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IN THE HIGH COURT OF JUSTICE  
FAMILY DIVISION  
[2018] EWHC 3834 (Fam)



No. FD18P00154

Royal Courts of Justice  
WC2A 2LL

Monday, 2 July 2018

Before:

MR JUSTICE KEEHAN

(In Private)

BETWEEN:

A

Applicant

- and -

B

Respondents

-and-

C

(by her Children's Guardian)

\_\_\_\_\_

MRS J. OKOYE (instructed by Philcox Gray, Solicitors) appeared on behalf of the Applicant.

THE FIRST RESPONDENT appeared in Person.

MRS D. MARSDEN solicitor, appeared on behalf of the Second Respondent.

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J U D G M E N T

### Introduction

1 In this matter I am concerned with one young person, C who was born on 6 October 2001 and is 16 years of age. Her father is A, and the first respondent to this application is B. On 4 October 2017 Her Honour Judge Probyn made a shared care order in favour of the father and B, whom I shall refer to as “the aunt”. No appeal was made against this order. The order was made following the father’s application of 19 December 2016. By an application made on 26 March 2018, the father sought for C to be made a ward of court, for a child arrangements order to be made in his favour. His objective being that he would be the only person who had parental responsibility for C. This application is opposed by the aunt and by C. C was at an earlier hearing made a party to these proceedings. She has attended in person all the hearings, including this final hearing which commenced on Friday of last week at the Royal Courts of Justice and has continued part-heard today.

### Background

2 C’s mother, D, very sadly and unexpectedly died from cancer on 9 January 2016. This was a devastating loss for C, and continues to be so.

3 The mother and father were both born in Nigeria, but met in the United Kingdom. They began a relationship in late 2000 which lasted only six months and ended acrimoniously. Some two months later, the mother contacted the father to notify him that she was pregnant. C was born on 6 October 2001 and thereafter she lived with her mother. There was no contact at this stage with the father.

4 In 2002 the mother took C to Nigeria to live with a maternal aunt and uncle, and she returned to this country. C first met her father when she was two-years old when she came to this country on holiday. Her father sought DNA testing to establish paternity. There was then no further contact for some five years. In 2012 C came to live with her mother in this country. DNA testing was then performed, and the paternity of the father was confirmed. Contact then commenced between C and her father when she was aged some ten or eleven years of age. After the mother’s tragic death, C went to live with her aunt and her family. There was contact with the father save for between September and November 2016. In 2016 the aunt applied for a child arrangements order to be made in her favour. The local authority was involved and undertook an assessment. In consequence, an interim child arrangements order was made in favour of the aunt on 5 September 2016.

5 The father was first aware of these court proceedings on 3 November 2016, when he was notified of them by his social worker. On 29 November 2016, the father was granted parental responsibility by a court order given that he was not named on C’s birth certificate. On the same date he sought permission to appeal the order made on 5 September 2016. As ordered by the court, the London Borough of Croydon filed a s.7 reported dated 24 January 2017, which recommended the making of a child arrangements order in favour of the father. On 26 January 2017 a children's guardian was appointed to represent C. On 12 April 2017 at a court hearing it was agreed that C was to live with the aunt but to have contact with her father. A children's guardian report dated 7 June 2017 recommended that there be a child arrangements order made in favour of the father with plans for a transition for C to move from the care of her aunt to the care of her father.

6 At a court hearing on 16 June, despite C wanting a shared child arrangements order, a sole child arrangements order was made in favour of the father. This order was discharged on 17 August 2017 because it was deemed to be unworkable. The matter then came before Her Honour Judge Probyn, as I've already indicated, on 4 October 2017. On 26 March this year the father sought the discharge of the order she made on the basis that there had been a change of circumstances insofar as C was now living with him, as she had been from late January or early February 2018. The aunt had presented C at the local social services department offices seeking for her to be placed in care because she had to travel to Nigeria to make funeral and other arrangement subsequent to the death of her mother. She was then placed in her father's care. C has remained living with the father although she has spent varying times with her aunt.

### Law

7 I remind myself that the court's paramount concern is the welfare best interests of C: s.1(1) of the Children Act 1989. In coming to a decision in this matter I have regard to the welfare checklist of s.1(3) of the 1989 Act. I take into account the Art.6 and Art.8 rights of C, the father, and the aunt, but bear in mind that where there is a tension between the Art.8 rights of a child on the one hand and of the adult or parent on the other, the rights of the child prevail: *Yousef v Netherland* [2003] 1 FLR 210. For reasons that I shall set out later in the judgment, I remind myself of what McFarlane L.J. said in *Re H (A Child)* [2015] EWCA Civ 1284 at paras.89-94, and again in *Re W (A Child)* [2016] EWCA Civ 793 at para.71, namely that there is no assumption in favour of a natural parent or a natural family member. Everything is determined with regard to the paramountcy of the welfare best interests of the child or children concerned.

### Evidence

8 The father told me that C will be upset if the court made orders as sought by him. He asserted that the aunt adversely influenced C against him, but could offer no evidence of the same. He asserted that the aunt had sought to frustrate his exercise of parental responsibility and gave me the example of the aunt's failure to surrender to him C's passport, child benefit details and red book. He gave me a further example of the difficulties he then encountered in seeking to register C with a new general practitioner. He also asserted that the aunt was solely, or mainly, motivated in having an interest in C because of her late mother's estate. He criticised the aunt for her failure to make mention of him when applying to the court for a child arrangements order in 2016, and accused the aunt of lying when she signed an affidavit, on 24 July 2017, in making an application for probate in respect of the late mother's estate, in which it was asserted that there was no father or other person with parental responsibility. He said that he would not prevent C seeing the aunt but, in my judgment, he had no recognition whatsoever of the importance of the aunt to C, or any of the positives in the relationship between C and her aunt.

9 The aunt sought to retain parental responsibility and a shared child arrangements order, as ordered in October 2017. She had told the court, in her original application for the child arrangements order, that there was no parent with parental responsibility for C. Strictly, at the time this was true, but it was, to say the least, a disingenuous approach on the part of the aunt. The assertion in a sworn affidavit of 24 July 2017 about C not having a father was untrue. Various other allegations of poor conduct, or a lack of interest in C's welfare were put to the aunt during the course of her evidence. She, the aunt, denied the suggestion that she was solely concerned with the estate rather than with C. She was taken to task for taking C to social services in early 2018 and for seeking for her to be placed in care while

she travelled to Nigeria. In doing so she sought to put in place different care arrangements from that which she had managed to organise for her own children. I consider this to be a significant error of judgment on her part.

- 10 Towards the end of her evidence, the aunt was asked questions on behalf of C, dealing with what was alleged to be father's poor treatment, or negligent treatment, of C. At the end of those questions, objection was raised on behalf of the father that he had had no opportunity to deal with these issues either in his own evidence or in the course of the cross-examination of the aunt. This is true. The aunt had not sought to give such evidence when she gave evidence on her own behalf. This evidence was elicited in cross-examination on behalf of C and not offered by the aunt. I accept the father's objection to this part of the aunt's evidence, and I take no account of the factual matters that were elicited during the course of this part of the aunt's evidence. Although, I do take account of, and consider it significant, the fact that C sought for her advocate to raise these matters contrary to her father's interests but in support of the actions of the aunt.
- 11 The social worker produced a report on the issues in this case, dated 13 April 2018. She recommended a child arrangements order was made in favour of the father because the previous child care arrangements and the sharing of parental responsibility had not worked. This recommendation remained unchanged after she had had the benefit of hearing the evidence of the father and of the aunt. She was concerned that C would have to intercede with both her father and with her aunt. This recommendation of the social worker appears to take no account that this is a difficulty which C would have to deal with on the ground, no matter what orders were made by the court.
- 12 The social worker accepted that C would be upset by her recommendation to the court. In my judgment, the assertion that C would simply be upset, underplayed what I find to be C's likely reaction to the court making such an order. I will refer to this later in this judgment. The social worker accepted, as do I, that it was a "really tough decision" to determine what is the right answer in this case. I note, and pay particular regard to the following matters that the social worker mentioned:
- a. The father's relationship with C is fractured.
  - b. The father had a lot of work to do as to how he presents to C.
  - c. C is more attached to her aunt.
  - d. The aunt has a soothing maternal role for C.
  - e. C is a vulnerable young person.
  - f. C and the aunt have a very close relationship with the maternal family, whereas the father has no such relationship.
  - g. C and the father have no relationship with the paternal family.
  - h. C does not trust either the father or the aunt to have sole parental responsibility for her.
- 13 I find the social worker has not given sufficient weight to two principal matters:
- a. That the animosity between the father and the aunt will continue whatever order is made by the court, and that C will have to deal with this. She will have to struggle to maintain relationships with both.
  - b. The adverse and significant effect on C if the father is granted sole parental responsibility.

14 C, at the conclusion of the evidence, wished to express her views to me from where she was seated in court. The social worker did not have the benefit of hearing what C had to say since she had left court immediately after concluding her evidence. C spoke very eloquently, very sincerely and very movingly. In summary, what she told me was as follows:

- a. She feels very insecure in her relationship with her father.
- b. She has just started to rebuild a relationship with father.
- c. She finds it hard to believe that she will continue to see her aunt if her father has sole parental responsibility.
- d. She has not felt able to speak openly about the issues of parental responsibility and the aunt with her father.
- e. She fears that her father will get angry. She feels unsafe and scared of him, and she feared the hostility that there may be when she returned home after Friday's court hearing.
- f. She therefore said she wants to rely on the aunt.
- g. She told me she did not want to be berated or blackmailed, or to engage in an attempt to trust her father at this time.
- h. She said, "I need security that my father will support my relationships."
- i. She feared that he would not support her relationship with the aunt or her maternal family after this case is concluded.
- j. She said, sadly, she really didn't know what will happen after this case is completed.

These were, if I may say so, a very clear and powerful expression of C's views, wishes and feelings.

### Analysis

15 The submissions of the father included the extraordinary submission that the court was, and had been, dismissive of the father's case. Nevertheless, I had to press counsel for the father to provide me with chapter and verse as to what was the basis of that submission. I was told:

- a. It related to my comments that I didn't wish to hear about the payment of school fees. I did make that comment. The issue with school fees was, and is, to my view irrelevant to the issues in this case.
- b. That at the hearing on 20 April I had made the comment that C's wishes and feelings overrode those of the father. I did not make any such comment. I may have observed, as I am sure I did, that given her age, C's wishes, and feelings would carry significant weight with the court.
- c. I was referred to the court order of 20 April where it was said, contrary to the agreement of the father, that I had made an order that Atkins Hope, a firm of solicitors, were to deal with the grant of probate of the late mother's estate. I made no such order. There were merely two recitals that related to the grant of probate, both of which I had been led to believe were agreed between the parties.
- d. It was alleged that I had in some way pre-judged his application. There is no foundation for any such assertion.
- e. It was asserted that I demonstrated effective bias and/or pre-judgment of the father's case by my frequent interruptions to counsel of father's presentation. I did not.

16 I make the following observations:

- 1) The aunt was a litigant in person. She is entitled to a certain latitude. I did not, in fact, have to give her any latitude because she kept her observations and submissions pithy. I did, however, on a number of occasions, stop her in her evidence when her answers to questions became prolonged and, if she'll forgive me for saying so, somewhat angry and incoherent.
- 2) In contrast to the father's case, C and her advocate played a minimal role, by which I do not intend to be critical, in the conduct of the hearing on Friday.
- 3) In contrast, counsel for the father made submissions which were wrong in law, sought to refer to matters which were irrelevant, or sought to introduce into evidence in cross-examination matters which were inappropriate (eg relating to matters which may have arisen prior to the birth of C) or misrepresented what I or others had said. In these circumstances it was entirely necessary and proportionate, to ensure the efficient and fair running of the hearing, that I commented on or corrected the same.
- 4) Finally, I observe no application was made for me to recuse myself. I am entirely satisfied that this submission is without any merit whatsoever.

17 I now return to the substantive application. In many ways, the aunt and the father are as bad as each other. They have an acrimonious relationship which is very unlikely to change in the future. The aunt has made two serious errors of judgment, a) by making a court application for a child arrangements order without naming anyone else as a party or giving notice to the father, and b) seeking to place C in foster care earlier this year. Further, the aunt had misrepresented the position in her probate affidavit on 24 July 2017. I accept these matters and take them into account, but I put them in the balance of the overall love and affection that the aunt has shown with C, and huge benefit to C of her relationship with the aunt. The aunt's role in C's life is, in my judgment, very significant, indeed crucial, to C's emotional and psychological wellbeing. She is an important link with C's maternal family. She is, I find, an emotional and psychological parent to C.

18 Father does not see this, or accept this, at all. He may have met her physical needs, certainly since she has been living with him. He is not, however, and, for the foreseeable future, he will not, absent making very significant changes, meet C's emotional and psychological needs. In particular, he will not promote, or see in a positive light, C's need for a close relationship with the aunt and with her maternal family. My assessment of the father was reinforced in closing submissions. It was asserted by counsel on behalf of the father that the father loves C, as I'm sure he does in his own way, but, it was submitted, he had no opportunity to say so in his evidence. When I pressed why not, when he had been examined-in-chief for some forty to forty-five minutes, it was submitted that he had forgotten to tell me that he loved his daughter, and that it had slipped his mind. I have to say I find this very, very difficult to accept. The father is, in my view, obsessed with his rights as a parent and does not focus on his duties and responsibilities to nurture or to be sensitive to the needs of his grieving daughter.

19 It was submitted on behalf of C that she had found last Friday's hearing, listening to the evidence, gruelling and exhausting. This does not surprise me at all because, on a number of occasions, I asked her advocate whether C was coping with hearing the evidence from

time to time. Despite the eloquent expression of her wishes by C last Friday afternoon, and the social worker's assessment of C as a vulnerable young person, it was submitted on behalf of the father that,

- a. C was flawed in her reasoning.
- b. C had made it impossible for him, the father, to exercise his parental responsibility by her support of the aunt.
- c. The father found it perplexing and bizarre that C wanted the aunt to have parental responsibility.
- d. There was nothing that he could do to stop C spending time with the aunt.

Each and every one of these submissions graphically illustrates my assessment of the father as a man obsessed with his rights as a parent and not with the extremely important emotional and psychological needs of his daughter.

### Conclusion

- 20 In the light of this analysis, I am entirely satisfied that it is overwhelmingly and manifestly in C's welfare best interests that I make a child arrangements order that she lives with her father, which reflects what is happening on the ground, and that I make a child arrangements order that she spend time with her aunt on no less than three occasions a week. I make it plain that is a minimum and not a maximum. In consequence of making a child arrangements order in favour of the aunt and pursuant to the provisions of s.12(2)(a) of the 1989 Act, I grant parental responsibility to the aunt.
- 21 I am satisfied that these combinations of orders will meet the welfare best interests of C. They will enable her to live with her father and, as she wants, to build her relationship with him, but it will provide her with the very important emotional and psychological comfort that she requires from her relationship with the aunt and, through her, with the wider maternal family who are all so very, very important to C and to her future welfare.
- 22 Ms Marsden, on behalf of C, invited the court to consider making of its own motion a s.91(14) order preventing any party from making further applications in respect of C without permission of the court. In making this application it was conceded that the father had not made repeated applications, but the basis of seeking the order was the gruelling consequences of Friday's hearing on C and the likely adverse affect upon her of yet further court proceedings. In response to my suggestion that as an alternative I could reserve this and any future applications to myself, which in any event I do, and that any application would be considered by me but without notice being given to C. It was said that C would not want to be side-lined from any potential proceedings in respect of her. This I entirely understand. It had not been my intention, in any way, to exclude C from involvement in any future court proceedings, but merely to remove from her the anxiety of hearing about an application unless it was one of merit.
- 23 After due consideration of the unusual features of this case, and reminding myself that the making of a s.91(14) order is an extremely rare and unusual order, I am not persuaded that it would be appropriate for me to make such an order at the conclusion of this hearing. A necessary filter on unmeritorious applications will, in my judgment, be provided by me reserving any further applications regarding C to myself. I give fair warning, however, both to the father and to the aunt, that if any further applications are made which do not appear to me to be meritorious, then it is likely that I will then be persuaded that it would be appropriate to make a s.91(14) order against either the father or the aunt, or both.

24 A considerable part of this hearing, and the evidence, has been taken up with issues relating to the grant of probate and the management of C's late mother's estate. Aside from recitals in the previous order of 20 April, which I had understood reflected an agreement between the parties, I do not consider it to be any part of my function to make any orders which relate to the grant or exercise of probate. These are more appropriately dealt with by the relevant probate office and/or a probate judge.

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**CERTIFICATE**

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