IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION
[2021] EWHC 3524 (Fam)

No. FA-2020-000147

Royal Courts of Justice
Strand
London, WC2A 2LL

Thursday 28 October 2021

Before:

THE HONOURABLE SIR JONATHAN COHEN

(**In Private**)

B E T W E E N :

JB — Appellant

- and -

DJ — Respondent

MS S. EDWARDS (instructed by MSB Solicitors Limited) appeared on behalf of the Appellant.

THE RESPONDENT appeared in Person.

J U D G M E N T

(Via remote hearing)

SIR JONATHAN COHEN:

1 This is an appeal from an order of HHJ Malcolm Sharpe, dated 3 August 2020, when he transferred the residence of the parties' daughter S, then aged 8 and now 9¼, from her mother to her father. Judd J granted permission to appeal on 26 October 2020 and I am hearing this appeal one year later. It is a matter of great regret that everything that procedurally could have gone wrong in this case has gone wrong and I shall return to that at various stages in the course of this judgment.

2 The case has a long history. The parents separated when S was aged just 13 months. Within a year, contact between S and her father had ceased. Contact was ordered following a fact-finding hearing but it appears that little contact took place before 2019, in part because of the mother's reluctance and in part because of the very extended court proceedings, including a delay caused by judicial illness.

3 In broad terms, the father's case is that the mother was obstructive of contact and held such negative views about him that S inevitably picked them up when there was no justification for him not to have normal paternal contact. The mother's case was that S was extremely attached to her and that S suffered from separation anxiety, and despite the mother's best endeavours, S simply would not go with her father.

4 In February 2019, the father issued an application for a residence order and that dispute came before HHJ Sharpe at a hearing in June 2019. At that hearing, the judge had the benefit of S being represented by Cafcass, having been joined as a party, and the evidence of a clinical psychologist. The judge determined that there were three practical or possible alternatives for him to consider: first, that S live with her mother; secondly, that S live with her father; and thirdly, that she live with her mother but subject to a provision that there would be a change in residence in the event that contact did not happen.

5 The judge found that:

(i) The child's anxieties of contact had no basis in any factual event to which she had been exposed;

(ii) The mother was reluctant to move matters forward and had long-held that stance;

(iii) Left to herself, the mother would not make effective changes to transform the paternal relationship into an effective reality; and

(iv) A change of arrangements would cause real and significant distress to S who had never been looked after by anyone else and that the mother was, in all other respects, doing an excellent job of caring for S and bringing her up.

6 During the course of the hearing, a broad measure of agreement was reached, namely that S should remain living with her mother subject to a child arrangements order to her father for contact with a provision for a change of residence in the event that contact did not happen. The judge made it clear that the point had been reached that either the mother embraced the reality of making contact to the father work, or the child's residence would be transferred to the father.

7 The order that the judge made in June 2019 provided for an accelerated programme of contact over 24 weeks. There was to be visiting contact of increasing duration until late October when one night per fortnight staying contact was to be introduced to run alongside one period of visiting contact per week after school for a few hours on a Tuesday. From

December, the one night staying contact was to be increased to two consecutive nights per fortnight.

8 Paragraph 2 of the order reads as follows:

> "If the child is not made available as per the schedule, the child shall move to live with the father."

THE 2020 PROCEEDINGS

9 On 13 January 2020, the father issued an application to enforce the order and requiring the change of residence due to the mother's alleged lack of compliance. In particular, the father alleged that the mother had been guilty of:

> "...specific and serious failings in relation to the implementation of overnight contact."

It was following the Christmas/New Year period when contact did not occur that the father issued his application.

THE JUDGE'S FINDINGS FOR THE PERIOD JUNE 2019/JANUARY 2020

10 (i) The judge found that until October, the parties followed the prescribed arrangements although they had differing views about the enjoyment or upset that S derived from contact;

(ii) In September 2019, the venue of contact collections was moved to the school premises. Initially, collections were very difficult albeit that as contact got underway, the difficulties subsided;

(iii) The position changed from early November and the advent of overnight contact. The first occasion was to be on 1 November 2020 but S, over a prolonged period, would not get into the father's car and so the contact did not happen. However, up to and including the mid-December contact, staying contact did take place as did throughout the weekly Tuesday after school contact. The collections for the overnight visits were particularly fraught. Throughout, the picture presented by the parties was as follows: The father said that after the initial upset at collections, S enjoyed her contact. The mother says that the collections were traumatic for S and the visits were not happy occasions;

(iv) Five contacts were due to take place over Christmas/New Year, namely 24 December (visiting); 27 December (staying); 31 December (visiting); 3 January (visiting); and 10 January (staying). The mother says that S was ill with a virus over the Christmas period and that on 3 and 10 January, S simply refused to go and on the last occasion, namely 10 January, the father described what must have been a very distressing scene when he attempted to pick S up from school and S was kicking and screaming, and clinging to the wall. It was after that that the father issued his application.

11 To their credit, the parties agreed that although the overnight contact would be suspended, the father would continue to see S every Tuesday and every alternate Friday but without the overnight contact. That happened until the coronavirus restrictions came in and the health of the mother's father, with whom the mother and S lived, was vulnerable which created its own issues and a cessation of the visiting contact. Rightly, no point was taken by the judge as to what happened in relation to contact since 10 January 2020.

12 Both parties agreed that the vast bulk of the visiting contact occasions had taken place as ordered, and the father calculated that there was 86 per cent compliance for day visits but the overnight contacts had not been successful or occurred on more than 30 per cent of the planned occasions, the latter statistic being of relatively little use in itself as the number would have been small in any event.

13 Notwithstanding the involvement of Cafcass in 2019, there was no such involvement in the 2020 proceedings. Cafcass should have been, but was not, sent a copy of the father's enforcement application in accordance with Family Procedure Rules 2010 Practice Direction 12C (3.1).

14 The judge decided not to make the child a party and gave four reasons set out at para.16 of his judgment:

> "(a) An enforcement application does not require the child to be made a party to the proceedings.
>
> (b) Whilst notice should be provided to a Cafcass officer previously charged with the monitoring of arrangements ... there was no on-going monitoring in this case as I had concluded those earlier proceedings without requiring such steps to be taken.
>
> (c) Although the child had been a party to the proceedings which resulted in the June order what was being sought now was not a variation of that order in the sense of inviting the court to change the order so as to include a new option which had not been fully considered previously. A variation application would have required the child to have been made a party as she had been a party to the proceedings which resulted in the order in respect of the variations now sought. **In these proceedings the sole question now was one of enforcement** [emphasis added].
>
> (d) On an enforcement application the issue is entirely factual. The issue is whether there has been compliance and, if not, whether there was a reasonable excuse for any non-compliance so found. **Subject to my factual findings the outcome was clear. In my view those issues were not such as required input from the guardian** [emphasis added]."

15 I have considerable doubts about the contents of para.12(c) and (d) of the judgment. Although described as an application for enforcement, it was an application for change of residence. Cafcass would, in my view, have much to offer as I shall explain.

16 The judge decided to approach the issues before him in two parts. The first part, which took up the bulk of the judgment, involved his application of the two-part test set out at s.11J of the Children Act 1989, namely:

(a) Section 11J(2) requires that any non-compliance of the provision of a child arrangements order must be proved beyond reasonable doubt, the burden laying with the party asserting the breach; and

(b) If the court is satisfied that such a breach is established then an enforcement order does not automatically following because, at that stage, the party found to have not complied with the order may establish, on the balance of probabilities, that she/he had a reasonable excuse for such non-compliance which has been found to have occurred (ss.11J(3) - (4)).

I take this summary from para.24 of the judgment.

17 The Judge answered the questions as follows. As to the first, he was satisfied that the non-compliance with proved beyond reasonable doubt and as to the second, there was no reasonable excuse for non-compliance.

NON-COMPLIANCE

18 The Judge said that he regarded the use of statistics as "bordering upon the facile" and that "compliance is not assessed according to whether a visit took place as intended or even at all":

> "63. The purpose of the order and its schedule was not simply to increase the time which the child spent with her father but through that time so spent to enable a real relationship to develop between them, one which enabled them to start to fashion an attachment personal to them and based upon shared experiences and a growing understanding of who each of them is as an individual as well as in relation to the other. Put simply, for father and daughter to get to know one another, to learn about each other, for S to start to like her father, to see him as someone who belonged in her life and with whom she wanted to spend time.
>
> ...
>
> 65. The aim of the order therefore was to move S away from the position that she was observed to be in by Dr Craig, of effectively being a child alienated from her father and who harboured negative feelings about him which had no basis either in her own experience of him or which could be assumed to be likely to occur based upon any assessment of risk of the father by reason of any previous actions on his part directed towards her mother.
>
> 66. Measured by this metric the arrangements have wholly failed to meet their primary aim. By 10 January 2020 S was expressing a negative and oppositional attitude to her father which precluded even being willing to travel in his car and spend any time with him. That stance was not adopted out of the blue but was simply a serious increase upon a general trend of reluctance which had never gone away and which, according to her mother, was only fuelled by almost everything the father did.
>
> 67. In my judgment therefore what took place between June 2019 and January 2020 did not amount to compliance with the order.

> It was in fact a near total failure of the aims of the plan for contact."

19 The judge concluded that the mother bore "by far the lion's share of the responsibility". He condemned her as being "dead set against contact between S and her father" and exhibiting overt antipathy towards him.

20 At para.76, the judge said:

> "In my judgment months of meetings and visits failed because they were taking place within an atmosphere which was designed to ensure contact failed. Despite her frequent references to wanting S to be happy and therefore to be comfortable spending time with her father I formed the clear view that this was merely lip service. It was never supported by any positive steps and the mother positively sought out comments and information which reinforced the negative view she was looking for. It explains not only the contents of her compilations of comments made, she says, by S and also the father and his wife but the very fact that she accumulated them in the first place."

21 At para.78, the judge said:

> "The reality is that this mother does not accept there is any value or benefit to S in having a relationship with her father..."

He concluded that there was no reasonable excuse for non-compliance.

22 Through her counsel, the mother makes a series of complaints about the judge's analysis:

(1) The judge was wrong to treat the application before him as an enforcement application when it was, in reality, a variation of living arrangements application. I do not accept that criticism in quite the way that it was put. It seems to me that it was incumbent upon the judge to form a conclusion as to whether the mother was in breach of the order when the matter was in dispute. However, that should have been, in my judgment, the background, significant though it was, to what should have been a welfare rather than an enforcement decision;

(2) The judge nowhere set out what breaches or non-compliance he found proved. I do not accept that criticism. I think he did so with sufficient clarity for the mother to know what the judge found even if the conclusions were generalised, as I consider was permissible in this case;

(3) The judge adopted the approach in assessing non-compliance of looking at the spirit in which the mother approached the order rather than her strict compliance. In my judgment, this criticism is properly made. On an application to enforce an order, the court should not have been deflected from looking at whether or not there was an actual breach of the order. Either there was or there was not. An allegation of a breach of an order should be strictly construed because the party against whom the complaint is made must have clarity of what is being alleged. The fact, as the judge found it to be at para.67 of his judgment, that there was a "near total failure of the aims of the plan for contact" does not in itself constitute a breach. That the mother may have lacked enthusiasm for contact, or may have held a low opinion of the father, or the role that he should play in S's life is not a breach. I fully accept that the mother paying lip service (as the judge found) to the spirit of the order is relevant to the issue

of welfare and the change of primary residence but it does not in itself prove non-compliance.

23 The application was treated by the Judge as an enforcement application and having found the breach and the lack of reasonable excuse, he went on to deal with consequences. At para.81, he set out general principles all of which are appropriate and non-contentious, and then at paras.82 - 86, he set out his conclusions:

> "82. In my view it is now appropriate to change the arrangements for this child so that she will move to live with her father and spend time with her mother.
>
> 83. My reasons for so concluding are these.
>
> 84. I wish to be clear that the fact that the order made in June 2019 requires the same to happen in the event of a failure to properly apply the contact arrangements does not by itself require the change to take place if it were the case that the welfare basis for such a move was not made out. S's welfare is far more important than obedience to my order.
>
> 85. However, S's welfare is, in my judgment, now seriously compromised by the current situation:
>
> a. She is demonstrating acute rejection of her father despite, not because of, his actions in attempting to inculcate a relationship with her;
>
> b. Her thoughts and feelings, as captured by both the mother and the school, suggest that she is suffering from exposure to her mother's opposition to contact. The mother must realise that any distress that S is manifesting is not as a result of the actions of the father but from the constant negativity of the mother towards that aim;
>
> c. As a consequence of the mother's actions S's opportunities to form a positive relationship with her father and her wider paternal family are dwindling as she is being shaped to view her father in an extreme negative light.
>
> d. More of what S has experienced over the period in question will undoubtedly drive S deeper into a view of her father from which she is unlikely to be extracted without difficulty and may lead to the prevention of any effective relationship with her father during her childhood.
>
> e. Whilst no child should ever suffer an absence of a parental relationship where a loving relationship could flourish, some fathers, through their own actions, attitudes or intentions, deserve such an outcome. This father has done nothing to merit that future.
>
> f. It need hardly be said that S does not deserve a future in which she experiences a vacuum where her paternal family

should be. Neither should she have to accept a loss in her emotional development. Gaps in her knowledge of herself, her origins and her identity can be filled when she is in a position to make her own choices, assuming that the relevant people are available to enable those gaps to be filled, but they neither compensate for nor correct the absence which will have been allowed to flourish at a critical time and which will reverberate down the years for her.

g. In any event, self-rectification of a paternal gap is unlikely by then to be an easy choice for any person to make, even as an adult, if they have been schooled to regard a father as an inappropriate person to be in life and one who was to be avoided.

86. In my view S's welfare is now clearly compromised in that there is no evidence that she will have any hope of balanced parental relationships if her only option is maintenance of the present situation."

24 At para.90, he said this:

> "To move the child will create significant distress. That is a fact. In many respects it is the least attractive option but it is also the one which his now necessary if this child is ever to enjoy the possibility of a balanced emotional development in which she can readily access both sides of her family."

25 The Judge accepted that a move to the father would involve a change of schools as the parties live some 17 miles apart. He said that he regretted this loss of stability. He ordered that S should live with her father from 5 August and that contact to the mother would be suspended until late September.

26 The judgment was sent out to the parties on 24 July, one month after the hearing and formally handed down at a short hearing on 3 August. At that hearing, the mother sought to rely on evidence not yet obtained by her from the school and the therapist who she and S had been seeing to show how hard the mother had tried to get S to go to contact and she asked for an adjournment for that evidence to be obtained.

27 This application had some history as the mother had emailed the court on 6 March asking for the court to order such evidence which would only have been provided by the school and the therapist if the court had so ordered. Unfortunately, the email to the court had not been acted on or put before the judge, to whom the case was reserved. No mention was made by the mother of her application on 24 June when the hearing took place and it is therefore unsurprising that on 3 August, the judge refused to admit such evidence which even then, of course, was not yet available. In my judgment, the judge was entitled to refuse to delay the proceedings to await these reports at such a late stage. Having failed to obtain an adjournment and the judgment having been handed down, the mother asked for permission to appeal and her application was refused by the judge.

28 It is common ground between the parties that no mention of a stay was made at that hearing. Both parties were litigants in person and knew little of the legal process, intelligent though

they both are. I hope that it will be standard practice that when a party is subjected to an important and significant change of circumstances to a child it would be explained to them that they may apply for a stay. There are few cases where a stay of a few days and or even a week to allow for an application to be made to a higher court for a stay would be harmful. That was not done here. The result was that the transfer of residence was implemented. It was only the following month that the mother obtained legal advice, an application was made for permission to appeal, and after a hearing attended by both parties, Judd J granted permission.

29 I return now to other issues. The non-appointment of a guardian; I find it hard to see how the reappointment of the guardian under FPR 16.2 could have been other than helpful. The child had had a guardian representing her when the "unless order" was made. The decision that the judge was now being asked to make was much more significant in its consequences. In my view, the Judge was wrong not to reappoint the guardian.

30 Reading the judgment, it strikes me how little weight is given to what the effect on S would be. I should spell it out. She would lose the only person with whom she had lived with throughout her life, her parents having separated when she was but a small baby or toddler. Her mother had been her sole carer throughout her life along with her maternal grandfather who also lived with her. She would lose her school and her friends in the neighbourhood and at school. She would lose the only home that she had lived in since she was a baby. The Judge recorded the extent of her distress on contact visits when handed to her father but that seems not further to have entered into the consideration. S would be going to live with her father with whom she had only ever spent a couple of nights since she was a baby. Of course, there may have been potential benefits but the losses were tangible and received only passing mention.

31 It seems to me that this happened because the judge's focus was on whether or not there had been compliance and whether or not there was reasonable excuse. His default position was that para.2 of the 2019 order was to be put into effect unless there was a reasonable excuse. The judgment reads as if the principle of the child having a proper relationship with her father trumped all other factors. There was no holistic consideration of the child's needs in the round.

32 The appointment of a children's guardian would have led to a proper examination of all aspects of S's welfare. There would have been enquiries of her school which plainly would have been important particularly since it was the venue of so many of the troublesome handovers. S would have been seen and asked her views of the wholesale changes in her life that were proposed. It was thirteen months since the guardian had last been involved and there had been a significant amount of contact between the father and S. No one asked S what she had felt about the events of the last thirteen months. In short, S's voice was unheard in the proceedings.

THE LAW

33 An appeal can only be allowed if the court is satisfied that the Judge below was wrong or that he took into account irrelevant matters or left out material matters. It is right to acknowledge that the judge said that the decision that he made was one that he reached with the upmost reluctance and I agree with him that it was a difficult decision. However, in my judgment, this very experienced judge uncharacteristically fell into error by:

(a) Not reappointing a children's guardian;

(b) By concentrating excessively on the issue of compliance;

(c) Applying the test of compliance with the aim of the order rather than the strict terms of the order; and

(d) By failing to determine the matter by strict reference to the child's welfare looked at holistically albeit against the background of the facts as he found them to be which were properly within his discretion.

THE APPEAL PROCESS

34 I have already commented on the failure to advise the parties about a stay. The application for permission to appeal was dealt with promptly by Judd J after she had called for the two-sided permission hearing but thereafter, a series of errors in the Family Division office has led to a period of one year between the grant of the permission to appeal and this hearing. I have expressed my profound apologies to the parties. It is wholly unsatisfactory and procedures are being put into place to try and ensure this never happens again.

THE MOTHER'S APPLICATION TO VARY

35 The one upside of this situation is that in April 2021, the mother issued her own application to vary the residence order. I was pleased to be told that contact to the mother has now been increased to take place overnight four times per fortnight and that there is FaceTime or other electronic contact every day between the mother and S when S is not physically with her mother, and that the school holidays are shared equally. I am also reassured to be told that a new guardian has been appointed within the Children Act proceedings and that the parties and S are to be seen by a new psychologist.

36 It is right that I should record that the father says that the change of residence has brought real benefits in the sense of S forming a close relationship with him and his children by a previous relationship, and that without a change of residence none of this would have happened. He says that she is settled and doing well. All that will be considered in the variation proceedings and I express no view as to how they should be determined.

37 In allowing the appeal, as I do, I have realistically not been asked on behalf of the mother to do anything other than remit the matter to the family court in Liverpool so that the variation application can be determined on a welfare basis. That is plainly correct. The parties wish that the matter remains before HHJ Sharpe. If that is what they both wish, it would not be right for me to interfere with that.

38 Accordingly, I allow the appeal and I remit the matter back to the family court at Liverpool to be heard as part of or together with the welfare proceedings, albeit that the welfare proceedings should entirely subsume any rehearing of the matters which have been before me.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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Official Court Reporters and Audio Transcribers
5 New Street Square, London, EC4A 3BF
Tel: 020 7831 5627 Fax: 020 7831 7737
civil@opus2.digital

This transcript has been approved by the Judge.