



Neutral Citation Number: [2020] EWFC 34

RG18P51496

IN THE FAMILY COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/04/2020

Before:

MR JUSTICE MOSTYN

Between:

KW
- and -
ST
B (by her Guardian)

Applicant

Respondents

Natasha March (instructed by Clifton Ingram LLP) for the applicant (father)
Andrew Duncan (instructed by Albin & Co) for the respondent (mother)
Seona Myerscough of Gardner Leader LLP for the respondent (child)

Hearing dates: 21 and 27 April 2020
The hearing was conducted by Zoom

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....
MR JUSTICE MOSTYN

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. **In any report this judgment should be referred to as Re B (a child).**

Mr Justice Mostyn:

1. The background to this case can be found in the characteristically clear judgment of Mr Justice Holman dated 2 December 2019¹. In that judgment he explains how the child, B, spent her third birthday on Saturday 25 August 2018 with her father. This was a routine contact session regulated by the terms of a child arrangements order dated 17 August 2017. B was returned to her mother the following day. The father has not seen his daughter since.
2. The reason for this separation of 1¾ years is that the mother claims that on Tuesday, 28 August 2018 B disclosed that her father had digitally penetrated her vagina and/or her bottom.
3. B was examined by a forensic examiner, Dr B, who found three injuries to B’s vagina which in her opinion were consistent with sexual assault by digital penetration. The examination was filmed, and the recording was placed on a DVD.
4. Arrangements were made for B to undergo an ABE interview. It was fixed for 21 September 2018. On 10 September 2018 at a pre-ABE preparatory session B repeated her allegations to a police officer, although not in identical terms to those disclosures said to have been made on 28 August 2018. However, at the actual ABE interview B made no disclosures whatsoever.
5. The police decided to take no action against the father.
6. On 15 November 2018 the father applied to enforce the existing child arrangements order. On 18 January 2019 the mother cross-applied to vary the order. The matter was set down for a fact-finding hearing. This took place in June 2019. The mother, the father and Dr B gave evidence. There were three other witnesses. The DVD was not produced, let alone examined by an independent paediatrician. The father in his evidence flatly denied sexually abusing his daughter. However, on 14 June 2019 the circuit judge found that he had, on a single occasion, sexually abused his daughter by poking his finger into her vagina.
7. The father appealed. Mr Justice Holman allowed the appeal. He identified 10 areas of concern in the circuit judge’s judgment. Taken together these rendered the judgment unreliable and therefore wrong. He set aside the finding. He directed that the issue be reheard at High Court judge level. The matter was allocated to me. I directed that an independent paediatrician should be instructed, and that the DVD should be made available to her. Dr Christine Greenshaw was jointly instructed. She is a consultant paediatrician and a senior forensic physician.
8. I also ordered that supervised contact should take place. On 7 March 2020 the first such contact session was due to happen. B was brought to the contact centre by her mother. She refused to see her father saying that he “hurts her bottom”. Further contact sessions have not been possible as a result of the coronavirus crisis.
9. Dr Greenshaw produced a comprehensive report dated 9 March 2020 and a short addendum report dated 14 April 2020. Her conclusion was expressed as follows:

¹ <https://www.bailii.org/ew/cases/EWHC/Fam/2019/3665.html>

“The medical evidence, in my opinion, does not help to ascertain if the alleged sexual touching or any form of child sexual abuse to the genito-anal area has taken place. Despite the good quality of the recording, I cannot identify in the DVD of the genital examination two of the three lacerations described by Dr B. The third laceration is in my opinion likely to be the result if the examination technique, possibly facilitated by the previously noted nappy rash.”

10. She addressed the disclosures made by B in these terms:

“Despite the lack of medical evidence, the fact remains that B disclosed on the 28/08/18 to her mother and subsequently in the presence of an intermediary and police officer during a pre-interview assessment (10/9/18) when talking to teddy, that “daddy hurts her bumby,... he puts his fingers down her bumby, ... She indicated on a picture that she calls the genital area noony and the anal area bumby, and specified when it happened: “Grandma is in the toilet when daddy puts his fingers in my bumby.” When asked directly where dad puts his finger, she replied: “...in the noony, in the little hole, ... lots of times.” However, in the archiving (*sic, semble* achieving) best evidence (ABE) interview, B would not talk, was evasive, and repeatedly stated that she could not remember and finally said, “I can’t remember what my dad did, like when he hurts me.”

From my paediatric experience, I can think of several reasons why B didn’t want to talk about her father during the video-interview. The strange new setting might have contributed, she might have felt that she had said it all already, felt pressured, had a conflict of interest and loyalty, realising that she had got her father into trouble, but also, she may have been uncomfortable because what she had previously said was not true. I also wonder if the child in the last 19 months expanded further on what she previously said. Children who have experienced maltreatment are often able to talk about what happened once they are in a secure setting and don’t have further contact with their abuser.”

11. The arrival of this evidence caused all the advisers intensely to reappraise the case. The pre-trial review was fixed before me on Tuesday, 21 April 2020 with the main case to follow a week later on 27 April 2020. On the morning of 21 April, a supplemental position statement was filed by Mr Duncan on behalf of the mother. This stated:

“The mother has reviewed how she sees the evidence and has been taken through the evidence with her counsel. The mother accepts that the evidential canvass as it exists now, is different to the canvass that existed in June 2019.

The mother respectfully stresses that her position has always been to ensure that a fair and safe determination is made as to B's allegations. Whilst the mother has never disbelieved her daughter, the mother is now able to see that the evidence in this case when assessed holistically, is not likely to meet the standard of proof required for findings to be made.

In those circumstances the mother no longer seeks to pursue these findings.”

12. It would have been theoretically possible for me to have insisted on the allegations being tried out notwithstanding that the mother was not seeking to pursue them. However, neither the father nor the Guardian sought such a course and even if they had I would not have adopted it in the light of the mother's stance and the evidence of Dr Greenshaw. Plainly, the court would never find that it was more likely than not that the father had sexually abused his daughter in the manner alleged or at all.
13. In such circumstances I confirm in this judgment, and in the order giving effect to it, that no findings are made of any kind of sexual impropriety by this father against his daughter. In such circumstances, the law treats as a certainty that the conduct alleged did not happen: see *Re B (Children)* [2009] 1 AC 11 at [2] per Lord Hoffmann and *Mallett v McMonagle* [1970] AC 166 at 176 per Lord Diplock. The father is therefore entitled to be treated as exonerated.
14. It is clear that the mother was convinced that the conduct alleged had happened and so her change of stance does represent both realism and courage on her part. I record that she is now demonstrating a degree of impartiality in contrast to her stance hitherto. I further record that she is not to be criticised for bringing the matter before the court and for seeking a judicial determination.
15. Unfortunately, there has been a complete disruption of the relationship between the father and his daughter – one of the two most vital relationships in her life. The father is realistic enough to acknowledge that rebuilding the relationship must be taken in small stages. I have ordered that there will be weekly contact by Skype for approximately eight weeks. No medium of direct contact is possible during the current national coronavirus emergency. The matter will then be the subject of a report by the Guardian, but the intention is it should then move to direct supervised access and from there to a normal father-daughter relationship.
16. I have retained the matter at High Court judge level, allocated to me. I am satisfied that the index of complexity is relatively high and that there is virtue in maintaining judicial continuity. I have exhorted the parents to work together responsibly and diligently to bring about a resumption of the father-daughter relationship which is so obviously important for the psychological well-being of this small child.
17. That is my judgment.

