Neutral Citation Number: [2024] EWHC 1784 (Fam)

Case No: FA-2023-000324

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION
On appeal from The Family Court, sitting at Canterbury
His Honour Judge Scarratt

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/07/2024

Before :

THE HONOURABLE MRS JUSTICE JUDD

- -

Between :

SL	**Appellant**
- and -	
JA	**1st Respondent**
-and-	
U	**2nd Respondent**
(through their children's guardian, Jo Whitnell)	

- -
- -

Stuart R Yeung (on a direct access basis) for the **Appellant**
The 1st Respondent appeared in person
Jonathan Bennett (instructed by **Berry & Lamberts**) for the **2nd Respondent**

Hearing dates: 8th July 2024

- -

Approved Judgment

This judgment was delivered in Court 48 at the Royal Courts of Justice at 11.30am on 9th July 2024.

....

THE HONOURABLE MRS JUSTICE JUDD

Mrs Justice Judd :

Introduction

1. This is an appeal by a mother from a number of orders made by His Honour Judge Scarratt sitting in the Family Court in Canterbury. The appeal is opposed by the father and the Guardian.

2. The parents met in about 2011 and began to live together in 2013. Their only child, a daughter (who I shall call U) was born in 2015. By this time their relationship had already become strained and finally broke down when U was 8 months old. She remained with her mother. Over the course of the next few years the mother alleged that the father had been domestically abusive to her, and she also claimed that U was exhibiting disturbing behaviours after returning from contact. Proceedings were issued for the first time in about 2016 which led to an agreement whereby U's time was shared equally between the parents. In 2018 further proceedings were launched. There was a fact finding hearing in which none of the mother's allegations of abuse were found, neither were allegations of alienation made by the father found. At a welfare hearing (in which three experts were instructed) an order was made transferring U's main residence from the father to the mother, with alternate weekend and holiday contact to be spent with the mother.

3. The mother appealed that decision, and the hearing came before me. I dismissed the appeal, save that I stated that the overarching order should be described as a joint lives with order.

4. Following the appeal in 2020, the child (U) moved her main base to that of her father, living with her mother every other weekend and for half the holidays and half terms. Apart from some issues in relation to a holiday in Canada, things appeared to go relatively smoothly.

5. Then in 2022, arrangements broke down. The mother did not return U to her father's home after a visit (there is a disagreement as to the reason for this) and the father issued proceedings. The mother also issued proceedings for a change of residence.

6. A section 7 report was produced in January 2023 that recorded U as saying that she wished to live with her mother, although U appeared to believe that if she did so they would be living in Canada. At that point U was reported to be a smiley and content child at school. They had not noted any welfare concerns although did query whether U had appeared as less happy than she had been previously. The mother told the Cafcass officer that U needed to live with her to enable her to have the access to the emotional support that she needs. The father expressed concern that U's behaviour was driven by the mother.

7. The Cafcass Officer noted that U said that her biggest worry was the sense of responsibility she felt for choosing her living arrangements 'if I chose to live with mummy then daddy will be upset'. The officer noted that U was aligning to the mother but said it was not clear whether that was a natural alignment or deriving from alienating behaviours.

8. After that report, directions were made appointing a Guardian to represent U. That Guardian is different to the author of the s7 report, and still represents U before me today.

9. In July 2023 the Guardian filed a report in which she expressed concerns (expressed to her by the school) about U's wellbeing before and after time spent with her mother. This was said to be something which had happened relatively recently. The Guardian said that the mother was trying to relitigate old matters which had already been decided and to frame the father as being an abusive and unsafe carer. The mother was relying heavily on U's therapist who appeared to have (according to the Guardian) very much taken on the mother's version of events. The guardian recommended that the mother's time with U should move to being totally supervised, and at a hearing before Her Honour Judge Davies she made an order for supervised contact to take place every two weeks until the final hearing.

10. The mother appealed that decision. I refused permission to appeal and certified it as totally without merit, as the appeal was late and this was an interim decision soon to be reconsidered. I also refused permission to appeal a decision that U's therapist should not be called to give oral evidence.

11. After that decision and in November 2023 before the final hearing the Guardian provided another report. In this she reported that U was 'unhappy, confused and disheartened by the decision for her to only spend time with her mother in a supervised setting. [U] has struggled and continued to struggle to understand this decision and feels that the Court and myself are making decisions on her behalf which she not only does not agree with, but does not understand. [U] feels that her voice in these proceedings has not been heard'.

12. At the Guardian's invitation, U wrote a letter for the judge which expresses her distress and disappointment at the supervised contact.

<u>The hearing below</u>

13. At the hearing below the mother and father appeared in person. The Guardian was represented by counsel. The case was listed for a day and a half, which included reading and judgment writing time. The mother, father and Guardian gave evidence. The parents each submitted their questions for each other for the judge.

14. The mother's sought an order that U should come back and live with her. She submitted that U was being harmed by the care her father was giving her and wished to rely on the evidence of the therapist that U had been seeing, a Ms. RF. Ms. RF had been having regular sessions with U since she had moved from her father's care in 2020. She was identified by the father and agreed jointly by the parents but for reasons I am not entirely clear about, she was seeing U on her visits to her mother.

15. The mother therefore sought to cross examine the Guardian by reference to the report of Ms. RF and to put forward her case that there should be a change of residence. Unsurprisingly she struggled to formulate questions properly, and took up quite a lot of the limited time allotted to her by making reference to what Ms. RF had said. The questions she asked about the proposal for unsupervised contact were very limited indeed, and came at the end.

16. The position of the father and the Guardian at that hearing was that the mother's application for a change in child arrangements so that U lived predominantly with her should be dismissed, and that contact should be supervised and take place once a fortnight. Given the costs of supervision the amount of time for contact realistically could not be more than two hours a session. The Guardian proposed, and the father supported, an order preventing any further applications for child arrangements orders pursuant to s91(14) for a period of 3 years.

17. The judge gave an extempore judgment the following day. It is apparent from the transcript that he had four cases in his list the following morning, so he had a very busy list indeed. He noted the extensive litigation history in this case, including several appeals by the mother with respect to decisions adverse to her. He set out the parties' respective cases and made it clear that he had read all the documents before him, including the expert reports that had been prepared for the original proceedings in 2018/19. H referred to the opinion of Dr. Willemsen in 2019 in which he had remarked upon the mother's negative attitude towards the father, and the lack of insight that she had as to the importance of U's relationship with him. Dr. Willemsen had opined that there was 'evidence of parental alienation', and a possibility that, in time, U could unknowingly identify with her mother's feelings and opt not to see her father. The judge also referred to the evidence of the other experts in those proceedings, namely Dr. Van Velsen, and Sarah Brookes, an independent social worker, which also advised that the mother's attitude towards the father was hostile and that there was a risk of this being transmitted to U. It was the views of these experts which underlay the decision that U should move to live with her father.

18. The judge was concerned that the mother still continued to maintain that U should come and live with her, and that she was not able or willing to support the arrangement whereby she lived with her father. She believed that U was not safe with him.

19. The judge then set out the Guardian's evidence which he accepted in every respect. He said that the Guardian took the view that U aligned herself with her mother, that she had far too much knowledge of the proceedings, that the mother over-emphasized some of U's behaviour (which she described as self-harming when it was not), and that the mother was simply not able to give U permission to live with her father. The judge records that the Guardian said that U was suffering from being engaged in the conflict by her mother, who was sharing inappropriate information with her.

20. In his decision the judge undoubtedly gave weight to the expert opinions in 2018/19. He rejected the mother's case and in particular rejected her reliance on U's therapist, Ms RF and accepted the Guardian's view that she (the therapist) was too close to the mother. He particularly rejected the mother's case that the Guardian was not giving sufficient weight to U's views, saying that 'on the contrary she has spent an inordinate amount of time with the child, far more than is usually spent in similar cases, I find'. He rejected the mother's case for a change in residence. He concluded that contact should continue to be supervised on the basis that this was in U's best interests. He made a section 91(14) order noting that it was a serious order to make but that it did not ban further applications altogether, just created a filter. U had been the subject of proceedings for too long, and she had been too involved. He therefore made an order for a period of 3 years in relation to all applications for child arrangement orders. He refused the mother's application for enforcement (by which she was seeking payment

from the father for fees for the therapy which he had not paid), and ordered that a copy of his judgment be provided to the contact supervisors.

Submissions on appeal

21. The mother is appealing all of the orders made by the judge, including the dismissal of her application for a change of residence and enforcement, the contact orders, the s91(14) orders, and the disclosure directions.

22. The Grounds of Appeal were drafted by the mother in person. There are eight grounds in all, including failure to apply PD12J (1), failure to admit evidence including that of the therapist (2), failure to centre the voice of the child (3), failing to consider the totality of the evidence and placing too great a weight on the evidence of the Guardian (4), failure to weigh in the balance the practical difficulty of the father being able to maintain the child's cultural identity (5), failure to properly assess the evidence in relation to risk (6), failure to apply best practice and government guidance (7) and taking a flawed approach to the therapy that the mother had been undertaking (8).

23. I granted permission on Grounds 3 and 6 only, stating as follows:-

> "*This is a case where there has been litigation for almost the whole of the child's life, and there can be little doubt that it will have affected her very greatly. Nonetheless, the order that there should only be supervised contact between the child and her mother, coupled with a s91(14) order for three years is a draconian one. Whilst the judge's approach to the wishes and feelings of an emotionally vulnerable child was quite properly based upon the views of the Guardian, there is a question mark as to the weight he gave at this final hearing to the emotional harm to [U] of having such a restricted regime of contact with her mother which had to be balanced against the harm of being exposed to her views if contact was unsupervised. The strength of the child's views and the distress that she exhibited when she was spoken to by the Guardian are striking, especially with respect to a child who has not had her main home with the mother for a number of years. The appeal itself must be focussed on the above Grounds and the decision of the judge to make a final order for supervised contact alone coupled with a s91(14) order*".

24. The appeal was not initially listed before me. It was adjourned twice, and for one reason or another, the original listing it had before another judge was not put into the diary. It was then put back into my diary when a gap became available unexpectedly.

25. In her skeleton argument the mother complained that the judge had closed down the mother's attempts to adduce evidence from the therapist, at least to put them to the Guardian. She said that the judge was wrong not to consider the therapist's report, noting that she had been appointed by the father rather than her.

26. She also submitted that, whilst the father and the Guardian were seeking to suggest that she was alienating U from her father this was not argued at the final hearing, albeit a very draconian order was made with respect to contact. She argued that the judge did not look beyond the Guardian's views to examine the issues in the case. The judge kept interrupting her when she tried to put her case.

27. In considering the child's views the mother pointed out that the child had not rejected her father, that she was not refusing to see or spend time with him. Indeed she stated that she loved him and was described as being thoughtful and taking time to set out her views. The mother said that the evidence that U would suffer harm in contact was speculative. The mother stated that in fact there was no evidence that U was aligning herself with her mother's views.

28. The mother also submitted that the judge failed to consider the mother's assertions that the conflict arose from the father's conduct towards her rather than the other way around. Indeed, the transcript is silent about the mother's case.

29. As to the effect of the supervised contact order, the mother submitted that the judge made no assessment as to the impact on the child of the arrangement staying in place for a number of years and that there was no evidence based assessment of the parties' means.

30. The mother also made a number of submissions about the judge's attitude (and that of the Guardian) towards the mother's therapy, and their reliance upon old reports.

31. In his position statement and oral submissions, Mr Yeung on behalf of the mother took the court to examples of where he said that the judge had gone wrong. He submitted that the court had never grappled with the mother's allegations of post separation abuse, never taking them seriously. Additionally, she had not been permitted to adduce oral evidence from the therapist. He emphasised that the hearing was short and rushed, and that the judge had adopted the views of the Guardian, without considering the evidence that lay behind it, wholesale.

32. The father, who appeared in person, had prepared a detailed skeleton argument and made oral submissions. He referred the court to the expert reports from 2019, and the judge's reliance on them as demonstrated in his judgment. He said of the mother that 'nothing has changed. The child is caught in this emotional turmoil and the endless conflict of her parents'.

33. The father also relied on the recent report from Cafcass which had been prepared to inform the court as to U's current situation. In this report the Guardian noted that U is more relaxed in general, and was presenting as well and happy at school. The father states that U is 'disappointed that she does not get to go to her mum's house but she does not dwell on it, living in the moment, having fun and enjoying herself. She loves the time she spends with her mum'.

34. He set out in some detail how the Guardian had taken into account U's views and spent time with her. He submitted that she had taken into account that the supervised arrangement might be long term. In coming to her recommendation the Guardian was entitled to rely on the fact that the mother's presentation was very much as had been described by the experts in the past. He pointed out how difficult the mother had

made it for U with respect to some arrangements (seeing her performing, for example).

35. The father quoted extensively from the judgment to illustrate the points he made. He also (and very helpfully) referred to the case of *Re A (A Child)(Supervised Contact)(s91(14)* [2021] EWCA Civ 1749 a decision of the Court of Appeal in which King LJ stated that supervised contact was appropriate as a means of allowing a child to continue to have a relationship with an absent parent, when the choice would be between having supervised contact or no contact at all.

36. In his oral submissions the father said again that U was doing well at home and was happy and settled. He said that U had been upset by what had happened at contact when the mother did not abide by the conditions of the supervisors.

37. On behalf of the Guardian, Mr. Bennett submitted that the Guardian remained of the firm view that contact needed to be supervised and the appeal dismissed. He stated that U's demeanour following the decision in December supported the view the Guardian had about the emotional effect on her of unsupervised contact with her mother, and the proceedings themselves. In answer to a question from me as to the views that U had expressed so strikingly to the Guardian before the final hearing, he submitted that it was the Guardians' view that they were not U's genuine views; but an echo of those of her mother. In other words, it was not the case where her views were her own but the Guardian did not consider that it was in her best interests, but that they were not authentically her own at all.

Decision

38. The court will only allow an appeal where the decision of the lower court was wrong, or unjust because of a serious procedural or other irregularity in the proceedings (Rule 30.12(3). An appeal court must not substitute its own judgment and must give deference to the trial judge who heard and read all of the evidence. The court must apply the principles set out in the case of *Piglowska v Piglowski* [1999] UKHL 27, bearing in mind the exigencies of daily court life are such that reasons for judgment will always be capable of being better expressed; these reasons should be read on the assumption that, unless it has been demonstrated to the contrary, the judge know how to perform his function and which matters they should take into account.

39. In coming to my decision I am acutely conscious of the fact that this experienced judge dealt with the case in the very short period of time which had been allotted to him. He read a large number of the documents and gave a detailed extempore judgment. He followed the recommendations of the Guardian, who was not only very experienced, but had given a great deal of time and thought to the case. Further, the mother was a litigant in person, and her questions of the Guardian did not help to illuminate the issues that the judge would have found most helpful.

40. I am clear that the judge's decision that U should live with her father is not open to challenge. A decision was taken in 2020 that U should move her primary home from her mother to her father. This was based on the careful assessment at the time, which included the evidence of three experts. Since that time, U has been living with her father, and attending school. There were no concerns that would be realistically regarding as matters of safeguarding, and U has done well. The Guardian was entitled

to point out, and the judge to accept, that the therapist appeared to have adopted an approach that the father was abusive despite the previous findings in this case and that her conclusions should be treated with some caution.

41. The mother's challenge to U continuing to be based with her father was based on a number of matters that had been raised and dealt with previously. The more recent allegations that she made were not such as the court considered it was necessary to have a fact finding hearing about them. If anything they demonstrate that the mother is inclined (as the experts said in the past) to put the worst interpretation upon any difficulties that U has suffered when in the care of the father. In granting permission to appeal on grounds 3 and 6, I made it clear that this related to the decision as to the spending time arrangements, namely supervised contact and the s91(14) restriction on making further applications for this, not the 'living with' arrangements. Nothing that I have heard or read changes this.

42. I have, however, decided with reluctance that the decision as to contact, or spending time with arrangements was flawed and cannot stand. My reasons for coming to this conclusion are as follows. First, the way in which U's wishes and feelings were treated. At the time of the November 2023 report she was still only eight years old, but her views were expressed in very heartfelt terms to the Guardian, and also, via a letter, to the judge. In that letter she says 'I am disappointed in the other judge's decision because I want to see my Mum and I want to see my Dad as well. ….. I really, really, really really, really, really, really don't like the decision that you have made I don't' this this should carry on. If you make the decision that it should carry on I don't think I will never get used to it the fact that you have made it happen…. and if it doesn't change for my WHOLE LIFE. Can you just listen to me and be in the room when MY life is decided, don't I deserve to be there when MY life is decided…. I want it to go back to the way it was and everyone knows that even you and I never want it to be like this EVER'.

43. The Guardian said in her report, accepted by the judge that U was echoing her mother's views, and gave some examples as to how U was said to have been repeating information that must have been given to her by her mother (for example how often she should be visited by the Guardian). But is hard to see how U could have been subject to significant influence by her mother in the months leading up to the final report and hearing. She had had no unsupervised contact with her for several months. There is no complaint from the contact supervisors or the father (who loosely supervised remote contact once a week) that the mother had been influencing U or engaging her in discussions about the case. Indeed the Guardian said that the contact had been going really well and that both mother and U enjoyed it.

44. What is more, U' s views were not totally aligned with those of her mother. Unlike her mother she was not asking to change residence. She has never told this Guardian that she did not want to live with her father. She has not expressed hostility to him or made disparaging comments about him.

45. The judge quoted at length from U's letter, which demonstrates that he had her words very much in mind. But he accepted without further query the Guardian's view that this was because she was suffering emotional turmoil and therefore that full weight could not be placed upon them.

46. It is not uncommon for a judge not to follow a strong view of a child, either because of the turmoil they are suffering or because their heartfelt wishes are not in their best interests, but this does not mean in itself that the feelings are not genuine or strong. Strong feelings on the part of a child do have to be taken into account and managed even if they cannot be acted upon. This is especially true when the issue at the heart of the case is the risk of emotional harm. The fact that there is recent evidence that U appears happy and calm is good, and may suggest that she will cope well with the loss of the unrestricted contact with her mother, but it is not sufficient of itself to bridge the gap in the reasoning of the judgment and the decision that was made at the time.

47. The second reason is related to the first and that is the judge's approach to the issue of risk of emotional harm to U overall. Following the Guardian, he plainly took into account the risk to her of being engaged in the dispute by the mother, and becoming aligned with her. But he did not say anything about the harm that was likely to be caused by the effect of such a restricted regime upon the mother/daughter relationship. The parties were not in a position to pay for contact for more than two hours a fortnight and there were no family members who could supervise to make the regime more natural. All those matters needed to be balanced in the overall decision the judge made.

48. The judgment does not contain explicit consideration as to (nor did the Guardian suggest it) whether the risk to U of being exposed to the mother's views could be sufficiently managed by anything in between what had happened before (every other weekend and half of all holidays and half terms) and the arrangement that he sanctioned, albeit he did ask himself (at paragraph 120) whether he could identify a time when contact could become unsupervised.

49. Finally, the question of whether there should be a s91(14) restriction was considered with respect to living arrangements and spending time with arrangements together rather than being looked at separately. There was good reason to restrict the mother from making further applications for a change of residence for three years as the judge did. It does not follow that this was the right decision for the contact arrangements. Indeed one possibility is that the finality of the living with arrangements and the restriction of a s91(14) order might have created more stability for U and opened the way for a less restrictive contact regime. Arrangements do seem to have worked reasonably well between 2020 and 2022 when there were no substantive proceedings about residence.

50. In my judgement these are all significant factors that fell to be placed in the balance by the judge in coming to the decision that he did, even if they were not dealt with in the Guardian's evidence. I have therefore come to the conclusion that the final decision with respect to supervised contact, and the s91(14) order that went with it cannot stand.

51. I therefore allow the mother's appeal against the order for spending time arrangements (paragraph 5), and paragraph 7 so far as it relates to the spending time arrangements.

52. The issue of contact, or spending time arrangements must therefore be remitted for a rehearing before another judge. I make it quite plain that nothing I have said above should indicate any view about the outcome, which will involve a careful assessment

of all the evidence. I realise that carrying on these proceedings is damaging in itself, but must bear in mind the long term effects of orders of this nature and the importance of making the best possible decision for this young child.

53. I will refer the case to the Family Presider for the South East, Mr. Justice Williams for him to allocate for hearing before a Circuit Judge who has not heard this case before. In the meantime the current arrangements for supervised contact will continue. In a separate short judgment I have refused the mother's application to take U to Canada.