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Case No. WJ10P00530

IN THE FAMILY COURT

Royal Courts of Justice

Date: Wednesday, 21st May 2014

Before:

THE PRESIDENT OF THE FAMILY DIVISION

B E T W E E N :

Q Applicant

- and -

Q Respondent

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THE APPLICANT appeared as a Litigant in Person.

MISS J. SPOONER appeared on behalf of the Respondent.

J U D G M E N T

THE PRESIDENT:

- These are private law proceedings relating to a boy born in June 2007, who is therefore a little short of seven years old. The proceedings, it is distressing to record, have been going on since as long ago as 27 July 2010. The applications currently before the court are by the father for contact to his son and by the mother for an order under s.91(14) of the Children Act 1989.

- The father is a convicted sex offender, having convictions for sexual offences with young male children, the second of which was committed during the currency of these proceedings.

- Reports have been commissioned from Ray Wyre Associates dealing with the question of the risk which the father poses to his son. Reports commissioned by the father were provided by DS of Ray Wyre Associates on 28 March 2011

with a more recent addendum report dated 15 January 2014. On joint instructions, reports were commissioned from JD of Ray Wyre Associates, the original report by JD being dated 3 February 2012, with an addendum report dated 27 February 2014. These reports were before Her Honour Judge Boye, who has had the carriage of this case since 31 October 2013, when on 10 March 2014 she made an order directing that the case be adjourned for a final hearing on 6, 7, 9 and 12 May 2014, the first day being a reading day.

- The reports both from DS and from JD set out unequivocally, and on the face of it with some force, the proposition that the father's son would not be safe in his presence and indeed that there should be, for reasons explained in the reports, no contact, direct or indirect, between the father and his son unless and until certain work identified by DS has been successfully undertaken by the father. Nonetheless, Judge Boye directed the final hearing and that order has not been challenged.

- Perhaps not entirely surprisingly in these seemingly unpromising circumstances, the father's legal aid has been terminated. The consequence of that is twofold. First, it means that there is no available fund to meet the costs of DS attending court as an expert witness or to fund the father's half share of the cost of JD attending court as an expert witness. Secondly, it means that the father is unrepresented.

- The father seemingly does not speak much, if any, English and is dependent upon the services of an interpreter. I need say nothing more to indicate the obvious forensic difficulties of a hearing taking place if the father is to challenge the expert reports, as he must if he is to have any realistic prospect of avoiding the orders for which the mother contends.

- Miss Spooner on behalf of the mother invites me today, in effect summarily, to determine the matter. She asks for the father's application to be dismissed forthwith, being as she puts it totally without merit and she seeks a s.91(14) order today in substance preventing the father making any application in respect of his son without the leave of the court at least until such time as the father has undertaken the work identified by DS.

- I can understand why Miss Spooner makes that submission. On the face of it, the reports are clear and compelling but, quite apart from the fact that Judge Boye was of the view that there required to be a substantial final hearing, the fact is, if one analyses the reports, that a significant part of the analysis is dependent upon the accounts given to each expert by one party or the other.

For example, the addendum report of JD addresses in paras. 6 and 7 the father's contention that, despite his convictions in relation to sexual abuse of other children, he poses no risk of sexual harm to his own son. In the course of analysis as to why that view is not accepted, JD founds herself in part upon the account given by the mother of the role played by the father in caring for his son, as also the mother's account of the relationship, including the nature of the sexual relationship, between the mother and the father.

- Tempting though it is to think that the father's case is totally lacking in merit, it does seem to me, despite everything Miss Spooner has said, and recognising the constraints which may be imposed on cross-examination by the fact that, in part, challenge on behalf of the father would be to his own expert, I am unpersuaded that there are not matters in these reports which could properly be challenged, probed, by someone representing the father.

- For example, a perfectly proper line of cross-examination of JD might be along these lines, "In part at least, your analysis of the risks that the father poses to his son, as opposed to other children, is based upon the account you have had from the mother of what went on in the family home." It would seem, bearing in mind the language of JD's report, that the answer could only be, "Yes." The next question then might be, "Suppose for the sake of argument that the true picture at home was not what the mother says but a very different picture presented by the father. Just suppose that. Would that affect your opinion?" I use that only by way of illustration of a wider point that could be made in relation to these reports. That seems to me to be a proper and appropriate line of cross-examination.

- My problem and ultimately Miss Spooner's problem is that it is completely a matter of speculation as to what JD's answer would be to the last question I formulated. The answer might be, "It does not make the slightest difference at all because of X, Y, Z", in which case the father's case might evaporate. It might be, "Well, yes, that might make a difference." The point is we simply do not know. Despite what Miss Spooner says, I cannot have that degree of assurance that there is nothing to be said which I would have to have, bearing in mind the extreme nature of the orders being sought here, were I to proceed summarily in the way she suggests.

- Putting it in the language of FPR 2010 1.1, the court is required to deal with this matter "justly" and by ensuring "so far as is practicable" that the case is dealt with "fairly" and also "that the parties are on an equal footing." That is the obligation of the court under domestic law. It is also the obligation of the

court under Articles 6 and 8 of the European Convention. Despite what Miss Spooner says, I am left with the strong feeling that I cannot deal with the matter today justly and fairly by acceding to her submission.

- The question then is what is to be done because, on one view, we have thereby reached an impasse, which is unthinkable. This case raises, in quite an acute form, a problem which is increasingly troubling judges sitting in the Family Court at all levels. It is an example of a problem which, in even more extreme form, was identified by His Honour Judge Wildblood, QC, sitting as a judge of the Family Division, in *Re B (A Child) (Private law fact finding – unrepresented father), D v K* [2014] EWHC 700 (Fam). See also His Honour Judge Bellamy in *Re R (Children; temporary leave to remove from jurisdiction)* [2014] EWHC 643 (Fam).

- Assuming that public funding in the form of legal aid is not going to be available to the father, because his public funding has been withdrawn and an appeal against that withdrawal has been dismissed, and on the footing that, although the father has recently gained employment, his income is not such as to enable him to fund the litigation, there is a pressing need to explore whether there is any other way in which the two problems I have identified can be overcome, the first problem being the funding of the attendance of the experts, the second being the funding of the father's representation.

- The issue which arises in the present case, which arose more acutely in Judge Wildblood's case and which is arising in other cases as I speak, is one which raises very important points of principle. As I have said, the domestic obligation on the court is to act justly and fairly and, to the extent that it is practicable, ensure that the parties are on an equal footing. In the well-known case of *Airey v Ireland (Application no 6289/73)* (1979) 2 EHRR 305, the European Court of Human Rights held as long ago as 1979 that there could be circumstances in which, without the assistance of a legally qualified representative, a litigant might be denied her Article 6 right to be able to present her case properly and satisfactorily. In that particular case, the court held that Ireland was in breach of Mrs. Airey's Article 6 rights because it was not realistic in the court's opinion to suppose that, in litigation of the type in which she was involved, she could effectively conduct her own case, despite the assistance which the judge affords to parties acting in person.

- *Mantovanelli v France (Application no 21497/93)* (1997) 24 EHRR 370, a judgment given by the court in March 1997, indicates the significance of the right to an adversarial hearing guaranteed by Article 6 specifically in the

context of an expert's report which was "likely to have a preponderant influence on the assessment of the facts by [the] court."

- I mention those cases merely as illustrative of the kind of issues which arise in this kind of situation. I emphasise I do so without expressing any view at all as to whether, in the circumstances I am faced with, unless there is some resolution of the present financial impasse, there would be a breach of either Article 6 or Article 8.

- There may be a need in this kind of situation to explore whether there is some other pocket to which the court can have resort to avoid the problem, if it is necessary in the particular case - I emphasise the word "necessary" - in order to ensure a just and fair hearing. In a public law case where the proceedings are brought by a local authority, one can see a possible argument that failing all else the local authority should have to pay. In a case such as the present where one party is publicly funded, because the mother has public funding, but the father does not, it is, I suppose, arguable that, if this is the only way of achieving a just trial, the costs of the proceedings should be thrown on the party which is in receipt of public funds. It is arguable that, failing all else, and bearing in mind that the court is itself a public authority subject to the duty to act in a Convention compliant way, if there is no other way of achieving a just and fair hearing, then the court must itself assume the financial burden, as for example the court does in certain circumstances in funding the cost of interpreters.

- May I be very clear? I am merely identifying possible arguments. None of these arguments may in the event withstand scrutiny. Each may dissolve as a mirage. But it seems to me that these are matters which required to be investigated in justice not merely to the father but I emphasise equally importantly to the son, as well as in the wider public interest of other litigants in a similar situation to that of the father here. I emphasise the interests of the son because, under our procedure in private law case like this where the child is not independently represented, fairness to the child can only be achieved if there is fairness to those who are litigating. There is the risk that, if one has a process which is not fair to one of the parents, that unfairness may in the final analysis rebound to the disadvantage of the child.

- In the circumstances, what I propose to do is this: I propose to adjourn this matter for, I emphasise, a short time, inviting the Ministry of Justice - or it may be the Secretary of State for Justice or it might be the Minister for the Courts and Legal Aid - to intervene in the proceedings to make such submissions as

are appropriate in relation, in particular, to the argument that in a situation such as this the expenditure which is not available from the Legal Aid Agency but which, in the view of the court, if it be the view of the court, is necessary to be incurred to ensure proceedings which are just and fair, can be met either from the Legal Aid Agency by route of the other certificate, the mother's certificate, or directly at the expense of the court.

- I appreciate that this is a case in which, as Miss Spooner points out, there have already been too many adjournments of supposedly final hearings. I appreciate it is a case which has been going on for the best part of four years, which is depressing to say the least. And I am very conscious of the fact that the mere existence of the proceedings, and they must seem to the mother and her son to drag on interminably, is having a significant impact both on the mother and also on the parties' son. Factoring that in as I do, it does seem to me that some further, but limited, delay is inescapable if I am to do justice not merely to the father but, as I have emphasised, also to the parents' son.

- I shall accordingly, in terms which I will draft, adjourn this matter so that the relevant ministry can intervene if it wishes to and on the basis that if it does not I will have to decide the issues I have canvassed without that assistance. I will reserve the matter to myself. I will direct that the hearing takes place as soon as it possibly can after the forthcoming short vacation. I would hope that the hearing can take place in front of me in June.

- I will direct that a transcript of the judgment I have just given is to be prepared at public expense as a matter of urgency. I will direct that it is to be translated at public expense for the benefit of both parties.

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