

Neutral Citation Number: [2017] EWHC 324 (Fam)

Case No. No. ZC15P00920

IN THE HIGH COURT OF JUSTICE

FAMILY DIVISION

Royal Courts of Justice

Date: Thursday, 2nd February, 2017

Before:

MR. JUSTICE MOOR

(In Private)

B E T W E E N :

M S

Appellant

- and -

M N

Respondent

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MS. V. MILLER (instructed by Aitken Harter Solicitors) appeared on behalf of the Appellant.

THE RESPONDENT appeared in Person.

J U D G M E N T (As approved by the Judge)

MR. JUSTICE MOOR:

- 1 This is an appeal that is brought from an order made by His Honour Judge Tolson QC on 4th November 2016. He directed a short period of indirect contact followed by direct contact, either supported or supervised. There was to be a further hearing to decide whether it should be supported or supervised contact which was listed for 9th December 2016. The hearing did not take place as a result of this appeal.
- 2 The case has a long and troubling history. The father appears in person. I recognise that this makes it very difficult for him. I am sure he loves his daughter. The issue I have to decide is whether the law requires me to direct a risk assessment before there can be direct contact. For me to allow the appeal, I have to be satisfied that the decision of the judge was either wrong or unjust because of a serious procedural or other irregularity in the proceedings in the lower court. I recognise that is a stiff test. However, permission to appeal has been given in this case and it therefore follows that Baker J, who gave that permission, considered that the appeal had a real prospect of success. Moreover, I am of the view that there is law involved in this case. It is not therefore a case where I can deal with the matter simply on the basis that the decision was based on an exercise of discretion.
- 3 By way of brief background, the father is M N. The mother is M S. The child is A, born in 2011, and therefore aged five. The parents separated in December 2012. The mother and child went to a refuge. There have been numerous allegations and counter-allegations ever since. I accept that there was a period of time when there was supported contact in a contact centre once a fortnight. I am told that such contact was stopped twice. The first time it was stopped because of an allegation made by the father that the mother had bitten A on the arm, causing a bruise. The second time was because it was alleged the father had followed the mother home and harassed her. Eventually a decision was taken that there should be a fact-finding hearing to determine the truth or otherwise of some serious allegations made by the mother. I am clear that that was because the court considered such findings could be relevant to the issue of direct contact. There were various appeals against that decision, but the order remained in place. The Magistrates heard the case in August 2016. They made findings that, in around August 2009, the father pulled the mother up the stairs by her hair. He punched her in the stomach, cheeks, eyes and mouth. He covered her mouth with a pillow. The mother sustained bleeding, swelling and bruising to her face. Photographs were produced. Findings were also made that, in March 2012, the father slapped the mother and punched her to the head, face and ears. There was redness to her eye, bruising to her body and a perforated eardrum. A was present. The third finding was that the father had made threats to kill the mother on a number of occasions. He was found to be aggressive and to have a short fuse.

- 4 He continues to deny those allegations strenuously. He appealed them to Judge Tolson QC. His appeal was dismissed. Those findings are therefore now what we call res judicata. In other words, the court has found these facts and I must proceed on the basis they are true. I explained that to M N. He said he understood but he clearly still does not accept the truth of the findings.

- 5 Having heard the appeal and dismissed it, Judge Tolson QC went on to deal with contact. His judgment was given after he had heard from the CAFCASS officer and had heard from the parties. The CAFCASS officer had said in her report in December 2015 that she did not consider it safe for A to spend time with her father. The arrangements had to be safe and appropriate. Before they could be safe, she considered the father needed to undertake a domestic violence perpetrator programme, although that might not be possible if the findings were that he posed a high risk, and there had to be a specialist risk assessment. She said that, if the father was not prepared to accept responsibility and apologise, or if he denied the allegations and did not show remorse or willingness to change, his application might have to be dismissed. The learned judge was not troubled by those observations. He took the view that the violence had not been directed to A, although she was present at one proven incident. He said that there was no suggestion the father would ever deliberately harm A. He was clear that there should be an attempt to establish a relationship between A and her father. On that, I agree with him. But, he said, he considered the contact could be ordered there and then. He mentioned the fact that the parents had agreed to contact in a contact centre; that they had met in public places on three separate occasions; that he had the distinct impression that the mother was not quite as vulnerable as she might at first sight seem; and there was not deeply ingrained opposition to contact. He found that there was no indication that A had been damaged by it, nor that the father would use the time for any purposes other than to have a good relationship with his daughter. That is the order that is appealed. It is said on behalf of the mother that it was against the CAFCASS officer's recommendation and that there was not sufficient explanation as to why the judge was going against the CAFCASS officer. It is further said that, in relation to the law, the court has to apply Practice Direction 12J and that the court had not done so. It is argued that, on the authorities, the court should have directed a risk assessment.

6 I have been referred to two cases by Ms Miller, who appears on behalf of the mother. The first is *Re M (Contact: Violent Parent)* [1999] 2 FLR, 321. In that case Wall J. said this:

“These boys cannot go through the whole of their childhood not knowing their father, but at the same time it is extremely important for the father to understand that, if he is to make a further application for direct contact, he must address the findings which the justices have made. He needs to be able to satisfy this mother...”

7 - but I think he means “this court” -

“... that he is no longer a threat to her security and her stability or the stability and security of the children. He needs to satisfy her and the court that he no longer has a problem with alcohol or with violence. He needs to look very carefully and fully within himself and, if need be, he should take direct steps to obtain that advice and counselling which he indicated in his evidence to the justices he may need if contact is to be re-established.”

8 The judge goes on to say:

“Often in these cases where domestic violence has been found too little weight ... is given to the need for the father to change. It is often said that, notwithstanding the violence, the mother must nonetheless bring up the children with full knowledge in a positive image of their natural father and arrange for the children to be available for contact. Too often it seems to me the courts neglect the other side of that equation, which is that a father, like this father must demonstrate that he is a fit person to exercise contact; that he is not going to destabilise the family; that he is not going to upset the children and harm them emotionally.”

9 Ms Miller then relies on *Re L (A child)(Contact: Domestic Violence) & Ors* [2001] FLR 260. That was a case in which the court dismissed four cases involving a background of domestic violence. Lady Justice Butler-Sloss said, at 272-273:

“The general principle that contact with the non-resident parent is in the interests of the child may sometimes have discouraged sufficient attention being paid to the adverse effects on children living in the household where violence occurred. ... In a contact or other section 8 application, where allegations of other domestic violence are made which might have an effect on the outcome, those allegations must be adjudicated upon and

found proved or not proved. It will be necessary to scrutinise such allegations which might not always be true, or may be grossly exaggerated. If, however, there is a firm basis for finding that violence has occurred, the psychiatric advice becomes very important. There is not, however, nor should there be, any presumption that on proof of domestic violence the offending parent has to surmount a prima facie barrier of no contact. As a matter of principle, domestic violence of itself cannot constitute a bar to contact. It is one factor in the difficult and delicate balancing exercise of discretion. ... In this context, the ability of the offending parent to recognise his past conduct, be aware of a need to change, and make genuine efforts to do so, will be likely to be an important consideration.”

- 10 The learned judge is very experienced in this work. But he did not consider Practice Direction 12J. He did not set out the cases I have referred to in his judgment and he did not say why it was right to order immediate direct contact, notwithstanding the approach set out in those cases. For that reason alone, I have decided that I have to allow this appeal.
- 11 It goes further than that. Section 16A of the Children Act requires a CAFCASS officer to make a risk assessment in relation to the child and provide the risk assessment to the court if, in carrying out his or her function, the officer is given cause to suspect that the child is at risk of harm. CAFCASS decided, of its own volition, that it was necessary to file such a statement. It was prepared by Louise Jones and it is dated 23rd November 2016. It begins by drawing to my attention that there are allegations in this case of drug misuse. There were orders for drug testing. They have not been complied with. I understand that the father has said he cannot afford his half of the costs. That of itself is one difficulty in this case. The document goes on to say that the officer has serious concerns for A’s safety because of the pattern of coercive control, which is a high risk indicator of future violence; of behaviours that could be lethal because of the fear of the victim; because of the high level of generalised aggression; because the father was abusive in another relationship; because there are mental health concerns with respect to him; because of drug misuse concerns; because of the proven threats to kill; and because of features of honour-based violence. I recognise that the father does not accept any of that. But an expert might well tell me that that makes it even more troubling when the court has made findings. Indeed, CAFCASS considered it should refer the matter to the Local Authority, given its concerns. At the end, the report says this: “High risk behaviours do not preclude treatment but necessitate a risk assessment prior to commencing treatment. Contact centres are not a long-term solution.” I gave permission for that fresh evidence to be admitted as it was not present before the judge, and I was of the view that it could not reasonably have been expected to be present because at

the time the CAFCASS officer did not know what order the judge was going to make.

12 It is a real difficulty in this case. I have CAFCASS telling me that this order is not safe in its current terms. I cannot ignore that. I make it clear that I do believe that every reasonable avenue should be investigated to see whether contact can be established in this case, but it has to be safe and secure. I cannot see that, given the findings of fact, a judge can say it is safe and secure, at this point in time. I hope that a judge will be able to say it in due course, but I am mindful of the report of Cobb J. I am reminded of the recent observations of the President of the Family Division as to the importance of Practice Direction 12J. I have come to the conclusion that I cannot order direct face-to-face contact without this further risk assessment being available to the court. I am troubled as to how it should take place. I am told that CAFCASS cannot do the report and will not pay for it to be done, unless the father admits the domestic violence. He has refused to do so. I am told that I could order him to pay for it. It would be done by the Domestic Violence Perpetrator Programme and would take 6 to 9 weeks. I am told it would cost £1,600 and has to be paid in advance, albeit that it can be paid by instalments. I am of the view that the court should not make orders that simply will not be complied with. The father has not paid his half of the drug testing. He tells me he is on benefits. I cannot see that it is remotely realistic that he will find £1,600, let alone that he will do so sufficiently quickly within the timescales for A, which requires this to be dealt with quickly.

13 So, what do I do? The matter has already been referred to the Local Authority. Section 7 of the Children Act 1989 says the following:

“7(1) A court considering any question with respect to a child under this Act may ...

(b) ask a local authority to arrange for -

(i) an officer of the authority; or

(ii) such other person (...) as the authority considers appropriate

to report to the court on such matters relating to the welfare of that child as are required to be dealt with in the report.”

14 I have come to the conclusion that the only way I can do justice to this case, given my paramount concern for the welfare interests of A, is to direct the Local Authority to provide me with such a report as to the safety of any proposed contact and a risk assessment of the father. The Local Authority is not here. I do not want a further unnecessary hearing at considerable public expense. I am, therefore, going to direct that assessment to take place, unless the Local Authority applies within seven days to discharge my order, whereupon there will be a short hearing before me.

15 I do not know how long it will take them to undertake this assessment. If it was going to take the Domestic Violence Perpetrator Programme nine weeks, I consider it reasonable to give the Local Authority 12 weeks, but they can also have liberty to apply as to that.

16 I am going to remit the matter to a Circuit Judge sitting at the Central Family Court. Ground four of the grounds of appeal says that that should not be his Honour Judge Tolson QC. I have had my attention drawn to his previous observations made in relation to the appeal of the mother against the decision that the lay Justices should hear this case. His Honour Judge Tolson QC, according to the order dated 19th April 2016, said this:

“The situation as to the father spending time with the children needs addressing urgently, not least as it does not seem to be the mother herself who is driving the gap in contact, but the CAFCASS officer. Re-allocation would produce further delay.”

17 It is also right to note that the judgment and some of the interventions made on 4th November 2016 indicate that the judge went into that hearing believing that he should make a direct contact order. Ms Miller has satisfied me that justice has to be seen to be done and, in the circumstances, I should direct that the matter go back before a different Circuit Judge. I therefore allow this appeal, direct the section 7 risk assessment report, and remit the matter to the Central Family Court for a hearing with a one-day time estimate, to be listed now on the first available date after 1st June 2017, to be heard by a different judge at that court. I hope that it will be possible to resolve this case finally but safely on that day.
