[2023] EWFC 42 (B)

IN THE FAMILY COURT AT WEST LONDON

West London Family Court,
Gloucester House, 4 Dukes Green Avenue
Feltham, TW14 0LR

Date: 8 February 2023 (Costs on 1 March 2023)

Before :

HIS HONOUR JUDGE WILLANS

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Between :

SW

Applicant

- and –

IB

Respondent

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Sophie Connors (instructed by Kingsley Napley) for the **Applicant**
Alex Verdan KC (instructed by **Payne Hicks Beach LLP**) for the **Respondent**

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PAPER TRIAGE
(pursuant to principles in G v G [2022] EWFC 151)

His Honour Judge Willans:

Introduction

1. The parties have been seeking to resolve child arrangements for their child, JB, who was born on 29 October 2020 and is now aged approximately 2 years and 3 months. Having failed to agree the arrangements the father issued an application before this Court. In due course the parties suspended those proceedings by consent in order to pursue alternative routes of resolution, namely arbitration. On 1 December 2022 the parents took part in a final arbitration hearing before Ms Claire Heppenstell MCIaArb. She produced a final determination ("the determination") on 5 December 2022.

2. The mother objects to the determination and has applied by C2. The father asks for the determination to be upheld and has provided a draft order. The parties agree the principles in **G v G [2022] EWFC 151 (per Peel J)** apply.

3. I have regard to the following key documents:
    a. The C2 application issued by the mother which attaches the determination under consideration
    b. A skeleton argument dated 16 January 2023 authored by Mr Alex Verdan KC
    c. Grounds in support of application
    d. A statement of the mother dated 16 January 2023 on which the mother seeks to rely
    e. A skeleton argument dated 1 February 2023 authored by Ms Sophie Connors
    f. The authority of **G v G**.

Legal Principles

4. A Judge making any welfare order under the Children Act 1989 must be independently satisfied that it is a proper order to make with the paramount consideration being given to the child's welfare. The same principle applies where an order is sought to be approved (whether by agreement or not) after an arbitration process. The parties cannot oust the jurisdiction of the Court or the obligation on the Court to consider whether the order is consistent with the best interests of the child.

5. Where there is a challenge to the approval of an arbitration determination the test the Court must apply is as to whether the determination was 'wrong' nothing more and nothing less. The concept of 'wrong' is intended to capture the same concept as found in Part 30 FPR. When a challenge to an arbitration determination is mounted the Court should undertake a triage stage to consider whether the challenge has a real prospect of success. This mirrors the test that arises when permission to appeal is sought. If that gateway is crossed then the Court will proceed to a full inter partes hearing for a review of the decision. That will mirror a full appeal hearing. If the gateway is not crossed then an order incorporating the determination will be made.

6. The parties in this case have proceeded in accordance with the observations of Peel J at §31 of **G v G**. Both have had the opportunity to make representations as envisaged in FPR 4.3 (2)(a).

Background

7. I do not consider it necessary to repeat the background history adequately summarised in the arbitration determination. I have read and carefully considered that history.

Grounds for challenge

8. This can be summarised concisely. Whilst there were a number of areas requiring resolution the key dispute (for these purposes) was the question as to (a) the point at which overnight contact between father and child would commence; (b) the speed of progression of the same once commenced, and (c) the point at which the arrangements would be labelled as shared care (the parties agreeing this label should apply but at differing points in time).

9. In summary the mother sought a slower process. Her proposal before the arbitrator is found at §20 of the determination and sought to delay overnight contact until the child was aged 4 years of age. It would then increase incrementally over the next 7 years until it reached a point of care on a 7/7 basis, and at which point it would be shared care. The structure to this plan essentially developed the conventional weekend by 1 night per year until the final point was reached. In summary the father was looking for a faster process. His proposal before the arbitrator is found at §19 of the determination. He sought to commence overnight contact immediately with a shared care arrangement (2/2/5/5) being reached by the point the child reached 4 years of age.

10. The arbitrator concluded contact could start sooner rather than later and provided a detailed schedule (see final determination §1(A-H)) under which overnight contact would commence after approximately 3 months and incremental change thereafter reaching the 2/2/5/5 shared care position by June 2025.

11. The grounds of challenge are that in making this decision (which is said to amount to a 'fundamental and radical change') the arbitrator failed to place sufficient weight on the following factors:
    a. the significant change that the introduction of overnights would represent;
    b. the fact that JB had never spent a night away from the mother;
    c. JB's experience of his mother being his primary carer who has met all his needs to a very high standard;
    d. JB's deep attachment and bond to the mother and the need for any future changes to take this into account;
    e. the key developmental stage that JB was at;

f. the high level of contact that JB was already having with the father (at least 4 times per week) and therefore there being no need for a radical change in the arrangements;
g. JB's need for routine, stability and security;
h. the recent changes that JB had undergone including his parents' separation, attempts to end co-sleeping, and reduced breast feeding, which JB was still adjusting to;
i. the need for any changes in arrangements to be at JB's pace and in stages;
j. the recent changes to the existing child arrangements made on 30.06.22;
k. JB's young age and characteristics;
l. the impact of this proposed change on JB's routine;
m. JB's emotional needs and his inability to manage these rapid changes;
n. the fact that JB would be commencing nursery in January 2023 and therefore would have to manage that significant change to his routine and need more time to adjust to this before the commencement of overnights.

12. The specific challenge is to two aspects of the determination:
    a. The decision to commence overnight contact on 27 February 2023 (now 11 March 2023 following agreement of the parents to delay this for identified special reasons)
    b. The decision to provide the father with the majority of weekends in an initial 'settling in' period between March and July 2023.

New evidence

13. The mother seeks to adduce further evidence in support of her application. She has filed a statement in which she relates the negative effect of the changes on JB since the date of the determination. The father opposes permission being given in this regard.

14. I do not give permission for the mother to rely on this 'new evidence'. (1) It is trite that decisions in children law are by their very nature dynamic and that final orders can rarely said to be truly final in that parents can agree changes, or seek the Court's determination as to changes, as circumstances change over time. However, there is a very real danger in permitting parties to provide their post-determination evaluation of how the order has progressed in the days and weeks following a decision. Such re-evaluation runs the risk of being subject to the very subjective perceptions as previously expounded at the hearing when the decision was made. It cannot be right for an appeal court (and this process if analogous) to allow the process to effectively become a rehearing rather than a review of the primary decision. Permitting this form of 'new evidence' would make that an almost inevitability. (2) I am not satisfied this meets the test expounded in **Ladd v Marshall** in any event (even when viewed with the greater latitude envisaged in **Re G (A Child) [2014] EWCA Civ 1365**. This information is updating information which could never have found its way before the arbitrator. (3) Finally, I agree the arbitrator was very alive to this issue within her

judgment. She accepts there is likely to be an element of 'initial upset' in the settling down period.

Triage determination

15. I am not satisfied this application has real prospects of success such as to justify an inter partes hearing. Rather I consider the determination should now be endorsed by the Court and the draft order approved. In reaching this conclusion I make the following observations:

    a. The adjudication in this case was thorough and reasoned. On my reading the arbitrator provided a clear and persuasive analysis of the reasons for setting her determination. She undoubtedly focused on the key factors relevant to her determination and did so in a painstaking fashion.
    b. Of course, she might have set the progression of contact at a different pace, but any triage assessment must have regard to there being a band of reasonable decisions.
    c. To the extent the decision was based on submissions rather than evidence this flowed from the agreement of the parties.
    d. The determination proceeded in circumstances in which there was no real challenge to the importance of the relationship of JB with both parents and there was no meaningful welfare issues in dispute. The parents agreed over time the child should enjoy shared care they simply couldn't agree when.
    e. The outcome reached by the Judge can be viewed as objectively unsurprising. Whilst there can be no presumption as to how contact should develop the conclusions reached are far from atypical in case with these features.
    f. In contrast the mother's timetable was unusual as to the level of incremental change being suggested. It is in my assessment unsurprising the arbitrator reached a conclusion which came closer to the case put forward by the father rather than mother.
    g. Importantly, throughout the decision the arbitrator set out in a clear and conscientious fashion the central relevance of JB to her decision making and his personal circumstances. She reached principled conclusions which she was entitled to make, and which came to underpin her decision.
    h. I consider the grounds relied upon largely amount to a repetition of points placed before the arbitrator and properly considered and resolved by her. Many of the points overlap. Many fail to recognise that with the challenge identified came the opportunity for JB to enhance his relationship with his father and in a context in which the arbitrator assessed the father having the ability to meet his needs.
    i. In reaching my conclusion I agree with the analysis of the determination at §35 of the father's skeleton argument.

16. I have not addressed the argument as to the mother requiring leave to apply out of time. For the avoidance of doubt, I would give such leave.

17. I therefore complete my triage exercise. I will formally make the order bringing the determination into effect. It is attached to this decision.

18. The father seeks the costs of this exercise. In principle (see §49 of **G v G**) he should be entitled to the same on a summary basis to be assessed summarily. However, I have nothing from the mother on this point and no costs schedule (unless I have overlooked the same).

19. I will deal with this on short written submissions on the following basis (if disputed):
    a. Father to serve his schedule on the other by 4pm on 13 February 2023
    b. Mother to raise any objections in principle/quantum by a short argument to be sent to the father by 4pm on 15 February 2023
    c. Father to respond to any points in like manner by 17 February 2023
    d. Parties to send me a consolidated email containing the above (unless agreed) by 4pm on 20 February 2023. I will then resolve the issue and complete the order.

20. This decision may be published. I consider it is already appropriately anonymised but if there are any views in that regard can I please hear them with the cost's argument.

Costs

21. I have now received the parties response to §19 above. I am also grateful to the parties for their response to §20.

22. I have received a concise bundle including the father's cost schedule and the parties respective contentions on costs.

The sum sought

23. The father's claim for costs amounts to £14,472.80 on the schedule dated 13 February 2023. However, an accompanying email instructs this is now increased by £1,918.80 (inclusive of VAT) in an updated schedule (17 February 2023) reflecting the additional work undertaken on the father's submissions on costs. This being the case the global costs sought (inclusive of VAT) are **£16,391.60[1].**

The mother's argument on costs in principle

24. The mother contends as follows in a summary form:
    a. The father is not as a matter of procedure or law entitled to his costs in respect of a permission to appeal hearing or a triage process akin to the same. My intention is drawn the FPR PD30A §4.23 (and also an equivalent principle on the CPR) which makes clear that '*where the Court does not request submissions from or attendance by the respondent, costs will not normally be allowed to a respondent who volunteers submissions or attendance*'. It is said

[1] Although for reasons which are unclear this is stated to add to £17,091.60 in the father's submissions

the father was not ordered to respond or attend a hearing and as such no costs should follow from his voluntary decision to respond. I note under the CPR the respondent is encouraged to provide a short response document notwithstanding the general rule as to non-recoverability of costs.

b. I am taken to the relevant case law and my attention is drawn to *Novartis AG v Anor v Teva UK Ltd & Ors*[2]*; Haley v Haley*[3]*; A v A*[4] *and G v G*. It is contended that taken together these support the argument that at a triage stage the permission to appeal principle of non-recoverability of respondent's costs holds. To allow costs in such a manner is said to allow the respondent recoverability by the back door despite the clear indication found within the practice directions and elsewhere as set out above. I am asked to consider any contrary indication in *G v G* as not being endorsed by the Court of Appeal or statute as of yet.

The father's argument on costs in principle

25. The father argues this triage proceeded on *G v G* principles as agreed by the parties. In any event the guidance in *G v G* is intended to provide the legal structure to be applied to a challenge to a arbitral award. Whilst it reflects the process applied on appeal (for instance a two stage process) and the principles to be applied it is a structure for a challenge to an arbitral award and not an appeal per se. As such the practice directions on appeals do not supplant the guidance in *G v G*. Further it is of note that each of *G v G; Haley v Haley and A v A* all make provision for the losing party to be penalised in costs at the triage stage. The father also contends as to the benefit the Court received from the father's submissions at the triage stage and as to it being contrary to general policy to permit a party an ability to impede or delay an arbitral award by having a free shot at a triage process if they are dissatisfied with the award.

Resolution of issue in principle

26. I am satisfied costs are a live issue following a triage determination in a very different manner to envisaged following a permission to appeal hearing. I reach this conclusion for the following reasons:

    a. I accept the guidance found in the authority of *G v G* is peculiary relevant to challenges to arbitral awards. The fact the Court has constructed a sensible structure largely (but not entirely) mimicking the appeal process does not make this an appeal or make the appeal practice directions automatically applicable in full. Were that the case the guidance would undoubtedly simply reference parties to PD30 as the process to be followed. I do consider the guidance to be applicable insofar as it departs from any general rule on costs.

    b. In my assessment the triage process (as set out in *G v G*) intends to permit the respondent a more active role in any triage hearing than would normally be expected under the a permission to appeal process. This can be seen in §31 of that decision where Peel J. explains why there would be no ordinary right

[2] [2022] EWCA Civ 775
[3] [2020] EWCA Civ 1369
[4] [2021] EWHC 1889 (Fam)

to apply to set aside the decision made on triage for want of a hearing. Where a permission to appeal hearing is determined on paper then a party generally has a right to an oral reconsideration. However as explained by Peeel J. the facility for each party to file submissions amounts to the 'opportunity to make representations' required under FPR 4.3 and thus removes any consequential right to an oral review.

c. In any event I consider, contrary to the submission of the mother, that there is clear authority on this issue (aside from *G v G*). Indeed it is this line of authority on which *G v G* builds:
    i. In his appendix to *A v A* Mostyn J. (§2) and in the context of a financial award made clear that if the permission to appeal test has not been passed then the party will likely be penalised in costs.
    ii. This paragraph in turn referenced *Haley v Haley* (§96) in which King LJ concluded:

> If the court at the triage/paper stage takes the view that the objection made to the award by one of the parties would not pass the permission to appeal test, it can make an order in the terms of the arbitral award without more ado and penalise the reluctant party in costs.

    iii. For my part it appears clear this was the line of authority on which Peel J. was relying when extending the same principles to children arbitration challenge cases.

27. In my assessment the father is entitled to his costs subject to the summary assessment that follows.

Mother's argument on quantum of costs

28. The following points are made:
    a. This was an overblown response and instead should have not exceeded the parameters of what might be expected by reference to a the CPR response noted above. In that case a 3 page document is suggested. If this had been the case then the costs would have been limited to a few thousand pounds. This has a direct impact on the counsel's fees reducing the claim from £3,500 to £1,500
    b. The time taken on correspondence and phone calls was excessive and did not justify a grade A fee earner as claimed. Overall this should reduce the bill by about £2,500
    c. Turning to documents items 1 and 2 should not be recoverable and 3 should be substantially reduced.
    d. Taken together these modifications reduce the bill to approximately £7,700 to which should be applied a 30% discount to reflect the summary process leading to an outcome bill of approximately £5,400.

Father's argument on quantum of costs

29. The following points are made:
    a. The substance of the father's response was a direct consequence of the approach taken by the mother. He was bound to provide a comprehensive

response to the mother's broad challenge to the award. Further there were issues as to new evidence which required consideration. In summary it would be inappropriate to restrict the father to an artificial 3 page response.

b. It was appropriate to seek some guidance from a senior member of the father's legal representatives on the facts of the case.
c. Counsels' fee was a function of (a) above but also the need to instruct replacement counsel given the timing of receipt of the application.
d. Note is made of the absence of a comparison schedule on behalf of the mother to gauge proportionality.

Conclusion of costs

30. I assess these costs on a summary standard basis. The paying party should obtain the benefit of the doubt as to any uncertainty as to proportionality.

31. At first blush these costs appear significant, indeed they are. However this needs to be assessed in context. The mother relied on a detailed argument and the compass of the challenge was significant. It was therefore unsurprising that the father engaged with all the issues raised. I do not consider it would be appropriate to restrict him artificially to a 3-page document.

32. I accept I have no comparator schedule and can see the logic in the argument that this likely reflects comparable costs incurred by the mother. This is particularly so given her recourse to leading counsel.

33. I accept the father was entitled to have recourse to an extent to a senior lawyer within the instructed form.

34. I consider there is some merit in the challenges to the documents. Whilst I appreciate at some point a review of the challenge would be required I am not of the view the father can recover for a <u>prospective</u> review. In any event counsel will have undertaken this review within advice sought. I do not consider item 2 is a recoverable item in this triage process as it is a necessary feature of the arbitration in any event. I consider the time taken on item 3 should be reduced. In total I allow £1,200 for item 3.

35. I therefore reduce the bill by £1,743 (exc. VAT), or £2,091.60 inclusive. This reduces the bill to £14,300. I also apply a 30% reduction to reflect the fact this is a summary assessment. In part this addresses a level of concern around the extent to which the father relied on a higher grade fee earner. This produces a costs order of £10,010 which I round down to £10,000.

36. The mother will pay the father's costs associated with this triage process summarily assessed in the sum of £10,000 inclusive of VAT.

37. I have modified the final order as attached. This will now be sealed and sent out.

His Honour Judge Willans