Limited v Ikon Finance Limited & Ors* [2019] 4 WLR 112 set out in the parties' submissions and the authorities bundle with which I have been provided.
- 37 The over-arching point is that I must bear in mind the huge advantage that the trial judge has over the appellate judge, and that an appeal court should not interfere with a decision unless the decision of the lower court was wrong. In particular, an appeal court should not substitute its own view for that of the judge who had heard and read all of the evidence.

### **My decision**

- 38 This judge has had conduct of the case for a long time, and she has seen the parties on various occasions and heard them give evidence. She is immersed in the facts of the case. She has an understanding of the case on the ground in a crucial way which will go beyond what it explained or articulated in the judgment. What is more, she had a lot of evidence before her at the hearing in August 2023 and indeed before that too. Her judgment is careful and conscientious. There is no doubt that this is a very difficult case and answers or solutions are not at all easy. I therefore approach the judge's judgment and decision with considerable deference. What is more, as Mr Miller pointed out, at first instance it was the father who was asking for the case to be adjourned and the mother and the guardian who were asking for final orders. I cannot see it was suggested to the judge that it was impermissible for her to make an either/or order.
- 39 Despite all these important points, I have come to the conclusion, with regret, that this appeal must be allowed and the case remitted back to the judge for a further case management hearing. The reason for this is that I consider her decision to rely on the outcome of the criminal investigation to determine whether the children should have unsupervised contact with the father to be wrong. It must be for the Family Court itself to determine whether it is satisfied that the physical and emotional safety of the child and parent can be secured before, during and after contact, based upon all the available evidence.
- 40 In being prepared to order that contact must continue to be supervised if the father is charged and that there must be a further risk assessment in the event that he is convicted, the judge quite properly acknowledged that the police hold evidence which could be relevant to any risk the father poses to this mother and the children. I am told that there has not been ongoing disclosure from the police in this case, either of digital or other material. Charging decisions are made and defendants convicted on a different basis and on a higher standard of proof than exists in the Family Court. The lower standard of proof in the family court exists



for public policy reasons, in cases such as this, for the protection of parents and children. In order to make a decision about the safety of child arrangements the evidence that informs the police should be assessed in the family court.

- 41 The risk in this case relates not only to physical abuse but also to the effects of the father's private and sexual behaviour. Dr Black has opined that the father does not pose a risk of direct physical or sexual harm to the children and that the possession of extreme pornography does not change things. Nonetheless she also says that in the event the father is convicted of any offences the risk the father poses to adult females would need to be assessed. In relying upon that conclusion and the recommendation of the Guardian the judge was led into error by relying on the outcome of the criminal proceedings to determine the progress or otherwise of the father's contact.
- 42 There is also a further point about The Way Forward document. In it both parties agreed not to pursue other allegations that had been raised by either of them which were not included. Nonetheless, were there to be new evidence in the police disclosure which could undermine the integrity of the agreed findings, the judge would have to consider it. The judge herself said in an earlier judgment that when she had read the documents for the fact-finding hearing that she had formed a preliminary view that some of the parties' allegations lacked the clear and cogent evidence that we need to enable the court to make evidence-based findings. No doubt that was one matter which lay behind a decision to compromise the proceedings.
- 43 In allowing the appeal I am very conscious of two things. First of the delay that my decision will entail and second that the material in the hands of the police may ultimately not reveal anything which changes the assessment of risk based on the current information or undermines the integrity of the facts as settled in The Way Forward document. At this stage, however, it is not possible to know. Once the police material is available there should be a further case management hearing where it can fall to be considered alongside other matters such as the need for any further assessment or fact finding.
- 44 In coming to this conclusion, I wish to make very clear that I do not wish to be unduly critical of the judge who approached her task with such conscientious care. The case has been going on for two years with proceedings continuing whilst the father engaged on a DAPP and contact was re-established. It is hardly surprising that she was very concerned about the delay and effect upon both the parents and the children of the prolonged proceedings.
- 45 I refuse the mother's application for contact to be reduced pending the case being remitted to the judge. It is being professionally supervised and the children enjoy and are used to it. I am satisfied, as was the judge, that this supervised contact secures the physical and emotional safety of the mother and children.
- 46 I therefore allow the appeal on the grounds 3 and 6. The order for contact to increase and move to being unsupervised is set aside and the case remitted to the judge for further directions. Having considered the submissions of the parties I have determined that it should go back to the same judge in the first instance.
- 47 I will also make an order for disclosure from the police so that the material is available as soon as possible.

**CERTIFICATE**

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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