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IN THE CENTRAL FAMILY COURT

No. ZC18P01277

42-49 High Holborn
London, WC1V 6NP

Tuesday, 17 September 2019

Before:

HIS HONOUR JUDGE TOLSON QC

(In Private)

B E T W E E N :

H

Applicant

- and -

C

Respondent

THE APPLICANT appeared in Person.

MS W. FREMPONG appeared on behalf of the Respondent.

A P P R O V E D J U D G M E N T

JUDGE TOLSON:

1 This is a case of an all too common kind these days. The ultimate issue for me to determine is how much in future K, a little girl born on 10 February 2015, therefore now four and a half, should see of her father. In common with so many other similar cases it is an issue which has been before the court for a long period of time without any satisfactory resolution. It is now, again in common with so many others, complicated by allegations of domestic abuse and even rape.

2 District Judge McGregor had to wrestle with the matter in December 2017 and made an order, which I do not think is actually before the court but which provided for supervised contact. There were enforcement proceedings, which came before Her Honour Judge Cox in October 2018, and Judge Cox declined to interfere with Judge McGregor's ruling. It seemed these interventions, from these two different judges, set the case on a course which would see a developing relationship between K and her father. In 2019, however, that has been derailed by a series of allegations made by K's mother, which have been tried by myself this morning at a fact-finding hearing. There are rather loose allegations of wider control, particularly financial, which against the background of this case I have not felt it necessary to investigate. More fundamentally the mother has made two allegations of rape against the father and after a good deal of hesitation I decided that it would be better for the future conduct of the case, and therefore for K herself, if these allegations were investigated, despite the fact that they were only made at a very late stage in the day, after the two court processes which I have already described. During those interventions there was no mention at all of the allegations which have been investigated this morning, and there is no satisfactory explanation as to why not. It might therefore be thought that they - wherever

the truth may lie - could have been safely consigned to the past. This is not, however, the era in which we now operate in that way in cases involving alleged domestic abuse. Such allegations are invariably taken very seriously. A CAFCASS report at the end of last year indicated that a fact-finding hearing might be necessary, although I do not believe the author committed herself on the point. It is, moreover, clear to me that this case is one which could become a truly long running and intractable saga, although I have every intention of preventing that happening in future if humanly possible. Determining the truth as to these allegations will I hope help provide some clarity. I would invite both parents and everyone involved in the case to recall that all we are about is establishing, if possible, a good relationship between a little girl and her father.

3 In any event, for reasons good or bad, I determined that these allegations had to be investigated and that is what we have been about this morning. It has been a short hearing because there is very little in the way of independent evidence concerning the allegations. Everything really turns on the evidence of the only two people who know what happened between them with any certainty, namely the mother and the father.

4 The allegations are set out in a schedule. The first in time goes back to May 2014, and is said to have occurred during the mother's very first visit to the father, who at the time was living in Jamaica. They had begun their relationship the previous year via social media, and the mother's trip to visit the father in Jamaica was their first physical encounter with each other. It will be perhaps immediately obvious why I made my earlier remark - that in other circumstances these allegations might have been consigned to the past. At the time of the first allegation the mother was not even pregnant with K. Moreover, whatever the truth of the mother's allegations, the incident is alleged to have taken place during a stay which otherwise lasted a month and which saw both mother and father staying together in the same

hotel room for that lengthy period and having frequent sex, as might be expected in the circumstances, and about which neither makes any complaint whatsoever.

5 After this trip the mother returned to England, and came back to Jamaica 18 months later in November 2015. This time with the young child, K, to whom she had given birth in the interim. (I should add in parenthesis that the mother has an older child, not the father's daughter, currently aged seven. She was also present on both trips to Jamaica.) A further allegation of rape is made, which is said to have occurred at an uncertain point during a visit lasting about three weeks. Again, however, it is important to point out that even on the mother's case this visit ended in a proposal of marriage by the father which the mother was able to accept, and which, her friend tells me, the mother hoped would be a genuine proposal. The mother, according to the friend, wanted the relationship to work in future and, it follows, wanted K to have a relationship with her father.

6 Thus, even if what the mother has to say is correct, these allegations take place within a very particular context. Even if they are true, I make the bold statement that they would have, in my judgment, almost no implications at this stage for the future development of the relationship between the father and K.

7 Only one allegation by the mother involves K herself, and that indirectly, because it is said that in the aftermath of the second alleged rape incident the father was guilty of a physical assault on the mother, banging her head against a cupboard door. This took place in the presence of both of the young children. It seems to me, however, that I should be very slow to infer from this that there is any direct risk to the child herself. The relevance if the mother's case is correct is that it might explain some of the anxiety which the mother professes to feel in permitting contact to develop from a supervised basis to an entirely

unsupervised normal basis. It might explain the mother's case which is that she is not in any way against a relation between the father and the daughter, but would want father to undertake some kind of domestic violence or anger management course before contact progressed. Against that, I have to observe that these allegations were apparently not made during two earlier sets of court proceedings.

8 I therefore turn to the detail of these allegations and I should, before coming to the evidence of the parents, first of all touch upon the only independent evidence which supports the mother's allegations. There is a statement from a friend of the mother's who the mother describes is like a sister to her. The friend also uses the word "sister" within her own statement. This use of the word 'sister' to describe someone who is in fact only a friend is relevant in that at an earlier hearing I was told that there would be a supporting statement from a sister of the mother in support of the allegations. The mother has three sisters but there is no statement from any of them. There is however the statement from the friend who also gave oral evidence.

9 The friend was not a witness to any abuse. The evidence which the friend is able to give relevant to the allegations is that during the November 2015 trip the friend was in frequent telephone conversation with the mother, and during one call the mother was upset. The friend had to press her and on being pressed the mother indicated to the friend that she had been raped and physically abused. The words the friend uses in her statement are as follows:

"She repeatedly told me how the father raped her and had got her head and slammed into a cupboard door. She was very distressed, very emotional and just in tears."

There are some difficulties with the friend's evidence however. Perhaps the first of those is that on the friend's account she was hearing of her close companion's extreme distress in a far distant country, where she had been raped by a partner who the friend effectively distrusted at the time, and had in her company two young and vulnerable children. Despite these circumstances the friend's evidence is that she did nothing about the mother's plight in Jamaica and did not even tell anyone what had been revealed to her. The second difficulty is that the friend's evidence cannot explain the development from this low point to the proposal of marriage, which on the best available evidence happened only a few days later. This is despite the fact that the friend and the mother were in regular telephone contact. It left me feeling deeply uncertain about the accuracy of the friend's evidence.

- 10 The problems were compounded because the friend's account of the mother's earlier trip to Jamaica in May 2014, is that again she was in daily telephone contact with her and throughout the mother was describing to her friend in England an "enjoyable" experience. In other words, on the friend's account, the mother made no mention of the first alleged incident. Now that would not affect the quality of the friend's evidence (although it has implications for the accuracy of the mother as a witness) but for the fact that when being pressed about this, the friend rather unconvincingly indicated to me that on the mother's return to England she, the mother, had described the quality of the stay as being that "generally it wasn't enjoyable." This is not the mother's description of that visit and I am very, very far from convinced that that is in fact anything the mother would have said to the friend at the time. I am left believing that the probability is that the friend is doing her best to support the mother but does not constitute independent evidence on which it is safe to rely.

11 The second piece of evidence from an outside source is that the mother gave an account of non-consensual sex to a health adviser, Ms S, on 18 December 2017, the account being recorded in Ms S's note which is not in the main bundle but is in the supplementary bundle provided by the father. It is the third page in Appendix A. Before coming to the detail of what the mother had to say to Ms S it is important to point out the context in which this was said to the health adviser. It occurs only six days after Judge McGregor's order on 12 December 2017. In any event, the relevant part of the note reads as follows:

"I asked the patient what happened three years ago. The patient states, 'Something traumatic.' I asked if she could tell me more. She said her ex-partner 'would have sex with her whenever he wanted.' Confirmed this was non-consensual she said yes. She has not spoken to anyone about this. Did not inform the police. She is still in contact with him because they have a child together."

12 The difficulty with my relying on that is that the note is a long way from the version of events which the mother now gives. She does not describe more than the limited non-consensual sex which I have described. She does not say that on every occasion or frequent occasions when she had sex with the father it was non-consensual, and indeed my impression is that any incident the mother is describing undoubtedly took place within the context of frequent sex which was entirely consensual between the parties. So again it seems to me that this piece of evidence cannot support the case which the mother now presents. Indeed it is in conflict with it. It also raises the question as to why no mention had been made of this frequent non-consensual sex to Judge McGregor.

13 Everything therefore turns on the evidence of the parties. Well the mother spoke very softly in court but I do not in any way hold that against her. It is an extremely difficult position for

her to be in, whether or not these allegations are true. The first difficulty with the mother's evidence occurs in the context of the May 2014 allegation. The mother had allowed, for whatever reason, directions and time limits for the filing of statements to pass without any good explanation, and when the case came before me last month the situation was sufficiently serious that I was compelled to impose a tight time limit for the evidence in support of these allegations upon the mother. I instructed that she was to set out her case in writing that day with her solicitor at court. This she did. She did so in circumstances which give the impression within the statement that the alleged incident of non-consensual sex occurred on the very first occasion that the parties met:

"On the first trip I was trying to organise my clothes from my suitcase to the hotel drawers beside the bed. The father came up behind me ..."

The mother then goes on to describe the incident in which she claims she had not consented to sex, and in which the father afterwards was to say that he had not heard her say "no". The statement in reality is at best vague as to whether the mother is in fact describing an allegation of rape. As clarified today, the mother's case is to accept that she is alleging that the father's version of events to her was that he was unaware that she had not consented. The result is that Ms Frempong of counsel, who appears for the mother, has had to attempt to direct the mother's case down a very narrow channel. I would like to say during this judgment that Ms Frempong's advocacy in this hearing has been of the highest standard and she has left no stone unturned in terms of her presentation. At the same time, in submissions she has realistically recognised some of the difficulties, which lie in the mother's path.

14 Another difficulty with the mother's statement, which was not cleared up during her oral evidence, is that the impression is that the mother understands perfectly well that the father

is "playing around" at the start of this incident. It is not clear to me how we get from that position to the mother's contention that she did not consent. It was suggested by Ms Frempong during her able cross-examination that this might have been to do with the mother's self-consciousness about certain features of her own body - but that is not the way the mother presented it during her oral evidence, where she simply said that sex was not to her taste at that moment because she was repacking the drawers in her hotel room.

- 15 I am afraid I find that an unconvincing explanation in the context of the parties having just met for the first time and being about to embark on a stay together of four weeks when, as I have already indicated, they remained in the same hotel room together throughout enjoying, it is common ground, consensual sex on many occasions. It is deeply unconvincing stuff.
- 16 I have to set against that the evidence of the father who again in an all too common and regrettable feature of cases this kind has been driven to represent himself. He does not have the benefit of the public funding which has come to the mother as she has convinced the Legal Aid authorities of at least an arguable case. Ms Frempong took a sensible approach into the cross-examination of her client. Almost no questions were directly asked of the mother by the father, with everything being put, I hope relatively gently, through me.
- 17 I record that the father was a straightforward witness telling a consistent tale well, without in any way attempting to shirk any of the questions which were asked of him during an able cross-examination. It is of course easy simply to deny an allegation but the reality is that the father's evidence is a complete fit with the context. The mother's case is very weak in respect of this allegation.

18 The mother's case is stronger when it comes to the November 2015 incident. It is a danger in judgments of this kind that overly precise findings at least run the risk of error, especially where the standard of proof is the simple balance of probabilities: what is more likely to have happened than not, with the burden of proof in this case being upon the mother. A finding on the basis of a probability is, once made, elevated into determined fact. It becomes written in stone. I do not alter the standard of proof in any way because we are dealing with a serious allegation of rape. In such circumstances, as I attempt to examine years later an incident which took place between two people, it is entirely possible to fall into error and I have reminded myself of that at all points in this hearing, especially as there is more to the mother's case in respect of November 2015.

19 Here there is some contextual detail. The mother indicates that the father in effect set upon her, as I understand it, in the bedroom of the apartment which she was then renting. He forced her to the floor and had sex with her when it must have been clear that she was not agreeing to it. The mother maintains that she can remember the beads of the skirt that she was wearing pressing into the marble floor beneath her and causing her pain. Following the sex the father left briefly and then returned to find her apparently making a call to her friend in England, which angered him and it is at this point that he is said to have banged her head against the cupboard covering the water heater in the apartment. This mention of the water heater is another contextual detail to the mother's case which causes me to hesitate.

20 Again the father gave good evidence about the incident, denying any wrongdoing and indicating that the sex between them was always consensual. I remind myself that the impression given by a witness in the witness box is often a poor guide to the truth. Again, however, the father has the context to support him. The mother's case is further weakened by the fact that it is only a few days later that she is accepting a proposal of marriage from

the father, hoping that the proposal is genuine and wanting the relationship to work. I can of course accept that that in no way rules out the possibility that the mother's versions of events was accurate. The compliant victim of domestic abuse is not unfamiliar in this type of case. But the reality is that this case would represent an extreme example of the phenomenon, and it is another factor which tells against the accuracy of the mother's version of events.

21 I have to approach this case with forensic rigour. The balance comes down in favour of the father. The reality is that I do not accept the truthfulness of the mother in respect of the 2014 incident. That allegation is so weak as to be almost unarguable. Once I have failed to accept the mother's case as to the May 2014 incident then I am faced with a dishonest witness and it is a very long step indeed to my accepting the accuracy of her version of events in November 2015 and making a finding of rape against the father on that basis. I am afraid for me that is a step which is by some margin too far in this case when set against the oral evidence of the father.

22 In those circumstances the outcome of this hearing is that Allegation 1 is not proven and did not happen. I have reached exactly the same conclusion in respect of Allegation 2 and Allegation 3 on the schedule. Allegations 4 and 5, financial abuse and emotional abuse and harassment, have not been investigated during this trial and have no implications for the future child arrangements in the context of this case.

23 I have of course had Practice Direction 12J firmly in mind throughout this hearing. There are no relevant findings which amount to any risk to the child or indeed any risk to the mother herself. Consequently the way is now clear to develop the father's relationship with K into one where there is a normal relationship between a separated father and his daughter.

24 I do not want to impose such arrangements on the parties. I sense that this case may be capable of settlement and I would invite the parents to go outside now and attempt to agree a path going forward. I would hope that this is not a case in which there is such deep-rooted conflict between the parents that this is not possible. It does not have some of the features of the extreme cases, which I so often encounter. If agreement is not possible today then I will provide for a further hearing in a few weeks, at which it may be important to get a report from CAFCASS, it may not. I will see where we go. That concludes this judgment.

25 Judge's Note: subsequently, as I recall, the parties reached agreement and an order by consent was made.

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