IN THE HIGH COURT OF JUSTICE

FAMILY DIVISION

[2019] EWHC 1637 (Fam)

No. GU18P00028

Royal Courts of Justice
Strand
London, WC2A 2LL

Thursday, 14 March 2019

Before:

MR JUSTICE NEWTON

(**In Private**)

B E T W E E N :

SC — Applicant

- and -

TC — Respondent

REPORTING RESTRICTIONS / ANONYMISATION APPLIES

MISS H. MARKHAM appeared on behalf of the Applicant.

THE RESPONDENT appeared in Person.

MR N. BULLOCK appeared on behalf of NYAS

J U D G M E N T

(Transcript prepared without the aid of documentation)

MR JUSTICE NEWTON:

1 This is an extemporary Judgment. This appeal arises from a decision of HHJ Raeside at an interim residence hearing on 28 November 2018 concerning the child arrangements for B, born in 2004, who is therefore 14. There were further hearings arising from that decision, which are also appealed, including communications from the Judge which occurred on 24 December.

2 By order of Knowles J of 21 December 2018, permission was given to appeal the substantive decision of 28 November. Further grounds and hearings have been lodged as a result. The matter was before Russell J on 6 February, who she gave full directions for today's hearing.

3 Significantly, that day Russell J transferred the case to be heard by a Judge of the Division, and NYAS, acknowledging that there had been procedural irregularities, were discharged as acting for B. They conceded through counsel, as Mr Bullock has before me, that there had been direct communication between the Judge and the solicitor at NYAS and others, without the knowledge of either parent; it is that point upon which I shall focus.

The background

4 B, as I say, was born in 2004. His brother, C, was born in 2003 and has lived with his father since 2017. Since that time, he has had no contact with his mother.

5 Litigation between the parents in relation to the boys has continued more or less without cease since 2011. The current chapter started in 2018 when the mother sought to enforce the existing child arrangements order (which was that the children should live with both of their parents, with scheduled time between them). The current application is the father's application for a change to the living arrangements of both boys. They both now live with their father in circumstances which I will describe later. A r16.4 Guardian was appointed. The children are parties. Ms Masson was subsequently appointed through NYAS.

6 The parents were married in 2002, separated first in 2007, and again in 2008, and were divorced in 2010. From 2011 to 2015 the boys had alternate weekend contact with their father, who lived in the north. From 16 September 2015 they effectively lived jointly with both parents, but nonetheless still mostly with their mother during term time. In the voluminous papers before the court, I note, by way of example, the order of HHJ Horowitz QC in 2011, a contact order from 2012, a magistrates' order from 16 September 2015, and an order of DJ Bell in May 2015. In May 2015, the father returned to the south east, and since then, despite the court's best efforts, the children's lives have become unregulated entirely as a result of the vicissitudes of the parental relationship. It is that aspect which Judge Raeside tried very hard to resolve, and as a result of my order an aspect which will again require determination.

7 It appears that C for a short period, after some domestic problem at home, went to live with his father for a while. In December 2017, C went again to his father's home, and then shortly after that, B refused to go back to see his father because, it is said, of C's abusive behaviour. That gives a flavour of the rollercoaster relationship between the parents and the boys themselves.

8 In January 2018, the magistrates made an order reinforcing the earlier joint arrangements for the parents. The mother was given permission to collect C - he had remained with his father - but he refused to go back to his mother's home; as a result the father appealed. The matter was stayed by HHJ Nathan and then came for the first time before HHJ Raeside on 22

March, and since then she has had oversight of the case. The Judge varied the existing orders to provide that C should live with his father.

9 In May of last year, a s.7 report expressed concern that B was not spending as much time as he should with his father and, indeed, was refusing to see his brother, who he said was bullying him. That difficult relationship has been a continuing theme and is a matter which may additionally require addressing. As CAFCASS were unable to assign the case in a reasonable time, the dispute was therefore allocated to NYAS, and Ms Masson became involved in June, she met B in July, and C more recently, I think, in September.

10 In June, Judge Raeside made an order for B to continue to see his father on Friday evenings, without C being present, and made provision for holiday contact. B's wishes and feelings were ascertained by Ms Masson, in that he was said to wish to have holiday contact, but without C being present, and if he was, he would visit during the day and return home at night. That is yet another dispute between the parties (as to what occurred during the August period). Some contact was agreed. There are counter allegations about who did and said what. In any event, B, it seems, went to see his father, then returned to his mother's care.

11 Ms Masson visited the father in September and saw both C and B the following week. Ms Masson did not see the mother. Ms Masson was told, I think by the boys, that the situation had been manipulated by the mother. As a result, when the matter came before the Judge on 19 September, the mother (who says that she had evidence to refute what was contended), was predictably accused of sabotaging B's holiday with his father. It appears that on 11 September, B had told Ms Masson that he was in fact perfectly happy to spend holiday time with his father and with C, contrary to what had been reported previously. As a result, an order was made for B to have contact with his father on either a Friday, a Saturday or a Sunday evening.

12 At that stage, the mother unilaterally sought to have B seen by a psychiatrist, as a result she contended, because of possible traits of autism. I interpose here to say that the report from Dr Bradford makes it clear that his behavioural problems, if any, have absolutely nothing to do with any potential autism, but are entirely do with his parents' inability to control themselves and maintain a level playing field for him. Quite properly, Judge Raeside condemned what had occurred.

13 The next hearing occurred on 2 November before Judge Raeside. Ms Masson, on behalf of NYAS, strongly urged that the Judge should consider a change of interim residence. It appears that the mother had not been told of that possible outcome until that day. There were, in any event, other applications – in particular a Part 25 application was being made by NYAS. The Judge was unwilling to fully consider the change of residence at that point, but did order contact for B with his father, and orders were made for the instruction of a psychologist.

14 The Judge adjourned the hearing until 28 November, the only time that was apparently available to her, it is evident from everything that I have read that the hearing was very much squeezed into a very busy list. It was a less than ideal arrangement. It was also unfortunate that the Judge embarked upon trying to complete the hearing - I think she sat until 6.40 at night, not an an ideal situation, and should only be done if there is some absolute emergency, which, to be candid, this was not. the Judge said;

> "Due to constraints on listing, I only had half a day to hear this important application. I heard evidence from the mother, the father and Ms Masson. I had to

control the time for each witness in order to complete the hearing and I finished hearing the case at about 6.45 p.m.".

Both the parents, of course, were unrepresented.

15 The Judge ordered a change of residence. She deferred giving judgment until the following day and, in not altogether straightforward circumstance. B moved to his father's home. To complete the picture, it is only necessary to say that since that time, his relationship with his mother has effectively ceased; all contact has now stopped. The Judge made a further order and there has been further judicial involvement most recently.

The Appeal

16 Ms Markham QC, makes a number of complaints about the Judge's decision. The first is that the Judge had no information on, and failed to seek and therefore weigh B's views - he is 14, his views had not been canvassed. The Judge could not know whether or not he expressed different views to his Guardian. Of course I am conscious that with the benefit of hindsight the subsequent evidence suggests that B supported that course, but the fact remains that unless it was really urgent, some proper enquiry should have taken place, and it did not.

17 B's wishes and feelings were not ascertained and simply were not before the court. He was not seen between the hearing on 2 November and 28 November, and whilst, of course, it is only one of the many factors which the Judge had to take into account, having regard to what had happened in B's life, it might be wondered why the terrible urgency and even more that it was absolutely crucial that he should be able to express a view, and for the Judge to evaluate that in the context of the opposing contentions. As part of that assessment the Judge would also have addressed whether he was competent. Significantly, the Judge acknowledged in her judgment that she did not have that evidence (of his views), and that she did not know how he might react. As a result of that deficit and of the Judge's anxiety she sought advice from NYAS, as to how to manage the change of residence. Residence, of course, in the context of a case which had been running for several years, during which he had always lived with his mother.

18 It is obviously an important factor; the ascertainment of his views may or may not have been straightforward. I acknowledge that Ms Masson was saying that in order for that assessment to be realistic, he needed to be in an environment where he could express a free and genuine view, not dominated by his mother.

19 The main complaint however, made on behalf of the mother by Miss Markham QC, arises from the disclosure of emails and attendance notes between the Judge and NYAS, which have come to light. It is contended on behalf of the mother that the Judge behaved in a way which was unfair, lacked transparency and was procedurally irregular. Specifically the sending of emails to NYAS, not copying in the parties, seeking advice by telephone, even suggesting how evidence might be sought or held, and instigating discussions about whether applications to amend orders and outcomes should be made. These are serious charges against an experienced judge, endeavouring to do her very best for this boy, caused I have no doubt by the mother's extreme behaviour. It is, I regret to say, a matter which has caused me very considerable anxiety.

20 As long ago as 22 June 2018, the Judge was in communication with Mr Zacharias at NYAS, (the full email needs to be read). In essence, the Judge was asking Mr Zacharias' opinion about a number of matters, and how best she could manage the case in the future. That

email was not disclosed to the either parent, and should never have been sent. It lays the foundation for what was to occur later.

21 Several further discussions clearly took place. But the most troubling one was during the course of the hearing itself on 28 November. There was a short adjournment, it has now been identified partway through the evidence. It appears at p.60 of the transcript. It was pretty much at the conclusion of the parents' evidence, but prior to Ms Masson's evidence, the Judge sought further advice from NYAS whose attendance note reads as follows:

> "A telephone conversation with the Judge who had called a short break in the hearing. She wanted to discuss matters with me. She's concerned about the reaction of the mother on receiving the judgment, which will provide for a change of residence. She as concerned about the logistics. She will give judgment first thing tomorrow whilst B is in school. NYAS can then make the arrangements with father for the change of residence before mother is served. She confirms she was content to me to email the caseworker and counsel setting out her intentions".

That is fleshed out a little more by what appears in Mr Bullock's skeleton argument:

> "The learned Judge agreed with Ms Singleton that she would give her judgment on 29 November and that NYAS should liaise with the school".

22 A considerable number of points arise. It should not be thought that Judges can sometimes be most concerned about how a change in living arrangements can be effected. Self-evidently, in public, and private law cases, it can cause enormous upset to the child if it is mishandled, the Judge took a view that this was such a case, but it she did so halfway through the hearing, prior to submissions, and disclosed her actions to no one. It is submitted therefore that it appears that she may therefore, have already reached her decision at that point, at the latest. More worryingly, it is also clear that she was again seeking the advice of NYAS. There needs to be openness and transparency. The communications could suggest that case management and even possibly the decisions themselves were in fact being made by NYAS, not the Court.

23 Those actions have to be viewed too in the context of other emails that were sent in October before the hearing, and subsequently also to the order on 28 November. I do not doubt for a moment the very anxious decision which confronted the Judge, but the short fact is that none of them should have been sent, none of this should have happened.

24 The very short submission made by Ms MarkhamQC is that here was a serious procedural irregularity, where the Judge was effectively managing evidence and outcome, during private communications with NYAS, who of course should be independent, and significantly neither parent was aware of what was taking place. It is I am afraid evident from the notes I have seen ,that the result of the communications, was that the Judge's view was to an extent affected, either qualifying, amending or contributing to her decisions, I have in mind in particular the decisions that she subsequently took in relation to contact. It is evident that she was in receipt of information, outside of the evidence, and that, to an extent, influenced her decisions. The short point is that there is a real issue here about transparency and fairness.

25 As long ago as 1982, in *H v H* the then President allowed an appeal where a court welfare officer (as they then were) had a communication with the Judge, which had not been reported to the parties, that principle was based on an even older case of *Fowler* from 1963. The appreciation and understanding of that established principle has developed considerably since that time.

26 I am extremely anxious about what appears to have occurred. As a matter of justice, everything must be conducted openly. No doubt, sometimes it is necessary for communications to occur of a routine nature, but it is necessary that everyone should know about it. With any other question, if there is an issue - and in this case, there are any number - then the matter has to come back to court, and be conducted in court, no one can be accused of conducting business behind closed doors, without the other party knowing it. There is a real issue here, because in this case the Judge had been in communication with NYAS for several months. It is unclear to what extent that might have affected her mind and the decision making process, let alone the decisions themselves.

27 I am well aware that Mr Bullock submits that the conversations that have been had with B, as to his circumstances, are confirmed by the new CAFCASS officer who has recently been to see him, but that is scarcely the point, it is not a justification for something which should simply not have occurred.

28 So whilst it can be easily understood how it was that the Judge reached the conclusions which she did, especially having regard to the mother's conduct, nonetheless, it seems to me that I do not think that the order, and judgment can stand. The hearing was fundamentally flawed. In those circumstances I do not address the other points (it not being necessary) - I allow the appeal.
