TRANSCRIPT OF PROCEEDINGS

Neutral citation number: F v M (3): (2022) EWFC 89

Ref. PE21P30829

IN THE FAMILY COURT AT PETERBOROUGH

Rivergate
Peterborough

Before HER HONOUR JUDGE DAVIES

IN THE MATTER OF

[PERSON A] F

Applicant

- v -

(1) [PERSON B] M
(2) UNNAMED MINOR & (3) UNNAMED MINOR (By their Guardian)

Respondents

HANNAH SUMMERS & BRIAN FARMER

Interested Parties

LUCY JONES-CLARKSON, instructed by Beck Fitzgerald Ltd Solicitors, appeared on behalf of the Applicant
MS KEILY, instructed by Thomson Snell and Passmore LLP, appeared on behalf of the First Respondent
MS REED, instructed by Pepperells Solicitors, appeared on behalf of the Second & Third Respondents (By their Guardian)

JUDGMENT
15th JUNE 2022
Approved 11 July 2022
Her Honour Judge Lindsay Davies

WARNING: 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.

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JUDGE DAVIES:

1. I am concerned with the arrangements for two children. The elder is now aged 13 and the younger is aged 10. Litigation began when they were aged about five and three. I made final orders in June 2021. As a result of my order the children have moved from living with their mother to living with the father. I made orders for limited contact for a short period after the move. The case came back to court for contact to be reconsidered in October 2021 and again in February 2022. Meanwhile, the mother had applied for permission to appeal the main order. The High Court judge considering the application for permission to appeal dismissed it on the basis that it was totally without merit.

2. The current position is that the children live with the father; they appear to be doing very well at school; they have a good friendship group; they are engaged in out-of-school activities; and, most importantly, they spend good quality time with their mother on a regular basis at weekends and in the school holidays.

3. The mother has applied for the main hearing to be reopened and for a re-hearing on the basis that the jointly instructed expert on parental alienation who reported in the main case was not an appropriately qualified expert and that too much weight was attached to her report. The mother was represented in the application by Professor Jo Delahunty QC who had not been involved in the case before February 2022.

4. The father opposes the mother's application on the basis that these arguments were fully explored in the main case in 2021 and also argued in the skeleton argument filed in support of the application for permission to appeal and they were rejected by the High Court judge. The father is represented by Charles Hale QC who has represented the father in the proceedings for some years, including at the final hearing last summer.

5. The children's guardian opposes the mother's application. Unfortunately there have been three children's guardians in this case. The first guardian was taken ill suddenly midway through the first attempt at the final hearing in January 2021. As a result of her illness the case had to be adjourned and a new guardian was appointed. It was adjourned for a significant period to enable the guardian to investigate and meet the parties and the children before filing her analysis. She carried out her own independent analysis of the issues.

6. In February 2022, when the court was alerted to the mother's intention to make the current application, there were discussions between the advocates as to the views of each party on the role of the expert and the impact on reopening the hearing. At that stage the therapists were advocating a further period of no contact between the children and the

mother. At that point the guardian indicated that she would want to consider the situation as, in particular, she did not agree with the suggestion that there should be a period of no contact with the mother. Shortly thereafter the guardian left the service and so another new guardian was appointed for this current application. With the agreement of both parents, she has not met the children. The guardian and the children are represented by Susan Reed, who represented the children in the 2021 case. The guardian's position today is that she opposes the mother's application to reopen the case.

7. In addition to the mother's application I must also consider whether or not a section 91(14) Children Act order should be made and, if so, for how long. I raised this as a possibility at the hearing in February 2022. I wanted to ensure that each of the parties had time to consider if a section 91(14) order might be appropriate and to enable them to address me on such an order and I heard submissions from each party in relation to this.

8. Finally, this hearing and the last hearing has been attended by Hannah Summers, who is a freelance journalist. She seeks permission to have access to the skeleton arguments of each party and she wants to report on the issues in the case, in particular the issues relating to the appointment of experts witnesses in cases where parental alienation is raised. Ms Summers, and also Mr Farmer (from The Press Association) have been present during these hearings. Ms Summers has set out her reasons for wanting to report some of the details of the case, including the identity of the jointly instructed expert and the names of the therapists involved. I have heard submissions from each party in respect of this aspect of the case as well.

The law on reopening hearings:

9. All parties have agreed that the starting point is the case of *Re E* [2019] EWCA Civ 1447. Lord Justice Peter Jackson, giving the leading judgment, considered the approach that should be taken where there is new evidence and where there is the need to balance the options of an appeal or an application for a rehearing. In that case the Court of Appeal was looking at a case involving a fact-finding hearing relating to physical injuries caused to a child. In subsequent criminal proceedings an expert gave evidence that an account given by one parent was a plausible explanation for the injury. That led to an application to reopen the findings made in the care proceedings. The court concluded that a Family Court does have jurisdiction to review its findings of fact.

10. At paragraph 49 Peter Jackson LJ set out a three-stage test that should be applied–

> "(a) first, the court must consider whether it will permit any reconsideration of the earlier finding; (b) if it is willing to do so,

> the second stage determines the extent of the investigation and evidence that will be considered; and (c) the third stage is the hearing of the review itself."

In paragraph 50 he said–

> "A court faced with an application to reopen a previous finding of fact should approach matters in this way:
> (1) It should remind itself at the outset that the context for its decision is a balancing of important considerations of public policy favouring finality of litigation on the one hand and soundly-based welfare decisions on the other.
> (2) It should weigh up all relevant matters. These will include: the need to put scarce resources to good use; the effect of delay on the child; the importance of establishing the truth; the nature and significance of the findings themselves; and the quality and relevance of the further evidence.
> (3) 'Above all, the court is bound to want to consider whether there is any reason to think that a rehearing of the issue will result in any different finding from that in the earlier trial.' There must be solid grounds for believing that the earlier findings require revisiting."

Finally, I remind myself that earlier in the judgment, at paragraph 34 Peter Jackson LJ stated– "It is not open to a party to appeal a finding simply because they do not like it."

The findings I made in June 2021:

11. My judgment in June 2021 should be read into this judgment.

12. I do not need to rehearse the whole background. Suffice it to say that the children had been living with the mother since the parties separated. In 2014/15 proceedings a district judge found that there had been coercive and controlling behaviour on the part of the father. The mother and the children moved to another part of the country. Provision was made for the children to spend time with the father on alternate weekends and in the school holidays. As the years passed, the contact did not take place in accordance with the court order. Applications were made to enforce the contact orders. The parents had agreed that there

should be therapeutic intervention for the children, which continued, off and on, over these years. The elder child stopped attending contact in the summer of 2018 despite attempts made by an independent social worker, despite orders of the court and despite the parents instructing counsellors or therapists to work with the child. The younger child also stopped attending contact for a period in 2018 but restarted attending following an order of the court made in October 2019.

13. In the context of the father's application to enforce contact in December 2019 he made an application for a psychiatrist to be instructed. That application was refused but, by agreement between all parties, an expert, to be instructed by the father's solicitor as lead solicitor, was appointed to report. That expert's CV set out her expertise in parental alienation. None of the lawyers involved nor the guardian had previously instructed her. Her instruction was recommended by another expert.

14. The report from this expert was eventually received in October 2020. That report concluded that the mother was alienating the children and made recommendations about where the children should live and how much time they should spend with their mother. That came before me on an interim basis and I made interim orders in October or November 2020.

15. The final hearing of this case was listed in January 2021. The author of the report gave evidence first. The mother was represented at that hearing by Leading Counsel, Mr Will Tyler QC, who robustly challenged the author on her qualifications, her expertise, the regulatory bodies who oversaw her work and her professional and commercial links with the various therapists. The first guardian had concluded in her analysis that there had been alienation.

16. The guardian who was appointed following the first guardian falling ill and the case having to be postponed carried out her own independent enquiries. She carried out her own analysis using the Cafcass Parental Alienation Toolkit. When the case came before the court in June of 2021 she, too, was cross-examined by Mr Tyler QC in relation to the Parental Alienation Toolkit. She gave her own evidence on her own analysis and she was able to talk through the approach that she had taken. For that final hearing I also heard evidence from both of the parents and they were each cross-examined.

17. Giving judgment in June 2021 I made it clear that my conclusions that the mother had alienated the children were based on three separate limbs: there was the evidence of the jointly instructed expert; there was the evidence of the children's guardian; and I also based my findings on my analysis of the credibility and reliability of the mother based on her own evidence to the court.

18. The mother was clearly unhappy with the conclusion I reached and, as she was entitled to, she sought permission to appeal. Her then counsel's skeleton argument for the permission to appeal application had been disclosed into this current application. At that stage the mother had instructed new counsel, a Dr Charlotte Proudman. Dr Proudman's skeleton covered the same grounds about the qualifications and the expertise of the jointly instructed expert that were raised by Mr Will Tyler QC in his cross-examination and have now been raised in the application that is currently before me.

19. At paragraph 7 the High Court judge who considered the application for permission to appeal held–

> "The complaints made by the mother about the expert are not sustainable. She was jointly appointed in March 2020 and no appeal against her appointment was made. She produced reports and gave oral evidence, which was challenged. Her expertise was firmly placed in the arena by the mother. It was open to the judge to accept her evidence and to find that she was an impressive witness. Further, her evidence was only one part of the totality of the evidence which the judge considered."

20. The arguments that are put before me now are those that were before the court in January and June 2021 and before the High Court judge in 2021. There are five elements: (a) it is said that the expert was not, and is not, qualified to provide expert psychological evidence; (b) she fails to satisfy the procedural requirements of the relevant Practice Direction (PD25); (c) her conduct fell short of the standard to be expected of a court-appointed expert; (d) her evidence has impacted on the rest of the evidence in the case, including the evidence given by the mother and the children's guardian; and (e) therefore the case needs rehearing.

21. I have been reminded of the terms of Practice Direction 25, the duty of expert witnesses, the way in which opinions may be expressed and I have re-read the standards for expert witnesses contained in the annex to Practice Direction 25B.

22. I have read the President's memorandum on experts in the Family Courts dated 4 October 2021, including the phrase –

> "Pseudo-science, which is not based on any established body of knowledge established body of knowledge, will be inadmissible in the Family Court."

I have reminded myself of the comments made by the President in his speech to the Family Bar in Jersey in the same month where he said–

> "Where the issue of parental alienation is raised and it is suggested to the court that an expert should be instructed, the court must be careful only to authorise such instruction where the individual expert has the relevant expertise."

23. My attention has been drawn to guidance issued by The Association of Clinical Psychologists in December 2021 as to the use of the word "psychologist" in various settings. Finally, I have read the guidance issued by The Family Justice Council and The British Psychological Society in May 2022 on psychologists as expert witnesses.

24. I note from the CV that was provided and from the evidence given that the expert chosen by the parties in this case had extensive experience in reporting in cases where allegations of parental alienation had been made. It is clear from the correspondence at the time that she was instructed that she had been chosen for that specific reason and my attention was drawn to a recently reported case of *Re A & B (Parental Alienation)* , decided on 14 January 2022, in which the same expert had given evidence in a completely different case, in another part of the country, and that is a mere example of a recent case in which her expertise had been accepted.

25. My conclusions on this aspect of the case are as follows.

26. For many years there has been a debate about the definition of a "psychologist," who can and who cannot use that term. There have been discussions and arguments about the differences between a clinical psychologist, a forensic psychologist or someone who has followed a Degree course in psychology. There have been many learned debates between the various professional bodies who are keen to regulate or register psychologists of various types. For good reasons, the professional bodies are anxious to protect those who fulfil the criteria for membership of one of those bodies. For that reason, guidance and memoranda have been issued by The Health and Care Professionals Council, The Professional Standards Authority, The British Psychological Society and The Association of Clinical Psychologists.

The latter supports a move so that only those who are registered under the HCPC should be instructed in cases. There is another group, The Academy of Experts, who take a different view.

27. It is clear that at some point these debates need to draw conclusions. At some point, simple guidance will be helpful to everyone to avoid the type of arguments that have arisen in the current case.

28. The May 2022 guidance notes that certain titles are protected by law, but Clause 3.9 of the guidance notes–

> "It remains at the discretion of court to appoint individuals who are not eligible for Chartered Membership of the BPS or qualify for registration with the HCPC, but the court should determine that that person has relevant psychological knowledge or training."

29. So even in May of 2022 the option of appointing someone who calls themselves a "psychologist" who does not fulfil the requirement to attain Chartered Membership or registration remains an option in appropriate cases. Whether this is a good thing or not is not for me to determine.

30. So far as the jointly appointed expert in the current case is concerned, her CV was approved by all parties and by the court. She fulfilled the letter of instruction and she fulfilled the role which was expected of her. Her conclusions were clear. They were not accepted by the mother. They were accepted by the father. They were accepted, in part, by the children's guardian and they were largely accepted by me. I accepted her conclusion about alienation. I did not agree with her recommendations for stopping all contact.

31. When the case came back before me in February 2022 I concluded that, contrary to the recommendations made by the therapists, it would still not be in the interests of the children for contact to cease for a further period. I determined that the children should be able to have a half-term holiday with their mother. I disagreed with the proposal that the therapy should continue. I concluded that the therapy should stop, as it was counterproductive.

32. Having reached those conclusions, I apply the tests that were set out in the case of *Re E*. First of all, I have no hesitation in finding that the children and the parents have been in litigation for far too long. They need finality and this litigation must stop.

33. Secondly, considering the second limb of *Re E* I conclude as follows. The resources of the parties, who have been funding this litigation themselves, and the resources of the court have been taken up with this case for a significant number of years. The financial and emotional cost to the parties has been immense. Further time and cost cannot be justified. The children - who love both of their parents - will not be assisted if the case is once again reopened. The children are thriving in their schools and they now have the benefit of a relationship with both of their parents. To have another year of litigation will be damaging.

34. The findings I made a year ago are not accepted by the mother, but it appears that the decision I made has in fact benefited both of the children so that they can continue to grow up having a good relationship with both of their parents. The mother cannot accept any responsibility for the damage that has been done to the children over the years. The findings are, and remain, significant to the children. The findings I made have enabled the children the freedom to develop good relationships with all of their family (maternal and paternal). Any further evidence, that would be based on a new report by new expert, who would have to revisit all of the past, would not assist the children. This is not a case in which new evidence has come to light since I made my decision.

35. The third limb of *Re E* is this. There is no reason to think that a rehearing of the issue will result in any different finding from the decision I made a year ago. The issues were fully explored during the 2021 hearings and in the application for permission to appeal. There are no solid grounds for believing that the earlier findings require revisiting.

36. In these circumstances, I must refuse the mother's application to reopen the final hearing and therefore refuse to order a rehearing.

37. I turn to the next matter, which is section 91(14) of the 1989 Children Act. I take into account that it has recently been revised and there is now a section (14A) that I should take into account as well.

38. Under section 91(14) and (14A) the court has power to make to make an order under its own initiative. This is not a case where there have been a series of hopeless applications. The law is now clear that these orders should not only be made in exceptional circumstances. Although the duration of the litigation in this case perhaps does put it to towards the top end of anything that could be regarded as a normal dispute, I take into account, as I must, the impact on these children of the continual litigation in this case. They have been in litigation, in one way or another, for about eight years of their lives. I accept the recommendation of the guardian that the children now need an extended period where they understand that their

living arrangements are stable and fixed and they need to know that their parents are no longer fighting over them.

39. The mother fears that this section 91(14) order will be seen as an interference with their Article 8 rights (in other words an interference in their private and family life).

40. A section 91(14) order is not a total bar of any further application but it adds an additional step which is required before an application could be made to ensure that such an application is appropriate. I have to make sure that any order is necessary, proportionate and is the least interventionalist order in any Article 8 rights.

41. I am satisfied that this is a case in which a section 91(14) order is necessary. I weigh the potential damage that will be caused to the children if there is further litigation. They need to settle into the routine that I put in place a year ago. The children need to continue to have good contact with their mother and to spend good time with their father. They need to enjoy their life at school and to continue to get involved in all of their out-of-school activities with their friends. The children do not need social workers, guardians, therapists or counsellors. They do not need the spectre of court cases hanging over them.

42. I have come to the conclusion that I should make a section 91(14) order and that this order will last until the eldest child has completed the GCSE exams (in June 2025). That will enable the children to know that there will be no major changes in their lives for a sensible period of time. That, then, is my order in respect of section 9(14).

43. I turn, then, to the journalists' request, first of all, for skeleton arguments and, secondly, for permission to name the expert and the therapists in this case.

44. At the conclusion of the submissions I made it clear that the skeleton arguments that had been filed could, and should, be redacted and disclosed to the journalists in order to enable the journalists to make sense of the arguments that they had heard and to make sense of this judgment. I do not know whether that has yet happened, but the journalists are clearly entitled to have those redacted skeletons.

The naming of the experts:

45. The jointly-appointed expert has not been given notice of this application and so I have not had any formal submissions from her or on her behalf. But I have, today, forwarded to the lawyers, Ms Summers and to Mr Farmer an email that was sent to the court yesterday afternoon from the expert who somehow had learnt of the application made by Ms Summers. I was keen that all parties should see this email and, if they thought it was necessary or appropriate, to addresses me in relation to it. I do not take her comments into account when I give this judgment unless any party thinks it is necessary that I should.

46. If I were to consider naming an expert and criticising that expert for their work or conclusions, it would be essential that that expert was given notice and would have a proper opportunity of making submissions about the naming and responding to any application for the name be disclosed. In the case I am dealing with today there is no criticism of the expert by the court in this case.

47. In this case the parties jointly selected the expert to report. Her CV was clear as to what she was able to do. She has not held herself out as being something she is not. Her expertise in parental alienation was the reason why the parties jointly asked her to report. I have already said that she fulfilled her instructions.

48. I have come to the conclusion that, in these circumstances, there is no reason why the name of the expert cannot be disclosed if the journalists consider it is necessary to do so. In her note that she put before the court Ms Summers has specifically said: ***"By way of reassurance, I would make it very clear in any reporting on this case that no findings were made by the court that discredited the expert or therapists involved and that this was made very clear in the judgment."*** I accept that reassurance given by Ms Summers.

49. I have also considered if there is a risk of "jigsaw" identification as a result of the expert's name being published. I have concluded that there is not a great risk as there is no obvious geographical connection between the location of the parties, the location of the court or the location of the expert.

50. I have also considered whether the naming of the expert will add to the issues raised by the President's Experts Group, which is chaired by Williams J. Many experts are reluctant to get involved in family cases if they fear they will be "named and shamed". I do not consider that the naming of the expert in this case should be an issue, particularly as there is no criticism made of the expert in my judgment.

51. I have come to the conclusion that Ms Summers and Mr Farmer may use the name of the expert. However, there must be a period of at least 21 days from the date of this order before any information or the expert's name is identified in order, first of all, to allow any party an opportunity to appeal and, secondly, to enable the expert an opportunity of making submissions - if she considers it is necessary or appropriate to do so - when she has been informed of the ambit of my judgment and what Ms Summers has made clear will be and will not be included in any reporting. So with that caveat, the name can be used.

The expert Miss Gill, has confirmed that she has no objection to her name being disclosed in any report of this case. 22 July 2022

Approved

Her Honour Judge Lindsay Davies
11 July 2022