



Neutral Citation Number: [2020] EWHC 893 (Fam)

Case No: FD19P00716

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/04/2020

Before:

MR JUSTICE MOSTYN

Between:

MW
- and -
LD

Applicant

Respondent

Gemma Linfield (instructed directly) for the applicant
The respondent appeared in person

Hearing date: 7 April 2020
The hearing was conducted remotely by Zoom

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.

.....
MR JUSTICE MOSTYN

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family 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. **The name of this judgment in any report should be *Re I and L (Children)*.**

Mr Justice Mostyn:

1. In this judgment I shall refer to the applicant as the father, to the respondent as the mother, and to the children as I and L.
2. On 14 December 2019 the mother and the children flew from South Africa to Heathrow. The purpose of the trip was to enable the father to have a three-week period of contact with the children. They flew on round trip tickets purchased by the father on about 4 November 2019 with a return flight on 8 January 2020.
3. The mother was not accompanied by her second husband who she married on 31 July 18; he remained at their home in South Africa.
4. At that point the mother and the children have been living in South Africa for over two years. They were all habitually resident there. On 5 August 2019, in circumstances which I will describe, the father and mother signed a parenting agreement in South Africa which provided for the mother to be the primary carer of the children and for the father to have ample contact including this three-week visit over Christmas. The agreement provided that it would be made an order of the court in South Africa, and at the time of the trip was awaiting approval by a South African judge. Plainly, a premise of the agreement was that any disputes about arrangements for the children would be adjudicated in the court in South Africa.
5. South African law requires that the written consent of both parents is needed to remove children from South Africa. On 9 December 2019 the father signed a letter of such consent¹. For good measure, although this is not required either by South African or English law, he signed a parental consent letter declaring his consent for his daughters to leave the United Kingdom on 8 January 2020 to return to South Africa.
6. That latter document was not signed in good faith. By that time the father had already decided that upon getting the children into his care he would apply to the High Court in London for an order preventing the return of the children to South Africa. He told me explicitly that when he signed the document, he intended to get the UK courts to intervene. On 11 December 2020 he instructed counsel directly for that purpose. Needless to say, the mother knew nothing of this.
7. On 18 December 2019, after the children had been delivered into his care, the father filed an application under the inherent jurisdiction of the High Court in Form C66. In the box for the children's address he stated:

“They are spending time with the Applicant until 3 January 2020 when they are due to be handed over to the Respondent. The children and the Respondent are due to fly back to South Africa on 8 January 2020.”

In the box about the relief that he sought he stated:

¹ After this judgment was distributed in draft, I was told that the South African law in question was changed in November 2019 to remove this requirement. However, it is clear that the father signed this agreement on the basis that it still applied.

“I seek that my children be made wards of court until such time as their welfare can be considered by the Family Court. I also seek a passport order and order prohibiting the mother from taking the children from my care until further order.”

In essence, the father was applying substantively for a prohibited steps order preventing the mother from returning to South Africa with the children.

8. On that same day the father made an ex parte application to the High Court. Mr Justice Keehan refused to deal with the matter ex parte and required the mother to be served. He directed that the matter be heard the following day when it came before Mr Justice Francis. The mother attended in person, and throughout the proceedings has represented herself. Mr Justice Francis declared himself satisfied that the court had jurisdiction to hear the matter. The only possible basis of jurisdiction would have been the children’s presence in this country: see section 3(1)(b) of the Family Law Act 1986. That had endured for four days. Mr Justice Francis ordered that the mother be prohibited from removing the children from the jurisdiction of England Wales until further order. The children have been here ever since.
9. On 7 April 2020 I conducted a welfare-based hearing to determine whether the children should return to the place of their habitual residence with their mother or whether they should stay here in the primary care of their mother but with ample contact to their father. An unspoken premise of the father’s case is that the mother would have to live apart from her new husband, unless he agreed to uproot himself from South Africa and moved to live here.
10. For the purposes of my hearing I was greatly assisted by the written and oral evidence of Allison Baker the Cafcass officer. She very clearly recommended that the children should be allowed to return to the place of their habitual residence with their mother.
11. I pause at this point to reflect on the actions taken by the father. Not only did he act in bad faith, as I have explained, but he also was guilty not only of blatant forum shopping but also of process shopping. If the father had genuinely developed misgivings about the wisdom and merits of the parenting agreement signed by him on 5 August 2019 then the appropriate place to raise those misgivings was the court in South Africa. Instead, by a *ruse de guerre* he lured the mother and children to this jurisdiction where he immediately started proceedings in the forum which he considered to be most favourable to him. By striking pre-emptively he also selected the process which he considered most favourable to him. Had he merely retained the children on 3 January 2020 and awaited the mother to take steps in response she would, unquestionably, have raised a case under the 1980 Hague Convention on the Civil Aspects of Child Abduction. In such a process the welfare of the children, while being an important consideration, would not have been the paramount consideration. Instead, the court would have started with the position that the children should be returned to the place of their habitual residence unless the father could demonstrate a defence.
12. However, by acting pre-emptively the father ensured that the question whether the children should be returned to the place of their habitual residence would be determined by reference to the paramountcy principle set out in section 1 of the Children Act 1989. True, the hearing was relatively short but full oral evidence was heard nonetheless and a full welfare enquiry by a Cafcass officer was undertaken. In contrast to a proceeding

under the 1980 Hague Convention the case was determined within the four corners of section 1 of the Children Act 1989

13. Thus, it can be seen that the father has doubly shopped to his advantage.
14. The mother and father married on 26 December 2010 in South Africa. A few weeks later they returned to the United Kingdom. I was born on 18 January 2012 and L on 13 July 2013. They are aged respectively 8 and 6¾. Both children were born in South Africa.
15. The family oscillated between South Africa and the UK until January 2015 when they finally moved back to South Africa.
16. The marriage was blighted by the father's misuse of alcohol. The mother makes very serious allegations of domestic abuse meted out to her by the father. The father does not admit the scale of the abuse alleged by the mother. However, he does make a partial admission. In his second witness statement dated 17 January 2020 he stated:

“I admit that I have been ill and I am not proud of my behaviour during this time I fought a long battle with alcohol and this did affect her for which I am very sorry.”

In her report Allison Baker records the father making a comparable admission in the following terms:

“The father has suffered from severe anxiety and stress and described himself to be “guilty of self-medication” but feels his mental wellbeing has improved since he returned to the UK. He accepts he abused alcohol and experienced problems with his mental health in South Africa.”

17. The marriage finally broke down in January 2017. The father moved out of the family home. By this stage the mother had begun her relationship with the man who has become the second husband. Without the father's consent she returned with the children and her new partner to the United Kingdom in March 2017; they were followed by the father in May 2017. In September 2017 the children started school in Brighton. In that month the mother sought the father's consent to take the children back to South Africa to live there; the father refused. The mother therefore practised self-help and wrongfully took the children South Africa in the autumn of 2017, where she appears to have gone to ground. The father had no idea where she was and could not contact the children. He was forced to issue an application under the 1980 Hague Convention. He sought access pursuant to Article 21 rather than a return order.
18. This was not creditable behaviour by the mother. Her delinquency was compounded by her actions in somehow changing the surnames of the children, in 2017 and 2018 respectively, from that of the father to her maiden name. The conduct of the father meted out to her during the marriage did not justify behaviour of this nature.
19. In November 2018 the father finally located the mother. She had been living in a town called Sedgefield which is about a 4½ hour drive eastwards from Cape Town along the Garden Route. In December 2018 the mother was interviewed by a South African

official pursuant to the father's Hague Convention application. She stated that she was living in KwaZulu Natal, near Durban. This was not true and was designed to perpetuate the obscurity of her whereabouts.

20. It is my clear judgment that up to this point both parents can be seriously criticised for their behaviour during the lifetimes of these girls.
21. In June 2019 the father instructed a South African attorney, Mandy Hemingway. Ms Hemingway and the mother entered into discussions which led to the signing of the parenting agreement on 5 August 2019. The terms of that agreement were drafted by Ms Hemingway. Certain clauses were the subject of negotiation. Eventually a final agreement was reached. It is a document of some substance. Paragraph 1 provides:

“The parties shall continue to be co-holders of parental responsibilities and rights of care and contact in respect of the minor children”

Paragraph 3 provides:

“The children shall reside primarily with [redacted] (“their mother”) but shall have reasonable contact with [redacted] (“their father”) as set out in paragraph 4.”

Paragraph 4 provides:

“(i) The children will visit the United Kingdom once a year to alternate each year between Christmas and the summer June/July holiday;

(ii) [father] will pay the costs of the flights for both girls and [mother] this year at Christmas;

(iii) [mother] will pay for the flights of the children to visit the United Kingdom in summer June /July 2020 which will include her own flight;

(iv) Each visit will be for no less than twenty-one days, of which a minimum of twenty days the children will spend with [father]and his family;

(v) The first visit to the United Kingdom will be during this Christmas 2019 holiday which will include Christmas day;

(vi) [father] will pay for this visit and [mother] the following visit in June/July 2020;

(vii) it is agreed that [father] will have unsupervised and unlimited visits to the children in South Africa;

(viii) [mother] will accompany the children to their first meeting with [father] in South Africa only if this visit takes place before Christmas 2019. Thereafter the children will spend time with

[father] unsupervised which will also include [father] taking the children on a holiday in South Africa for a period but not exceeding twenty days.

(ix) The parties agree that an hour a day will be set aside for the children to speak to [father] and or his family;

(x) [mother] agrees to provide internet and ensure that their phones are charged and that they have a quiet and private space to conduct these calls and that they will not be disturbed for this period;

(xi) [mother] will provide a cellular phone;

(xii) [father] will provide a tablet;

(xiii) [mother] undertakes to provide [father] with the children's school reports well as keep him updated as to their school activities and progress;

(xiv) [mother] will advise [father] of any health or educational related issues the children may have from time to time;

(xv) [mother] will on signature of this settlement place the following documents: Birth certificates; copies of the children's full passports; their past school reports; their present residential address; a criminal record check for [redacted], proof of medical aid for the children with her lawyer for safe keeping. Her attorneys will forthwith give a written confirmation to Hemingway Law that the above documents are in their possession. They will also list which documents they have (and which they do not have). It is noted that the police check may not be available immediately but [mother] undertakes to apply for this and to submit it in due course to her attorney. On this parenting plan becoming an order of court her attorney will make these documents available to [father] which will include the police check.

(xvi) [mother] agrees not to leave the RSA without the girls at any time."

Paragraph 7 provides

"The Parenting Plan shall be made an Order of Court and both parties agree and consent hereto."

22. It is noteworthy that the agreement does not stipulate where the mother must live in South Africa with the children. The father must have realised that the mother was not living near Durban because the attestation of the agreement states that she signed it in George, which is a town near Sedgefield.

23. In his oral evidence the father asserted that he signed this agreement in good faith. He intended it to be “actioned” in South Africa and that his intentions were true when he signed it.
24. In my judgment when the parties signed this agreement, they mutually agreed to put the past behind them and to let bygones be bygones. I made it very clear that this was my view during the hearing. Nonetheless counsel for the father persisted in seeking to pick over the past to excavate matters to seek to undermine the fitness of the mother as the primary caregiver. The problem with such a strategy is that it undermines the father’s proclamation that he signed the agreement in good faith. The more counsel went on the more I wondered whether in fact the father had never intended during the negotiations to act honourably in relation to it. Further, there was no answer to my question, which I put repeatedly, that if the father felt so strongly about the behaviour of the mother from 2017 to 2018, why he never sought to raise a case for the custody of the children in the courts of South Africa.
25. In his first witness statement the father stated that he now did not agree with the parenting plan for nine reasons which he expressed as follows:

“(i) The plan was drawn up on the basis that the children would be in the province of KwaZulu-Natal. The children are familiar with this province. [Mother] has moved jurisdiction from where she was interviewed. The Central Authority do not know where [mother] is living. [Mother] told them that she was on holiday in Cape Town. On two occasions the Central Authority has prepared papers for submission in Durban, not the Western Cape. In fact in the past couple of weeks they have drafted papers for submission which state that [mother] is living in Durban, which I understand to be incorrect.

(ii) It has transpired that I and L do not have study visas to enable them to access the education system in South Africa. I advised [mother] before she abducted the children in September 2017 that these would need to be obtained. [Mother] has requested outside of the parental agreement that I send her my passport and has asked me to sign papers to submit to South African authorities. I have not done so because I am concerned about the children’s welfare in South Africa

(iii) The children have moved home three times since my contact started a few months ago, with a fourth move planned in February 2020. Prior to my contact commencing my understanding is that there have been at least four moves in the last two years whilst I have been looking for the children.

(iv) The girl’s passports bear the wrong surname and I do not understand how.

(v) This was a clear attempt to conceal their whereabouts and alienate me from their life. I believe [mother] unlawfully changed the girls names in England by deed poll in around May

2017 at the same time that she changed [redacted] surname and has obtained new passports using these documents. In both the UK and South Africa my signature is needed for this change to occur. I can only assume that [mother] has forged my signature.

(vi) I and L are currently living in a studio cottage in N's parents garden. They do not have a bedroom. They sleep in a bunk in [mother] and N studio room. The room has a sofa, a table, a clothes rail and has no bath. Power cuts are frequent due to load shedding. They also share the space with 2 pit bull dogs. I understand that they have stayed here three or more times for lengths of time in the past 2 years. A few weeks ago, they were in another property but then moved back to the cottage. There is then the further proposed move in February 2020. I do not know the nature of that accommodation or whether it is a short or long-term arrangement.

(vi) I have asked for confirmation that the children are in receipt of Medical Aid but I have not received any such confirmation. I am extremely concerned as to how they would be treated for any illness or what would happen in a medical emergency.

(vii) I have repeatedly asked for details of how the girls would be safeguarded should something happen to [mother] but I have not received any response.

(vii) It is unclear to me what income [mother] and her husband [N] have. I have found posts on the Internet where [mother] is advertising as an online counsellor and N as a virtual personal assistant. The information that I have been passed by [redacted] regarding about financial difficulties tallies with the itinerant lifestyle that L and the children are living.

(ix) [Mother] has requested that in my consent letter to leave South Africa and re-enter I align any reference to my daughter's surnames to that which is in their passports, is that I refer to them as [redacted]. On the South African document for the study visas [mother] has completed them with the surname [redacted]. This causes me great concern as it is not clear what then immigration status and how they can be traced when they are entering and exiting in different names to a possible study visa. I believe she is placing them in a precarious position.

26. In relation to these various misgivings these are my findings:

- i) First and foremost, every misgiving would have been apparent to the father well before he booked and paid for the flights to England on 4 November 2019. Every misgiving would have been apparent to him before they boarded the flight on 14 December. Every misgiving could and should have been raised by him with the court in South Africa.

- ii) In relation to the immigration status in South Africa of the mother and the children, the mother has produced a letter dated 3 April 2020 from Mr Hein Stroebel, an Immigration Law Practitioner, which states:

“I have been retained and instructed by [mother] to assist and represent her in obtaining the relevant visas for South Africa.

I have represented [mother] for almost 2 years now. She is married to a South African citizen. She also has a valid spousal visa that allows her to reside with her SA husband in SA.

[Mother’s] current Visa will expire whilst abroad, but her renewal visa can be submitted in South Africa when she re-enters South Africa again ...

And can also apply the new study visas for her children in South Africa together with her renewal visa application.”

I accept this evidence. It was not challenged.

- iii) I cannot accept that the father was unaware that the children were living in Sedgfield following the signing of the parenting agreement on 5 August 2019. Skype contact immediately started following the execution of that agreement and the children obviously would have made their father aware of where they were living and going to school. The mother has produced an email from Mandy Hemingway dated 25 November 2019 written to both the mother and the father which states:

“Dear [mother] and [father]

I am emailing you both to ensure we are all on the same page regarding the above.

Firstly congrats on getting the Christmas arrangements sorted. As I understand it [mother] you and the girl will fly to Heathrow and [father] will meet you there and the girls will return home with him.

I do not have much detail as to how long and where the girls will be or you [mother]. Please can you both let me have full details for my records.

I need to mention that I have emailed [the court] for an update as well. I have heard nothing further from her and am not sure if [mother] has either?

Please let me know. We do need to get the ball rolling and have this order made. There is no chance of that this year now unfortunately but we need to ensure it is done first thing next year.

I have arranged for neutral office to assist us. It is Jordaan van Wyk Attorneys. Their office is at 65 Main Road, Sedgfield. I hope this is convenient for you [mother]. I will send him the tickets”

This email clearly shows that the father was well aware that the children were living in Sedgfield. It also clearly shows his acceptance of the necessity of obtaining an order regulating the child arrangements in the court in South Africa.

- iv) The father’s concerns about the movements of the mother and the children between 2017 and 5 August 2019 were laid to rest by the agreement signed on that day. The agreement did not stipulate that the mother had to live in any particular part of South Africa. In the mother’s position statement, which she adopted in her oral evidence, she stated:

“We have lived at my husband’s 3-bedroom parents’ home in Sedgfield since September 2017. We have spent 8 months approximately in the cottage over one period (January 2019 - August 2019) when my in-laws come back from the UK as they spend time between the UK and South Africa. We have rented short-term and moved into two 4-bedroom properties for a period of 6 months in total however we have returned back to the house/cottage because we are saving for our own home. Prior to coming to the UK in December 2019, we stayed in the cottage for a few weeks and over this time was when we secured our 2-bedroom property in Barracuda Street. It means for 2.5 years we’ve lived at this address in Sedgfield. More recently, we have been living in the cottage, whilst it’s small we do have open access to the 3-bedroom thatched house next door. We have a large garden and grass field area which we use ...”

I accept this evidence. The property in Barracuda Street will be a rental from a friend and in my judgment would represent perfectly satisfactory accommodation for the family. The mother and her husband are saving up funds in order eventually to purchase a home for the family.

- v) The mother is a qualified psychotherapist earning approximately £2,500 a month in that field. A husband works in the field of IT but is at the moment presently studying in order to enhance his skills. They have accumulated savings thus far of a little under £12,000. I have no concerns about the functioning of the mother’s economy.
- vi) So far as private health insurance is concerned the mother explained to me that this has not yet been taken out notwithstanding that the parenting agreement plainly contemplated that it would be. The mother explained to me that they have a private GP who they paid directly. In Sedgfield there are two public hospitals which the mother is satisfied would very adequately meet any emergency situation that may arise. In my judgment the mother must in due course obtain private health insurance in accordance with the terms of the agreement, although I will not make an order to that effect. If there is any future

dispute in relation to this issue, then that must be raised with the court in South Africa.

- vii) I dismiss the father's concerns about the arrangements the mother has made should an accident befall her. It is obvious that the mother has made the necessary arrangements. After all she is living with her husband in her parents-in-law's property. I also dismiss his concerns about the family's dogs. These are obvious makeweights.
27. Having made these findings, I now turn to the welfare exercise mandated by section 1 of the Children Act 1989.
28. The welfare of these children is my paramount consideration.
29. I am satisfied that I should deal with the issue now and that any further delay in determining the question is likely to prejudice the welfare of the children.
30. I am satisfied that the order which I will make will nonetheless permit the involvement of the father in the lives of the children, and that this would further their welfare.
31. The ascertainable wishes and feelings of the children have been very clearly expressed to Allison Baker. They both wish to return home to South Africa. They were each given three wishes and for each child this was their first and only wish. At aged 8 and nearly 7 these are wishes and feelings expressed with a reasonable degree of maturity. In my judgment they should be given due weight.
32. In my judgment the physical, emotional and educational needs of these children are best served by them returning to the place of their habitual residence namely South Africa. In my judgment their emotional needs are presently being impaired by the enforced disruption to their family life and the separation of their mother and stepfather.
33. In my judgment to enforce the change of circumstances on these girls proposed by the father would be highly detrimental to their welfare. It would expose the girls to a high risk of the suffering of harm.
34. In my judgment each parent is capable of meeting the needs of these girls although I have expressed criticism as to their past conduct. I urge the parents to put the past behind them and to cooperate fully in giving complete effect to the terms of their parenting agreement.
35. In her thoughtful evidence Allison Baker confirmed her recommendation in her report. Nothing that she had read in the parties' positions statements or heard in their oral evidence changed her recommendation. I reject entirely the suggestion put to Allison Baker in cross-examination that she had approached the matter with a closed mind or otherwise in a biased way. In my judgment Allison Baker approached the matter objectively and professionally. I accept her evidence.
36. In my judgment it is in the best interests of these children that as soon as it is safe to travel, they should be allowed to return to the place of their habitual residence to resume family life there with their mother and stepfather. It is in their best interests that any further disputes concerning the arrangements for their upbringing are adjudicated in the

court in South Africa. It is in their best interests that their parenting agreement is given full effect and made an order of the court in South Africa.

37. For these reasons I dismiss the father's application and I order that the mother is to be at liberty to return with the children to South Africa. The children may travel on their existing passports. If the father wishes to contend that the children's passports should be reissued so that their surnames are restored to his own, then he should raise that matter with the court in South Africa.
 38. This case was heard in the midst of the Covid-19 national medical emergency. The case was heard remotely via Zoom. It proceeded completely successfully without any technical hitches. I was able to observe that the mother and father gave their oral evidence. Although I have not placed any weight on their demeanour in reaching my decision, I can say that I felt no disadvantage in seeing the parties with crystal clarity on a computer screen rather than in the flesh. All participants conducted themselves with great politeness and efficiency, for which I am grateful.
 39. At the present time there are no flights between London and South Africa. South Africa has barred entry to foreign nationals and all visas have been temporarily revoked. Plainly, the mother will not be able to return to South Africa with the children until it has been deemed safe to do so by both the UK and South African governments. Therefore, my order will provide that the actual return date will be on a date to be fixed following the filing of further written submissions by the parties.
 40. That concludes this judgment.
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