IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

No. 2018/0057

ON APPEAL FROM THE FAMILY
COURT SITTING AT BOURNEMOUTH

[2019] EWHC 612 (Fam)

Royal Courts of Justice
Strand
London, WC2A 2LL

Tuesday, 5 February 2019

IN THE MATTER OF THE CHILDREN ACT 1989

Before:

MR JUSTICE COHEN

B E T W E E N :

VB — Applicant

- and -

(1) JD and LD
(3) B
(4) A (by her Children's Guardian) — Respondents

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J U D G M E N T

A P P E A R A N C E S

MISS K. BRANIGAN QC and MR J. WARD-PROWSE (instructed by Jacobs & Reeves Solicitors) appeared on behalf of the Applicant.

THE FIRST AND SECOND RESPONDENTS appeared in Person.

MS S. EARLEY (instructed by Abels Solicitors) appeared on behalf of the Third Respondent.

MR A. HAND appeared on behalf of the Children's Guardian.

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MR JUSTICE COHEN:

1 The mother of A, who is 7½, appeals against an order of HHJ Meston QC which stopped all direct contact to A by her. She is supported in her appeal by A's half-sister, B, who is aged 17 and is the daughter of the mother and her former partner. The appeal is opposed by the father and A's guardian. The father has no biological relationship to B.

2 In 2015, the mother and B alleged that the father sexually abused B. By that time, the mother and father had been separated since 2013. The chronology reveals that litigation has continued between the parties, almost without cease, for now some six years but the proceedings in 2015 are for the purposes of the case that is before me, the starting point of what I have to consider.

3 The matter was considered carefully by District Judge Willis at hearings that took place in the early part of 2015. In a judgment dated 28 April 2015, the district judge said this:

> "In the light of the clear view I have formed about B's evidence, it must follow that I dismiss the allegations against the father. I am not able to say that nothing untoward happened. It is simply that the mother has wholly failed to discharge the burden of proving what she alleges."

4 Then at paragraph 17, he went on to make this important observation:

> "It seems to me to be a reasonable inference to draw that this mother appears determined, at any cost, to ensure that A has no contact or relationship with the father."

5 That is the backdrop to this case. It remains the case that B still insists that the father has sexually abused her. Thus, she says, A is at risk from her father. The mother says that she now accepts the findings of District Judge Willis, although Judge Meston had his doubts, as I will come on to.

6 The chronology of court hearings makes desperate reading. The parents' relationship with each other is non-existent. In December 2015, at a final hearing, District Judge Willis varied the pre-existing shared care arrangement and directed that A should live with her father and stepmother. Since then, A has neither lived with her mother nor had staying contact and all contact has been supervised. Although I have not been given details, the parents live fairly close to one another. The conclusion reached by the district judge was, at least in part, based on a recommendation of Dr S, a consultant psychologist.

7 There have been innumerable changes of arrangements for contact over the years but put very broadly, contact has taken place on an approximate monthly basis with various changes in terms of frequency and identity of the supervisor and that contact has been by both the mother and by B to A. There have been very many hearings before HHJ Meston. I suspect the list that I have got is not complete because it excludes certain minor directions appointments, but it seems as though it must have been in excess of a dozen hearings. He is, of course, an extremely experienced and, if I may respectfully say so, highly regarded judge and he has a handle on this case in a way that I cannot have.

8 I am going to take up the chronology from June 2016 when the mother applied for a variation of the child arrangements order whereby A made her home with her father. The matter came substantively before Judge Meston in January 2017. At that hearing, the

mother indicated that she did not intend to pursue her application for a variation of the living arrangements and simply wished to have the issue of contact looked at again. The judge made an order for contact every four weeks for the mother to see A and for B to see A. The father indicated that he was not willing to comply with the arrangement and that A should go and live with her mother. That was what the parties appear to have agreed.

9 The final hearing was due to take place on 25 January 2017. The guardian was unavailable for the hearing because of ill-health but enquiries revealed that the supervisor at CAFCASS was not willing to accept the proposal that the parties had agreed. The matter was accordingly listed for a contested hearing on 13 March. There was a hearing at which evidence was given by the mother, the father, and the lady who was supervising contact.

10 On the third day, the father arrived at court with proposals which the parents were able to agree and CAFCASS to approve. They were long and detailed and which I shall try to summarise. Broadly speaking, they provided for fortnightly contact during the school terms by the mother to A and by B to A, their contact taking place in alternating weeks, and more extended holiday contact, B seeing A for one day each week and the mother seeing A for one day every three weeks, and the schedule provided for an increase to take place over the course of the next twelve months. It also included by agreement an order under section 91(14) of the Children Act 1989 barring further applications for the next twelve months without permission. Very sadly, these carefully formulated arrangements contained in the order did not survive. In fact, they lasted only for about ten weeks.

11 On 22 May, the father issued an application for permission to start further proceedings seeking a prohibited steps order against the mother and against B and for variation of the child arrangements order agreed in March. The catalyst to that application was that some three days previously B had attended A's school and demanded to see her teacher. He said that his concern was that B had been influenced by the mother to do what she did when she had gone to the school. He went on to say that the order of 15 March had not worked smoothly and that A was returning from contact distressed or hyperactive. Also, he said the school had noticed a significant change in her behaviour and demeanour since the new arrangements had come into force.

12 The application came before Judge Meston on 2 June. The mother opposed the father's applications and sought a review and variation of the arrangements saying that A wanted more contact, including overnight contact.

13 The judge gave both parties permission to bring their applications and directed that, until determination of the applications, contact should continue in accordance with the order of 15 March. I am told that contact took place monthly between May 2017 and November 2017 when the hearing of the substantive application began on 20 November.

14 At the start of the hearing on that day, and it was a five-day hearing, counsel for the mother pursued an application for permission to instruct a psychologist because, he said, that the order recommended by the guardian for no contact should not be considered without a psychologist having considered the profound loss involved. Unsurprisingly to me, the judge declined to deal with the application at that time because it would inevitably have meant that the hearing would have gone off. However, he put it over to reconsider at the conclusion of the evidence in the hearing.

15 The events that the father relied upon in support of his application are set out at paragraph 76 of the judgment of HHJ Meston which he formally handed down on 23 February 2018

having sent out a draft some four days before. At paragraph 76, there are some 19 events that took place between 29 March 2017 and 6 June 2017 which, says the father, were actions by the mother and B and others which showed that the arrangements reached in the consent order had become unworkable. Some of them are more serious than others. The most serious seem to me to be these five: at number 4, on 31 March, B telephoned the local authority Children's Services stating that she was concerned about A who was living with her father who had sexually and physically abused her, B, when she was younger and that during supervised contact A was distressed and saying that she wanted to live with B and the mother, and B did not feel that the court and the children's guardian had made the right decisions; at 8, it is recorded that on 13 April, B called the police and expressed her concerns for A who she said was living with A's father who had physically and sexually abused B; and at 10, a similar allegation was made by B to the local authority Children's Services on 8 May.

16 At 12, on 16 May, B called the police with concerns about A and what the father might do. The police log says that during the course of the discussion, the police spoke to the mother who was, and these are my words, broadly supportive of what B was saying and that B had seen evidence that something was not right and this was down to the fear of the father that A was displaying. The mother also made some disparaging comments about the reasons why the father had left the police force.

17 Then at 13, the incident on 19 May when B attended A's school and created an incident there. The judge records that the mother denied any knowledge of what B was doing until told some days later. The judge recorded this in his comment about this last incident:

> "In my judgment, the close relationship between the mother and B and the mother's sympathy for the strong feelings of B make it likely that, at the very least, the mother had some suspicion of what B was thinking of doing."

18 It is also clear from the list set out at paragraph 76 of the judgment, which extends over some five pages, that a number of the mother's friends weighed in on the mother's behalf during that period and made representations, particularly to the children's guardian.

19 B is now 17 and doing her A levels. She is represented in these proceedings. Indeed, she has been a party now for a number of years. Her case remains that the allegations she made against the father are true.

20 The father, for his part, felt that he and his partner could take no more. His proposal was that A should continue to live with him and he sought an order that direct contact between A and the mother and B should cease until A was old enough to be informed of "the whole scenario" which he considered should be when she was about 15. He said that he would not cooperate if he was ordered to continue the contact arrangements and would not abide by a court order to do so. He said that A was becoming incredibly distressed by handovers and that the warfare was destroying his family and career.

21 When asked about the effect of his proposal, he said that he would expect A to be distressed because it was horrible to lose her mother and sister but it was far worse to allow the existing situation to continue and he said that he and his wife had bent over backwards to make things work but the mother and B had been making their lives hell. The father said that although A was doing well, she still had difficulty with the current arrangements for contact and that after contact periods A would come back tearful saying she missed her

mother or B. The father said that either she genuinely missed them or she had been coached to produce an emotional response.

22 This highlights some of the tragedies of this case. First, that the contacts between A and her mother, and A and B have been enjoyable occasions in themselves and nothing transpires during the contact periods that in themselves create difficulties. They are regarded by the guardian and, of course, by the mother as occasions that have been happy occasions for A. Secondly, as the guardian says, although the father has more hesitation, it is what goes on outside contact that is the problem. It is not what goes on during contact and it is the complaints made by B, possibly maliciously, and with, on the judge's findings, at least the implicit support of the mother.

23 The mother's case before the judge was that she wished for A to live with her and B and that she would agree to there being unsupervised direct contact between A and her father every other weekend. The mother said that she accepted the findings made by the district judge and that no findings of abuse had been made but, she said, the words of the district judge that he was not able to say that nothing had happened still rang in her ears. She said that she had accepted those findings for over a year but that B has her own beliefs, worries, and memories. However, she said that she and also B would never share beliefs and feelings with A knowing how important it was that A had a relationship with her father.

24 B did not give oral evidence to the court but she had made two statements. She told the court in her statement that she went to the school on 19 May unencouraged by her mother because she was worried about A and wanted to make sure that A was safe. She said that she was worried sick about A. B was seen by a CAFCASS officer on 22 June and she recorded B saying that she had been physically, verbally, and sexually abused by her father; that she went to the school because she was very worried about A all day and feared that the father might have hurt her; and so decided to go and check that A was all right.

25 The guardian reported and gave evidence. She described A as having a maturity and familiarity with the work that professionals undertake and presented as older than her normal chronological age. She wrote that A told her, that is the guardian, that she was sad about contact because she misses them, referring to her mother and to B. She described A's needs as seeming to have been obscured and overwhelmed by the ongoing adult conflict and the behaviour of B. The guardian referred to there having been nine different arrangements regarding where and with whom A lives and when and how she spends time with the non-resident parent. That is a doleful statistic.

26 The guardian advised the court that there were three available options. Option A, as she described it, meant A moving back to live with her mother. The effect of that, she said, would be that the father had indicated he would not engage in contact with A so that she would therefore experience the loss of her relationship with her father and the paternal family. Option B was for A to continue living with her father and stepmother and for direct contact to be offered. However, the father had said he would not support that and if the court ordered it, the father and stepmother might choose not to comply with directions for contact leading to repeated returns to court. Option C was for A to continue living with the father and stepmother having only indirect contact with the mother and sister. That, of course, would be a change for A that would disrupt her relationship with the maternal family and would be likely to lead A to experience a sense of profound loss and to need support to manage her feelings about this. However, she said, without direct contact the father and stepmother might be better able to deal with stresses caused by B and the risk of A being exposed to conflict was reduced.

27 She said consideration could be given to reintroducing direct contact at a future point if this was in A's best interests and adjudged to be safe. She described the contact between A on the one hand and her mother and B on the other as:

> "...observably warm and affectionate and supports A's identity as member of her maternal family."

28 She said, however, that did not fully counterbalance the risks and that A must be safeguarded from harm and that her age and need demand that to reach her best outcome she must be provided with a safe, stable home. Thus, it was that she recommended that A should continue to live with her father and stepmother and have only indirect contact. She said she was very concerned about the impact of her recommendations on B but could not make recommendations that are in B's interests when they contradict those of A. She described the matter as "incredibly finely balanced".

29 Before leaving the guardian's evidence, there are several other matters that I want to mention. The first is that she described A as a charming, happy little girl doing well at school and thriving in the care of the father and stepmother, and that she had, in the main, been protected from much of the animosity.

30 The guardian considered that there was a need to maintain A's primary placement over and above the need to maintain contact and, therefore, her main concern was the risk of destabilising that placement through causing stress to the father and stepmother by making an order for contact, and that there was a concern that, through direct contact, A would hear B's belief despite her assurances to the contrary. I question in my own mind whether that would be the case if contact was professionally supervised.

31 Finally, in dealing with the guardian's evidence, I should refer to the fact that the guardian said that A would find it extremely difficult to make sense of the decision if it was as she recommended. A would need life story work to help her with distress and incomprehension. I am sorry to have to recite that, apparently, no such assistance has been provided.

32 The judge went with option C, that is no direct contact by the mother and B with A and only indirect contact by way of sending written communications once a month.

33 Before examining the judgment in more detail, I want to record first, as I have already said, that there were no incidents reported since the start of June 2017. Thus, though contact continued from June 2017 until February 2018 when the judge handed down his judgment, the contact had continued monthly without incident. Secondly, that indirect contact has been taken up and there have been monthly communications from the mother and her family members to A, and the father has told me that A has been pleased to receive them and that answers have been given. I am pleased to hear that.

34 In addition to the no direct contact order, the judge made a series of prohibited steps orders which are not the subject of appeal and he imposed a three-year bar on further applications under section 91(14) of the Children Act 1989 without the court's approval. That, in effect, means that when allied with the order made in 2017, there would be four years without court application albeit the first year was, in fact, much taken up in dealing with applications that the court gave leave for.

35 The legal test to be applied by the judge was clearly and impeccably set out. I need only refer to paragraphs 136 and 137 of the judgment and, in particular, his reference to *Re J-M*

(A Child) (Contact Proceedings: Balance of Harm) [2015] 1 FLR 838 where he summarised the guiding principles to be as follows:

> "i) the welfare of the child is paramount;
>
> ii) it is almost always in the interests of a child whose parents are separated that he or she should have contact with the parent with whom he or she is not living;
>
> iii) there is a positive obligation on the state and therefore on the judge to take measures to promote contact, grappling with all available alternatives and taking all necessary steps that can reasonably be demanded, before abandoning hope of achieving contact;
>
> iv) excessive weight should not be accorded to short term problems and the court should take a medium and long term view;
>
> v) contact should be terminated only in exceptional circumstances where there are cogent reasons for doing so, as a last resort, when there is no alternative, and only if contact will be detrimental to the child's welfare."

36 The criticisms of the judgment seem to me to come down to this:

(1) Miss Branigan QC, on behalf of the mother, says how can it be right to go from an order for contact made by agreement in March 2017 providing for a lot of contact to no contact whatsoever? The events of March to early June 2017 could not justify a complete cessation of contact;

(2) The judge did not look at the contact as between A and her mother, and A and B separately. However unrestrained B might be, the position, says Miss Branigan, was different so far as the mother was concerned. I interpose at this stage to say that on B's behalf, the same point was made although obviously from a different emphasis, namely that B had a particularly strong relationship with A, that the contact arranged in March 2017 in fact provided more contact with B to A than it did the mother to A, and that B deserved separate consideration;

(3) If the judge was going to say no contact, he should only have done so after obtaining a child psychiatrist's or psychologist's report on the effect on A of the loss of this crucial relationship with her mother and sister. Only then could the relative damage of the various options be properly considered;

(4) Miss Branigan says that the admirable history and exposition of the law that the judge made cannot hide the fact that there was, it is said, little analysis. Whilst there is reference to the short-term loss that A would suffer by the decision, there is no analysis or indeed even reference to the medium and long-term. The loss of a parental or sibling relationship for many years is something that will damage a child's sense of identity, self-esteem, and worth which can only be partially compensated for by letters. She buttresses that argument by reference to paragraph 140(c) where under the heading "The likely effect on A of any change in her circumstances," the judge says this:

> "It is common ground that the ending of direct contact will be difficult for A to understand and would, at least in the short term, cause her distress... As

> the guardian said, A will certainly suffer a significant sense of loss coupled with upset and confusion in the short term with a need for explanation, support, and reassurance."

(5) There is no consideration of alternatives to the three propositions of the guardian.

37 When I read the papers, I wondered what consideration there had been given to the possibility of what in olden days was sometimes called identity contact. That is contact two or three times a year so that the child can assure herself that all is well with her mother, or sister, that they are not forgotten, and that she does not have to worry about what might have happened to the absent family member. I am told that that possibility was not canvassed or considered during the course of the hearing.

38 I have great sympathy with the father saying that he cannot take any more as he did to Judge Meston but that sort of very infrequent contact, which serves a discrete purpose, is a far call from the extended monthly contact that had been taking place before and it needed consideration which no one gave it.

39 I am acutely aware of the fact that Judge Meston has been handling this case for several years before I have come in to it and that he is totally immersed in the detail of it but I am anxious about the following points. First, there has been no expressed consideration of the option of a very limited level of contact. As the passage that I have already recited from *Re J-M* sets out, the court must grapple with all available alternatives before abandoning contact.

40 Secondly, there has been no separate consideration given to the position of the mother and B. The father himself accepts that there is a difference in their positions and he is understandably far more wary of what B might do than what the mother might do. That was also, I think, recognised by the judge because at page 64 of the judgment, and I use a page rather than a paragraph number because the paragraph goes over a number of pages, he refers to the fact that B:

> "...has been unable to control her strong pervading belief that the father is a risk to A and has found it difficult to contain her sense of injustice."

41 As the guardian accepted, there was no evidence that B has actually communicated her allegations to A, but there remains a real concern that because B feels strongly that nothing could keep A safe, there is therefore a continuing risk that B will feel that she must tell A so as to protect her. As to the mother, the judge was more qualified:

> "The mother has not been capable of reconciling her wish to support B with her wish to see A and ideally, from the mother's point of view, to resume her care. It is also not clear that mother had reached the point of reconciling her loyalty to B with her claimed acceptance of the district judge's findings. I regret also I was not convinced by the mother's assurances that she has moved on. The fact that the mother has not moved on is not, in itself, indicative that she would disrupt contact or A's stability with her father by expressing her views."

42 Thirdly, although the father expressed his strong views to the judge against any form of contact, he did not have the opportunity, and it would have been quite wrong for me to press him in court today, to reflect on the possibility of contemplating contact on a very limited basis that I have mentioned. He would, in my judgment, quite rightly insist that if there was

to be safe contact it would have to be independently supervised. That would require the parties and the guardian to give thought as to how that might be managed, who will pay for it, who will undertake it, what facilities CAFCASS or a local authority might be able to make available for that. To make it clear, I am not making such an order, that is not for me to do today, but I think it needs exploration and consideration.

43 Fourthly, the events that caused the father such distress and which, to his credit, he shielded A from between March and early June 2017 were disgraceful, but they were all outside contact and stopping contact will not, in itself, mean that those events do not recur. They are independent of contact. Of course, they impacted on the father's view of contact but that is, if I may respectfully say so, an emotional rather than a logical connection and the fact that there have not been events since the start of June 2017 even though contact continued was not referred to at all by the judge in his judgment.

44 Fifthly, to remove the mother from the child's physical presence for three years, a child then aged 6, so half the child's lifetime, is a very long time and it does not seem to me it is an answer simply to say, as Mr Hand on behalf of the guardian did, "Well, if there is good reason, she can always apply earlier."

45 I make it clear that the suggestions ventilated during the appeal of occasional supervised contact and different proposals for the mother and B were not put to the judge. I have had to consider them but the judge was not asked to do so.

46 I agree with Miss Branigan that in circumstances where contact itself was going well and enjoyed by the child, greater thought needs to be given to the instruction of a child psychiatrist but I want to make it quite clear that this is not a criticism of the judge. The application for child psychiatrist or psychologist was made so late it would have derailed the hearing. So, it is entirely understandable that the judge did not want that. The draft judgment was circulated four days before it was officially handed down but still no formal application was made before handing down for such an instruction, perhaps deterred by what the judge had himself said in the judgment. To terminate a child's relationship with the mother and sister is very draconian and it seems to me that this was a case where all available alternatives had not been fully explored.

47 This appeal has taken an unconscionable period of time to come on, over nine months since permission was given by Newton J. In most children's cases, I would regard that delay as so contrary to a child's welfare as to be the subject of critical comment but, in this case, it might actually have been to the benefit of the parties and to the benefit of A and to give them some respite from the litigation.

48 I therefore allow the appeal to that limited extent and I remit the matter to the designated family judge at Bournemouth for further directions, the trial judge having moved from the area. I will consider whether there are any directions that I can usefully give in a moment but, above all, there needs to be considered the instruction of a child and adolescent psychiatrist with very careful consideration needing to be given to the ambit of any instruction. The enquiry would need to be a wide one and I have not lost sight of and record the father's submission that to reintroduce contact would be destabilising to A and to her progress. That needs to be assessed in a way that I, sitting on an appeal, cannot possibly do.

49 I do not know what the outcome of this case will be, but I make it clear that I find it hard to envisage contact for the foreseeable future occurring, if it does at all, with anything like the frequency that it has in the past. The mother and B have to prove themselves. Further

complaints to the Social Services or police, whether done personally or through the agency of others, are, if unjustified, likely to lead to a longer cessation of any contact at all. Likewise, if the contact is used to further the case against the father.

50 I hope the father will give serious thought to accepting the benefit of occasional independent supervised contact to the mother at least but that is not a matter for me today. I make it clear that the mother no longer seeks in any way to pursue her claim for residence of A or against the prohibited steps order. She is correct to abandon that part of her appeal and I hope the father is able to draw some comfort from that.

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