

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM Guildford County Court

Her Honour Judge Cushing
Case No: GU12P00038

Royal Courts of Justice
Strand, London, WC2A 2LL
Date: 20/09/2013

Before :

THE RIGHT HONOURABLE LORD JUSTICE LONGMORE

THE RIGHT HONOURABLE LORD JUSTICE UNDERHILL

and

THE RIGHT HONOURABLE LADY JUSTICE MACUR DBE

M (Children)

Mr A Verdan QC (instructed by **Direct Access**) for the **Applicant**
Ms A Ball QC & Ms Z Lane-Smith (instructed by **Jeary & Lewis Solicitors**) for the **Respondent**

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Judgment

Lady Justice Macur DBE:

1. The father seeks to overturn the order of Her Honour Judge Cushing dated 17 May 2013 refusing his application for contact with his three sons, A, L and F now aged 7, 5 and 3 respectively. His application for permission to appeal was adjourned to the full court, with appeal to follow if granted. He was directed to file and serve any amended grounds of appeal, addendum skeleton argument and statement regarding "new" evidence he seeks to rely upon.
2. At the outset we granted permission to appeal on the ground that "The learned judge failed to assess properly what risks if any existed from supervised contact". Mr Verdan QC, who did not appear below, renewed his application in respect of the other grounds of appeal which relate to the judge's assessment of the parents. We heard argument in the course of hearing the substantive appeal. We refused permission on these grounds as will be apparent in the judgement below.
3. The mother was represented by Miss Ball QC, who did not appear below, and Miss Lane Smith. They lodged a supplemental bundle of materials responding to the new evidence introduced by the father and sought permission to rely on the same. We read it de bene esse but had no need

to consider it's admission into the appeal proceedings in view of our disregard of the father's materials, which he would argue undermines the judge's assessment of the mother, in view of our refusal of permission in respect of these grounds.

4. I would allow the appeal and remit the case to HHJ Cushing for re-hearing on the issue of availability of adequate resources, including accommodation and personnel to supervise contact strictly and securely between father and the three boys with a review thereafter. In these circumstances I would anticipate that the mother and father would seek to refer to the "new" evidence to inform the judge of the necessary arrangements to be made.
5. The facts of the case may be stated baldly. The mother 'escaped' the family home with the three boys on 5 December 2011. She took up accommodation in a women's refuge. She had been the victim of significant domestic violence over a prolonged period. The two elder boys had witnessed the father's physical and verbal aggression towards their mother and other adults, are seen on occasions to have demonstrated/ acted out his pernicious influence and had themselves been subject to over and inappropriate chastisement albeit not in any sense to the same degree as that inflicted upon their mother. The father has criminal convictions. They are distant in time but all but one relate to violent behaviour, including causing grievous bodily harm with intent. Dr Bester, consultant child and adolescent forensic psychiatrist, considered that the father exhibited mixed traits of three personality disorders; "of dissocial and obsessional and emotionally unstable personality." The mother voices fears of their abduction out of the jurisdiction and her own personal safety to the extent of "honour based" violence and death at the hands or instigation of the father.
6. The boys have not seen the father since December 2011. He issued application for contact in January 2012. For a variety of reasons, none of which can be laid at the door of either party, the substantive hearing did not commence until 16 April 2013. Both mother and father were represented in the hearing. The father in the meantime had attended a number of courses aimed at addressing his violent behaviour.
7. The judge was "left in no do doubt whatsoever of [the mother's] truthfulness, or of her real terror of [the father]... I find that [the mother] is terrified of her husband and believes that he has the power to do her great harm" (Judgment para 18). As to the father, she found that in oral evidence he was "minimising his behaviour, attributing blame to the victim of his violence, denying what she said she had suffered... there have been few if any lasting benefits of all the courses of therapy that [the father] has undertaken... He failed to satisfy me that he had learned anything from his engagement with the assessments and therapy save what he needed to say in order to attain his goal. He failed to persuade me that he had let go of his old beliefs and ways, failed to persuade me that he was not going to destabilise the family by continuing his violent, threatening, minimising behaviours, upsetting the children and harming them emotionally....he will continue to display these negative behaviours which will destabilise the children's home and security, which are provided by their mother."(Judgment para 50).
8. There are other passages to like effect. However, I consider the effect of the character judgment made by the judge is amply illustrated in the above for the purpose of this appeal.
9. Mr Verdan QC attempts to undermine the judge's entirely positive assessment of the mother and, particularly her findings as to the degree of her anxieties and the entirely negative impression of the father by reference to material that was available in evidence in the court below and with passing reference to the "new" evidence. He has referred us to parts of Dr

Bester's evidence concerning his opinion of, what may be termed, mother's inner resilience and father's contrition and the father's positive engagement with outside agencies. In doing so he attempts to challenge the primary facts found by the judge, not merely to advance his argument on permission to appeal, but also to highlight the deficiency he alleges in the judge's lack of consideration of the possibility of supervised contact.

10. It is exceptionally rare for an appellate court to contemplate reversing the evaluation of an issue which depends upon primary facts. There is copious jurisprudence on the point more recently reviewed by the Supreme Court in *re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] 1 WLR 1911, to warrant any further contribution otiose.
11. The judge's assessment of the parents characters, past behaviour and present attitudes are entirely dependent upon finding primary fact, interpreting and drawing reasonable inference from the same. I agree with Miss Ball QC, they are unassailable on appeal. The judge was obliged to reach her conclusions on the whole of the evidence and was not bound by the opinions of others, however eminent in their field. The judge states the basis of her departure from their views, namely that of her "good opportunity not only to hear the witnesses' evidence but to observe their demeanour and credibility".
12. Conscious that such comment is trite in first instance judgments it is pertinent to note in this one under review that the judge's description of the mother and father when giving evidence before her is analytical and detailed and obviously draws upon more than their performance in court. It is obviously a counsel of perfection but seems to me advisable that any judge appraising witnesses in the emotionally charged atmosphere of a contested family dispute should warn themselves to guard against an assessment solely by virtue of their behaviour in the witness box and to expressly indicate that they have done so.
13. Despite the judge's dire assessment of the father's character and vulnerability of the mother, which I accept as indicated, it nevertheless remains the case that there must be careful scrutiny of the outcome reached. The judge's order is draconian. The prospect of the children having any relationship with their father during their minority will diminish increasingly with the passage of time.
14. There is no issue between Counsel as to the relevant principles of law to be applied. The welfare of the child is paramount. A child's continuing relationship with a non-residential parent is highly desirable and contact should not be denied unless the child's welfare demands it. Domestic violence is not, in itself, a bar to direct contact, but must be assessed in the circumstances as a whole. See *Re L (Contact: Domestic Violence)* [2000] 2 FLR 334. It is opportune to reflect at this point that the appellate court is unlikely to be assisted by reference to cases which are not competent in establishing principle and merely reflect what are described as similar circumstance. All case outcomes, none more so in the family arena, are fact specific.
15. Additionally, significantly in this case, and non-controversially inter-partes, the court must address Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedom in respect of mother, father and each child; those 'Convention' rights undoubtedly engaged by the prospective court order. The child's rights take priority above those of his parents. See more recently *YC v United Kingdom* (2012) 55 EHRR 967 at para 134.
16. Mr Verdan QC argues that the judge's focus had been diverted from consideration of closely supervised contact as demonstrated by her reference throughout her judgment to the mischief

of direct contact. Miss Ball QC correctly observes that supervised contact must, logically, envisage direct as opposed to indirect contact and necessarily, the judge could not contemplate supervised contact without reference to direct contact.

17. This is a point well made, but I am left with a lingering disquiet that the judge was adversely influenced against directing supervised contact in favour of the father by reason of his "true intention...to press soon for unsupervised contact, notwithstanding what he had previously said. Despite all that happened during the course of the hearing, including [the mother's] emotional breakdown, it remained [the father's] case that his application should be listed for a hearing to consider introducing unsupervised contact". If this is misplaced on my part, objectively the perception is not so easily able to be dismissed.
18. Realistically, accepting the judge's primary findings, this father will not enjoy an unfettered relationship with his sons, if at all, for a considerable time to come. That said, it is unfortunate to regard a father's aspiration for a less restricted contact regime to be destructive of the implementation of a heavily circumscribed regime if the acknowledged benefits of contact for these children can be achieved whilst assuring the mother's safety and emotional stability.
19. I review the judge's conclusion as to the possibility of supervised contact bearing in mind the unmistakeable adjudications she made about the parents, sufficiently and ably explained so as to unequivocally resist challenge in this court. I acknowledge the necessity to identify the implicit reasoning contained in amongst the explicit judicial observations as stressed by Miss Ball QC. Having done so I conclude that the appeal should succeed on the ground that whilst the judge describes Dr Bester's evidence as "balanced and focused on the children's psychological well being" and that it would be "highly desirable" if contact "can be achieved without undermining other aspects of their welfare", she fails to adequately address why the children's safety and the management of mother's anxieties cannot be achieved under any circumstances of supervision.
20. The evidence of Dr Bester was unequivocal and implacably maintained during the hearing and under cross examination that this was possible. He advocated a review by the court after limited trial period.
21. Despite the efforts of Miss Ball QC I do not regard the identification and evaluation of the risks made by the judge at paragraph 53 and 54 of her judgment, or the judge's assessment of the so called 'welfare check list' provided by section 1(3) of the Children Act 1989, to implicitly address the possible deficiencies of a rigorously supervised professional contact setting nor to sufficiently explain her departure from expert opinion in this regard. They undoubtedly and explicitly do address the issue of unsupervised contact.
22. It is a matter of conjecture that the judge would have articulated her reasons in permitting or denying supervised contact if she had been provided with well researched and considered evidence of available facilities and resources, including transportation. She would have every reason to be, as I am, somewhat dismayed by the nebulous nature of the evidence before her regarding possible arrangements. They are decidedly inapt in the light of the judge's findings but may only be thinly mitigated by being formulated in advance of the hearing. I fully understand that she "was not assisted by the report or evidence of Mr Verity, CAFCASS officer".
23. Equally, whilst recognising the difficult circumstances of supporting a distraught/disappointed client in the face of an adverse ruling, it is a matter of regret that the

judge's attention was not directed to this issue by counsel following judgment being handed down in accordance with good practice identified in *Re T (Contact: Alienation: Permission to Appeal)* [2003] 1 FLR 531, at para [41]; *Re B (Appeal: Lack of Reasons)* [2003] 2 FLR 1035; *Re S (Omission from Judgment)* [2007] EWCA Civ 694.

24. However, there is no question but that an order that there should be no contact between a child and his non-residential parent is draconian. In this case, the order dated 17 May 2013 can only be lawful within the meaning of Art 8(2) of the Convention if the order for no direct contact is necessary in a democratic society for the protection of the right of the mother, and consequently the minor children in her care, to grow up free from harm. In order to reach that conclusion the court must consider and discard all reasonable and available avenues which may otherwise promote the boys rights to respect for family life, including, if in the interests of promoting their welfare during minority, contact with their discredited father.
25. In the circumstances and for the reasons given in paragraphs 19 – 22 above I am not satisfied that the order is demonstrated to be proportionate to the legitimate end which the judge pursued in ensuring the viability and stable placement of the children with their mother. This is not to consider the question of proportionality anew but merely to review it in accordance with the challenge made in this appeal process.
26. I would allow the appeal, set aside the order and remit the case for re-hearing before Her Honour Judge Cushing with a view to an informed investigation of any supervised contact resources appropriate to the particular circumstances of this case. I do not consider that there is any suitable and sufficient evidence available to this court which would enable or entitle it to make a value judgment on the same. The "new" evidence may, or may not be instructive in this regard, but is in dispute and not amenable to resolution here.

Lord Justice Underhill:

27. I agree with Macur LJ that the Judge's primary findings both about the father's failure to address the attitudes and behaviours which he displayed during the marriage and about the mother's genuine fear of him are, on the evidence before her, unimpeachable. But I also agree that those findings would not justify the drastic order which she made unless she was satisfied that any form of contact – however carefully controlled and supervised – would cause serious damage to the children, whether directly or indirectly through its impact on the mother. Although the judgment is in most respects both clear and thorough, I agree with Macur LJ that there is insufficient examination of whether the risks could be sufficiently guarded against by careful and professional arrangements for setting up the contact and for close supervision during it. That may well reflect the fact that the Judge did not receive proper assistance on this aspect from the CAFCASS officer, which may in turn be a criticism of the father's advisers; but in view of the consequences for the father if the present order stands I do not think that it would be right to let the matter rest. I therefore agree that the matter should be remitted to Judge Cushing in order to enable the father to have the opportunity to produce detailed and specific proposals, supported by evidence, for how supervised contact might be managed in a way which should reassure the mother; and for her to reconsider her decision in the light of any such proposals. Such reconsideration would not involve the revisiting of her primary findings, save only to the extent that she is persuaded that the new evidence which the father sought to introduce before us might affect her assessment of the degree of the mother's fears.

Lord Justice Longmore:

28. I agree with both judgments.

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