

CASE REFERENCE: FA-2024-000219

IN THE FAMILY DIVISION OF THE HIGH COURT
ON APPEAL FROM HHJ SHELTON

IN THE MATTER OF THE CHILDREN ACT 1989

AND IN THE MATTER OF EF

NCN: [2024] EWHC 2956 (Fam)

BETWEEN

AB

Appellant

and

CD

First Respondent

and

EF

(by her Rule 16.4 Guardian Alexa Munday)

Second Respondent

Appearances:

- The Appellant in person assisted by her McKenzie Friend, AH
- Phillipa Hildyard of Counsel instructed by Paul Metcalfe of Metcalfe David Eyres for the First Respondent
- Catherine Mason of Counsel instructed by Nicola Rhodes of Ramsdens Solicitors for the Second Respondent

JUDGMENT OF SIR JONATHAN COHEN ON 6 AUGUST 2024

This judgment was delivered in public. 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 OR the parties] must be strictly preserved. All persons, including representatives of the media and legal bloggers, must ensure that this condition is strictly complied with.

Failure to do so may be a contempt of court.

SIR JONATHAN COHEN:

1. This case concerns a young girl EF who is ten and a half years old. She is the daughter of AB and CD, the mother and father in this case, who have been engaged in private law proceedings for many years.
2. The particular unusual characteristic in relation to EF is her diabetes, from which she has suffered now for some years, having been diagnosed with type one diabetes at about the start of July 2023. The effect of that is set out in a report from Dr SG, consultant paediatrician, which was not in the appeal bundle but a copy of which I asked for, and was provided with.
3. Diabetes has a major impact on her life as is clearly set out in the report. It needs extremely careful monitoring and treatment, and if not properly managed can have life threatening consequences. This is a key part of the mother's application for permission to appeal and a stay of the order made on 5 August 2024. It is hard to think that was only yesterday.
4. The Judge gave judgment yesterday in a long and carefully structured judgment running to 180 paragraphs. He in effect had three options put before him. The first was that EF would remain living with her mother without contact to her father. The second was that the Court has another go at making work a contact order in favour of the father, notwithstanding the making of three previous orders which had been unsuccessful; thirdly, that the care of EF is transferred to the father, in what is described as a staged manner.
5. A fourth suggestion was put forward in closing submissions by the mother to the Judge, namely that she and the father's wife G, whom AB previously had a good regard for, should try to work together to try to establish a relationship between EF and her father. Unsurprisingly the Judge did not find this an appropriate alternative as it was unlikely to lead anywhere and rejected it.
6. The second alternative, yet another contact order, was unsurprisingly rejected by the Judge and thus he was left with the two alternatives, EF remaining with the mother, with the reality that EF would not have a relationship with her father, or a transfer in a

staggered manner to the care of her father via initially her living with G and the father's parents, with the father vacating.

7. These cases are intensely difficult. As I mentioned to counsel this is about the sixth such case I have had to deal with in the last six weeks or so. This case was, in its different ways, as hard as any that a Judge would have to deal with.
8. I want to say a few more things by way of preface. I am not the trial judge. I have not heard the evidence. I have not read the mound of material placed before him. The case lasted for five days in February, it did not finish in time, and continued later for a further two days of evidence from the children's guardian, and with submissions then presented to the Court.
9. After the first five days, the mother parted company with her lawyers. It is not for me to enquire why that happened but the consequence has been that she has represented herself before me and she has been articulate and fluent.
10. But the Judge had the benefit of a huge amount of material. The mother complains it wasn't enough, in particular, she says position statements that either she or her lawyers had drafted were not put before the Court. As I have explained, position statements are not evidence and the court proceeds on evidence. Position statements are no more than an articulation by either a lay party or their lawyer of what they would like the Court to do.
11. In these sort of cases there is never a right answer. There are only alternatives, all of which are unsatisfactory, for the reasons set out in the Judgment. I would like to add this: when the Court makes determinations, particularly in transfer of residence cases, this is not the court determining matters necessarily once and for all. The court must always keep at the forefront of its mind what is best for the child. And if what it first seeks to achieve turns out not to be working for the child, then an alternative course has to be taken.
12. I have read the Judgment very carefully on two occasions in the hours that have been available to me. The history is well set out. It is not necessary for me to give it. But in headline, the parties separated in 2018. I don't know exactly what time of year it was, but EF would not have been more than four years old at the time the separation actually took place.

13. EF has not seen her father since 2019 when she would have been 5 years old, save for once seeing him across a crowded room. There has been indirect contact by communications and EF has apparently heard his voice from time to time when with her paternal grandparents and they have been speaking on the telephone to the father.
14. She has seen her paternal grandparents on about a monthly basis. I am told it would have been more but for illness of the paternal grandmother in particular and holidays, and she has never met G, although the mother did have a good opinion of her before she married the father. So this is something of a journey into the unknown.
15. Following the separation, contact for the best part of a year took place to the father for one day each weekend supervised by the paternal grandparents, so frequent contact, but in or about June 2019, or it may have been April 2019, the mother alleged that EF had told her that the father had sexually abused her, and the allegations are set out at paragraph 44 of the Judgment. There are not only allegations of inappropriate sexual touching and sexual language, but also of excessive chastisement, and controlling and coercive behaviour in the marriage.
16. The allegations were the subject of a finding of fact hearing in October 2021, I imagine the delay being caused by the public health emergency of Covid, and the outcome is set out at paragraph 46 of the Judgment. As the Judge points out at paragraph 47 in particular, the Judge did not find the father to have sexually abused EF, nor did he find his behaviour to be controlling or coercive, but he did find there was some inappropriate language and chastisement. And it was a matter of record that the father had a conviction for common assault against the mother arising out of an incident on the day of their separation in 2018.
17. The Judge, by which I mean the fact-finding Judge, who is not the same as the Judge who made the welfare decision, was critical of the mother's credibility about the allegations of sexual abuse. He observed there had been inappropriate behaviour by both parents, and he gave some examples. He ended up by adding that his decision was not a complete vindication of the father, just a limited set of findings.
18. Thereafter, attempts at contact did not work, although there were no less than three contact orders. There are numerous references to the mother not accepting the findings of

the Judge in respect of the sexual abuse allegation and this belief of hers has bedeviled this case ever since.

19. EF has become involved by her mother to a wholly inappropriate extent in this litigation. I deplore, as many courts, in this case and others, have deplored, that the child was given by the mother a recording device effectively to bug her when seeing the father and professionals, and this happened on many occasions.
20. Various experts were brought in to assist the Court, perhaps most significantly Dr Khurram. She too expressed her concern about the mother's involvement in EF's covert recordings. At paragraphs 81 - 82 of the Judgment, the Judge sets out the risks relating to EF according to Dr Khurram if EF were to transfer to the care of her father or remain in the care of her mother. Dr Khurram advised that any separation would be traumatic and abrupt for EF. She had not lived with or seen her father for a significant period of time.
21. On the other hand, while there are many positive aspects of the mother's relationship with EF, Dr Khurram says the level of control exerted by the mother was emotionally harmful and would continue to be so. Whilst in the care of her mother, she was unlikely ever to have a relationship with her father. She felt the mother has little insight into the harm caused by the use of recording devices; the narrative of sexual abuse; and the isolation from professionals and other family members.
22. One of the matters Dr Khurram thought necessary was that there should be a psychological assessment of the mother, and I am sure it was not just Dr Khurram who suggested that. The Judge proposed that to the mother on various occasions. Indeed, one of the orders from February 2024 apparently stated (and I have not seen a copy of that but I have been told) that if the mother wished to retain the care of EF she should undergo a psychological assessment. The mother was not willing to do that. She says she took advice from some form of organisation, who told her to get a report from her GP as to her mental health and if there were no issues arising then she should not feel obliged to do what the court had said. I do not think the parties have ever seen anything recording that advice, but if it was given, it was very mistaken.

23. The children's guardian's recommendation was that there was no solution to the case that would not cause EF some sort of emotional harm, and reluctantly she came to the view that the least harmful course of action was to transfer care from AB to CD.
24. She said "I feel this will not be an easy process and will need great care and consideration". She concluded by recommending that EF should go to live with G, the father's wife, and the paternal grandparents, with the father moving out and being introduced gradually, before moving back in fully, over a total of six weeks.
25. The Judge's findings are particularly contained at paragraphs 153-154 of the Judgment. He found EF was suffering and likely to suffer significant emotional harm in the mother's care owing to her parenting, and in particular her refusal to accept findings from the fact-finding hearing, and sharing that narrative with EF that the father poses a risk to her. The mother was implacably opposed to contact and EF's resistance and hostility to contact was solely the result of the mother's manipulation.
26. The Judge accepted the father's evidence to a large extent, and also the guardian's evidence that the father presented no risk to EF. The Judge was optimistic that, through the paternal grandparents, the father will be able to re-establish a relationship with EF without undue delay, and EF will be able to settle in their care. The paternal grandparents are crucial to the plan and things must move at EF's pace.
27. Finally I refer to paragraphs 168 to 175 of the Judgment, where the Judge sets out the advantages and disadvantages of the various courses, which I have already touched upon.
28. The mother's criticisms of the Judgment are many. She, and I put this first as it seems to me to be the most important, said the Judge simply did not place weight on the stress of a move on EF, which might be life-threatening for her. I refer particularly to paragraphs 9 and 10 of the report of Dr SG. It says that adults caring for EF must be properly trained by the paediatric diabetes team at MY Hospitals, and that they do expect fluctuating glucose levels in all children with Type 1 diabetes.
29. I am told, and have no reason to disbelieve, that the father and G have been trained in care of diabetes, and indeed have had a refresher course to cover training of the pump, which has now taken the place of the many injections previously required on a daily basis. I

require that to be put in writing (email is fine), namely they have been so trained, and that must be done by tomorrow at the latest and provided to the Local Authority for onward transmission to the mother.

30. Dr SG says at paragraph 10 that “stressful events will have an impact on the blood glucose readings of a child or young person with diabetes leading to fluctuations in blood glucose readings. Stress hormones can cause blood glucose readings to be high or low blood glucose readings, and this can vary between individuals. From our experience, EF experiences high blood glucose readings when facing stressful situations. The management of high and low blood glucose readings is outlined above.”
31. There is apparently an ‘app’ which the carer has on a mobile phone, currently the mother, which has a mirror ‘app’ with the diabetes team at P Hospital, and so that if the blood glucose readings go wrong, or get out of the acceptable bracket, if this is not picked up by the carer, it will be picked up by the treating team and immediate steps can be taken.
32. I have carefully considered this point and understand the mother’s concerns but the evidence does not establish that it would be unsafe to transfer the care of EF to the paternal grandparents and G and then to the father. But it is plainly crucial they have access to the ‘app’ immediately and that must be done. It would not be right for me, on the material I have, simply to say it is unsafe, because I do not have evidence to that effect.
33. The mother’s skeleton argument and position statement in many ways mirror points that she took at Court. They contain some really very serious allegations against all counsel, the Judge, the father, and the children’s guardian. I have not gone into them at any length.
34. In the order in which they appear in the documents I have seen, first the mother is very critical of Ms Mason counsel for the children’s guardian. Ms Mason has courageously accepted that she used a disparaging expression about the mother in the advocates’ room. I am sure she deeply regrets it and it should not have happened. But what counsel might say to another counsel, but does not say to the Court and is not in the evidence, is precisely that; it is not evidence, and it would not have affected the outcome. I understand why the mother says she feels that EF was not properly represented before the Court, but I would have been very much more concerned if the assertion had been made against a

children's guardian, who was going to give evidence, rather than an advocate who does not give evidence.

35. The mother criticises the children's guardian for not seeing EF more often. The children's guardian set out that she did not see EF more than she did so as to reduce the number of professionals meeting her, but she did see her on three occasions in the eight months or so before the hearing and I do not think fair criticism can be made of her for that.
36. I do not accept the assertion of blackmail made against the Judge in respect of the psychological assessment. The Judge would be criticised if he had not said to the mother that there might be consequences if she did not undergo a psychological assessment.
37. Regarding the 'error' by arranging contact when a police investigation was outgoing; that is water under the bridge and immaterial. Likewise, the failure to hear evidence of a misdemeanor of the father many years ago in relation to a young girl. I do not think the allegation of downplaying the assault inflicted by the father on the mother in 2018, nor the assertions of dishonesty of counsel or the children's guardian really take the matter further forward.
38. It is not for me to put my discretion in the place of that of the Judge. I do not know what I would have done if I had been hearing the case, but it was a difficult and finely balanced case with unique aspects to it in relation to EF's diabetes and the length of time she had not seen her father. I cannot say that the Judge was not entitled to reach the decision he did. I therefore grant permission to appeal but dismiss the appeal.
39. But I do say this: cases involving young children in these circumstances are often dynamic. By that I mean people cannot predict what the future will hold. The court must, and I have no doubt will, keep an open mind as time develops as to what is best for EF.
40. I am very concerned about any medical risk that she may run. And I direct as discussed, and I can see that the father accepts, that G must give a daily update to the social workers about EF's welfare, and her settlement in her home, and her glucose levels, for onward transmissions to the mother, except on Sundays. It seems to me it would be inhumane if the mother was not made aware of these important matters relating to EF's health and welfare. In very difficult circumstances, that is the order that I make.

41. I want to conclude by thanking everyone for attending. This appeal was put across my desk at about 9:00am this morning, and in between dealing with rest of my list I have used every moment of the day reading the documents I have been sent. I hope that has given me as good a grasp as possible in the circumstances.
42. The stay is due to expire as soon as this hearing finishes, hence the urgency of it. I hope what happens this evening is as un-traumatic as is possible. I hope everyone will show restraint.
43. If you want a transcript of my judgment, you can obtain one. The matter is coming back to to the family court on 16 August 2024 so you are going to need it before then. I imagine someone has been typing it as I have delivered it, so do your best to put it in a respectable form and send to my clerk by the end of the week, in numbered paragraphs, not too long paragraphs. It makes it much more readable and easier to correct any obvious errors. Recipients must include AB to see if her notes accord with what is written down and you can present a copy to the Judge.

CM – Daily updates – do I presume correctly that is to be reviewed by trial judge?

J – Certainly. By 16th you will have a fair indication whether or not there are concerns about EF's health. And I hope very much there are not but time will tell.

AB – Can I find out how to appeal, do I need to go to the Supreme Court. What forms?

J – To appeal this decision, you need the permission of the Court of Appeal. I am not able to give you permission as it would be a second appeal and it can only be granted by the Court of Appeal. You will need to fill in the correct form – I think the N161 form - and you will need to get in touch with the Civil Appeals Office about that. Can I suggest whoever was typing my Judgment out provides you with a copy tomorrow as the Court of Appeal will need that. But I am not granting a stay of the Order.

AB – Can I check, is EF being removed tonight?

J – Yes (unless otherwise ordered). If you are intending to appeal, get in touch with the Court of Appeal first thing tomorrow morning, the Civil Appeals Office.

J- Can I ask, what is the advantage of moving EF at this time of night? It seems to me an unusual order to make?

CM – I think the intention behind the Judge granting a stay was effectively until end of next working day was in accordance with case of *Re N (Children Interim Order Stays)* [2020] EWCA Civ 1070, which deals with stays.

PH – The other consideration is that EF was told yesterday by social workers that she will likely move today so that is what she is expecting,

J – I am thinking of the point AB makes – would it not be appropriate for it to be extended until tomorrow? Would it not be appropriate to extend to 2pm tomorrow?

CM- The children’s guardian is very concerned about the extent to which EF is exposed to the mother’s views and emotions in particular, but on the flip side the mother has indicated her pump needs to be replaced tomorrow. The mother could be requested to give assurances that she won’t discuss the move, or only do so in positive terms.

J – That is unrealistic, I think.

CM – I agree and that is what the children’s guardian is concerned about. EF may be more fearful of a move the longer it is prolonged.

J- I will deal with this in a further short Judgment.

44. The mother has indicated to me that she wishes to seek permission to appeal my decision and intends to approach the Court of Appeal first thing tomorrow morning. The Judge granted a stay of his Judgment yesterday until 4:30pm today. It is now 5:00pm and, because of other matters in my list which I had to do at express speed this morning, I was not able to start this case until 2:30pm.

45. EF has been told she will be removed from her mother's care today. I am not a proponent of removing children late in evening as it would be, but in any event, the mother wishes to go to the Court of Appeal as she is entitled to ask for their permission, and children are not to be treated like ping-pong balls to be batted across the net between their parents. There is also the small point that EF's diabetes pump needs renewing. So, it seems sensible for the mother to do that tomorrow morning, and I can see the father nodding his head in agreement. I will stay the order [for removal] until 3pm tomorrow.

46. I will cause immediate reference of the matter to whichever family judge in the Court of Appeal is on duty. I will do that this evening. I want please a copy of the Judgment, unperfected as it will be during the course of this evening, so that it can be sent to the duty family Judge in the Court of Appeal. I am afraid this timetable imposes pressures on all of us but it is inevitable.

6th August 2024.

Postscript: the Court of Appeal refused permission to appeal.