Neutral Citation Number: [2022] EWHC 3107 (Fam)

Case No: PR21P00759

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/12/2022

Before :

MRS JUSTICE LIEVEN

- -

Between :

THE MOTHER

Appellant

and

THE FATHER

Respondent

- -
- -

Ms Kirstin Beswick (instructed by **Holdens Law**) for the **Appellant**
Ms Janice Wills (instructed by **Amy Walklate Family Law**) for the **Respondent**

Hearing dates: **18 November 2022**

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Approved Judgment

This judgment was handed down remotely at 10.30am on 5 December 2022 by circulation to the parties or their representatives by e-mail and release to The National Archives.

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MRS JUSTICE LIEVEN

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

Mrs Justice Lieven DBE :

1. This is an appeal against the decision of the Family Court at Stoke on Trent, before the Lay Magistrates, dated 18 October 2022. The decision in question was not to allow either parent to be cross-examined. The Mother has appealed that decision.

2. The Mother was represented before me by Ms Kirstin Beswick. The Father was represented by Ms Janice Wills. These are the same representatives as appeared before the Magistrates.

3. The parties are the Mother ("M") and Father ("F") of X, an 8 year old girl. The parents separated in 2019 and X remained living in the family home. The F works close to the family home, whereas the M's work is some 50 miles further north. In March 2021 the M applied for X to live with her and for her school to be changed from close to the family home to the town where the M was living. The F made a cross application for the child to remain living with him and to remain at her existing school.

4. The M filed a detailed statement in April 2021. A Cafcass safeguarding letter was filed on 17 August 2021. The M raised a number of inaccuracies and two amended letters were produced. The Legal Advisor ordered that Cafcass produce a section 7 report, which was produced on 8 March 2022. Cafcass recommended that the Court make a Child Arrangements Order ("CAO") that the child live with the F and have contact with the M. This would necessarily involve X remaining at her current school.

5. The parents each filed a statement in response, and in the F's case he also responded to the M's initial statement.

6. A Dispute Resolution Appointment ("DRA") took place on 20 April 2022. The M argued that the section 7 report was inaccurate and that there should be a fact finding hearing. The Court at the DRA did not order a fact finding hearing.

7. The matter was listed for a fully contested final hearing with a time estimate of a day on 18 October 2022. Both parties were represented at that hearing by the counsel who appeared before me. The Cafcass officer who had written the section 7 report was in attendance. The Lay Bench determined that the matter should proceed without either party being entitled to cross-examine the other. The Recital to the order states:

> *"Recordings*
>
> *The matter was due to proceed as a final hearing today.*
>
> *Recordings Re Appeal*
>
> *The bench determined that the matter should proceed without either party being permitted to cross-examine the other.*
>
> *The mother indicated she would want to appeal that decision on 3 grounds.*
>
> *First that she did not agree with matters in the father's statement which went to the case and the welfare of the child and in being prevented from*

properly challenging these matters the case could not be fairly or properly heard.

Secondly that the bench indicated that the decision not to allow the cross-examination of the parents was on the basis that there were no safeguarding issues.

That the bench had prejudged the case and accepted the CAFCASS Officer's report before the CAFCASS Officer had been cross-examined.

In the circumstances the bench adjourned the case pending the mother's application to appeal.

Both parties indicated that they are very unhappy with the further delay that must then occur and the impact of that on the child.

Other Matters

It is agreed that the CAFCASS Officer shall speak with the school to identify a single person there to explain to the child what has happened today."

8. A specific issue at the hearing was that the F had applied to file a letter from the headteacher about the child's glasses. In her statement of 6 September 2022 the M had alleged that the F had been undermining X's confidence about wearing her glasses in school "for the sole purpose of winning custody". The F wished to rebut this allegation of "malicious parenting". The M opposed this application. The Court asked the Cafcass officer to read the letter and give her opinion. The officer said that she had contacted the school about the issue, and the school had no welfare concerns.

The law

9. The starting point is Family Procedure Rule ("FPR") 22.1, which states:

22.1 Power of court to control evidence

(1) The court may control the evidence by giving directions as to –

(a) the issues on which it requires evidence;

(b) the nature of the evidence which it requires to decide those issues; and

(c) the way in which the evidence is to be placed before the court

(2) The court may use its power under this rule to exclude evidence that would otherwise be admissible.

(3) The court may permit a party to adduce evidence, or to seek to rely on a document, in respect of which that party has failed to comply with the requirements of this Part.

(4) The court may limit cross-examination.

10. FPR22.6(1) states:

> **22.6 Use at the final hearing of witness statements which have been served**
>
> (1) If a party –
>
> (a) has served a witness statement; and
>
> (b) wishes to rely at the final hearing on the evidence of the witness who made the statement,
>
> that party must call the witness to give oral evidence unless the court directs otherwise or the party puts the statement in as hearsay evidence.

11. Ms Beswick submitted that FPR22.1 only covered restricting cross-examination, not ruling it out altogether. However, she accepted that she had no authority for that proposition.

12. In considering the use of case management powers, it is highly relevant to have in mind the overriding objective in FPR1.1:

> **1.1 The overriding objective**
>
> (1) These rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly, having regard to any welfare issues involved.
>
> (2) Dealing with cases justly includes, so far as is practicable –
>
> (a) ensuring that it is dealt with expeditiously and fairly;
>
> (b) dealing with the case in ways which are proportionate to the nature, importance and complexity of the issues;
>
> (c) ensuring that the parties are on an equal footing;
>
> (d) saving expenses; and
>
> (e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.

13. This is an appeal and therefore my powers are set out in FPR30.12(3), which states:

> **30.12 Hearing of appeals**
>
> (3) The appeal court will allow an appeal where the decision of the lower court was –

(a) wrong; or

(b) unjust because of a serious procedural or other irregularity in the proceedings in the lower court.

14. The Court's approach to an appeal against a case management decision was considered by the Court of Appeal in *Re TG (A Child)* [2013] EWCA Civ 5. The passages from [24] to [38] are particularly relevant, but I only set out [35] to [36]:

> *"35. (4) Fourth, the Court of Appeal has recently re-emphasised the importance of supporting first-instance judges who make robust but fair case-management decisions: Deripaska v Cherney [2012] EWCA Civ 1235 , paras [17], [30], and Stokors SA v IG Markets Ltd [2012] EWCA Civ 1706, paras [25], [45], [46]. Of course, the Court of Appeal must and will intervene when it is proper to do so. However, it must be understood that in the case of appeals from case management decisions the circumstances in which it can interfere are limited. The Court of Appeal can interfere only if satisfied that the judge erred in principle, took into account irrelevant matters, failed to take into account relevant matters, or came to a decision so plainly wrong that it must be regarded as outside the generous ambit of the discretion entrusted to the judge: Royal & Sun Alliance Insurance plc v T & N Limited [2002] EWCA Civ 1964 , paras [37]-[38], [47], Walbrook Trustee (Jersey) Ltd v Fattal [2008] EWCA Civ 427 , para [33], and Stokors SA v IG Markets Ltd [2012] EWCA Civ 1706 , para [46]. This is not a question of judicial comity; there are sound pragmatic reasons for this approach. First, as Arden LJ pointed out in Royal & Sun Alliance Insurance plc v T & N Limited [2002] EWCA Civ 1964 , para [47]:*
>
> *"Case management should not be interrupted by interim appeals as this will lead to satellite litigation and delays in the litigation process."*
>
> *Second, as she went on to observe:*
>
> *"the judge dealing with case management is often better equipped to deal with case management issues."*
>
> *The judge well acquainted with the proceedings because he or she has dealt with previous interlocutory applications will have a knowledge of and 'feel' for the case superior to that of the Court of Appeal.*
>
> *36. Exactly the same applies in family cases. Thus in Re C Thorpe LJ and I dismissed the appeal notwithstanding what I said was the "robust view" His Honour Judge Cliffe had formed when deciding to stop the hearing. And in Re B I refused permission to appeal from an order of Her Honour Judge Miranda Robertshaw involving what I described (para [16]) as "appropriately vigorous and robust case management." I said (para [17]):*
>
> *"The circumstances in which this court can or should interfere at the interlocutory stage with case management decisions are limited. Part of*

> *the process of family litigation in the modern era is vigorous case management by allocated judges who have responsibility for the case which they are managing. This court can intervene only if there has been serious error, if the case management judge has gone plainly wrong; otherwise the entire purpose of case management, which is to move cases forward as quickly as possible, will be frustrated, because cases are liable to be derailed by interlocutory appeals."*
>
> *As Black LJ very recently observed in Re B (A Child) [2012] EWCA Civ 1742, para [35]:*
>
> *"a judge making case management decisions has a very wide discretion and anyone seeking to appeal against such a decision has an uphill task."*

15. Subsequently to this decision the Court of Appeal clarified that the test for an appeal was whether the decision was "wrong", rather than plainly wrong, *Re P* [2014] 1 FLR 824. The test I therefore apply is whether the Bench's decision was wrong

Submissions

16. Ms Beswick submits that the decision to prevent the parties cross-examining each other was so unfair as to be procedurally wrong within the meaning of FPR30.12(3)(b).

17. She submits that the case was listed for a full hearing of a day and, as such, the parties had an expectation that they would be allowed to cross-examine. There was sufficient time for cross-examination so there was no concern about delay or wasting court time. She said that the Magistrates decision had tipped over into unfairness, and relied upon the following passage in *Re SW (Children)* [2015] EWCA Civ 27 at [24]:

> *"24. A key feature of the family justice reforms now found in the CA 1989 as amended and FPR 2010 Part 12 and Practice Direction 12A , has been the use by the courts "vigorous and robust case management" as a tool for ensuring that, wherever possible, delay is minimised and the statutory 26 week requirement found at s32 CA1989 , is achieved. It is undoubtedly the case that, as a result of the reforms, there has been a significant change in culture, driven through by dedicated judges and specialist counsel and solicitors up and down the country. Many care cases are now concluded at either the IRH or well within 26 weeks, to the considerable benefit of the children involved. The Liverpool area has been notable in its successful implementation of the reforms and its early achievement of the routine disposal of care cases within 26 weeks."*

18. She further submits that there were specific issues that the M wished to challenge the F upon, and the Court needed to hear evidence and cross-examination on those issues. When I asked her to explain specifically what these issues were, she referred to the allegation by the M that X was bullied at school; that the M had been the child's primary carer up to 2019; the importance of X attending a Roman Catholic school; the allegations the M made about the F trying to prevent X from attending the optician and wearing glasses; and various issues about attending extra curricular activities such as dance classes.

19. Ms Beswick further submits that the Bench erred in treating the Cafcass officer as the arbiter of the concern that had been raised by the M about the glasses. In her Skeleton Argument, Ms Beswick had a ground of appeal that the Bench had prejudged the case and had accepted the Cafcass report before they had heard evidence from the officer, or submissions. However, she did not make any oral submissions on this point and it did not re-emerge in her Skeleton Argument.

20. Ms Beswick accepted in her Skeleton Argument that the Court made no determination in respect of the glasses' concern, or indeed any other part of the evidence. However, she does say:

> *"This too, it is submitted, was a procedural irregularity and the outcome of it was concerning to a degree that would suggest no trial before this bench could be fair and that the bench would merely follow the Cafcass recommendation without properly considering the merits of the case on each side."*

21. Ms Wills submitted that the Bench's decision fell well within the scope of its case management powers. If they were satisfied that it could fairly determine the case without hearing cross-examination of the parents, then that was a matter for the Court.

22. She also strongly refuted any suggestion that the Bench had pre-determined the matter. Neither the Bench nor the Legal Advisor stated or indicated that they accepted the section 7 report without challenge.

Conclusions

23. In my view, the Court's decision fell within the scope of their case management powers and discretion. The starting point is that there is no right in any party to cross-examine. This is made entirely clear by FPR22.1. It is open to the Court to limit cross-examination where it is fair and proportionate to do so. This must include the power to prevent cross-examination altogether given that FPR22.6 provides that the Court can order that a witness should not be called at all. It would make no sense of FPR22.1 to restrict it in the way Ms Beswick suggests to having to allow the witness to be cross-examined but then restrict what s/he is cross-examined about.

24. The question then becomes whether, on the facts of this case, the decision not to allow cross-examination of the parents was one that fell within the Bench's case management discretion. The test in FPR30.12(3) is whether the decision was unjust because of a serious procedural error. Munby LJ in ***Re TG*** at [36] said that in a case management appeal there would need to be a "serious error" and the case management judge would have to "have gone plainly wrong".

25. In this case there is no such error. The Court had two statements from the M and one from the F. They therefore knew what the parties' evidence and positions were. Further, Counsel for the parents could cross-examine the Cafcass officer and, as such, put any material areas of disagreement to her. It was open to the Bench to consider that this would be a more effective and proportionate way to consider the material, rather than hearing oral evidence from the parents. It should be remembered that the Bench had the parties' written evidence.

26. The allegation by the M that the child had been bullied at school had been fully considered by the Cafcass officer. She had spoken to the child about this twice and, on both occasions, X had not said she was bullied. The officer had also spoken to the school, which had said that they had no concerns in respect of the child.

27. I appreciate that it is hard for parents to accept, but it is likely that a court facing this type of issue will put the most weight on the Cafcass officer's evidence. They are an independent person with great expertise in this field, and great skill in talking to children. However, much as the parents love their children and wish the best for them, they will often not be the most objective witnesses. As Ms Wills put it, *"both parents come with their own spin".* It was entirely open to the Court to take the view that they needed to hear the Cafcass officer on this matter, but that the oral evidence of the parents would not be of material assistance.

28. The issue as to whether the M was the primary carer up to 2019 was one that was set out in the witness statements. Whether it was necessary, or even useful, to hear oral evidence and cross-examination on this issue was a matter for the Magistrates. In my view, this was a historic issue that was unlikely to be determinative, or even weighty, in the decision as to what was in the child's best interests going forward. This is the type of dispute that may have seemed incredibly important to the parents in their dispute, but in all probability not to the Court.

29. A very similar position arises in relation to the allegation that the F was controlling in the relationship. It was for the Bench to decide whether cross-examination would help them on this issue, and the weight they would attach to it.

30. The next specific matter raised by Ms Beswick was the M's wish for X to attend a Catholic School. However, this was a matter that had been raised very late in the day, not in the M's application or her original statement. It could be dealt with by submission to the degree the Court thought they should place any weight upon it.

31. In respect of the M's evidence that she was best placed to take X to dancing and swimming lessons, again the Court had the M's evidence. In my view, it is highly doubtful that the Court would have been assisted by cross-examination on this matter. It is so important in these disputes to focus on the matters that are central to the child's welfare and for Courts not to feel they have to engage with and determine every issue that the parents may wish to raise.

32. Ms Beswick submits that the Bench made their decision without hearing from the parties on what was the best way for the case to be put. The procedure to be adopted in court is a matter for the judge or tribunal, subject to the basic principles of natural justice and, to the degree it does not overlap, Article 6. The Bench had a view as to how the case should proceed and, as I have explained, the process they adopted was not in breach of such principles. Whether they chose to hear the parties on particular points or not was therefore a matter for them.

33. Equally, in my view there is no merit in Ms Beswick's submission that the Court was biased and had prejudged the case as set out in her Skeleton Argument above. There is nothing in the material before me that would support this submission. The Court did not suggest that it would accept the Cafcass officer's report unchallenged. Indeed, to the contrary, the Court made clear that the officer could be cross-examined. The Court

had asked the officer for her view on the M's allegation about the F's approach to X's glasses as an effective and proportionate means of discovering the degree to which this matter was impacting on the child's welfare.

34. For all these reasons I consider that the Bench acted well within their case management powers and that they did not prejudge any issues in a way which would lead to a breach of natural justice.

35. Finally, I note the Bench adjourned the case to allow the Mother to appeal. I fully understand why they took this course, but Courts in this situation should carefully consider whether it would be more effective and proportionate to continue with the hearing and then for any appeal to be based on the substantive outcome. It is possible that the grounds for appeal would thereby fall away, and it would have the obvious benefit of not building more delay into the determination of the case.