



Neutral Citation Number: [2022] EWHC 3369 (Fam)

Case No: FA-2022-000333

**IN THE HIGH COURT OF JUSTICE**  
**FAMILY DIVISION**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 23/12/2022

**Before :**

**MR JUSTICE MOSTYN**

-----

**In re HH (A Child: Stay of Order pending Appeal)**

-----  
-----

**Approved Judgment**

23 December 2022

.....  
MR JUSTICE MOSTYN

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of 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.

**Mr Justice Mostyn:**

1. This case concerns HH, a boy aged 2 years and 10 months. His father applied for a child arrangements order to have direct contact to him. The mother opposed the application on the ground that the father has sexually and physically abused HH. The father has not had direct contact to HH for over a year. He is confined to twice weekly video contact.
2. Recorder Wood KC conducted a 6-day hearing and delivered a comprehensive judgment on 11 November 2022. She found as a fact that the father had not sexually or physically abused HH. In clear and unambiguous terms she rejected the evidence of the mother and her supporting witnesses. She ordered that direct, unsupervised, contact should commence on 26 December 2022 initially for one hour, twice weekly (“the contact order”).
3. I do not know if the mother sought permission to appeal (‘PTA’) and a stay of the contact order from Recorder Wood KC. If she did not, then in my judgment she certainly should have done. Although the rules do not require an application for PTA to be made to the trial judge it has been stated by the Court of Appeal that it is good practice to do so: *P v P (Variation of Post-Nuptial Settlement)* [2015] EWCA Civ 447 per Jackson LJ at [68]. I would go further and say that it would be extremely bad practice for an appeal to be mounted, whether from district judge to circuit judge, from circuit judge to High Court judge, or from High Court judge to the Court of Appeal without seeking PTA, and a stay (where applicable), from the trial judge preferably at the time that the judgment is handed down.
4. On 5 December 2022 the mother filed a notice of appeal in the High Court. She not only seeks to challenge the findings of fact, but she also alleges that she was subjected to procedural unfairness during the hearing. In her appeal notice she seeks a stay of the contact order. Section 11 of her appeal notice states:

“The appellant seeks a stay of the proceedings and a stay on any direct contact ordered for the reasons set out in the appellant’s draft grounds of appeal attached to this notice. These issues must be explored thoroughly before it can be determined whether or not direct contact is appropriate.”
5. The appeal notice was placed before the President who on 16 December 2022 extended the mother’s time for filing perfected grounds of appeal and the skeleton argument in support until 13 January 2023. He did not, however, deal with the application for a stay.
6. On 22 December 2022 the appellant’s solicitor emailed the court urgently seeking that the application for a stay should be considered before the commencement of direct contact on 26 December 2022.
7. That application has been placed before me.
8. The appellant relies on my own decision in *NB v London Borough of Haringey* [2011] EWHC 3544 (Fam) where I laid out the principles to be applied on an application for a stay of implementation of the trial court’s decision pending the determination of an

appeal. In that decision I adopted and applied the principles stated by the Chief Judge of the High Court of Hong Kong, Ma J, in *Wenden Engineering Services Co Ltd v Lee Shing UEY Construction Co Ltd* (HCCT No 90 of 1999). He wrote:

“From these authorities I derive the following five principles ... First, the court must take into account all the circumstances of the case. Second, a stay is the exception rather than the general rule. Third, the party seeking a stay should provide cogent evidence that the appeal will be stifled or rendered nugatory unless a stay is granted. Fourth, in exercising its discretion the court applies what is in effect a balance of harm test in which the likely prejudice to the successful party must be carefully considered. Fifth, the court should take into account the prospects of the appeal succeeding. Only where strong grounds of appeal or a strong likelihood of success is shown should a stay be considered.’ ”

9. These principles are now routinely applied where a stay pending the hearing of an appeal is sought. I have noted with interest that they have been specifically approved by the Court of Appeal of the Eastern Caribbean: see *C-Mobile Services Limited v Huawei Technologies Co. Ltd* (2014) per Blenman JA and *Novel Blaze Ltd (In Liquidation) v Chance Talent Management Ltd* (2020) per Webster JA.
10. In my judgment the *Wenden Engineering* principles should apply forcefully where the application for a stay is being considered alongside the application for PTA. This is equally the case whether the applications are being considered by the trial judge or by the appeal court. It is only in such circumstances that the court considering the question of a stay can fully and fairly assess whether the grounds of appeal are strong or whether there is a strong likelihood of success of an appeal.
11. If PTA is refused, a stay will also be refused unless the appeal court decides to allow it pending any oral renewal hearing that the applicant is entitled to seek under FPR 30.3(5).
12. In my judgment, the position is rather different where, as here, the application for a stay is being considered by the appeal court in advance of the PTA determination. In these circumstances it would be inappropriate, and fraught with potential error, for the appeal court to determine the fifth principle in *Wenden Engineering* because to do so would be to pre-empt the very PTA decision that the stay is seeking to preserve. Indeed, it would not be an overstatement to say that to decide the fifth principle in such circumstances would be to usurp the primary PTA function of the appeal court.
13. In my judgment, in such circumstances the court should only be thinking of awarding an interim stay to endure until the application for PTA is considered by the appeal court. The award of such an interim stay would not require proof of strong grounds of appeal or a strong likelihood of success; those are matters for the appeal court considering PTA. Rather, the court when considering an interim stay pending determination of PTA need only be satisfied that the grounds of appeal are not fanciful. Instead, court should be focussing on whether the refusal of such an interim stay would stifle the proposed appeal or render it nugatory.

14. In a money case the refusal of an interim stay of execution will mean that there will have to be a payment of money, or the transfer of money's worth, by one party to the other. A refusal of an interim stay can be done on terms that if the court later grants PTA and decides that there should be a stay pending the hearing of the appeal, the payment or transfer should be reversed and the asset preserved in the meantime. Generally speaking, execution of a money judgment can be reversed and conditions can be imposed to ensure its reversability. By contrast, there are other civil orders such as the award of an injunction or an order for specific performance the implementation of which cannot be realistically or practically reversed. Those cases should be dealt with in the way I have set out below.
15. Where the issue is whether a parent should have direct contact to their child the refusal of an interim stay, resulting in such direct contact taking place, in effect decides the very subject matter of the appeal. In this case, whatever I may think about the reasonableness of the mother's stance, and the likelihood of her being awarded PTA, it is an undeniable fact that without an interim stay pending determination of PTA, the viability of mother's proposed appeal is pre-emptively extinguished.
16. Therefore, if that would be the consequence, the court should normally award such an interim stay. It should not be seen as being of the same character as a full stay of execution awarded at the same time as the grant of PTA. Such a full stay should only be awarded if the *Wenden Engineering* principles are satisfied. By contrast, the award of an interim stay pending determination of PTA should be seen more in the character of a suspension of the order under appeal, doing no more than holding the ring pending that determination. It should not be seen as establishing any precedent for, or any indication as to the outcome of, the full stay application.
17. I emphasise that the appeal court should only award an interim stay pending the decision on PTA where (a) the grounds of appeal are not fanciful and (b) implementation of the order pending the PTA decision would irreversibly extinguish the viability of the proposed appeal. If this latter criterion is not met, because, for example, conditions can be imposed to ensure that any implementation of the order in the meantime can be effectively reversed, then the appeal court should leave the question of a stay to the judge determining the PTA application.
18. Where such an interim stay is awarded the court should give directions to bring the PTA application before the court at the soonest opportunity. Further, I would suggest that in such circumstances the appeal court should allow the respondent to the appeal to make submissions in writing under FPR PD 30A para 4.22 as to whether PTA should be granted and/or a full stay of execution awarded.
19. In this case I award such an interim stay of the contact order. I am satisfied that the mother's grounds of appeal are not fanciful. Critically, I am satisfied that if I were not to award an interim stay the viability of the mother's appeal would be extinguished. The respondent father is given permission to file short responsive submissions not exceeding four sides of A4 by 27 January 2023, that is 14 days after the extended date for the appellant to file her perfected grounds of appeal and skeleton argument. The application for PTA and for a full stay pending the appeal (if permission is granted) should then be put before a judge of the Family Division with a request that the decision be expedited. Until then the indirect video contact will continue as before.

