



Neutral Citation Number: [2020] EWFC 49

Case No: ME19P01668

IN THE FAMILY COURT
Sitting at the Royal Courts of Justice

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/07/2020

Before:

MRS JUSTICE THEIS

Between:

W
- and -
Y
- and -
Z

Applicant

1st Respondent

2nd Respondent

W In Person
Mrs Arlene Small (Direct Access) for the Y
Z In Person

Hearing dates: 15th & 16th July 2020

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.

.....
MRS JUSTICE THEIS

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published. 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 Theis DBE:

Introduction

1. This matter concerns X who is now 6. The applicant, W, is her biological father and the respondents are her parents Y and Z. At the time of X's birth, the respondents were civil partners. They have since separated; X remained living with Y, who has since remarried.
2. Z has a new partner and lives some distance away. Following proceedings in 2017 the court made an order that X would see Z. Following a gap in these arrangements X's parents have been able to reach agreement that she should see Z every six weeks, with additional contact over some holiday periods. In addition, Z agrees to an order that will prevent her permitting contact between X and W or sharing information with him about X on social media.
3. The issue I am concerned with is W's application for a child arrangements order to spend time with X. This is opposed by Y. Z is neutral and leaves that issue to the court.
4. This hearing was originally listed on 22 April 2020, it was not able to take place remotely due to technical difficulties and was adjourned to this in person hearing. As well as reading the court bundle, I have heard oral evidence from W, Y and Ms Adams, the Cafcass officer. The latter gave her evidence remotely.
5. There was a previous application by W in 2015, initially for leave to make an application and, when that was granted, for direct contact with X. The judgments relating to those applications are reported as [2015] EWFC 83 and [2015] EWFC 84.

Relevant background

6. The detailed background to this matter is set out in those earlier judgments. X was conceived following artificial insemination that took place at the respondent's home with Y using W's sperm. At that time Y and Z were civil partners. The parties had met through a website when the respondents were seeking a known donor. W maintains his understanding that they were looking for a co-parent. The extent of W's role in X's life remained in dispute after X's birth, with W seeking to rely on what he understood to be a co-parent role, which was not shared by Y and Z.
7. Although W spent some time with X after her birth, the adult relationship became more difficult with the result that Y and Z as X's legal parents stopped W's contact with X and he last saw her in September 2014.
8. W was given leave to make his application in March 2015 and in November 2015 his application for direct contact was refused and an order was made for annual indirect contact, which has taken place. X was separately represented during those proceedings; Ms Adams was her Children's Guardian. A feature of the earlier proceedings was the different perceptions by W and Y and Z about his role in relation to X and the impact that had on Y and Z, in particular on their role as X's parents. I accepted Y and Z's evidence at that time that they recognised X is going to ask questions about her genetic background which they will need to deal with. They

wished to deal with those issues at X's pace, fully recognising that X may wish to meet or have more information about W in the future. I concluded there should be no direct contact and provided for an annual exchange of letters.

9. In 2016 Y and Z's relationship broke down and they separated. The difficulties at that time resulted in referrals to the local authority and Y and X receiving referrals for early help and support at a children's centre. Z got in touch with W and following that he sought to raise the issue with Y of having contact with X.
10. Z applied for a child arrangements order in February 2017, those proceedings concluded in June 2017 with an agreed order that X spends regular unsupervised time with Z.
11. W re-applied for permission to make an application for a child arrangements order in August 2019, he sought to have direct contact six times a year although in his oral evidence at this hearing stated he was flexible about how often he saw X. His application initially had the support of Z, she says her opposition to his application in wrongly recorded in the safeguarding letter although her recent position is to be neutral on the issue.
12. Permission was given on 10 October 2019 and directions made for a hearing. Ms Adams was allocated by Cafcass to prepare a report and she saw Y, X and W in December and spoke to Z on the telephone. She has prepared 3 reports dated 18 December 2019, 26 March 2020 and 2 July 2020. Following her initial meeting W has not returned any of her calls or requests for contact since December. She recommends that there is no order in respect of W's application, that the indirect contact continues, and the court makes a s 91(14) order for a period of five years.

Evidence

13. W has filed 4 statements. Several factors prompted his application. He relies in X's rights to know who her biological parent is and to spend time with him. He considers it is important for her identity and to understand her background, as he said in one of his statements '*her sense of identity and her heritage*'. He has tried to avoid proceedings by approaching Y directly in 2017 and, according to W, they reached an agreement for him to see X which she then changed her mind about. In addition, he refers to other reported cases where men in his position have been able to see their child and he states '*there is a lack of explicit judicial consideration of the interests of gay men involved in collaborative co-parenting...*'. He also suggests that Y was not as forthcoming as she should have been in 2015 about the state of her relationship with Z.
14. In his later statements, W is critical of the assessment undertaken by Ms Adams describing it as inaccurate in information, subjective in its claims, unbalanced and presumptuous. He considers it focuses too much on the adult conflict, relies on Y self-reporting of W being the trigger for her anxiety without any evidence base for Y's claims. W sets out how he recognises that he is not X's legal parent but is her genetic father. In his oral evidence he updated the court about his personal circumstances, including his recent nursing qualification. He accepted that Y would facilitate any contact with him once X started asking questions, but he considered it should not be

left to wait until then. He said he felt the adult relationships were better now and he did not consider he was the cause of Y's mental health difficulties.

15. Y has filed four statements. Her position remains largely as it was in 2015, she does not consider X spending time with W is in her interests at this stage. She fears that W would be unable to accept limited contact, sees little change in his position and relies on the conclusion the court reached previously that his lack of insight and focus on his rights and the adult conflict without considering the reality of X's position and those who care for her, making the prospect for any sustainable change in his behaviour very unlikely.
16. In her oral evidence she described the annual exchange of indirect contact and how more recently she had included photograph of Y of X. She described the steps she had taken and the advice she had sought about how to make sure X has a full understanding of her background. This has included her compiling an age appropriate story book in 2019 for X about the relationship between Y and Z, how they had been helped to have a baby and gave a positive description of W's role. She described how she had read this to X on two occasions in late 2019 and Ms Adams looked at it as part of her assessment, as described in her report. X had asked who the man's name was, Y told her W's first name. She said X had not asked anymore about this, but it was on her electronic device with her other story books, so available to her when she wanted to. She considered X was not yet ready to see W, although she had some information about her circumstances, she had not asked any more. Y considers it should wait until she is older, making it clear if X did start asking questions and wanted to have contact with W, Y would take steps to arrange that.
17. As regards timing for the s91(14) order Y said she would like it to extend until after X moves school in 2025 and allow her a period of time to settle in.
18. Z, although present at the hearing, took a limited part as she and Y had been able to reach agreement about when she would see X.
19. Ms Adams gave oral evidence. She confirmed her three reports and that her recommendation had not changed. In her report she recognised that W has progressed in respect of his sensitivity to the difficulties of the situation but still failed to show any genuine insight into X's need. Whilst she recognised it was a loss for X to not have the benefit of an additional loving relationship with a genetic parent, but she considered the threat it represents to her stability and her primary carer are too great. She was concerned about the way the application had come about and W's lack of understanding of the difficulties that were being encountered by Y as X's primary carer during the breakdown of the relationship between Y and Z. Ms Adams considered that what was known of Y's mental health and its relationship to court related matters meant her assessment was that court ordered time for X to spend time with W would impede her recovery, which represents further cumulative adversity for X bearing in mind the background of her parent's separation, local authority referrals and this application being the third set of proceedings concerning X.
20. In response to questions from W, Ms Adams made it clear she was not blaming W for Y's mental health; it is the impact of the continuing litigation and what Y regards as a loss of control. She commented on Z and W's recent contact as it was in contrast to the position in 2015, when Z was so opposed to W having any contact with X. As

regards her concern that if W had contact with X he would then seek more, she said that was based on her discussions with W in December when he referred to deferring to professional advice, yet when she submitted her assessment he did not want to accept it. Consequently, she had concerns about whether he would in fact follow any professional advice with the result that she considers that there is a real risk he would soon seek more. When asked why she had not referred to any research about the benefits for children of contact with their genetic parent she responded saying she was fully aware of the benefits for children to have access to information about their parentage but such studies do not dictate the outcome, there is a need to look at the relevant issues in each particular case.

21. She confirmed it was her assessment that the risk to X included to her current stability of knowing she has two parents, Y and Z. By introducing W at this stage could risk her welfare, as it may undermine her relationship with her parents and risk her current emotional stability. In her view it would be better in this case to follow X's thinking rather than risk the impact on her welfare of any re-ordering of her current established relationships. She did not equate introducing W was the same as the mother's new partners. When W explored whether any self-assessment tool could be exaggerated Ms Adams said she did not consider that to be the case in her discussions with Y, she considered the way Y talked about her difficulties led her to form the view they were genuine difficulties.

Legal framework

22. Any decision this court makes is governed by what is in X's best interests in accordance with s 1 CA 1989, having regard to the welfare checklist.
23. Each case has to be considered on its own facts. W has helpfully referred to other cases where applicants in his position have successfully obtained orders to spend time with the child. They each had different backgrounds and a feature of each of them is that there had been some ongoing direct contact, so whilst of assistance they do not and cannot dictate the outcome in this case.
24. The court is also being asked to consider making an order under s 91(14) CA 1989. If made such an order would require W to apply for leave and obtain the leave of the court before he would be able to make an application. W conceded that in the event the court did not order direct contact he would not be making any repeated applications and saw the force of the timing Y outlined relating to X's schooling. The relevant principles in considering these applications is set out in *Re P (Section 91(14) Guidelines)* [1999] 2 FLR 573 CA. In considering such an application the court must again have regard to the children's welfare and undertake the balancing exercise of the relevant considerations in deciding whether such an order should be made. It is an order that should be made with great care and sparingly and if made should only be for such time period as is proportionate.

Submissions

25. W helpfully set out the points he wanted to make in a document he submitted during the hearing. In summary he considers the time is right now for what he considers are X's rights to know about her identity. He says he recognises he had unrealistic expectations in the past in seeking to be treated the same as a separated parent and

expresses his gratitude for the indirect contact which has taken place. Based on the reports in the cases he has referred to of other donor fathers he considers they should all be treated the same stating *'We are all ultimately biological fathers of donor conceived children and all our donor conceived children should have the same rights to spend time with their biological fathers'*.

26. Ms Small, on behalf of Y, submits now is not the time. With Y's support X is beginning to learn about her identity. If the court were to make the orders W seeks that risks not only X's immediate stability as outlined in Ms Adam's report but there is every likelihood that it would lead to increased demands by W. This would have a detrimental impact on X due to the risks that would place on Y being able to properly recover from her mental health difficulties.

Discussion and decision

27. As I set out in my earlier judgment the lodestar for considering the various issues relating to X is her welfare, that is the courts paramount consideration in accordance with s 1 CA 1989.
28. X is not aware of this application but, with the assistance of Y, is beginning to become aware of her own particular circumstances. As Ms Adams describes in her report X is aware there is a third person involved in her conception describing the information being imparted to her *'though a beautifully crafted book that [Y] made for her. It tells a loving story of a much-wanted baby and how two ladies needed help from a donor. The donor is depicted as a man who resembles [W] and is presented as a hero in the story'*. Ms Adams described X showing the book to her with enthusiasm when she met her, which supports the evidence given by Y about how she has introduced the information.
29. X is settled in the care of Y and will continue to see Z within the structure of the order agreed between them. Despite their difficulties around their separation it was obvious during Y's oral evidence they work together for X. On a number of occasions Y referred to issues concerning X which they had discussed and agreed on a way forward. The evidence demonstrates that X is settled and doing well in her current situation and it is meeting her physical, emotional and educational needs.
30. Having any time with W will mean a change for X. W submits it will enhance her welfare as it will enable her to better understand her background and identity and will recognise her rights to be able to have access to him and spend time with him as her biological father. Y, supported by Ms Adams, submits the risks are too high as due to X's particular circumstances; it risks causing confusion to the world she currently knows, where she is secure in her relationships with Y and Z. In addition, it risks delaying Y's mental health recovery, which will impact on K, and is likely to lead to further conflict from requests for increased time. These risks, they submit, outweigh any benefits from direct contact with W.
31. X has had to manage quite considerable disruption despite her young age. She has been the subject of three sets of proceedings as well as other interventions via the local authority to support her primary carer. Her welfare requires her to have a period of stability, with minimal risk of disruption. It is clear she is being brought up in a household where her emotional needs regarding her background and identity are

being met in a way that is commensurate with her needs and her age. The book created by Y demonstrates the care and sensitivity Y has about these issues.

32. Having considered the written and oral evidence I have reached the conclusion that X's welfare needs will be met by this court refusing W's application for an order to spend time with X. I do so for the following reasons:
- (1) Whilst I accept the importance and the need for X to have information about her background and identity, including her genetic identity, that is not a right that exists irrespective of her welfare, It is an important part of any welfare evaluation.
 - (2) I accept the evidence of Y that she has sought and taken advice about how to meet X's needs in relation to her background. Her oral evidence about the book she created, how she has read it with X and it is available to her was compelling and supported by the observations of Ms Adams. I have no doubt she will continue to support X in this sensitive and age appropriate way which meets X's welfare needs. I have every confidence that if X said she wanted to meet or have some contact with W Y would take such steps, in consultation with Z, to meet that request from X in accordance with her welfare needs.
 - (3) Having listened to the evidence it is clear that whilst W has made significant steps in his own life that he is rightly proud of, such as gaining his nursing qualification, it was equally clear that his views, as expressed in 2015, that he regarded the arrangement the parties entered into as a co-parenting relationship were not far below the surface. For example, he sought to question Y during this hearing about why she had withdrawn from that arrangement. That raises the real risk that if he did have any time with X it is very likely he would seek an increase in the time and his involvement in X's life, which would, in my judgment, put at risk her current stability.
 - (4) I agree with Ms Adams recommendations and her evidence, including her assessment that it is difficult to get W to engage with the issues in this case that are particular to X. He maintained his position that he regarded the orders that he sought as X's right and how he should be treated the same as other donor fathers in his position. I have fully taken into account the fact that he is a litigant in person although he has shown no difficulty in engaging with these proceedings and articulating his position in his documents, and to the court in his evidence and during the hearing. However, his somewhat blinkered reliance on general rights has meant he has been unable to engage with X's reality now and the steps Y is taking to assist her. Although he has said he would follow professional advice there is a real risk that he would only follow it if it was what he agreed with.
 - (5) I regard there has been limited change in Y's mental health condition, until the recent health restrictions she was still receiving weekly support from a psychologist. I agree with Ms Adams that her recovery has been hampered by the continuation of these proceedings and it is likely to be further impacted by an order being made for X to spend time with W. Y being unable to recover properly has a direct impact on X's welfare and the stability of care Y can provide.
33. Turning to the question of s 91 (14). In the event of the court refusing W's application he accepted the position advocated on behalf of Y of needing a period until X has

settled into a new school. In the light of that concession and the background to this case including the number of applications, the impact of the court applications on Y's mental health, the consequent risks of that on X's welfare and the confidence this court has that Y will continue to ensure X receives age appropriate information about her background I consider her welfare requires. The order will last until March 2026, which is six months after she has moved school in September 2025 to ensure she has time to settle.

34. I consider the annual exchanges of information should continue and that it should include photographs going each way. This will enable Y, together with Z, to discuss with X the information and the photos from W, in accordance with her wishes and welfare needs.