



Neutral Citation Number: [2024] EWFC 296

Case No: NG22P00347

**IN THE FAMILY COURT**  
**SITTING IN NOTTINGHAM**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 15/10/2024

**Before :**

**THE HONOURABLE MR JUSTICE HAYDEN**

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**Between :**

**AB**

**Applicant**

**- and -**

**TC**

**First**  
**Respondent**

**- and -**

**L**

**(Represented by her 16.4 Guardian)**

**Second**  
**Respondent**

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**Tom Wilson** (instructed by **Roythornes Solicitors LLP**) for the **Applicant**  
**Kathryn Moran** (instructed by **Clayton Mott LLP**) for the **First Respondent**  
**Jane Withington** (instructed by **Hopkins Solicitors LLP**) for the **Second Respondent**

Hearing dates: 14<sup>th</sup> and 15<sup>th</sup> of October 2024  
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**APPROVED JUDGMENT**

**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.**

**Mr Justice Hayden :**

1. I am concerned here with L, who was born on the 27<sup>th</sup> of December 2013. Both her parents have Parental Responsibility.
2. This case has been repeatedly before the court, since the 1<sup>st</sup> of October 2020, when F first made an application for a Child Arrangements Order. That application was determined by the Justices sitting in the Family Court in Nottingham on the 17<sup>th</sup> of January 2022. Following a contested hearing, the Justices provided that L should live with M, and should have both direct and indirect contact with F in accordance with a schedule, which was structured around F's work commitments. The arrangements quickly foundered, breaking down entirely in May 2022, following a referral to social services arising from allegations of physical abuse made by L. On May 2022, M filed an application to vary the final order to make provision for supervision of L's contact with F.

**Background**

3. The protracted and depressing history of this litigation has been distilled into an agreed case summary which requires to be incorporated into this judgment. I can do so with very few amendments.
4. On the 9<sup>th</sup> of August 2022, at an FHDRA before Lay Justices, the Magistrates considered that due to the complexity of the matter further hearings should be before a District Judge, and they suspended the Final Order pending the outcome of the police investigation. The Magistrates made an Order for indirect contact to continue.
5. On the 1<sup>st</sup> of November 2022, the Police confirmed that their investigation was complete and that no further action was to be taken. On the 8<sup>th</sup> of November 2022, F filed a C100 and C1A application with the Court to reinstate his contact with L and for enforcement of any further Orders. The application for enforcement remains before the Court, consolidated with the existing proceedings.
6. By Order of DJ MacMillan, dated the 10<sup>th</sup> of May 2023, Ms Deborah Thorp was appointed as a single joint expert Clinical Psychologist and her Report and addendum are dated the 3<sup>rd</sup> of July 2023 and the 14<sup>th</sup> of August 2023. The parties have

subsequently filed their respective position statements regarding Ms Thorp's psychological assessment. The matter was then listed before DDJ Henderson for an adjourned Dispute Resolution Appointment on the 12<sup>th</sup> of October 2023. The Order of DDJ Henderson, as amended as to some timings, has been complied with by the parties. In particular, M has completed her Cognitive Behavioural Therapy and L has completed her Play Therapy. The Guardian filed her Position Statement.

7. By application dated the 18<sup>th</sup> of January 2024, the Children's Guardian made an urgent application to the Court following concerns raised by an ICFA representative and a Local Authority social worker undertaking a s.37 investigation. That application has been consolidated, and will be heard together, with the parties' respective applications. Following completion of the s.37 investigation, the Local Authority concluded that the threshold had not been met for care or supervision orders, but instead proposed a s.17 Child in Need Plan for L, in respect of which both parents are cooperating. The CIN Report was issued on the 15<sup>th</sup> of March 2024.
8. Visiting contact between L and F, initially supervised by ICFA, then became unsupervised, but organised and supported by the Local Authority. L was referred (outwith the proceedings) to Dr Clare Boorn, an Independent HCPC registered Practitioner Educational Psychologist for an Autism Spectrum Disorder assessment. An initial assessment of mild autism was made by Dr Boorn.
9. On the 15<sup>th</sup> of March 2024, the local authority issued its Child in Need Plan. The final hearing of the said applications was due to take place on the 16<sup>th</sup> and 17<sup>th</sup> of May 2024. In advance of that hearing, there was a PTR hearing on the 21<sup>st</sup> of March 2024 when further directions were made by DJ Dinan-Hayward. As part of those directions, the Local Authority was to disclose (amongst other things) the minutes of any Child in Need meetings and all documents and other case records relating to L.
10. On the 21<sup>st</sup> April 2024, L alleged that F had kicked and pushed her during contact. The Guardian referred matters to Social Care. On the 23<sup>rd</sup> April 2024, L was interviewed by members of the Local Authority's Social Care team who reported to M that L claimed she was scared of F and did not wish to see him. Photographs of bruising were taken. Pending the outcome of a Local Authority risk assessment, it was proposed by the Social Care supervisor, Ms Charlene Comrie, that further contact

should, until further notice, be supervised by the local authority. Such supervision has since ceased, but the Local Authority continue to support contact arrangements as required.

11. On the 1<sup>st</sup> of May 2024, in light of L's allegations and the outstanding risk assessment, the Guardian applied to the Court for further directions and for the adjournment of the final hearing. That application was allowed by DJ Dinan-Hayward on the same day, and the matter was listed for a Case Management hearing on the 17<sup>th</sup> of May 2024 before HHJ Reece, who gave further case management directions and ordered that the the final hearing be fixed for the 14<sup>th</sup> to the 17<sup>th</sup> of October 2024.
12. Since the 17<sup>th</sup> of May 2024, the parties have filed further narrative statements and further questions have been put to, and answered by, Dr Thorp. An agreed Safety Plan has since been put in place. Meanwhile, L continues to have unsupervised contact, to include staying contact, with F.

### **The Importance of Contact**

13. Though it should be obvious, it is necessary to emphasise that the obligation of parents on separation is to ensure that, in a different context from that which was planned, their child has a family life in the fullest and most meaningful sense. The responsibility of the parents is to ensure that the child has the best possible relationship with each of them, recognising that is the child's right. Intrinsic to that right is an understanding that the child who grows up happily moving between the lives of her two parents, who both remain committed to her welfare, has a much greater prospect of achieving stability and security which will in turn provide her with the best possible platform from which to achieve her potential. Ongoing conflict, particularly in the sphere of litigation, is not only inimical to these objectives, but also harmful to the child. It has often been said, but bears reiteration, that it is conflict, not separation that damages children.
14. L asked to meet with me prior to the commencement of this hearing. At approaching 11 years of age, she is poised, intelligent, and engages charmingly, when she chooses to do so. For nearly half of her short life, her parents' conflict in this litigation has swirled around her and has inhibited her potential and marred her happiness. Both parents, perhaps to differing degrees, bear the responsibility for that. It is important, to

my mind, that both realise the weight of the renewed obligation upon them both to free L from the conflict she has lived with, and to make reparation for the harm that they have undoubtedly caused her, the evidence of which is clear in the case papers.

### **Future Behaviour**

15. It is a sad fact that past behaviour is so often the most accurate indicator of likely future behaviour. This however is not always the case. Sometimes, a sea change can occur in parental relations, where parents recognise that everybody in a family conflict loses. Here, over the past few months, there has been what can properly be described as significant progress in L's relationship with F. Though the past history might never have predicted it, L has begun to have overnight contact with F and the parties now contemplate L spending a few nights away on a half term holiday on the Northeastern coast. Most striking about this holiday plan is the extent to which it is dominated by L's own interests and enthusiasms.
16. Historically, the parties have been assisted by a court appointed psychologist. L has been able to access play therapy. M has been able to obtain private Cognitive Behavioural Therapy. Both parents have attended parenting courses.
17. An Improving Child and Family Arrangements (ICFA) programme began. The ICFA worker found L to be a "worrying case". It was her clear view that L was not afraid of F but was pretending to be so. A Section 37 Report was ordered from the Local Authority, which concluded that if contact arrangements continued to be hindered, this would be a case in which the court would be required seriously to consider a change of residence. Following the Section 37 Report and a Compliance Report, there was a sudden and positive improvement in the contact arrangements. This sadly dipped in March 2024 when L made allegations that F had physically harmed her. As the summary of the background history above shows, such allegations had been made before. Investigations on this occasion assessed L's complaints as false. L became subject to a Child Protection Plan. The contact arrangements again, improved.
18. At the Guardian's most recent visit with L, L spoke comfortably about F. The Guardian described her as being at ease when talking about F. L described her time with him as being "*perfectly fine*", though she said she would not want anything more or (notably) less than one night every two weeks. She told the Guardian that this was

because she has a “*full life*”. It must be said that L’s charm is not without precocity. She went on to explain that she was going to Whitby “*with Dad*”. M is of the view that the change in L towards F is because social care has, as she sees it, a better understanding of L’s needs. She also tells the Guardian that she considers the interactions between her and F are “*more amicable*” and at least insinuates that this helps L too.

19. Whilst F welcomes the happier atmosphere, he remains understandably sceptical as to M’s good faith. Moreover, he sees the rapid change in L’s attitude to him as evidence of M’s capricious and alienating behaviours. He regards the threat of protection procedures and change of residence as having had a significant impact. Dr Thorp, the court appointed psychologist has stated that it is “*highly possible that [L] feels an obligation to report negative things about her father, this is very unhealthy for her and will cause long term psychological damage*”. The Guardian has also stated that L has felt guilty for enjoying her time with F.
20. The Local Authority has observed that following the introduction of overnight contact, “*the interaction with [L] and [F] has been much more positive, and [L] looks very comfortable with him, and she talks positively about him, which is a vast change from when we were initially involved*”.
21. The Local Authority social worker states “*it is not clear what has changed*”. She talks of a “*drastic change*” and, as I have recorded “*a vast change*”. Though in an excess of caution she draws back from stating it, she unambiguously insinuates that M has changed her approach to contact, and has been able to use her influence to enable L to enjoy her relationship with F.
22. What ultimately matters is that L is the beneficiary of this new approach. She is comfortable with F. More than that, it is plain she takes pleasure in his company, though she remains inhibited in the expression of that pleasure. In her meeting with me, she was also relaxed and comfortable when talking about F, whom she mentioned spontaneously, in exactly the way the professionals had identified. She moved deftly from talking about Taylor Swift (whose lyrics she told me she knew by heart, merely because she had heard them so frequently, insisting that should not indicate that she liked her music) to talking about F, with no discomfort or hesitation.

### The Legal Framework

23. Ms Moran, on behalf of F, was keen to tilt the legal scaffolding in such a way as to keep the pressure on M to comply. She invited me to make a Suspended Lives With Order indicating that if there was, in effect, a return to the usual hostilities, L would most likely move to live with F. Ms Moran sought to persuade me that this case was so similar to that in **Re M (Contact) [2012] EWHC 1948 Fam** that I should follow the course adopted there by Peter Jackson J, as he then was:

*“72. Weighing up matters, my conclusion is that it is unacceptable from the point of view of the boys' welfare in the short, medium and long term for them to be deprived of family relationships that are essential for their development as balanced young people, and as adults. Although leaving the children to grow up in relative isolation of their mother's home is the easier short-term solution, it does not provide the foundations that they need for a healthy, rounded future.*

*73. It is also, as I have already noted, bad for the children to be taught that the sort of manipulation that they have been caught up in succeeds. That would be a lesson in injustice. The Court has repeatedly concluded that it is in their interests to see their father and it is plainly wrong for them to learn that decisions of this kind can be ignored or defied, as is now happening.”*

24. Jackson J also took care to analyse a wider approach to the evaluation of a child's wishes and feelings:

*“74. Although the boys are of an age where their views have to be taken seriously, I am not deterred by what they say they want to happen. This is not to disrespect them, but to respect them by treating them as children who have no way of dealing with this sort of pressure. A true appreciation of their wishes*



*and feelings points towards the restoration of their relationship with their father, not to its abandonment.”*

25. On the facts of the case before him, Jackson J was considering circumstances in which there had been no change in the mother’s approach:

*“76. Taking everything into account, I consider that the father's application for a residence order should succeed. I will however allow the mother one final opportunity, and direct that the order will not come into effect if contact is now resumed. In the light of experience, I do not assume that she will take this opportunity, but for the children's sake I hope that she and Mr A decide to do so, and that they set about persuading the boys that they mean it.”*

26. The Suspended Residence Order provided a further opportunity for the mother to comply. It is notable that the Judge thought compliance to be unlikely. The key point in this judgment is that the Judge was already satisfied that the circumstances of the case justified the making of a Residence Order at that juncture. That is not the case here. On the contrary, the CAFCASS Report contains the following professional judgement:

*“34. Social care do not assess and support [L] moving to her father’s care at this time, given there is now progress. This is evidenced and an indication of change. However, it has to be acknowledged that this progress is in the early stages, and not sufficiently evidencing that this can be maintained in the longer term. There is still dispute in terms of [L]’s needs.”*

27. Jackson J underscored that the “*Conditional Residence Order*” is appropriate where the court can confidently see how it would come into effect. I would add that the court should only make such an order where it can confidently see how it would come into effect.

*“77. A conditional residence order is in my view appropriate where the court can confidently foresee the circumstances in*

*which it might come into effect. I therefore limit it to the period of the next eight weeks. Thereafter, and until the end of next year, the order will not automatically come into effect if there are failed contacts, but if there are, the father can restore his application before me for an early decision.*

*78. If the boys move to their father, arrangements will after a while be made for contact with their mother. What can be achieved will in large part depend on her level of co-operation.”*

28. I have a strong sense that M has recognised that she came to the very brink of the court transferring L to F’s care. The contemplated plan, in such a scenario, envisaged a bridgement foster placement. However, I have already signalled that given the recent professional observations discussed above, I would have taken a great deal of persuasion as to the appropriateness of that course and signalled that I would have been far more attracted to a direct transfer to F’s care. Whatever may be the motivation, M plainly now has powerful incentives to promote contact. Accordingly, it is impossible to say, with any degree of certainty, how a suspended ‘Lives With’ Order might come into effect. It is this uncertainty that renders such an order inappropriate in this case. This said, I note that the history reveals a lack of judicial continuity. That invariably provides fertile ground for a recalcitrant litigant. For this reason alone, I have reserved this case to myself, should there be any future applications.
29. Ms Moran has asked me to attach a Penal Notice to the orders for contact. The history of the case justifies that tenacious application. However, I note that the orders made in March and May this year have been complied with, despite the absence of a Penal Notice. In those circumstances, it would, in my judgement, be wrong to introduce a more draconian measure. I prefer gently to encourage M at this stage. She is an intelligent woman who is under no misapprehension as to the seriousness of the situation and the view that I have taken of it. The Penal Order risks inflaming the situation, in which I consider it is better, at least for now, to endeavour to pour oil on troubled waters.

### Costs

30. Finally, Ms Moran invites me to make a costs order against M. The applicable provisions are the Family Proceedings Rules (FPR) Part 28 and Practice Directions 28A. They grant complete discretion as to costs, see FPR Rule 28.1. The general rule that costs follow the event are disapplied, see FPR Rule 28.2. There are many reasons for this. Primarily, family proceedings are intended to be non-adversarial and investigative. It is not difficult to imagine F's reaction to this proposition. Nonetheless, the behaviour of a particular litigant does not dislodge the central philosophy of the process. In investigative proceedings, there is almost by definition no successful party. This case is in many ways a paradigm illustration of this point. F's application for a change of residence is not pursued, but he has succeeded in gaining a level of contact with his daughter, beyond that which he has experienced for many years. Quite how that might redound in costs is not immediately obvious. Additionally, a costs order against the primary carer will inevitably reduce the funds available to meet the needs of the child. It is also, of course, predictable that a costs order would inflame tensions in a case which I have already indicated requires a sensitive and constructive approach. In this case, an order for costs would most likely cause M to feel punished in circumstances where she requires to be proactively encouraged. Moreover, the history of the case indicates that were she to feel punished, there is a real risk that this might impinge ultimately on the welfare of the child, see **Re T (A Child) Order for Costs [2005] EWCA Civ [36] and [50]**.