-

Case No: NP24P70285
Neutral Citation Number: [2024] EWFC 284 (B)

IN THE Family Court

Sitting in Cardiff Civil and Family Justice Centre

Date: 11/10/2024

Before :

HHJ SCANNELL

- -

IN the Matter of Child A and B :

JUDGMENT

- -
- -

Kayleigh Simmons for the **Appellant**
Zoe Saunders for the Respondent

- -

Introduction

1. On the 16th August 2024 the lay justices sitting in Newport Family Court made on order which determined that the two children of this family should attend a secondary school in Wales (the Welsh school) rather than a secondary school in England (the English school). Each school is close to the border. The children were a boy and a girl who have recently turned 11 years of age. I shall refer to them as Child A and Child B throughout this judgment.

2. The Appellant to these proceedings is the children's mother and the Respondent their father. Whilst the application related to which school the children should attend, the real issue in the case was how attendance at either school would affect practical arrangements around collection and return of the children when they spent time with their father, and what it would mean for each parent's work schedule. Both parents accepted that each school could meet their children's educational needs.

3. The application was dealt with as a Pathfinder case in accordance with Practe Direction 36Z of the Family Procedure Rules 2010. This scheme has been in operation in all family courts in South East Wales since 29th April 2024.

4. Each party is represented by counsel. Counsel for mother attended the hearing in the court below. Father's counsel did not.

5. The parties agree that this judgment should be published because of practise points arising from the appeal relating to the Pathfinder pilot in South East Wales.

Brief Background

6. Mother and father married in 2012 and separated in May 2022. Each party has made allegations of abusive behaviour against the other. The Court has never adjudicated upon the allegations. Injunction proceedings were compromised with undertakings being given in May 2022. In February 2023 in an earlier private law application the parties chose not to pursue a fact finding hearing and the Court agreed it would not be necessary or proportionate taking into account PD12J.

7. On 26th May 2023 at a Dispute Resolution Appointment the parties agreed the arrangements for the children and a Child Arrangements Order was made in terms that the children would live with mother and spend time with their father. During term time that meant the children would be with their father in week 1 Wednesday from school until school on Friday. In week 2 Wednesday from school until school on Thursday, Friday from school until school on Monday. School holidays were to be shared equally. Arrangements for Christmas, bank holidays, inset days, birthdays, Mother and Father's Day were also made. Collection was to be from school by father and it was to be the responsibility of the parent with care to return them to the other parent.

8. Contact is said to have operated in accordance with this order although each parent contends it has not been without its difficulties.

9. The current proceedings commenced on 31st May 2024. The children were due to transition from primary to secondary school in September 2024 and by way of her application mother asked the court to order the children attend the English school.

10. On 4th June 2024 the application was dealt with on the papers at a Gatekeeping 1 hearing (GK1). An order was made for the preparation of a Child Impact Report (CIR) and the case was listed for a Gatekeeping 2 hearing (GK2). GK2 is a hearing on the papers. It took place on 30th July 2024. The order confirms that GK2 judge had read the C100 and the CIR which is dated 24th July 2024. The case was allocated to the adjudication track, to be heard before the lay justices and with a final Decision Hearing to take place at a family court in South East Wales on 14th August 2024. Directions were also made for the filing of evidence by mother and father to include a copy of father's work rota. The order also made clear that no other document should be filed without the Court's permission unless filed in accordance with the Rules or any Practice Direction. The was case to be heard on submissions and the Cafcass officer would not be in attendance. The order contained notice to the parties of an important right to apply asking the court to reconsider the order within 7 days. No applications were made.

11. The CIR report had recommended a move to the school in England for both children which aligned with the wishes and feelings of child A. On 5th August 2024 father's representatives

wrote to the author of the CIR posing 7 detailed questions which spanned 3 pages. The Court's permission was not sought and whilst mother's representatives were sent a copy of the letter they were not invited to comment on its contents before it was sent. The response from Cafcass is dated 12th August 2024. It was sent only to father's representatives and was not disclosed to mother's representatives or the Court until the morning of the hearing.

12. The hearing took place on 14th August, and was determined on the basis of submissions and in the absence of the Cafcass Officer. The justices rejected the recommendation of the Cafcass officer and ordered that the children should attend the Welsh school. This aligned with the views of child B whose friends would be going there.

13. Following the hearing mother moved from the former matrimonial home to a new home in a village in the South West of England close to the border and the English school. Following that move Father has made an application by which he seeks a return of the children to the former matrimonial home and a variation to the live with order in terms that the children live with both him and mother. That application is made in circumstances where the Justices Reasons dated 14/08/24 record the court being told that father did not oppose the move of home but did oppose their move to the school of mother's choice. Father now disputes that this was his position. The children have commenced their attendance at the school in Wales in accordance with the order made.

Grounds of Appeal

14. **Ground 1**: the decision of the Lay Justices was unjust because of serious procedural irregularities in the proceedings in that:-

(a) The Court concluded that it required further evidence, yet took no steps to obtain that evidence and provided no reason for its decision not to do so
(b) The Court departed from the recommendation of the Child Impact Analysis (CIR) dated 24th July 2024 without good reason
(c) The Court having identified what it considered to be flaws in the CIR failed to carry out its own analysis, or any proper analysis, of these issues in order to come to its own conclusion.

15. **Ground 2A**: The Court's decision is wrong in fact in that:

(a) The Court failed to place any weight , or any sufficient weight, on general factual matters which were relevant to the proper decision making process
(b) The Court placed undue weight on general factual matters, which were not relevant to the proper decision making and in any event was not supported by the evidence
(c) The Court referred incorrectly to submissions made by the advocates
(d) The Court failed to properly consider the welfare checklist, pursuant to s1(3) of the Children Act 1989
(e) The decision was inconsistent with the evidence before the Court.

16. **Ground 2B**: the Courts decision is wrong in law in that

(a) The court failed to consider the welfare checklist
(b) The Court failed to consider the parties Article 8 rights

The Law on Appeal

17. By operation of the FPR 30.12(30), an appeal may only be allowed where the decision of the court below was wrong or there is a procedural irregularity such that the decision made is unjust. The appellate court may conclude that a decision is wrong or procedurally unjust where (i) there has been an error of law (ii) where the judge has clearly failed to give due weight to some very significant matter or, by contrast has clearly given undue weight to some matter not deserving of it. (B v B Residence Orders: Reason for Decision [1997] 2 FLR 602 (iii) that the conclusion has been reached on the facts before the Court which was not open to the judge reaching them on the evidence (RBS v Carlyle [2015] UKSC 13, or (iv) that a process has been adopted at the court below which is procedurally irregular and unfair to such an extent that it renders the decision made unjust (Re S-W Care Proceedings: Case Management Hearing [2015] 2FLR 136 or (v) that a discretion has been exercised which is outside of the parameters within which it is possible to have reasonable disagreement (G v G Minors :Custody Appeal) [1985] 1 WLR 647

18. In essence the task of the Appellate court is to consider whether the judgment of the court below is sustainable. In Re F (Children) [2016] EWCA 546 the then President summarised the approach as follows:

"Like any judgment, the judgment of the Deputy Judge (i.e. the judge appealed against in that case] has to be read as a whole and having regard to its content and structure.

19. The appeal must also apply the principles set out in the speech of Lord Hoffman in Piglowska v Piglowska [1999] 1 WLR 1360 and in particular at 1372:

"The exigencies of daily court room life are such that reasons for judgment will always be capable of being better expressed. This is particularly true of an unreserved judgment such as the judge gave in this case……These reasons should be read on the assumption that , unless he has demonstrated the contrary, the judge knew how he should perform his functions and which matters he should take into account……..an appellate court should resist the temptation to subvert the principle that they should not substitute their own discretion for that of the judge by a narrow textual analysis which enables them to claim he misdirected himself.

20. As this appeal in part relies on a decision which represents a departure from the recommendation of the Cafcass author in her CIR I also bear firmly in mind the authority of Re R (A Child) 2009 EWCA Civ 445 [2010] 1FLR 509 in which Moore Bick LJ in his judgment sets out that unless there are strong reasons to do so judges should follow the guidance of Thorpe LJ in Re A (Children: 1959 UN Declaration) 1998 1 FLR 354 and if minded to depart from the recommendation of an experienced Cafcass officer should test any misgivings they may have with the officer in the witness box before reaching a final decision.

21. I also recognise for the purpose of this appeal that ultimately it is a decision for the trial judge as to whether to proceed without hearing from Cafcass, that this decision involves an exercise of discretion and must take into account a number of factors including the assistance that will be provided, the delay that will be occasioned and the welfare of the child in accordance with Re C (s8 Order: Court Welfare Officer) [1995] 1 FLR 617 CA

22. Ultimately however it is incumbent on any judge who does depart from a recommendation made in a s7 report has a duty to ensure that the reasons for departure are clear. Re J (Children) Residence: expert evidence) [2001] 2 FCR 44 CA.

The Appeal : Ground 1

23. I start by acknowledging that the Justices found themselves in a difficult position. There was no status quo when this case came before them. The children had already left their primary school and could not return there by virtue of age. The hearing was listed at a point where just two weeks of the summer holidays were left and the justices may well have felt that a decision had to be made.

24. However, what is abundantly clear from the reasons they provided is that they felt there were deficiencies in the report of the CIR, those deficiencies are listed and a global observation is made that "the CIR does not comment on the impact of change on the children should we order they attend (the Welsh school)". The reasons go on to identify several omissions from the report including the absence of information about Child A's views about attending the school in Wales, the impact on Child B of not attending their school of choice and concerns about the relative weight given to Child B's views as opposed to Child A. Ultimately the conclusion reached for departing from the report recommendation is stated to be as follows

"In the absence of the Cafcass Officer in court we have had to rely solely on the contents of the report and an email presented to the court this morning addressing a number of questions raised by father. Also during the hearing a number of issues were raised which we feel would have benefitted from further information from Cafcass in particular about the considerations taken into account when assessing the impact of future arrangements on the children and their ability to maintain the current level of engagement with father. For all of those reasons we have identified above we feel we cannot follow the recommendation of the CIR and in conclusion we do not agree that an order be made for the children to attend (the school in England) and they should attend (the school in Wales) with effect from September 2024.

25. The submission is made on behalf of the father that the CIR is different in nature to a s7 report, should not be given the same weight, that a recommendation within the report is not of the same status as that of a s7 report recommendation and that as a consequence this case can be distinguished from Re R in so far as the decision to depart from the CIR recommendation is concerned.

26. I accept that a CIR and s7 report are not the same, the very fact that PD36Z allows the court to order either report makes that clear. However, in my judgment the CIR encompasses a broad child focused analysis the contents of which allow the court to properly address each element of the welfare checklist when reaching a conclusion. In the majority of cases before the Pathfinder court it is the only welfare report that the court will have. The investigative nature of the Pathfinder approach and the move to focus on the child's voice and experience does not undermine the content of the report or make it less useful. One of the aims of Pathfinder is greater upfront investigation and information provided through a CIR and the template for the report has been constructed to ensure the child is at the centre of decision making. It achieves that aim. I reject the submission made on behalf of father that the parties cannot expect the degree of analysis from a CIR

that would be available via a s7 report. In my judgment it is not open to me to conclude either that it should be given less weight nor that the content of the CIR makes this case distinguishable from those authorities that were concerned with s7 reports.

27. The GK2 order contained at recital J a clear statement that the court must have a good reason to depart from the recommendations. The lay justices were all too aware of that because they say so. Having identified that to be the case I agree with the submission made on behalf of mother that what follows is a statement in their reasons which is no more than an outline of their concerns about what is not in the report. An analysis of what is missing cannot in isolation provide a good reason for departure from the recommendation.

28. It was of course entirely open to the court to substitute its own analysis for that of the CIR author and indeed to use evidence from the parents to fill what they considered to be evidential gaps. That exercise could have allowed them to set out their reasons for rejecting the recommendations. However, they did not do so. One example relates to the travel arrangements. The reasons only record that there is a difference of opinion between the parents as to how the move would impact on time spent with father and indeed the children. They do not attempt within the reasons to resolve that dispute. Another example relates to the effect of change upon the children in relation to which they say this:

"Whilst mother and father contend that change is inevitable because of the children's ages and educational requirements, there is a difference of opinion about the scale and impact on the children of the potential changes both in terms of residence, secondary school and social networks. We find that the Cafcass report does not assist us when assessing how this change would affect the children".

29. Nowhere in the reasons is it possible to identify what the lay justice's own assessment of these issues were and how that fed into their welfare analysis. It is perhaps unsurprising in those circumstances that a good reason for the departure cannot be identified.

30. At this stage it is important to record that the parties agree that the Court did not indicate to the parties during submissions that it was dissatisfied with the report. The first indication of this was when the reasons were delivered. I have read the note of hearing within the court bundle which confirms this to be the case. That meant that each party was deprived of the opportunity to consider whether oral evidence was necessary, whether the Cafcass officer should in fact be ordered to attend or whether a CIR2 was required.

31. It was not part of either party's case in submissions that the report was deficient. The parties cannot have known that this was in the court's mind nor the extent of the concern. In my judgment it is incumbent on the court in those circumstances to alert the parties to its concern. If it was not evident from pre reading but crystallised during their reflection and decision making time, then the lay justices should have come back into court to invite further representations about their concerns. Whilst I agree with the submission made by father that not every case will demand that the Cafcass officer attend, the failure to allow the parties to consider the necessity of this, amounts to a serious procedural irregularity.

32. I acknowledge that looking at a case at appeal gives this court a very real advantage. I can step back and survey what happened in some detail. This is a very different exercise to that which the justices had to undertake in a relatively short space of time with the parties

before them awaiting a determination. This court's task is in fact far easier. However, considering my observations thus far it is my judgment that the mother has succeeded in establishing ground 1 of her appeal in the manner pleaded by the Appellant.

Grounds 2A and 2B

33. The most significant criticism made by the mother in respect of these grounds is that the justices did not address the welfare checklist. I make clear for these purposes that I do not expect lay justices to slavishly follow the welfare checklist. It would be enough if it were possible to identify from the entirety of the reasons what they had decided with reference to each relevant part of it. It is clear they had the welfare checklist firmly in mind. They recite aspects of the CIR that relate to the welfare checklist but nowhere is it possible to identify any conclusions they reach.

34. Mother's submissions make this point with reference to the wishes and feelings of the children. It is not clear what weight has been given to each child's expressed view in light of their age and understanding. Neither is it clear how they have balanced the views of one against the other and ultimately favoured child B's choice. There is no analysis of how wishes and feeling were placed into the overall analysis of the welfare checklist and the extent to which they were the deciding factor.

35. In terms of the impact of change, as I have already set out, the reasons acknowledge the parent's differing views about the scale and impact of change but do not try to resolve that dispute concluding only that "the proposed arrangements put forward by mother have not had the benefit of being tested". There is no analysis of what that meant for the overall welfare analysis in circumstances where the status quo could not be maintained. Both children were in any event moving from primary to secondary school. Each parents' proposal involved change that had not been tested. This could not therefore amount to a sound basis for favouring one parties case over the other

36. The reasons do not contain any assessment of the impact on the children of the proposal of each of the parents nor any balancing of the strengths/weaknesses.

37. In my judgment that is sufficient to allow me to conclude that's grounds 2A and 2B are made out by the Appellant without needing to stray into the more contentious and disputed factual aspects of the case relating to the stance taken by each party and how the lay justices understood their case. Those disputed matters are inappropriate for determination at an appeal hearing and in any event, it is not necessary for me to do so.

38. It is important however also to acknowledge that the reasons do not deal with proportionality in the context of the impact on mother and her work of the decision made. Father's counsel makes the point that the court's attention was not drawn to relevant authorities relating to internal relocation. It is a point well made. Decision hearings are the same as any other hearing and it was incumbent on the legal representatives to assist the court as they would in any other hearing, by drawing attention to relevant authorities. That is even more so in circumstances where the matter is being heard by lay justices. The absence of any consideration of the impact on mother and thereby the children is a deficit in the reasons which also leads me to conclude that the grounds set out at 2A(d) and 2B a) and (b) are made out.

As a consequence of my determination, I intend to make case management orders to ensure that this matter is dealt with at the earliest opportunity.

Practise Points arising

39. I have been invited by counsel for father to include some guidance in this judgment as to how Pathfinder operates in South East Wales. The point is fairly made that those operating outside of a pilot area would benefit from such insight when they are instructed to appear in pilot courts in this area.

40. In accepting that invitation I acknowledge that counsel from outside of this pilot area will frequently appear in this court. I make clear however that this judgment is only intended to deal with the operation of the pilot in South East Wales and the practise points arising out of this appeal which relate to cases allocated to the adjudication track.

41. The decision to allocate a case to that track is one taken at GK2 when it appears to the court that the mater is capable of being settled by agreement and when the issues for determination are limited. It is a paper exercise undertaken when the Court has the CIR and any risk assessment in respect of domestic abuse that has been prepared. The parties have no input into the GK2 hearing. Their positions are protected by virtue of FPR 2010 4.3 which allows them to apply within 7 days to vary any order or case management direction so made. Their right to do so is endorsed on the GK2 order.

42. If the case is allocated to the adjudication track then the directions made will usually prescribe whether the case is to be determined on submissions or following oral evidence. If evidence is to be called, then the court may limit the extent of that evidence pursuant to FPR 2010 Part 22. It will also make clear whether or not the Cafcass Officer is required to attend the hearing.

43. In this case the officer was not ordered to attend and it was contemplated that the matter was capable of being determined by way of submissions. Neither party made an application to vary the GK2 order.

44. I have been made aware of a small number of cases where following the GK2 order one or more of the parties has sent a list of questions to the author of the CIR.

45. In what I accept was an attempt to be helpful, father's solicitor in this case unilaterally wrote to the Cafcass officer with questions, after receipt of the GK2 order. Consideration of those questions lead me to conclude they were not matters of clarification with some of them being properly characterised as cross examination. The letter was only disclosed to the mother's solicitors after it was sent, and they therefore had no input into it. Importantly, neither did the court. Permission was not sought either to ask the questions nor to file and reply upon the response which was only served on mother's legal team on the morning of the decision hearing.

46. This is not an approach the court can endorse. The GK2 order makes clear that it is only the documents ordered by the court than can be filed without further permission being granted. The approach taken by father's solicitors took no account of that order and had the potential to undermine the process and the timetable. In the absence of a court order

there was no obligation on the Cafcass officer to respond and if she chose to, no obligation to respond in advance of the decision hearing. There was also the potential for unfairness in circumstances where mother's solicitors were excluded from that process.

47. The court's requirement is that any party seeking to ask questions of the CIR author should either apply to vary the GK2 order within the 7 days allowed. The application should ask for an order that the Cafcass officer attend with a clear indication as to why that is necessary and the basis of any challenge to the report.

48. Alternatively, it should seek permission to put questions which must be set out in the application itself. This will allow the court to consider whether the report fails to address important issues, which may mean a CIR2 is necessary. It also allows the court to keep a watchful eye on the timetable and to ensure the procedure adopted is fair to all parties. This is of particular significance when, as is so often the case in private law applications, one of the parties to the litigation is unrepresented.

49. Before any such application is made, the application should consider carefully whether it is a step consistent with the problem solving approach and indeed whether it is absolutely necessary.

50. A further issue which arose in this case relates to judge led conciliation.

51. The problem solving approach will be familiar to many as mirroring that adopted in the well established FDAC courts. That approach will be at the forefront of the court's mind in dealing with private law applications under the pilot. Where cases are allocated to the adjudication track and listed for a determination hearing, the expectation is that the parties will engage the problem solving approach and avoid an adversarial approach to the litigation that sadly became all too familiar under CAP. Judge led conciliation is a significant feature of the adjudication track and the problem solving approach. It is not like the conciliation that takes place at a FHDRA. It is informed by significant assessments by Cafcass Cymru and the IDVA service where domestic abuse is a feature of the case. Those assessments allow the court to take an evidence based approach to problem solving and helping the parties to reach agreement.

52. That judge led conciliation is recorded as an essential component of the decision hearing in the GK2 order and is ordered to take place before submissions or evidence is heard in the anticipation that settlement is possible. There may be scepticism about this approach by those faced with seemingly intransigent parties. However experience in the early pilot areas establishes that it is effective on refocusing the parties on the children and their welfare and also what is achievable within the life of the proceedings. It is also worth noting that by virtue of FPR 2010 Rule 1.4(g) it has for quite some time, been part of the court's duty to help the parties settle the whole or part of the case.

53. In this case it is clear from the note of the hearing that judge led conciliation did not take place. Indeed it was not mentioned by the court or either party. The hearing moved straight to submissions. That should not have happened and must not happen in the future. It deprived the parties of an opportunity to be assisted to reach agreement and forced the court to make a decision about an exercise of parental responsibility that should, if at all possible, have been left to the parents.

54. If the court did not of its own initiative take the opportunity to conciliate then the parties should have drawn the court's attention to the order and invited them to undertake judge

led conciliation. That omission in itself suggests the parties were not engaged with the problem solving approach but were focused on the advancement of their own case. They bypassed an important step in the process consequently.

55. It is of course entirely possible that when a case arrives at a decision hearing the court and/or the parties come to the conclusion that judge led conciliation is no longer appropriate. However, that is a significant case management decision in a Pathfinder case and in my judgment should be taken only after hearing submissions from the parties. It will not be enough to submit that the parties are not likely to agree. If the decision is taken, it should be clearly recorded on the face of the order so that the case management decision can be understood.

56. The issues in this case were very narrow at the time the lay justices were asked to hear this matter. It is my clear view that if the problem solving approach had been adopted it was perfectly possible with compromise on both sides to find a middle ground that met the children's needs. It is a matter of great regret to this court that the issues have now widened, the litigation has been enlarged and the court asked to decide a "live with" application. That will mean delay and greater anxiety for the parents, and particularly the children, quite the opposite of what the Pathfinder model aims to achieve.

57. On that basis these observations are made with a view to ensuring Pathfinder operates as it should in South East Wales and with a view to ensuring the guidance is followed in any application made that falls within the pilot scheme.

HHJ Scannell 4th October 2024.