

**IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM Exeter Combined Court Centre
Recorder Chippindall**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/02/2016

Before :

**LORD JUSTICE VOS
LADY JUSTICE KING
and
LORD JUSTICE SIMON**

Re K (children)

Ms Tina Villarosa (instructed by Direct Access) for the **Appellant**
Ms Beth Heaton (instructed by Tozers Solicitors) for the **1st Respondent**
Christopher Naish (instructed by Stephens Scown LLP) for the **2nd Respondent**

Hearing date: Thursday 28th January 2016

Judgment

Lady Justice King :

1. This is an appeal by the MK (the father) against an order made by Mr Recorder Chippindall at the Exeter Family Court on 1 June 2015. By his order the recorder made a child arrangements order in respect the father's two children AK, a girl born 23 April 2009 (6 years 9 months) and IK, a boy born 26 September 2010 (5 years 4 months). The order of the recorder provided for the children to live with FP (the mother) and dismissed the father's application for direct contact with his children providing for there to be only indirect contact for an unspecified period of time in the future.
2. The issue before the court is whether the recorder had, prior to refusing the father's application, failed adequately to consider alternative means by which direct contact could be introduced to the children.

Background

3. The mother was born in Iran and the father in Iraq. The parties met in 2006. They married the following year and lived in Holland until 2010 when they moved to London.
4. The marriage came to an end on 23 October 2013 when the mother left the family home with the children. Two days later the mother and children moved into a refuge for victims of domestic violence and thereafter were re-housed in Devon where they continue to live. The father has not seen his children since that day, now over 2 years ago. An initial assessment was carried out by the local authority in October 2013, the mother having presented to social services alleging that she had been attacked by the father. The contemporaneous recording by the police is of the mother alleging that on 23 October (the day of the separation), the father "had grabbed her by her arm" and dragged her back into the house.
5. On 11 November 2013, a matter of days after the separation, the father made an application in the family court for contact with the children. On 24 March 2014, the District Judge directed pursuant to Rule 16.4 Family Proceedings Rules 2010, that a children's guardian be appointed and the children be joined as parties. This was clearly an indication of the seriousness with which the District Judge regarded the case. On 15 May 2014, the guardian filed the first of three reports.
6. In the first report, the guardian said that in her professional judgment, there was little evidence to support the allegations of domestic violence and that the only specific allegation was not one that would prevent direct contact from taking place. The guardian recorded that she had discussed with the mother the possibility of her (the guardian) supervising contact between the children and their father. This was not progressed as the guardian was concerned that the father would speak in Arabic to the children and she would be unable to control what was being said to the children. No explanation has ever been offered as to why the father was not simply told to speak in English during any contact visit.
7. This first report also said that the children were each saying that they did not wish to see their father. The guardian recommended a finding of fact hearing in relation to the allegations of domestic violence being made by the mother; that recommendation was accepted by the court; in the meantime on 23 May 2014, a holding order was made saying that there should be no direct contact.
8. On 16 December 2014, over a year after the father had made his application for contact, the recorder gave his judgment following the planned finding of fact hearing. The timetable for the case had unfortunately slipped, with hearings in September and November having been lost due to the mother's failure to comply with case management directions.
9. The recorder concluded that, because of language and cultural difficulties and because the father was unrepresented, it had been difficult for him to detect what the father was feeling and thinking simply from his demeanour. The mother in contrast, the recorder regarded as "obviously over-strung". He described her as having "wept through" much of the proceedings and having appeared frightened and anxious. In addition he said:

"It seems to me that there is this added difficulty that she has very much become "a victim" psychologically in any event."

10. The recorder conscientiously considered each of the allegations contained on the Scott schedule prepared on behalf of the mother; the allegations included a theme of aggressive and controlling behaviour on the part of the father, violence before the marriage as well as when the mother was pregnant and also of threats to kill. The recorder was largely unimpressed by the allegations of direct physical violence, for example in relation to an allegation of violence whilst they were on honeymoon, the recorder said:

"However there is in my judgment insufficient evidence before me to support an allegation of striking a blow. The evidence at E5 strongly points the other way, and I fear that mother has convinced herself of violence before the marriage and on the honeymoon when none existed."

11. Ultimately the recorder made a finding in relation to one incidence of violence, finding that the father had struck the mother on an occasion at least five years earlier. The recorder did not accept the mother's account of routine violence.

12. The recorder considered the circumstances of the last evening when the parents were together when the mother had told the father she intended to leave him. The recorder accepted that the children saw very aggressive behaviour from the father directed towards the mother but again held that there had not been physical violence.

13. In conclusion the recorder found that the father had over the course of the marriage:

"Exhibited some controlling behaviour over mother perhaps consistent with his view of how his wife and the mother of his children should behave in the home extending to what she wore, extending to making her somewhat fearful about her position and requirement to conform. I accept that there was the incident in Holland but that has not been repeated and there is no evidence of recent actual physical violence between father and mother particularly in relation the period immediately prior to the mother taking the children away. There clearly has been aggressive confrontational behaviour by father which has reached a high pitch and which, in my judgment, has probably psychologically browbeaten mother but no more."

14. The finding of fact hearing having taken place, the matter returned to the children's guardian for consideration as to how contact could be progressed. Accordingly the guardian filed a further report dated 28 January 2015. The guardian noted that the children had not seen any actual physical violence although they had seen their father's aggressive behaviour which would have been frightening to them. She further noted that AK remained consistent and vocal that she did not wish to have any direct contact with her father. IK was saying the same as his sister, but had been seen by the guardian looking 'positively' at a photograph album that his father had sent to him. The guardian believed that had AK wished to see her father, IK would also have wished to resume contact with him. The guardian was not of the view that the mother would refuse to comply with an order for contact, but reminded herself of the need to consider the emotional impact of a contact order, not only on the mother, but also as to how her reaction to such an order would in turn affect the children.

15. A consideration for the guardian was as to how the father had responded to the findings made by the recorder that he had behaved aggressively and in a confrontational manner to his wife and also of his understanding of the impact that his behaviour had had upon the children. The guardian was of the view that if the children were ever able fully to trust the father again, he needed to acknowledge that they had witnessed frightening behaviour and then for him to apologise to them for his behaviour.
16. The guardian concluded that a plan for contact needed to be taken in stages. She proposed that the indirect contact should continue with the children writing directly to the father. She suggested that the father wrote apologising for his past behaviour towards their mother then "at least they can then see that he is remorseful about what has happened in the past". The guardian recorded that the children were happy to receive presents from their father and that IK enjoyed looking at photographs of him. It seems therefore that at that stage there was some cause to be optimistic at the prospect of successfully re-introducing direct contact.
17. Overall then the guardian, having considered the findings of fact and having seen the children again, suggested a gradual progression of contact at the children's pace. She seemed to anticipate a reintroduction of direct contact suggesting that she should manage any arrangements and recommending that English should be spoken throughout. The guardian therefore recommended that she should work with the family to move towards direct contact. The guardian suggested a review three months later.
18. The position therefore at the end of January 2015 was that the recorder had made the findings of fact outlined above at the request of the guardian and the guardian was, notwithstanding the mother's continued anxieties and the children's reluctance, looking to work to the re-establishment of direct contact between the children and their father.
19. The father in due course sent, as part of the indirect contact, a photograph; it shows him and the children sitting on a sofa and laughing together; he had inserted a balloon containing the words "Hi AK and IK I love you and miss you so much, I am sorry for everything upsetting".
20. The guardian prepared a final report and recommendation on 15 May 2015 in preparation for the welfare hearing listed for hearing on 1 June 2015. The guardian recorded that the mother remained as anxious about direct contact as before and that she, the guardian, therefore had to consider how this would potentially destabilise the family. She further recorded that a CAMHS worker had now seen the whole family together on one occasion. The mother had told the guardian that the father had not been in regular contact with the children although he had sent a birthday present to AK. At the time of writing her report, the guardian had not had an opportunity of speaking to the father; the guardian was therefore unaware as to whether the father accepted that he had failed to be in touch with the children as was alleged by the mother, or whether as was his case, that he had sent emails to the children on a unspecified number of occasions to which he had received no reply.
21. The guardian now took the view that the proceedings needed to be concluded as she was increasingly concerned about the impact they were having on the children and the mother. She again recorded a strong resistance to contact; the guardian said that there had been no change in the parties' positions and she concluded, on the basis of what the

mother had said to her, that the father had showed a lack of commitment by failing to keep to the plan for indirect contact. She said:

"Sadly domestic violence is often a cyclical pattern of behaviour with perpetrators being likely to behave abusively in future relationships or towards others; and victims vulnerable to abusive relationships. As a consequence, careful assessment of the perpetrator's propensity to harm others again is necessary alongside assessment of the victim's vulnerability. At present we are without any form of risk assessment of the father and his ability to safely care for the children."

22. The guardian said that the father wished to 'sweep the recorder's findings aside and simply to move onto direct contact'. She said that his primary concern was 'when he was going to see the children' rather than 'how he could make amends towards them'. The guardian therefore concluded that it would be counterproductive for the children to be 'forced' into having direct contact with the father. Notwithstanding the very young ages of the children the guardian said that to do so would "confirm to them that they do not have a voice within these proceedings and that that is not the basis on which to reintroduce their father to them". The guardian again referred to the father being "currently an un-assessed risk in terms of direct contact" saying that "until he addresses this issue the risks are too high for direct contact to be initiated".
23. The guardian reached these damning conclusions having made no attempt to supervise a contact session and having at no stage recommended a risk assessment or any direct work with the father. The matter came on before the recorder with the recommendation from the guardian now being that there should be no direct contact or attempt to establish direct contact for these two children now aged 4 years and 6 years with their father.
24. The mother and the guardian were each represented by Counsel at the welfare hearing. The father was again unrepresented and had, it would appear, not been seen by the guardian since the preparation of her second report which had looked to moving toward direct contact.

The Judgment

25. The recorder in his judgment confirmed his earlier findings that the father had been aggressive and controlling towards the mother. The recorder set out at length the children's current views before turning to his assessment of the father's presentation as observed by him the witness box.
26. The recorder was clearly unimpressed with the attitude and demeanour of the father; a view to which he was entitled to come. The father in evidence had taken no responsibility for anything which could have given rise to the children's reluctance to seeing him; the father's view, the recorder found, was that the responsibility for the present situation was that of the mother for having taken the children away and for having denied them contact with their father. After he had given his evidence, the father subsequently said that he "meant to say" that there had been arguments during the course of the marriage and that, if he had caused distress to the children, he would like apologise to the children.

27. The recorder, understandably, found this to be a particularly unattractive approach on the father's part; firstly because the children had, beyond peradventure, been caused distress as a consequence of his behaviour and secondly, that the apology was to the children alone and not also to their mother. The recorder was of the view that the apology, such as it was, was not genuinely aimed at reparation of a situation for which he was at least in part, if not wholly, responsible. The recorder concluded that the father's attitude did not demonstrate any change of heart and that he was simply saying what he thought the court wished to hear. The recorder continued at paragraph 12:

"Father has not yet crossed the Rubicon of self awareness and acceptance that he did act badly. In my judgment he is still the same man whom I described in my judgment. He has not moved on. Accordingly I find that if direct contact took place now, wittingly or unwittingly, but I am inclined to the view that it is likely to be deliberate rather than unwitting, father will be a subversive influence on the children and mother's care of them. He will not be able to acknowledge his part and he will continue to blame her."

28. The recorder in considering specific matters in the welfare checklist, considered the risk of harm to the children of there being no direct contact but concluded that, at the moment, direct contact would pose a "very great risk of harm" although it might be the "right course in the future". The recorder further expressed his concern at the mother's "excessive anxiety" which he believed she needed to address. The recorder said:

"However I see how difficult it is when she hears father in the witness box saying that everything is down to her. Father is both controlling and aggressive; mother is anxious. That is a very poor combination for the future. Father needs to set aside pride and begin to communicate openly with the children on a new and secure basis, not a false one. If it is not in his heart it will not happen. Mother must begin to work with the children in relation to contact, must be positive in relation to indirect contact and help."

29. The recorder did not however move on to consider what could be done to facilitate each parent making the progress he judged to be necessary in order for direct contact to be re-introduced.

The Appeal

30. The father has today, for the first time, had the benefit of representation by Counsel, Ms Villarosa. Ms Villarosa's key submission is that no attempts whatsoever had been made to re-establish contact for these very young children in circumstances where the starting point of the Guardian had been that the nature of the findings against the father were not such as would have in themselves precluded direct contact. Ms Villarosa submits that an early opportunity to restore contact was lost shortly after the parents separated, and that 18 months later, it was little wonder that the children's views had hardened given the mother's excessive anxiety. Ms Villarosa points to various programmes which are available, including courses run by Cafcass and the Domestic Violence Perpetrators Programme (DVPP). The father, as a litigant in person could not, she submits, have been expected to have been aware of the existence of such courses and was therefore unable to make submissions to the recorder to the effect that there were a number of options not yet tried.

The Law

31. Ms Villarosa makes her submissions against the well established first principle in relation to contact, namely that contact is almost always in the interests of a child.
32. The President recently reiterated this fundamental premise in ***Q v Q* [2015] EWCA Civ 991**:

"19. The first are the principles which I sought to distil in ***Re C (A Child) (Suspension of Contact)* [2011] EWCA Civ 521**, [2011] 2 FLR 912, para 47, as follows:

- Contact between parent and child is a fundamental element of family life and is almost always in the interests of the child.
- Contact between parent and child is to be terminated only in exceptional circumstances, where there are cogent reasons for doing so and when there is no alternative. Contact is to be terminated only if it will be detrimental to the child's welfare.
- There is a positive obligation on the State, and therefore on the recorder, to take measures to maintain and to reconstitute the relationship between parent and child, in short, to maintain or restore contact. The recorder has a positive duty to attempt to promote contact. The recorder must grapple with all the available alternatives before abandoning hope of achieving some contact. He must be careful not to come to a premature decision, for contact is to be stopped only as a last resort and only once it has become clear that the child will not benefit from continuing the attempt.
- The court should take both a medium-term and long-term view and not accord excessive weight to what appear likely to be short-term or transient problems.
- The key question, which requires 'stricter scrutiny', is whether the recorder has taken all necessary steps to facilitate contact as can reasonably be demanded in the circumstances of the particular case.
- All that said, at the end of the day the welfare of the child is paramount; 'the child's interest must have precedence over any other consideration.'

33. In ***Q v Q*** The President set out all the attempts which had been made to establish contact in that case saying:

"5. The present impasse is not for want of enormous efforts by Judge Brasse, who down the years has invited appropriate assistance from a variety of professionals."

34. In ***Re M (children)* [2013] EWCA Civ 1147** Lady Justice Macur had considered contact against the backdrop of domestic violence saying:

"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..."

35. Ms Villarosa refers the court also to *Re M (a child)* 25 November 2015 another (separate) judgment of Lady Justice Macur. In that case following a finding of fact hearing, the recorder had made findings of physical and verbal violence including in front of the child in question. The father had refused to go on a DVPP despite the recorder seeking to persuade him during the course of the hearing that such a course was a potential way forward. The recorder made an order for indirect contact only.

36. In allowing the father's appeal Macur LJ said:

"This court has made clear on numerous occasions that an order refusing a child's contact to his or her non residential parent is extreme. The starting point should be that the welfare of the child requires ongoing and meaningful contact with both parents. This principle should only be displaced for compelling reasons on the clearest of evidence and only then when all reasonable avenues of promoting safe contact, both physically and emotionally for the child, have been considered and rejected.

In my view, there was no opportunity available or taken, in the hearing on 28 April, to investigate necessary and/or possible concurrent strategies to promote direct contact. The recorder was not bound to accept the Cafcass recommendation that unless and until the father had satisfactorily embarked and participated in a DVPP course there should be no consideration of direct contact. In fact, he demonstrated no desire to challenge the Cafcass officer as to the need for other intervention and, by what appear to be closed questions, supported a restricted view of the resolution to the problem."

Discussion

37. This case is yet one more example of the formidable difficulties faced by unrepresented parents. The father did not have solicitors or counsel to explain to or inform him of, the various different alternatives and programmes which have been developed for such cases as this. It would appear that the Guardian had not explored any of the various options with the father.

38. The limited nature of the findings made by the recorder did not appear to have been factored into the balancing exercise before a conclusion was reached that the reintroduction of contact was 'high risk'; rather both the Guardian and the recorder seem to have taken the view that failure on the father's part to make a genuine and heart felt 'apology' to both the mother and the children precluded him from seeing his children again. Counsel on behalf of the mother submits baldly that there was no question of the father being accepted onto the DVPP programme absent an acceptance of culpability on his part; that may be right, but there had been neither the risk assessment which the Guardian said was necessary nor any assessment of the father to see if there was the potential for increased insight on his part.

39. Ms Villarosa points to the Child Contact Intervention Programme which is funded by Cafcass which provides 12 sessions of which the first 2 – 4 are preparatory with a trained worker and the balance supervised contact between the children and the absent parent. This is a highly respected programme about which the father was wholly unaware and was not ever considered, if only to be rejected, by either the guardian or the court.

40. I do not know whether the father would have been accepted on to any of these programmes, I do not know whether he would have attended them if accepted. What I do know is that the father had no way of knowing about any of these options or possibilities unless someone had told him about them. Far from enormous efforts "having been made to reinstate, contact", as in *Q v Q*, no efforts at all were made, other than to expect the father to make a fulsome apology to his wife and children without the benefit of any work having been done with him to help him to understand the damage domestic violence (even short of physical violence) can and had caused to his family. I accept the submission of Ms Villarosa that an important opportunity was missed in early 2014 when the only reason a supervised contact visit did not take place was because the guardian was worried that the father may have spoken in Arabic to the children.
41. The courts have available to them in *Practice Direction 12J – Child Arrangements & Contact Order: Domestic Violence and Harm*, clear guidance as to how to approach cases where there has been, or there is, a risk of domestic violence. The Practice Direction provides a blueprint for dealing with allegations of domestic violence (which per Paragraph 2 includes "controlling behaviour" of the type exhibited by this father). The Practice Direction incorporates a number of checklists for the court's assistance at various stages including the consideration of the effect of the violence on the family itself and the parent's ability to appreciate those consequences. The emphasis throughout is on ensuring the safety and security of the children in question balanced against the assumption that the involvement of a parent in a child's life will further his or her welfare so long as the child or other parent is not put at risk (Paragraph 4).
42. In *Re W (Children: Domestic Violence)* [2012] EWCA Civ 1619 [2014] 1 FLR 260 Black LJ, at [13], confirmed that the Practice Direction represents good practice and should be followed in cases involving domestic violence. Counsel told the court that the recorder had been referred to the Practice Direction although he made no reference to it or its guidance in his judgment.
43. Of relevance also in the present case are Paragraphs 33 and 34 of the Practice Direction which provide:
- "33. Following any determination of the nature and extent of domestic violence or abuse, whether or not following a fact-finding hearing, the court should consider whether any party should seek advice, treatment or other intervention as a precondition to any child arrangements order being made or as a means of assisting the court in ascertaining the likely risk of harm to the child and to the parent with whom the child is living from that person, and may (with the consent of that party) give directions for such attendance and the filing of any consequent report.
34. Further or as an alternative to the advice, treatment or other intervention referred to in paragraph 33 above, the court may make an Activity Direction under section 11A and 11B Children Act 1989. Any intervention directed pursuant to this provision should be one commissioned and approved by Cafcass. It is acknowledged that acceptance on a DVPP is subject to a suitability assessment by the service provider, and that completion of a DVPP will take time in order to achieve the aim of risk-reduction for the long-term benefit of the child and the parent with whom the child is living."
44. This approach dovetails precisely with the President's observation in *Q v Q* that:

"The recorder has a positive duty to attempt to promote contact. The recorder must grapple with all the available alternatives before abandoning hope of achieving some contact. He must be careful not to come to a premature decision, for contact is to be stopped only as a last resort and only once it has become clear that the child will not benefit from continuing the attempt."

45. Had the recorder been directed to the relevant parts of the Practice Direction and been informed of the available options by way of direct work with the father and for the children, he may not have fallen into the trap of reaching what was in my judgment a 'premature decision' that there could be no direct contact between these very young children and their father.
46. In my judgment the recorder fell into error by having, as the President put it in *Q v Q*, "failed to grapple with all the available alternatives before abandoning hope of achieving contact". I would accordingly allow the father's appeal and remit the matter in the first instance to the Designated Family Judge at Exeter for directions, case management and future allocation of the matter.

Lord Justice Simon:

47. I agree.

Lord Justice Vos:

48. I agree, and would only add a few words on one aspect of this case that I found somewhat disturbing. As Lady Justice King has recorded, the recorder seems to have taken the view that the father's failure to make a genuine and heartfelt apology to the mother precluded him from seeing his children. I cannot accept such a starting point. It may well be that a repentant father would offer a reduced risk of harm to the children, but it is that risk and the welfare of the children generally that are important in contact cases, not any moral judgment of either parent. As has been often pointed out, parents are of all kinds and demonstrate all levels of moral virtue. It is not the court's job to judge a wrongdoing parent for the sake of doing so, because it will, in all but the most exceptional circumstances, be in the children's best interests to see their parents. If the failure to apologise posed a risk to the children, that might have been a different matter, but that does not seem to have been the case here. The recorder was wrong to impose a pre-condition of repentance and apology. Those matters were relevant, but only insofar as they had a bearing on the welfare of the children.