D R A F T

This judgment was delivered in public but is subject to reporting restrictions. The judge has given leave for this version of the judgment to be published but, notwithstanding anything said in the judgment, the anonymity of the child and members of his family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court and can be punished by a fine or a sentence of imprisonment of up to two years. The judgment is published for transparency purposes not because it raises any important or novel point of law.

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION
[2018] EWHC 3252 (fam)

Royal Courts of Justice

Thursday, 18 October 2018

Before:

MR JUSTICE MOOR

(**In Private**)

B E T W E E N :

RR

Appellant

- and -

MM

Respondent

MS PHILLIMORE appeared pro bono on behalf of the Appellant (instructed by Advocate).

THE RESPONDENT did not appear and was not represented.

J U D G M E N T

MR JUSTICE MOOR:

1 This is an application for permission to appeal from an order made by HHJ Newton sitting in the Family Court in Manchester in February 2018. I have already made a reporting restriction order to ensure that there is no identification of either the child in this case or the child's parents or other carers as a result of this judgment. This case has an extraordinarily long history. The appellant is RR, the father. The respondent is MM, the mother. They met in 2004 and commenced a relationship in 2005. They separated whilst the mother was pregnant in early 2007. There were allegations by the mother of domestic abuse.

2 The child, with whom I am concerned, is TT, born in 2007 and therefore 11 years of age. In May 2008, there was an order for interim contact at a Contact Centre for two hours weekly. In March 2010, DJ Fairclough heard a fact-finding hearing. I do not consider it necessary to repeat all the findings that he made, but it is correct to say that he did find domestic abuse by the father against the mother and, to a certain extent, against her two elder children by a previous relationship. In July 2010, HHJ Newton dismissed his appeal from that fact-finding outcome, save she set aside one finding in relation to a pillow. An appeal to the Court of Appeal was refused.

3 It is clear that at that point expert evidence was obtained. A report was obtained from Dr CR. He said that the mother had an entrenched opposition to contact. Both parents had a capacity for insensitivity. It is clear that, in addition to Dr CR, a number of agencies were involved over and above Cafcass. These agencies included NYAS. The last period of supervised contact was in September 2011. It is clear that the contact itself did not present any significant difficulties. The problems surrounded TT’s reaction to the contact both before and afterwards.

4 The matter was then heard again by DJ Fairclough. He granted the father parental responsibility, but he brought the existing supervised contact to an end. He said there should be a two-year gap to relieve the pressure on TT and to enable the mother to reduce her anxiety. He found that there were aspects of the contact that were good, but aspects of concern were expressed. TT was refusing to go into the contact room and TT found aspects of the contact distressing due to the mother's anxiety. Therapy, the judge said, might assist, but the mother's willingness to engage was questionable.

5 The matter came before HHJ Newton in February 2012. She dismissed the father's appeal from the order of DJ Fairclough. The matter went to the Court of Appeal in July 2012 when the single judge, McFarlane LJ, heard the father's renewed application for permission to appeal. He noted that it was a second appeal and he took the view that he could not grant permission to appeal. He did say that he was of the view that the mother should undergo therapy and the ball was in the mother's court.

6 The father applied again in March 2013 for direct contact. The mother opposed the application on the basis that insufficient time had elapsed. HHJ Newton agreed and adjourned the application on the basis that it was premature. Thereafter, a Cafcass report was ordered. TT told the Cafcass officer that he does not have a dad. He acted out being angry to the officer, but the officer considered that he was not in fact angry. The father had shifted from blame and being offensive to a more appropriate position, but the mother was not inclined to engage.

7 In July 2014, HHJ Newton heard the application substantively. She dismissed the application but said that Cafcass should monitor indirect contact. Her judgment says that TT did not wish to see his father. She found that direct contact would cause him emotional harm, although time was running out for a meaningful relationship. There was no evidence the father would not be child focused, but the judge herself was not so sure. The mother was still anxious and distressed. TT was not immune from the mother's anxieties. It was not in his interests for there to be direct contact.

8 The father appealed to the Court of Appeal. He was given permission to appeal by McFarlane LJ. The substantive hearing came on before Ryder, Richards and King LJJ in March 2015. The judgment says that the Court of Appeal had reservations as to the strategy of allowing the case time to heal. There had been insufficient emphasis placed on the cause of the child's anxieties. The mother was not exercising parental responsibility properly, but the application had been premature. It could not be said that the judge was wrong as to the likelihood of harm to TT or wrong in her welfare analysis. The judgment did say that, in the absence of a better attitude to contact, a change of residence might yet have to be considered. It also said that, if the strategy of giving more time failed, there would need to be expert evidence, but the appeal was dismissed.

9 In August 2015, the father applied for a psychological assessment of the mother. It may well be that, in part, his eagerness to engage the court has been a problem for him.

10 HHJ Newton heard the application in May 2016. She found that TT cannot contemplate anybody even discussing his father with him. The father's application for further steps to be taken was refused, including his application for an expert psychologist. The judge had come to the conclusion that the court could not do any more. The mother was clear that she was not willing to take part in any further assessment of herself, and the judge was clear that it was not necessary, nor even helpful, for such a report to be ordered. She did make a finding that this was not a case of implacable hostility.

11 McFarlane LJ refused the application for permission to appeal on paper but allowed it at an oral hearing in which the father appeared in person in November 2016. He was clearly concerned about the fact that the expert report had not been ordered and thought it was arguable that it was a wrong decision. The matter came before the Court of Appeal (Black, Floyd and Flaux LJJ) on 30 March 2017 for the full hearing at which the mother was, of course, represented. The appeal was dismissed. The judgment says that the Cafcass officer could not see how it was feasible to reintroduce direct contact; that continuing the proceedings was not in TT's interest; that the judge was entitled to place reliance on that. She had evaluated the situation for herself. Indeed, at paragraph 52, Black LJ, who gives the main judgment of the court, says the following:

> "*The judge was entitled to place reliance upon the Cafcass officer's advice, which was the result of the application of his considerable professional expertise to his own investigations. Moreover, I get no sense from the judgment that Judge Newton followed him blindly. The judgment shows her evaluating the situation for herself. As is always the case, there were a number of influences upon her decision. These included the impact of the proceedings on TT's life, directly and through his mother. The judge referred to the fact that he had been the object of proceedings since he was a matter of months old and said that she had lost count of the number of professionals this child had been interviewed by and could not begin to calculate the number of court hearings. Of considerable importance also were TT's wishes and feelings, which were undoubtedly an obstacle to contact. The judge noted particularly their*

consistency over many years tracing their course in her judgment. There was also the view of the Cafcass officer that, whichever way it was approached, a move towards direct contact would cause TT emotional harm and the judge's own view that the more limited option of telephone calls between TT and his father would not work, given his present state of mind."

I take the view that that is the magnetic judgment in this case. The Court of Appeal rejected the father's application for further expert analysis and report and brought that particular line of enquiry to an end.

12 Ms Phillimore, in her extremely careful submissions to me, says at one point that the Court of Appeal was wrong to find HHJ Newton's judgment unassailable, and she sets out her reasons. I, of course, cannot go behind the Court of Appeal's judgment. At that point, appeals from Circuit Judges went to the Court of Appeal whereas I am the tier below, namely a High Court Judge. That has now changed and appeals from Circuit Judges are now heard by the High Court, but the Court of Appeal judgment is undoubtedly of crucial importance, even more so given the fact that the father attempted to appeal to the Supreme Court and the Supreme Court refused his application for a further appeal in December 2017. I have read the Court of Appeal's reasoning. The full Court of Appeal clearly disagreed with McFarlane LJ and the Court of Appeal came to the conclusion that further intervention in this case was futile.

13 The father, of course, does not, and cannot, accept that. He therefore applied back almost instantly to HHJ Newton in August 2017, before his appeal to the Supreme Court had even been determined. He sent a private and confidential letter to the court requesting that the application was not allocated to HHJ Newton. He says, in the letter, that the judge was incapable of finding a solution, that an appeal from her order was inevitable, that it was her mess and therefore she should not deal with the case. The gatekeeping judges, in my view, inevitably allocated the case to HHJ Newton. The judge read the letter. There is complaint about that which I will deal with in due course. She referred the matter to the Family Division Liaison Judge, Hayden J, as was thoroughly appropriate, and he decided to take no further action. The matter therefore proceeded before HHJ Newton.

14 In October 2017, the father indicated he intended to make an application for the judge to recuse herself on the grounds of bias. He also contended that she should not have read his

correspondence that was marked “Private and Confidential”. There are various allegations as to whether or not he refused to enter into discussions with the Cafcass officer at court. I do not need to consider those. The mother indicated that she wished to make a section 91(14) application to prevent applications to the court by the father without leave, to last for the rest of TT’s minority, and, as I understand it, Cafcass agreed that that was what should happen. The mother made that application in October 2017.

15 The matter came before Judge Newton in November 2017. The father had not filed his response to the mother's application, so he was directed to do so by a date in December 2017 and the Judge directed that both applications should be heard in early January 2018. The father did not, in fact, comply with the time limit. I am clear that I should deal with this case on the basis of the merits and not the father’s failure to comply with that order, which I put out of my mind. It did, however, mean that the judge adjourned the case again to a date in February 2018. On that occasion she heard the application in full. She refused the application that she should recuse herself. She refused the father's application for contact. She made a section 91(14) order not for the whole of TT’s minority but for three years. She said that the previous orders for indirect contact remain in force and the case was continued to be reserved to her, or her successor as Designated Family Judge for Manchester.

16 I have read her judgment with care. She states that Cafcass had expressed concern as to the difficulties in implementing the existing indirect contact order. Cafcass said that, in view of the numerous applications and assessments, the court should consider dismissing the application and making the section 91(14) order for the rest of TT’s minority. She refers to the fact that the father has alleged that she was corrupt, incompetent and biased. She said the mother was manifestly distressed and she had excused the mother’s attendance at that final hearing.

17 In relation to the recusal, she accepted that the tribunal must be impartial from an objective point of view. In other words, it is not just a question of whether the tribunal is biased. It is whether or not there is an appearance of bias to the notional fair-minded and informed observer. She reminded herself that section 91(14) was a *draconian* order only to be made as a last resort. She refused reallocation. She said that the application for residence was not pursued and, indeed, it was wholly contrary to TT’s welfare for him to be uprooted from all that was familiar to him.

18 She had had the benefit of a Cafcass officer's report from Ms W dated February 2017, in which the officer dealt with the difficulties in implementing the family assistance order. When she went to see TT, he looked anxious, worried and upset. He made it clear he did not want to see the birthday card that had been sent to him by the father. Ms W was very concerned as to the impact of the litigation and her involvement on TT. She said, "he feels he's not being listened to". Cafcass was clear that nothing else could be done and any further assessment was futile.

19 The learned judge accepted that it was damaging to TT to have no relationship with his father, but there was no evidence that he was coming to any other harm in the mother's care. She said that the evidence suggests he continues to thrive, so she could not make a section 37 direction to the local authority. She came to the conclusion that all realistic avenues had been explored. There had been no change of circumstances since the last hearing. This was the fourth unsuccessful application for direct contact. There had been 10 years of litigation. It was a considerable source of stress and anxiety for the mother and TT. The father's current application, unlike previous applications, was unreasonable. It was made only four months after the Court of Appeal dismissed the appeal. She now had a sense that the father was playing games. The case was quite exceptional, but a three-year section 91(14) order was reasonable and proportionate.

20 The father's Notice of Appeal is dated April 2018. He argues that the judge should have recused herself. He says there was the appearance of bias. His says his right to privacy was not respected. He says that the judge had come to her conclusions in advance of the hearing. He argues the 91(14) order was disproportionate. He says that the application for recusal should have been heard by another judge. In May 2018, his notice asks for an order that the High Court refer the mother's "proven criminal offences of perjury" to the police and also her alleged offence of perverting the course of justice. He says she has admitted lying on oath.

21 Knowles J made various direction orders and, in particular, adjourned the matter to be heard as an oral hearing before Cohen J in October 2018. That was subsequently adjourned to today.

22 Ms Phillimore has attended before me instructed by Advocate, previously the Bar Pro Bono Unit. The father has been unable to come, due to caring commitments that require him to be with his very elderly mother. I make absolutely no criticism of him for not attending. It is abundantly clear that he has been completely dedicated to this litigation. Some, of course, would say he has been too dedicated, but I make it clear that his failure to attend before me has made absolutely no difference whatsoever to the decision to which I have come. I am also extremely grateful to Ms Phillimore for taking on this case on a *pro bono* basis, given the serious complexities involved in the matter.

23 I, of course, have to apply the rules as to whether or not to give permission to appeal in this case. Pursuant to rule 30.3 of the Family Procedure Rules 2010 I may only give permission where (a) I consider that the appeal would have a real prospect of success or (b) there is some other compelling reason why the appeal should be heard. In the case of *AB v RM* [2012] EWHC 1173 I held that no judicial gloss should be placed on the words of the rules other than to say that "real" meant that the prospect of success must be realistic rather than fanciful. Two other High Court Judges, both of whom are now in the Court of Appeal, have followed my *dicta* in that regard in subsequent cases.

24 Of course, if permission is granted the hearing proceeds on the basis that the court will only allow an appeal if the decision of the lower court was wrong or was unjust because of a serious procedural or other irregularity in the proceedings in the lower court. Of course, in this case the father relies on both grounds. His application in relation to procedural or other irregularity would be the refusal of the judge to recuse herself. I can only say that the decision is wrong if the decision was wrong in law or it was outside the band of reasonable decisions that a court could come to. That, is, of course, a stiff test.

25 I will deal with the various grounds that are raised in the notice of appeal and the grounds of appeal in turn. The first is the possibility of bias. I am quite clear that this ground cannot be sustained. There is no evidence whatsoever that this judge was either biased or that there was the appearance of bias in this case. The judge has heard the matter for many years. There have been numerous appeals against her decisions. Although permission to appeal has been given twice, no substantive appeal has been successful. The fact that a judge determines a case against a litigant does not make her biased. When the first application is dismissed or refused but the applicant continues to make applications with great regularity, it is, of course,

inevitable that the subsequent applications are more likely to be refused than would otherwise be the case. But again, the question is not whether they were regularly refused, it is whether or not the judge was right to refuse them on each individual occasion. I am quite clear that, in this case, the judge has always dealt with the applications on their merits and attempts to appeal her have been unsuccessful. That does not make her biased. I am quite sure that any reasonable observer would undoubtedly conclude that this was the case in this particular instance. There is no reasonable prospect of success on this ground.

26 It was also said, at one point, that she should have asked another judge to hear the application for recusal. That is not the way in which we proceed in these cases. The application to recuse is made to the judge concerned. If that is unsuccessful, then, of course, there is the right to bring an appeal, as indeed this father is attempting to do. It would be a complete nonsense for it to go to a different judge. The father might believe to himself that no judge ever allows a recusal application but that is completely incorrect. Judges regularly do so if there is some legitimate or good reason why they should not hear the case, but the mere fact that numerous applications have been refused is most certainly not a good reason.

27 The second ground for appeal is that the father's respect for his right to privacy was invaded. This is completely hopeless. It is not for a civil servant to decide who is to hear a case. It is a judicial function. It is absolutely not appropriate for any litigant to write to a court on a private and confidential basis. The gatekeeping judges were bound to allocate this application back to Judge Newton given her long involvement with the case, and she was bound to consider the letter. There cannot be secrets with the court and I ask myself rhetorically, "How would this father react if the mother was sending letters to the court on a private and confidential basis, not to be disclosed to him or to the judge hearing his application?" The answer is absolutely obvious.

28 In any event, I have read the letter and I cannot see how it can possibly be said that reading it invades his privacy. He has made it abundantly clear that he has no confidence in Judge Newton and wants her removed from the case. The letter goes no further than what he has regularly said publicly. Indeed, he has said stronger things to her openly than he has set out in the letter. That ground of appeal, therefore, has no possible reasonable prospect of success.

29 It is then said that the judge had predetermined the matter and therefore it was an unfair hearing. Again, there is no indication whatsoever that she did not deal with this case on the basis of the law and the facts and made a judgment in accordance with the Children Act. It is a very careful judgment. It gives no indication whatsoever that she has predetermined the matter, although, of course, it goes without saying that the past history of the case is relevant. That must include the fact that, in 2016, she said that the court could do no more and the Court of Appeal refused the appeal from that decision. Indeed, in one particular respect she has gone against Cafcass and the mother by saying that the section 91(14) should be for three years and not for the entirety of TT's minority.

30 The next ground is nepotism. I simply do not understand this argument at all. There is no nepotism in this case. The ground is hopeless.

31 Section 91(14) is the next ground. Again it is clear to me that the learned judge set out the law and applied it entirely properly. It was open to her to say, as she did, that this was an exceptional case, that it was an order of last resort, but in this particular case it had to be made. In my view, she was absolutely right that this point had been reached, but even if I had any doubt about it, it was certainly within the range of possible orders that she could make.

32 Finally, one turns to the point in relation to the judge not being prepared to make any further orders for experts or pursuant to any other provision in the Children Act. This, of course, is the aspect on which Ms Phillimore has concentrated in her very able submissions to me. Again, however, I am quite clear that the submissions cannot possibly satisfy me that there is a real prospect of success in this appeal.

33 The Court of Appeal decided last year that there was to be no further, or no expert, evidence. I cannot possibly go behind that. The learned judge considered the matter again and, for reasons that she explains carefully, took the view that it was not appropriate or proper to direct either a further section 7 report or any expert evidence. In the highly unusual circumstances of this case, and given the observations of the Cafcass officer that further investigation by Cafcass would be positively harmful to TT, it cannot possibly be said that she was wrong in deciding not to order a further section 7 report and, so far as the expert is concerned, I think that she was very close to being bound by the Court of Appeal not to make

any such further order, but insofar as it was right for her to consider the matter again so shortly after the Court of Appeal's decision, I cannot fault her for not making any orders and bringing this matter to a final close.

34 The final point raised is Article 6. There was nothing unfair about this trial whatsoever. So far as Article 8 is concerned, I take the view that all the points made by Ms Phillimore were considered by the Court of Appeal in 2017 and rejected. I am therefore absolutely clear that, although it is sad that there is no relationship between this father and TT, the orders that he seeks to appeal cannot be susceptible to any hope of successful challenge. I am therefore absolutely clear that the application for permission to appeal must be refused in all respects, such that the order of Judge Newton stands and there is to be no further application without leave for three years.

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