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Case No: 2019 / 0120

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION
ON APPEAL FROM HHJ TOLSON Q.C.
SITTING AT THE CENTRAL FAMILY COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Wednesday, 14th August 2019

Before:

MRS. JUSTICE THEIS

Between:

X
- and -
Y

Appellant

Respondent

MR. MICHAEL EDWARDS (instructed by **Kingsley Napley LLP**) for the **Appellant**
MR. HENRY SETRIGHT QC and **MR. HARRY NOSWORTHY**
(instructed by **Harbottle & Lewis**) for the **Respondent**

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2nd Floor, Quality House, 6-9 Quality Court, Chancery Lane, London WC2A 1HP.
Telephone No: 020 7067 2900. Fax No: 020 7831 6864 DX 410 LDE
Email: info@martenwalshcherer.com
Web: www.martenwalshcherer.com

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1. The court is giving this ex tempore judgment in relation to a hearing that was listed today with a time estimate of one-and-a-half hours (presumably to include reading, submissions, and judgment time). I observe in passing that it is now 4 o'clock. The matter has been in court for submissions in excess of two hours so on any view it was an over-optimistic time estimate, for which counsel who appear before me did not demure from or take any steps in advance to ensure the court was informed of what was a more realistic time estimate.
2. This hearing was directed by Cohen J on 8th August having seen the appeal notice that was lodged the day before on behalf of the father, dated 7th August, seeking permission to appeal the order of HHJ Tolson Q.C. The directions read: "On the basis that the mother intends to travel abroad with the child on 17th August the stay application which is made by the father and the application for permission to appeal subject to the judge's discretion is listed [today] with a time estimate of one-and-a-half hours". The order then gave directions for the bundle to be filed.
3. The matters that the court is considering, therefore, is not only permission to appeal but also the application for a stay. During the course of the hearing, there has been a debate which comes first. It is accepted by all parties that in fact the two are closely entwined and both parties have accepted, or at least nobody has taken any objection to, the fact that the court should consider both issues today.
4. The appellant is the father and the respondent the mother of Z. They have been extremely well represented at this hearing, not only in terms of the written submissions that have been put in but by the eloquent submissions on behalf of the father by Mr. Edwards and by Mr. Setright Q.C. on behalf of the mother. I have read the bundle and skeleton arguments before coming into court.

Relevant Background

5. The relevant background can be summarised as follows. The father and the mother had a relatively brief relationship, separating in early 2016 when Z was very young. They did not marry and there have been subsequent proceedings issued by both of them. Shortly after the separation the mother applied for an order under the Family Law Act 1996 and a Prohibited Steps Order, due to her concerns about the father's alleged drug use and behaviour. Orders were made without notice to the father at the end of August 2016 by MacDonald J.
6. There then followed a number of inter-partes hearings during which time the father made an application for a Child Arrangements Order. This culminated in an order made in October 2016, which set out a staged process whereby Z would spend increasing times with the father, initially starting on Saturdays, moving to Saturdays and Sundays, and then progressing to alternate weekends. According to the mother, this contact did not work out as planned. She says there were times, which have been a feature of their post-separation relationship, when the father would not be around or available to see Z. To some extent that is disputed by the father.

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7. On 8th December 2016, there was an order made by consent in relation to the Family Law Act application which recorded that the Non-Molestation Order was dismissed, the father's application of 9th November was dismissed, and the father was released from various undertakings.
8. The matter next came before the court on 19th June 2017 when the parties submitted a consent order to Judge Tolson Q.C. providing a detailed framework for the arrangements for Z's care going forward, which included provision such as the parties agreeing not to take Z out of the jurisdiction unless with the consent of the other parent or the order of the court. There were undertakings given by the parties about use of or not using controlled drugs or alcohol during any time that Z was in their care to the extent that it may impair their ability to be able to care for Z.
9. There was then again a structure of time that Z would be spending with the father starting off with some times during the week, moving on to alternate weekends from the short weekend from Saturday till Sunday moving on to Friday to Sunday and then building up again on one weekend a month from Friday to Monday. There was provision for alternate Christmas periods that Z would spend with the parents and if either parent went away, there would be provision for time to be made up.
10. In addition, the parties resolved the financial proceedings. A property was settled for the benefit of Z with periodical payments, payable to the mother for the benefit of Z, of £6,000 a month and for the father to meet the cost of up to three annual holidays for the mother and Z to take together.
11. The order in June 2017 is an extremely detailed and comprehensive order, it included detailed undertakings and recitals in relation to the practical arrangements that would be in place in the event that Z went abroad, including matters such as security being provided as well as other arrangements and also, importantly, an undertaking to return the child back to the jurisdiction.
12. Following on with the chronology, the mother's case is that again the father did not follow and adhere to the planned arrangements for the time that he spent with Z and there is some suggestion he had not spent a night with the father in his sole care for a considerable period of time. More recently, according to the mother, the father has been more involved prior to the ex parte hearing in July and, according to her in the statement she submitted to the court in support of her recent ex parte application, that exposed her and Z to the father's behaviour as described by her in her statement. This is denied by the father and directions have been made for him to file evidence.
13. These events resulted in the mother issuing her application without notice seeking Non-Molestation Orders and a Child Arrangements Order, seeking a suspension of contact pending the return date and after the return date for contact to be supervised with various conditions; namely, the father undergoing drug testing, for there to be some psychological evaluation and the court being satisfied that Z was not at risk in any unsupervised contact with the father.
14. The matter came before HHJ Meston without notice on 18th July. He made various holding orders preventing the father from removing Z from the mother's care, he varied the Child Arrangements Order of 19th June so that the time that Z was to spend with his father was suspended pending the return date, and made directions for an

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urgent inter partes hearing which was listed before Judge Tolson on 25th July, with a time estimate of an hour.

15. The parties attended for the return date before Judge Tolson on 25th July. The father attended in person, although his solicitors were in the background because they had been copied into correspondence that was taking place the day before. The father emailed the mother's solicitors about 2 o'clock the previous day, 24th July, requesting an adjournment to allow him time for a proper response to be made to the application and to enable him to get legal advice.
16. The mother's solicitors responded about 8 o'clock that evening, saying they would agree to the adjournment if the injunctive orders continued, that the new return date was suitable for their counsel, and that the mother was permitted to take Z to Europe for a period of 14 nights in the second half of August with an undertaking by her to return.
17. The father responded late on the 24th, just after 11pm, effectively signalling he withheld his consent to the proposed holiday. The following morning at just before 10am he emailed the mother's solicitors his position statement that the court has in the bundle today. The mother's solicitors forwarded it to the judge's clerk at about 10.10am. The hearing the court has the transcript for started at 11.48 and finished at 12.08, so lasted for about 20 minutes.
18. During that hearing the court considered a number of matters, in particular whether to make an interim Child Arrangements Order. The purpose of that was to enable the mother to go on holiday in Europe. This was made having heard submissions from the parties. The judge was shown the father's position statement by junior counsel for the mother, through handing up a tablet and he was directed to the relevant pages.
19. The order, made on an interim basis, makes provision for the father to have supervised contact with Z with an agreed person to be present. The court made a 'live with' order with the intention that it would enable the mother to be able to take Z for the proposed trip in Europe. The mother assured the court, set out in recitals in the order, that the nanny would attend, that she would return to the UK and that pending the next hearing there was a 'live with' order in her favour at paragraph 8. Directions were made including for safeguarding checks and drug testing. It recorded that the Child Arrangements Order made on 19th June 2017 was varied to the extent provided in the 25th July 2019 order, and directed that the parties should prepare short statements dealing with their future arrangements for the care of the children. The matter was listed for a dispute resolution appointment on 4th November 2019.
20. The father's solicitors came on the record the following day, 26th July 2019, twelve days prior to any appeal notice being lodged, which is dated 7th August. The notice sets out the grounds of appeal. As Mr. Edwards has put it today, grounds 1 to 4 are procedural grounds, where they say there was a flawed procedure upon which the hearing proceeded, namely, the father was not given sufficient opportunity to be able to make the submissions that he wanted to make, and the court did not make any definitive ruling that included any analysis that made a reference, even by implication, to the welfare checklist and, finally, the father's concerns in relation to the mother going on holiday to Europe were given insufficient weight.

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21. As a fifth ground of appeal, which Mr. Edwards says should be treated separately, the father should be given an opportunity to respond to the evidence filed by the mother in support of her non-molestation application.
22. On 8th August the mother's solicitors wrote with precise details in relation to the proposed holiday. I am told there has not been any substantive response to that letter in relation to any matters that are said to be of concern. What that letter does set out is that this is a two-week holiday in a rented villa. There are friends of the family accompanying the mother and Z, including a child of those friends who is a friend of Z's.
23. This is an application for permission to appeal under Part 30 of the Family Procedure Rules 2010. The court needs to consider whether it has, in considering whether to grant permission, a real prospect of success or whether there is some other compelling reason. Rule 30.12(3) provides that it may be allowed where the decision is unjust for procedural irregularity.
24. Mr. Setright Q.C. in his written submissions has referred the court to the relevant part of the Family Court Practice, where it states when a court considers any interim applications, it is not necessary for the court to give elaborate consideration to the welfare checklist at section 1(3) relying on the case of *Re C (A Child) [2001] EWCA Civ 718*. There are other authorities that I have been referred to, in particular the case of *Re T (Contact: Alienation: permission to Appeal) [2003] 1 FLR 531*, in particular at paragraph 45, where Mr. Setright submits this is an appeal founded on there being insufficient reasons having been given by the trial judge. *Re T* supports the position that the appropriate course would have been to have gone back to the trial judge to ask for further reasons which was not taken up. If that course had been taken Judge Tolson would have been given the opportunity to give any further reasons, which may or may not have meant that the appeal needed to proceed.

Submissions

25. In his written submissions Mr. Edwards, on behalf of the father, makes a number of criticisms in relation to the process that took place at the hearing below. As general points he makes the following submissions.
26. First there was no application for a Child Arrangements Order that had been issued by the mother prior to the application or the hearing on 25th July. Whilst he has not taken issue with the fact that the court has jurisdiction by virtue of the applications that were before it to make an order of its own motion, what he submits is that it was not something applied for by the mother and that is, in part, supported by the lack of enthusiasm Mr. Setright has given in his submissions in relation to that order.
27. Secondly, the issue of the holiday was not raised for the first time until 8.11 pm the night before, and then only flagged up as a holiday in Europe. It was flagged up in the last page of the mother's position statement, in paragraphs 44 and 45 as being an issue to be considered. That was being looked at in the framework of the June 2017 order which provided all the safeguards that are set out there, either for the parties to agree such holidays or for there to be an order of the court.

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28. The third matter Mr. Edwards relies upon is the process that was adopted below, as set out in the transcript. He submits it was not until E188, at the bottom of the page, when Mr. Verdan Q.C., counsel for the applicant, says that the only other urgent issue is the mother's wish to take Z away on holiday for two weeks to Europe. It is accepted the father has expressed concern about that, as Mr. Verdan said. The judge then continues in the exchanges in the transcript about whether there is a live with order and in the middle of E189 he is told that there is not, and so responds as follows:

“So, we are in a sort of vacuum where no one knows what the law is.”

29. There is then a debate as to whether there is any actual issue about Z living with his mother as a matter of fact. It was accepted there was no live with order.

30. The transcript then reaches the part of the hearing where Judge Tolson addresses the father. He deals with various issues in relation to drug testing, directions for that, and directions for an independent social worker of which there is no issue about in this appeal. At E191 Judge Tolson says, at the bottom:

“Now that leaves the one question of [Z's] summer. What is the problem with him going abroad for a fortnight?”

31. The father (at the top of E192) sets out what his concerns are. First of all, he says: “I believe there is a flight risk.” Secondly, he says he has concerns in the context of what he terms the extraordinary allegations. The judge then says: “Perhaps [Z] needs a summer holiday,” expressing perhaps a provisional view.

32. The father continues expressing what his concerns are, referring to his position statement, his grave concerns. He says:

“[Z] has been placed in preparation for this trip in a position which is compromising his human rights perhaps even so far as this is a situation which could have political implications. These are my chief concerns.”

33. The judge goes back to Mr. Verdan, then returns to the father and says:

“Thank you for the argument but I am against you. [Z] clearly needs a summer holiday. The simplest thing for me to do is to make an interim live with order which gives an automatic permission to take abroad for up to a month away and it is not the sort of case that I would curtail that in any way.”

34. The father then asks whether the judge has read his position statement, which had only been filed just before the hearing started. It appeared the judge had not read that, some exchanges follow, and an electronic version is handed up for the judge to read. He is then referred (at E194) to which particular part he is being asked to look at. The father says it is just the first part. The judge then reads that part and hands the tablet back.

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35. The judge then observes: “There are simply no grounds advanced for me to prevent what would happen.” The father interrupts and the judge continues:
- “There is simply no argument that I can see that would cause me to stop [Z] going on holiday with his mother.”
36. The father responds that there are matters, including witnesses who are giving evidence, that give him cause for concern that the mother is complicit in other contrived potentially criminal matters which risk Z’s life, his wellbeing, psychologically and emotionally, in so far as she has been cajoling this young boy in and objecting to a relationship with him for about 18 months.
37. The judge then responds:
- “No one is saying that he should not be living with his mother.”
38. The father replies:
- “This is just travel. This is just a question of him remaining in the jurisdiction.”
39. The judge responds:
- “Exactly but you have to show me that there is a chance that he will not come back from his summer holiday and there is no evidence.”
40. The father then sets out, in a long passage at the top of page E195, what he says in relation to the lack of a familial environment, concerns about emotional and psychological issues, that his removal from the jurisdiction is more of a psychological and emotionally based concern given the circumstances. He then continues that he has been watching and investigating all those days that “she calls me out as disappearing”.
41. The judge responds “I am going to stop you there. Thank you very much, interim live with order”. He continued that he was going to leave the rest to Mr. Verdan in terms of the final drawing up of the order. The consequence of this is the order I have seen in the papers, whereby he made an interim live with order at paragraph 8, and at paragraph 15 provided that the order varied the 2017 order.
42. What the mother says through Mr. Setright, is that the court needs to look at the transcript as a whole. The judge was dealing with an interim position, there is sufficient reasoning given where he gives the father an opportunity at each stage to be able to say what he wants to say. He does not shut out that opportunity and when one looks at the objections made the only one of any substance, he submits, is the one in relation to a flight risk. That needed to be looked at in the context of the history of the case where there have been numerous trips abroad and where there has been no suggestion that the child has not been brought back to this jurisdiction. The trips abroad include up until February of this year. He submits, with the suitable safeguards in place, as he set out and listed, there would be no or very limited risk in relation to

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non-return because of the fact that the proposed destination is in Europe and the necessary safeguards that can be put in place.

43. On behalf of the father, Mr. Edwards accepts the court can make a determination if permission to appeal is given in relation to this interim issue in the context of the stay application the court is considering. What he says is that if the court does give permission the court should then make directions in relation to a proper determination of this issue with an application being issued by the mother, evidence filed in the court of her application, the father having an opportunity to respond recognising the consequence of that, on the father's case, is the trip to Europe would be lost.

Discussion and Decision

44. I have considered the submissions with some care. In relation to permission to appeal there are reasonable prospects for a successful appeal in relation to the live with order. I have reached that conclusion for the following reasons. This was not before the court in any formal or informal way as being an issue to be determined on 25th July. It was not an issue that was investigated by the court at that hearing, nor properly considered by the court as to what the implications of making that order were.
45. As Mr. Setright has fairly accepted during this hearing, when asked on a number of occasions what the implication of that order was, he responded that he was not able to say in terms of its relationship with the 2017 order, in particular, as to precisely which parts remained in force and which parts did not, and, as he succinctly put it, that issue had not yet been run to earth. In the light of that, in my judgment, this is an order where there is a reasonable prospect of this court allowing an appeal and to Mr. Setright's credit it was not an order that he hung on to with any great enthusiasm.
46. Even though there has not been a stay that has prevented her leaving the jurisdiction and she would, arguably, have been perfectly entitled to have left the jurisdiction following the order of 25th July the mother has responsibly not done that, presumably wanting to make sure that there was clarity in relation to the position. I do not know whether advance notice was given in relation to any appeal before 7th August. It demonstrates that she has acted entirely appropriately in these difficult circumstances.
47. Whilst the intention behind making the Child Arrangements Order was to permit the holiday, it did so in circumstances where there remained complete uncertainty, in my judgment, in relation to precisely what was the legal framework and structure that governed any trip abroad. For those reasons, I consider that there are grounds for the permission to appeal in relation to that order being given. It is accepted, having reached that conclusion, that this court can determine what should happen in relation to the proposed trip to Europe.
48. Mr. Edwards, on behalf of the father, submits the court should do nothing because it has not given the father the opportunity to put forward his objections. He has said that the matter should be adjourned to enable evidence to be filed.
49. Mr. Setright, on behalf of the mother, submits this court can deal with this issue, proportionately looking at the welfare position of Z. He says it should be done against the background of the litigation and this is family that has had regular trips abroad where there has been no issue about the mother not returning back to the

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jurisdiction. He submits that with the safeguards I imagine that would be in place with the June 2017 order, with the addition of the safeguards that he proposes, namely evidence provided of the return flight, the holiday address where the mother and Z will be staying at, confirmation that the nanny will be present, and that she will have charge of the passport.

50. Mr. Edwards raised that there are now concerns in relation to the nanny, however in the father's statement that was put before the court on 25th July he relied heavily on the nanny to be able to be the guardian not only on any trip but also to be trusted with Z's passport.
51. Mr Setright proposes a further undertaking that Z will not spend a night away from the holiday address and there will be an Annex 2 certificate which will ensure that if there are any difficulties or concerns steps can be taken under either the Hague Convention or Bllr. Additionally, matters are to be in place in relation to security as provided for in the June 2017 order.
52. Mr Setright makes the additional points that the mother has her own property here in her own name, she does not own any property abroad, and her home has been in England for a number of years. There is, he submits, nothing to suggest that she will not be returning here, if anything, all the indications point in the opposite direction. A place for Z has been agreed between the parties at the school they both wish Z to attend, and it would be inconceivable, he submits, that the mother would wish to place herself at risk by not returning, not only the financial loss that would be almost immediate but also the damage in relation to her position in these proceedings.
53. Mr. Edwards submits that the objections by the father should be allowed to be developed further than they were in front of Judge Tolson. He says it was necessary to look at what the substance of the objections are. However, he accepts that this issue of the holiday in Europe is at the root of this appeal and that once that issue is determined it is very likely that the appeal will fall away.
54. I have reached my conclusion on the information that I have with Z's welfare being the paramount consideration of this court. Looking at the context of the background to these proceedings where there have been regular trips abroad, where there is a comprehensive package of safeguards that are not only going to be in existence through the June 2017 order but also by the additional safeguards that have been offered on behalf of the mother by Mr. Setright there is minimal, if any, risk of Z not being returned back to this jurisdiction. In any event, the jurisdiction where they are going to has effective procedures in place that would swiftly ensure Z was returned, although I consider that to be a very unlikely event.
55. The father's other objections in relation to psychological and other matters seem to fall away when his position is, according to his position statement, that he would have no objection to a holiday in this jurisdiction, it is the significance of it being abroad which is his issue. In my judgment that distinction, in the circumstances of this case, makes no difference to Z's welfare and does not provide a rational basis for objecting to the proposed trip.
56. So, for those reasons, I will give permission to appeal on the basis that I have set out. I have considered that I can deal with the holiday issue in a proportionate way having

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considered the welfare issues in relation to Z. I have balanced the competing considerations and taken into account the additional safeguards offered by Mr. Setright, that can be incorporated in an order discussed between the parties outside court. In my judgment the proposed trip meets Z's welfare needs.

57. The only other matter is I understand there have been discussions between the parties in relation to the management of the hearing down below and I am confident both parties will be able to make the necessary adjustments to the directions to ensure that the hearing can proceed.

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This transcript has been approved by Mrs. Justice Theis