

Neutral Citation Number: [2023] EWHC 1175 (Fam)

Case No: SE21P71590

IN THE FAMILY COURT AT DERBY

Morledge
Derby
DE1 2XE

Monday, 3 April 2023

BEFORE:

MRS JUSTICE LIEVEN DBE

BETWEEN:

THE MOTHER

Applicant

- and -

(1) JAMIE MACDOUGALL
(2) B (THE CHILD THROUGH THEIR CHILDREN'S GUARDIAN)

Respondents

MS J HARRISON appeared on behalf of the Applicant Mother
MR J MACDOUGALL appeared in person (with assistance from a friend)
MRS JONES appeared on behalf of the Second Respondent Child

JUDGMENT
(Approved)

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(Official Shorthand Writers to the Court)

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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 children and members of their 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.

1. MRS JUSTICE LIEVEN DBE: This is a case management decision at the beginning of what is listed as a final hearing in this matter. I am dealing with Mr MacDougall, the father's application for a child arrangements order and a parental responsibility order. The application was made on or about 15 September 2021 so these proceedings have been going on for a long time. They concern a young child, B, who is now aged four.
2. I have set out the background to these proceedings in an earlier judgment. What is material for today is that Mr MacDougall has quite significant difficulties in engaging with the court and is very reluctant to speak to the court. He has been reluctant to come into court this morning.
3. Last week I was informed, as were the parties, that Mr MacDougall was no longer getting the benefit of legal aid and therefore the solicitors applied to come off the record. They informed me that the removal of legal aid was based on the Legal Aid Agency's adverse determination on the merits, so he had failed a merits test. Having read the application by the solicitors to come off the record, although they raise the possibility of appeal, they make it clear that it seems to them extremely unlikely that Mr MacDougall would success on such an appeal. Ms Jones, who represents the guardian, agrees with that analysis.
4. Ms Jones raises the possibility that an application could be made for exceptional funding from the Legal Aid Agency but her view accords with my experience which is that even if I adjourned and asked the Legal Aid Agency to consider exceptional funding, there is a high probability they would not agree.
5. I also take into account the fact that these proceedings have now been going on for over 18 months. They are taking a heavy toll on the Mother, and quite possibly through her on B.
6. On the more positive side of the balance, it is also relevant that I am very familiar with these proceedings having heard at least two if not three hearings, including hearing evidence from the parties including Mr MacDougall at a point when he was

represented. So although there is no doubt whatsoever that he is significantly disadvantaged today by not having lawyers representing him, I do have the benefit of a great deal of background knowledge of the case. I therefore do not think that the fairness of the proceedings will be fundamentally undermined by Mr MacDougall not being represented, albeit it would be a great deal better if he was represented.

7. In those circumstances, I am going to proceed today.

(After further submissions)

8. This is an application to vary a child arrangements order. The child in question is B born in July 2018, so now 4 years old. The Mother is the mother, Mr MacDougall is the father.
9. I have given a previous judgment concerning Mr MacDougall last year but not making final orders in respect of this child. I note, as the guardian did, that there have been proceedings concerning B and the father's contact with him since October 2019, so the vast majority of B's life has been spent in proceedings.
10. On 1 March 2021 a final child arrangements order was made in the previous proceedings in Sheffield. On 15 September 2021 the Mother made an application to vary that order. That application was made because the Mother said that B had come back from contact with bruises. These proceedings have therefore been ongoing since September 2021.
11. I should note that in respect of the previous proceedings, the CAFCASS officer was Mr Donohoe. He recommended, and indeed the court ordered, direct contact between B and Mr MacDougall.
12. There have been a large number of hearings in these proceedings, which I do not need to go through. The matter was transferred to be heard by me in Derby because Mr MacDougall had other children who had proceedings in the Derby Family Court and it was considered that this case should be listed together with those other cases.

13. In April 2022 there was an order that interim contact should take place at a contact centre. Between April 2022 and now, there have only been three direct contacts with Mr MacDougall at the contact centre, one in August 2022 and then two in January 2023. My understanding is that the reason why there has been so little direct contact is that there had been disputes about both the timing of contact, who was going to pay for it and Mr MacDougall was not happy with the contact being in the contact centre at all. The unfortunate consequence of this is that there has been no systematic measured contact between Mr MacDougall and B and that undoubtedly has impacted on B's ability to know Mr MacDougall and to respond to him. However, I do note that the reports as to those three contacts have been positive in the sense that although B was somewhat quiet at the start, Mr MacDougall had engaged well with B.
14. Unfortunately, on 21 December 2022 there was supposed to be a direct contact at the contact centre. The Mother informed Mr MacDougall that B was unwell and could not attend. Mr MacDougall did not accept this and was by all accounts angry and upset. Ms Newcombe the social worker spoke to Mr MacDougall and Ms Newcombe gave evidence before me. She said that Mr MacDougall was very agitated and upset during that conversation, did not accept that B was unwell and in the end passed the phone to his father, the paternal grandparent who was himself then angry and upset and Ms Newcombe said she had to terminate the conversation.
15. Later that day, according to the police, the paternal grandfather rang them and made allegations that B had bruising and that there was a safeguarding concern. I note that the paternal grandfather had not seen B for well over a year by that stage. Mr MacDougall says that he did not know about that conversation at the time and only found out about it later. I have to say, having heard Mr MacDougall and seen his response to those questions, I am not at all sure that I believe Mr MacDougall that he did not know about the conversation. In any event, the effect of the conversation was that the police went round quite late at night, woke up the mother and the two children in the home and then looked for bruising on B. It is difficult to overestimate the degree to which that must have been incredibly upsetting for B and was a massively inappropriate action by Mr MacDougall's father. I note that Mr MacDougall, when he

gave evidence, did not appear to have any appreciation of what impact that must have had on B.

16. There were then two contacts in January, as I have said. These contacts on the face seem to have gone reasonably well. I am, however, concerned about a letter from B's school dated 8 March where they talk about his having suffered a drastic change in his behaviour in the middle of November where he was refusing to follow adult instructions, started throwing equipment, screaming and crying, and had to be restrained. Then they refer to his behaviour after Christmas continuing to escalate. There were two exclusions on 30 January and 2 February of this year when he was unable to regulate his behaviour despite interventions from staff when he was hurting himself through disregard for his safety.
17. I note that B is only a 4-year-old and it is in my experience extremely unusual for a 4-year-old to be excluded from school. It is impossible to tell what has triggered B's behaviour and whether the start of it in November was because, as the Mother suggests, she had told B that he was having contact with his father and whether the behaviour in January was of the consequence of the contact that he had with the father. However, what this evidence does show me is a child who is very unsettled and dysregulated and for whom something is making him very upset and that is a matter which I have to take close regard to.
18. In terms of evidence before me, I heard very briefly from Ms Newcombe, I heard from the father and I heard from the Mother. I note in respect of the father, as I noted at length in my previous judgment, he has a diagnosis of autism and plainly struggles badly with the court process and being able to communicate through that process and indeed perhaps with professionals generally. I do note, however, that having refused to adjourn for the reasons I set out in the short judgment at the start, Mr MacDougall has been able to communicate with the court and has been able to engage, perhaps actually more freely than when he had legal representation. So although he is plainly disadvantaged by not being represented today, I do feel I have been able to hear from him reasonably clearly.

19. As I say, Mr MacDougall has a diagnosis of autism. It is not that hard to understand some of the difficulties he has. He has a very literal approach and says things in anger which he probably does not mean. I have no doubt that he desperately wants to have a relationship with B and feels very hard done by and disadvantaged by this process and he has said that on a number of occasions. He feels that the current social worker, Ms Newcombe, and the CAFCASS Family Court Advisor Ms Vine do not understand him and are, my words not his, prejudiced against him because of his autism. He felt he had a much better relationship with the previous social worker and CAFCASS FCA, being Mr Donohoe. He feels he has not been given a chance and all he wants is to see his children and have a relationship with them. He says that the reason B becomes upset, or at least one reason why he may become upset, is that B does not like the contact centre environment and it is not a natural environment for him. He wants to have contact moving towards back being in the community, supervised by his mother and cannot see any reason why that should not happen.
20. The Mother's position is that she had in her final statement supported direct contact six times a year in the contact centre. Ms Harrison, who represents her and has represented her throughout, said that she took that stance because she thought that no contact was not really an option. But the Mother now supports the guardian's position that there should be no direct contact. She is very concerned about what may happen once these proceedings end and there is no longer a social worker or guardian involved. She explains in her statement how extremely upsetting the police coming round in December was for the whole family including B. She also sets out an incident in January after contact where Mr MacDougall had put a Christmas card for B into his bag which he said came from, although obviously it actually came from Mr MacDougall, B's half siblings who he does not know and he does not even know about. The Mother said she removed this card and it showed a lack of understanding by Mr MacDougall about his actions on the children.
21. The guardian, Ms Vine, has given evidence both in these proceedings and in the proceedings concerning the other children on which I gave judgment before. Ms Vine was a measured and careful witness. Her recommendation is that Mr MacDougall has

no direct contact with B. She accepts this is a very unusual situation but very much focuses that recommendation on B's best interests. She says the current situation, or the one that has been going on really throughout these proceedings, is one of confusion for B and of a messy, highly conflictual situation between the parents which has been going on for most of B's life and which is strongly contrary to his interests. She says the disruption caused and the inability of the parents to put together a stable plan with the minimum fuss is causing B real harm. She sees this as really having no end if direct contact is ordered.

22. When asked by Mr MacDougall about why she differed so strongly from the position of Mr Donohoe, the previous FCA, she said that Mr Donohoe made his recommendations at a very early stage in the proceedings but also at one where it seemed Mr MacDougall and the Mother were in agreement.
23. I do not think this is an easy decision. Section 1(2A) of the Children Act 1989 makes clear that unless the contrary is shown there is a presumption that the involvement of a parent in the life of the child will further the child's welfare. I am very conscious of the fact that B's contact with his father, albeit very limited, has in itself generally seemed quite positive. I am also very conscious of the fact that most, if not all of Mr MacDougall's problems in these proceedings and in having contact do probably stem from his autism and his inability to control himself.
24. However, I have to focus, as does Ms Vine, on the best interests of the child. This is from my point of view all about B and not ultimately about Mr MacDougall or what he wants, or the fact that I feel very sympathetic to Mr MacDougall and would like him to have a relationship with B. What concerns me, and I have now met Mr MacDougall in court on a number of occasions, is that he is a man who simply finds it impossible to control himself. When faced with opposition or a decision that he does not like, he lashes out and he himself would accept he acts in ways which are uncontrolled and which he does not think through.
25. It is clear from the history of this matter, particularly over the last year to 18 months, that Mr MacDougall's behaviour has been all about Mr MacDougall and his inability to

control himself. There are a number of examples. The first is that rather than doing everything he could to ensure that he went to the contact in the contact centre and that it was positive for B, instead he felt angry and unhappy with the arrangements and what has ended up happening is that he has only seen B three times since April 2022. So he has not been able to build up the stable, systematic contact which the previous social worker would have been able to assess and perhaps then move back into the community. This would have allowed B to feel a settled rhythm of contact which could have given him and the Mother confidence.

26. The second example is that when contact was cancelled in December, rather than Mr MacDougall accepting that small children often do get ill and looking forward to the next contact, he, to put it colloquially, kicked off. He said it was the Mother's fault, became angry and aggressive to the social worker, and then put the phone on to his father, who then himself became angry and aggressive. As I have said, the paternal grandfather then contacted the police, which was completely inappropriate and in my view malicious. I find that Mr MacDougall, if he did not know about that at the time, must have known very shortly thereafter. I note that when Mr MacDougall was asked about that, he could not put himself into B's shoes and understand how incredibly upsetting it is for a child to have the police coming round at 10 o'clock at night and then checking whether he had bruises.
27. Those are two slightly different examples of Mr MacDougall's inability to control himself and apparent inability to put himself in the position of the children.
28. The third example is that of the card that I have just referred to, where again Mr MacDougall seems to have been unable to think about how that card would impact on B if he had understood it.
29. In my view, if I order direct contact the father will find it impossible to obey the rules, will kick off against the contact centre and we will be in a situation of more and more distress, confusion and unhappiness. This will have a direct and very negative impact on B.

30. The final factor I take into account is that B is showing very concerning behaviour at school. It is not clear why this is and it would probably be impossible to get to the bottom of the reasons with any degree of certainty. I accept it would be unfair to assume that it was directly related to issues around contact. But what is overwhelmingly important for B's future is that everything is done now to help him settle at school, engage with education and minimise any stresses in his life which could lead to the kind of really troubling behavioural problems that have been exhibited recently.
31. It is clear that these proceedings and the issues around contact place a great deal of stress on the Mother who has her own issues. In those circumstances, I think to order direct contact to be continued at this stage is only going to lead to more unhappiness for B, more dysregulation and likely to be very contrary to his best interests at the present time.
32. I am going to order indirect contact through cards on B's birthday and at Christmas.
33. I got to this point in the judgment and Mr MacDougall became very upset and agitated. He started shouting and then approached the bench. I asked security to attend, but with the help of Mr MacDougall's friend and Ms Jones we gradually managed to de-escalate the situation. However, it was not possible to continue with the oral judgment. I therefore said that I would put the rest of the judgment in writing and then order a transcript so that one composite judgment could be produced.
34. My conclusion in respect of contact is that there should be indirect contact only for the present time. This will be through letters or cards sent via the maternal grandmother, assuming she is prepared to undertake this task. Indirect contact 6 times a year is the sensible amount.
35. The Mother asks me to make a s.91(14) order for 10 years. The guardian suggests that a period of 3 years is more appropriate.

36. A s.91(14) order is a draconian order as it impacts on the father's Article 6 and Article 8 rights. However, B has been subject to proceedings and applications for 3 out of 4 years of his life. This is taking a toll on the Mother, but also through her on B himself. In my view everyone in this case needs a break from the stress of proceedings. I will make the order for 3 years. This period should allow B to settle at school and hopefully move on from the behavioural problems which have occurred.
37. I hope that this will also give Mr MacDougall time to engage in some kind of therapeutic work which will help him to deal with people not agreeing with him. I do think that Mr MacDougall loves B and wants to have a relationship with him. Mr MacDougall can use the 3 years to learn how to engage with B and the Mother in a more productive, and less stressful, way. The events during this hearing just reinforce the degree to which Mr MacDougall cannot deal with situations he cannot control and when he does not get his own way. He needs to be helped to develop some strategies to deal with these frustrations, although I do not underestimate how hard this will be given his autism.
38. I will continue the Child Arrangements Order by which B lives with the Mother.
39. I do not think there is any justification for a Prohibited Steps Order preventing Mr MacDougall from removing B from school, or going close to his school, given that Mr MacDougall has not done either of these things. However, I will put in the recital that Mr MacDougall should restrain from so acting.
40. I will continue the order that Mr MacDougall does not post anything on social media about B until he is 16 years old.
41. I will make no order on Mr MacDougall's enforcement application, given what I have found about contact.
42. I will continue the non molestation order for 3 years, to be in line with the s.91(14). I note that Mr MacDougall denies any intention of breaching the order, and suggests that

it is being used by people associated with the Mother, to put him in a bad light.
However, Mr MacDougall has been found to have breached the order in the past.

43. In my view it is appropriate to continue the order. To remove it now will make the Mother more vulnerable, whereas to continue it should do Mr MacDougall no harm.

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