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Neutral Citation Number: [2021] EWHC 154 (Fam)

Case No: LV19P02759

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/01/2021

Before :

MRS JUSTICE LIEVEN

Between :

FC

Applicant

and

MC

Respondent

and

DC

(A minor acting by his rule 16.4 guardian Karen Brown)

Second Respondent

The Applicant represented herself

The Respondent represented herself

Mr Damian Sanders (instructed by Cafcass) for the **Second Respondent**

Hearing dates: **19 and 20 January 2021**

Approved Judgment

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MRS JUSTICE LIEVEN

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.

Mrs Justice Lieven DBE :

1. This is an application by FC for an order granting her parental responsibility in respect of a child, D. D has just turned 5 years old. The application is opposed by MC, D's biological and legal mother. There is also a limited dispute over the duration and precise timing of contact, but I am happy to say that during the course of the litigation, contact between D and FC has been agreed and has been supported by MC.
2. There is no dispute that D and FC have a close relationship and that D enjoys and benefits from his contact with FC. When this litigation began, relations between the parties were extremely poor and contact between FC and D was problematic. However, MC has become much more supportive of contact and relations have much improved. Through the hearing both Mr Sanders, for the Child, and I were at pains not to create more tension or do anything which might lead to a deterioration in the improving relations between the parties. Therefore, some of the references below are to written statements made earlier in the proceedings where the parties, particularly MC, have now moved on in their position. However, I decided it was best not to question MC in a highly forensic manner as to the degree to which she maintained some of her earlier statements.
3. Both FC and MC were unrepresented before me. The Child (D) was represented by Mr Sanders and I am very grateful to him for the assistance that he gave me through the hearing.

The background

4. In the main, the facts of the case are not in dispute. I will set out below my understanding of the factual position and then return to any important points of disagreement when I refer to the parties' cases.
5. FC and MC were in a same sex relationship from 2010 until 2018. They did not enter into a civil partnership. There is some dispute between the parties in relation to the degree to which FC was involved in MC's decision to become pregnant, but there is no doubt it was a planned pregnancy and FC was fully involved in both the process and the parenting. According to FC there had been discussions about having a baby for a number of years. In April 2015 the parties discussed the possibility of attending a fertility clinic but decided this was too expensive and instead invited a friend to donate the sperm. They discussed which of them would be the biological (and gestational) mother of any baby. MC indicated that she did not feel she would be able to have the same relationship with a child if she was not its biological mother and so it was decided that MC would be the one who would become pregnant.
6. A friend of MC's provided the sperm and FC assisted with the artificial insemination. MC became pregnant almost immediately and D was born in January 2016. MC was entered, entirely correctly, on the birth certificate as D's mother and no application was made under the Human Fertilisation and Embryology Act 2008 in respect of FC. FC is therefore not, and could not be, named on the birth certificate, and she does not fall within s.12(1) or (1A) of the Children Act 1989 in respect of parental responsibility.

7. According to FC it was always the intention that she and MC would be joint parents and she would be fully involved in D's life. She says that she attended antenatal appointments and all announcements about the pregnancy and the birth were in terms that they were both the parents. MC agrees that they had intended to jointly parent D although her statements suggest that she has always considered herself to be the main, and at times exclusive, parent.
8. Once D was born FC says that she was as involved, if not more so, in caring for D as MC was. There was a period from when D was about 3 months old when FC gave up her job and looked after him whilst MC returned to being a full time student. FC regularly took D to the GP surgery and to nursery from when he was 9 months old.
9. FC says that both parties were so excited and involved with the birth, and the parenting, that the issue of the legal position in respect of D simply got forgotten or overlooked. She says that she did raise with MC on a number of occasions the prospect of either applying for a parental responsibility order or an adoption order, but it did not seem to be a priority at the time. This was because both parties perceived her to be an equal parent. FC says that as problems began to develop in the relationship, MC would delay taking any action in terms of regularising FC's legal relationship with D.
10. FC changed her surname so that it was the same as MC and D's surname. She says this was so that they would present as a family who all had the same surname. She did this with the assistance of MC's father.
11. D has always called MC "Mummy". According to FC the parties decided to refer to her as "Mummy XX" but this morphed into Mummy Ona, and then Mumona given that D when learning to talk struggled with Mummy XX. According to FC D called her "Mumona" until she left the family home in August 2018. He subsequently started calling her Ona.
12. The parties split up in August 2018. The circumstances of the break are not relevant to the issues before me, but it was plainly unpleasant and has left MC with a high level of distrust of FC. It does appear that some of the arguments between them took place in front of D, which was obviously unsettling for him.
13. From August 2018 until June 2019 D was having regular contact with FC. There is considerable dispute about the degree to which D was enjoying this contact and whether he wished to have contact with FC or not. According to FC, MC was making it difficult for her to have significant amounts of contact with D and was also encouraging D to not call her Mumona and perhaps to be distrustful of contact with FC at that time.
14. FC stopped contact in June 2019 after what was plainly a fierce argument between her and MC. There was then a period of some 9 months when FC had no contact with D. FC commenced proceedings on 2nd August 2019 seeking contact and parental responsibility. Contact was recommenced, being initially supervised and then moving to unsupervised contact, including one overnight stay every two weeks. Ms Brown, on behalf of Cafcass, noted in her Addendum report dated March 2020 that contact had gone extremely well. Both parties agree that the contact is very positive for D. There

is no dispute that he has a close relationship with FC and views her as a very important part of his life.

The law on parental responsibility

15. Parental responsibility is defined in s.3(1) of the Children Act 1989. It means “*all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child, and his property*”.
16. There are a number of persons who either automatically have parental responsibility under s.2 of the Children Act, or who have a specific right to apply for it, see Hershman and McFarlane at [208]-[209]. However, the Act does not set out any criteria to be taken into account to determine whether parental responsibility should be ordered in those cases where the court has a discretion.
17. Section 12 of the 1989 Act sets out the statutory provision for when parental responsibility should be ordered. Section 12(1) and (1A) are irrelevant to the present case, because FC is not a parent under s.43 of the Human Fertilisation and Embryology Act 2008. Section 12(2) and (2A) state as follows:

“s.(2)

Where the court makes a child arrangements order and a person who is not a parent or guardian of the child concerned is named in the order as a person with whom the child is to live, that person shall have parental responsibility for the child while the order remains in force so far as providing for the child to live with that person.

s.(2A)

Where the court makes a child arrangements order and—

(a) a person who is not the parent or guardian of the child concerned is named in the order as a person with whom the child is to spend time or otherwise have contact, but

(b) the person is not named in the order as a person with whom the child is to live, the court may provide in the order for the person to have parental responsibility for the child while paragraphs (a) and (b) continue to be met in the person's case.”

18. It follows from these provisions that if the court makes a “lives with” order then parental responsibility automatically follows for as long as that part of the order remains in place.
19. There are a very large number of cases where the courts have addressed the question of in what circumstances an applicant should be granted parental responsibility for a child when they do not have that status automatically. Many of these are referred to in the very helpful judgment of Black LJ (as she then was) in Re G (Children) [2014] EWCA Civ 336.

20. The starting point is as set out in Re H (Minors) (Local Authority: Parental Rights (No 3)) [1991] Fam 151 where the Court of Appeal highlighted three particular features from amongst the factors the court should take into account when considering an application by a father for parental responsibility. These were the degree of commitment the father had shown to the child; the degree of attachment between them; and the motivation behind the father's application. In my view, these are the three touchstone issues that the court has to address when deciding parental responsibility, and there is no difference in this regard between a father and a woman who argues she stands in the position of a second female parent.
21. A number of judges have emphasised the status that parental responsibility confers, see as but one example, Ryder LJ in Re M (Parental Responsibility Order) [2013] EWCA Civ 969:

“27. I return now to the question of status. The status conferred by parental responsibility is an important legal recognition of the delicate balance between rights, duties, powers, responsibilities and authority that are the components of family and private life. It is integral to the concept of parental responsibility. It is not, however, a separate ‘stand alone’ factor, let alone a presumptive factor to be weighed alongside other Re S factors in the welfare consideration of whether a parental responsibility order should be made. The status of parental responsibility underlies the authorities and the guidance that was applied by the judge in this case. It would no doubt have been helpful to articulate the importance of parental responsibility as a status question i.e. the reason why the Re S factors have been identified as being relevant to the welfare question, but that would not have altered the evidence the judge accepted nor the evaluative judgment on the Re S factors to which he came. For my part, I have come to the clear conclusion that the judge did not err in law nor was there any error in his approach or his evaluation.”
22. In A v B and C (Lesbian Co-Parents: Role of Father) [2012] EWCA Civ 285 Thorpe LJ made clear that there was no general rule about whether parental responsibility should be ordered and said: *“In the end the only principle is the paramountcy of child welfare”* at [23]. He went on to say that he was cautious about the proposition that great weight should be given to *“the plans that adults make for future relationships between the child and the relevant adults. Human emotions are powerful and inconstant. What the adults look forward to before undertaking the hazards of conception, birth and the first experience of parenting may prove to be illusion or fantasy”*.
23. In my view, it follows that whatever agreement or understanding the parties may have had at the time of conception and birth will not be determinative in deciding whether parental responsibility should be granted. That is not to say that such an agreement is wholly irrelevant, as it may provide evidence as to the commitment of the applicant to the child and be informative as to the nature of the relationship that they have with the child. However, evidence as to the applicant's current commitment and attachment to the child is likely to be of greater interest to the court than the parties' earlier intentions.

24. It is clear from the caselaw that a potential reason for not granting parental responsibility is how the applicant may use the parental responsibility if given it. If the court considers that the applicant may misuse the parental responsibility, then that would be a ground to refuse it. In *Re M (Parental Responsibility Order)*, the Court of Appeal upheld a refusal of parental responsibility to a father who the judge believed would use the order to undermine the mother and the child. This issue of possible misuse of the order goes in my view to the “motivation” factor referred to above.
25. By section 12(2) an applicant will automatically gain parental responsibility if there is a shared care/lives with order in favour of the applicant. This means that where the court is considering whether to make such an order, with the consequence of parental responsibility, it will need to have in mind the issues of commitment, attachment and motivation before making the order. In the vast majority of cases I would assume that the issues about the nature of the order and parental responsibility would effectively be the same.
26. In *Re G (Children) (Residence: Same Sex Partner)* [2006] UKHL 43, Baroness Hale considered the weight to be attached to the fact that one party is both the natural and legal parent of the child, as is the case here for MC. She also considered the number of different ways that a person may be a parent to a child including being a social and psychological parent. I note at this point that FC was clear that she entirely respected MC’s position as D’s biological and legal parent and said that she had no intention of competing with or undermining this position.

Evidence and submissions

27. I heard evidence from both FC and MC and had a number of written statements from them. The position of the parties and the issues in dispute have changed significantly over the course of the case, although MC has remained opposed to FC having parental responsibility. There is now relatively little factual dispute between them.
28. It is clear that both of them love D very much and both want what they perceive to be best for him. FC’s evidence was that it was always intended that she and MC would both be parents to D. This was a planned pregnancy with both parties to stand as parents to D. The decision that MC would be the one who became pregnant was largely because MC had said that she would find it much more difficult to bond with a baby who was not genetically or physically related to her.
29. FC said that after the first 12 weeks MC went back to full time studying and FC gave up her job and cared for D until he was 9 months old and started at full time nursery. She plainly had a very close relationship with D until she and MC split up in June 2019. There was then a period of approximately 7 months when she did not see D, but she has been having regular contact with D since early 2020. The contact was initially supervised and then moved on to overnight contact every second Friday night with visiting contact on every second Wednesday evening.
30. It was FC’s evidence that she is completely committed to D and to having a parenting role for him. She explained why she wanted parental responsibility in ways that seemed to me to be both practical and emotional. She says the original intention was that she and MC would have a baby together and they acted as joint parents when they were together. She had made a lifelong commitment to D when he was born (and

indeed before) and that continues to be the case. She believes that it is in D's best interests to have both parties as parents and to have that reality reflected in the order, so that it is clear to him that both MC and FC are his parents. She feels that if MC was prepared to share that responsibility and accept that position before they separated, then there is no reason why that should not continue to be the case now. For her to have parental responsibility would reflect the reality of her relationship with D.

31. In practical terms, FC says that she wants to be in a position where if there is an emergency, she can seek medical care for D, and she can have the right to have educational and medical information. She also wants to have a clear and established position in his life where she has a decision-making role in his future. She said that she thought it would be in D's interests to have a second parent who could, if necessary, challenge MC's decisions and put D's point of view, particularly when he is older.
32. FC was however very clear that she did not wish to undermine MC's position with D, or to place her views in conflict with MC's. She said at the end of the hearing that she would endeavour to accept MC's parenting.
33. In terms of the factual evidence, MC's evidence did not materially differ from that of FC. However, in her written statements she said that she had been the person who made the decisions in respect of D and it is plain that she considers that she has always been his primary (and probably his sole) parent and she is the person who has taken responsibility for him throughout his life. She did say that it had suited FC, when D was 3 months old, to give up her job, so FC's sole motivation in stopping work was not to look after D. However, she accepted that FC did look after D between 3 and 9 months and that he had a very close relationship with her both then and now.
34. She said strongly that she could not see what benefit it was to D for FC to have parental responsibility and it was not in his best interests for that to happen. This is her main reason to oppose the order. MC said that she was not convinced about FC's commitment to D. As I understood her position, there were two strands to this. She is plainly still upset and hurt by the end of the relationship and, whether rightly or wrongly, feels that FC did not show commitment to D at that stage. She also referred to more recent events as evidence of lack of commitment. She pointed to the fact that when D's after school club closed due to Covid, it was MC who took time off to collect him from school and look after him. However, she accepted, when I questioned her, that she had not asked FC to collect D from school on non-contact afternoons, and to look after him when the after school club was closed.
35. MC was also obviously concerned that FC would undermine her parenting in practical terms, by not being consistent with MC's parenting style, and not upholding the enforcement of boundaries in the way that MC would consider necessary and appropriate.
36. MC agreed some time ago for FC to have overnight contact. She gave various examples where she felt that FC had not supported her parenting decisions, and she had had to deal with the consequences when D had come home.

37. Both parties agree that after the separation and when contact was recommenced D could at times become difficult and upset around contact with FC. Given all the problems after the separation and the fact that in 2020 he had not seen FC for about 9 months, where previously she had been an integral part of his young life, it is hardly surprising that he was somewhat confused and upset by the situation. Those problems have now long since passed, and D obviously enjoys his time with FC.
38. Ms Brown, of Cafcass, drew up a section 7 report and an addendum report. She has not made a recommendation in respect of parental responsibility to FC. However, in her addendum report she did say that she thought there was evidence that FC had shown the requisite commitment, attachment and motivation for parental responsibility to be ordered. However, I note that this report was drawn up after only a limited period of contact, so I only give Ms Brown's views on parental responsibility (at that stage) limited weight.
39. Mr Sanders in his submissions made clear that he was not advocating for any particular outcome in respect of parental responsibility. He questioned the parties to seek to elucidate their views on particular matters but did not advance any conclusions on the issue of parental responsibility.

Conclusions

40. In my view it is in D's best interests for FC to have parental responsibility and for there to be a shared care/lives with order. D was a planned baby and it is clear that it was intended by the parties that FC would be a parent to him. I accept FC's evidence that she made a lifelong commitment to D from the time of his birth and that she continues with that commitment.
41. I am not going to delve into the reasons for the breakdown in MC and FC's relationship, but adult relationships frequently breakdown whilst both parties remain fully committed to the lives of the children. I appreciate that MC feels that the burdens of parenting fall upon her, and that FC is not committed to D in a day to day practical sense. However, this does seem to be at least in part because MC has not wished to ask FC for help and therefore FC has not been able to show her practical commitment to D.
42. FC has sought through these proceedings for parental responsibility and that process in itself shows a level of commitment to her relationship with D. FC views herself as one of D's parents and is in my view both emotionally and practically committed to fulfilling that role. FC spoke very sensibly about being involved in decisions concerning D, including future decisions about school, and the benefits to him of having two parents and of her being able to say when she thought D might want something different from what MC was planning. This kind of iterative process between two parents is capable of being of considerable benefit to any child.
43. The evidence suggests that D has a strong bond with FC, that he enjoys spending time with her and views her as a parent. The level of attachment is shown by the relationship that they have had since his birth, and indeed before his birth in the planning of the pregnancy. It is also shown by the very positive contact that D currently enjoys with FC and the fact that this is plainly something he enjoys and

benefits from. Crucially, MC does not dispute the level of attachment that exists between D and FC.

44. At an early stage of proceedings MC did question FC's motivation for making the application and suggested that it was as a means of controlling MC's relationship with D. When I asked her about this, MC said that she now did not understand FC's reasons for making the application and what she sought to gain from it. She said she thought FC might want the "status" of being a parent. The caselaw shows that parental responsibility is partly about the status of being a parent, and I agree with MC that this may be part of FC's motivation. However, in my view that is not a bad thing. FC wants her role in D's life to be formally and legally established. This will give her certain rights, but most importantly it will make clear to MC that FC has an important position for D.
45. I have not seen any evidence to support a finding that FC's motivation is based on ill-will or a desire to thwart or control MC; indeed during the hearing that case was not put with any force or conviction by MC. I think FC does want to be in a position where she can say if she thinks something is not in D's best interests, but I trust her to do this in a sensitive, considered and respectful manner.
46. It did appear from the evidence that there were some areas of tension between MC and FC over parenting decisions. However, it seemed to me that these concerns were to some degree more about different parenting styles, and the process of rebuilding trust should continue.
47. FC needs to re-establish a normal relationship with D as a parent, by which she too has to set boundaries and take responsibility, for example ensuring that D does not become overweight, which is an understandable concern of MC. Equally, MC has to trust FC and to allow her to take more responsibility for D. These are issues that many separated parents have to grapple with. I have no doubt, having listened to both of them, that MC and FC are both very loving parents who are intelligent and insightful and will be able to overcome, with a little time and patience, the problems inherent in parenting a child in separate households.
48. MC was very honest in giving evidence in saying that she did not want to agree more extensive contact, but that she was prepared to do so. It seemed that much of her concern was around ensuring that there was an adequate transition period so that D was not upset by suddenly moving to two nights of contact when he had never been away from MC for that long before. D, and indeed MC, will take a little time to get used to D spending two nights with FC, but there is no reason to believe that this cannot happily be achieved.
49. I will therefore make a joint lives with/shared care order which carries with it parental responsibility to FC. The contact should build up to two nights every second weekend, from Friday after school to Sunday; and two nights during the week on the alternate week. I will leave to Mr Sanders the drafting of the precise terms of the order.