



Neutral Citation Number: [2021] EWHC 3423 (Fam)

Case No: FA-2021-000018

**IN THE HIGH COURT OF JUSTICE**  
**FAMILY DIVISION**  
**ON APPEAL FROM THE FAMILY COURT**  
**RECORDER KAINTH**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 17/12/2021

**Before :**

**THE HONOURABLE MRS JUSTICE JUDD DBE**

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**Between :**

**HKS**  
**- and -**  
**HSM**

**Appellant**

**Respondent**

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**Lucy Hawkins** (instructed by **HRS Family Law Solicitors Ltd**) for the **Appellant**  
**Christopher Butterfield** (instructed by **Pinder Reaux solicitors**) for the **Respondent**

Hearing dates: 1<sup>st</sup> December 2021  
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**Approved Judgment**

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

On Appeal from Recorder Kainth  
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**THE HONOURABLE MRS JUSTICE JUDD DBE**

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.

**Covid-19 Protocol: This judgment will be handed down by the judge remotely by circulation to the parties' representatives and any litigants in person by email. The date and time for hand-down will be deemed to be 1030am on 17 December 2021. A copy of the judgment in final form as handed down will be automatically sent to the advocates and any litigants in person shortly afterwards.**

**The Hon Mrs Justice Judd DBE :**

1. This is an appeal by a mother against a child arrangements order made on 20th of April 2021. Permission to appeal was granted by Mr Justice Cohen on the 8th of July 2021.

Brief Background

2. The mother and father met in 2016 and married in August 2018. Their child was born in 2019. The marriage came to an end in November 2019 just after the father attended the local police station to make an allegation of assault against the mother. The mother was arrested, detained and questioned. Part of the evidence produced by the father was a memory stick containing audio recordings which he had surreptitiously obtained of a mother in the family home. All in all there were about 680 hours of covert audio recordings of the mother, both when the father was at home and when he was out, although these were not all provided to the police.
3. The mother issued applications for a child arrangements, specific issue and non-molestation orders immediately upon separation. She made allegations of coercive control against the father as well as one or two incidents of physical abuse. The father also made allegations against the mother. He alleged that the mother had punched him 8 to 10 times in the chest on one occasion, that she had made and was planning to make false allegations against him, that she had made threats of harm to herself and the child, and that she had said that when the child was able to speak she would manipulate him to say he did not want to go with his father. Several of the father's allegations were based upon the material contained in the covert recordings. The matter was set down for a fact finding here which took place before the Recorder in December 2020. Judgment was handed down on 23<sup>rd</sup> December.
4. Following the fact finding hearing a welfare hearing took place in April 2021. The Recorder made a shared care order, with the child now age 2 to spend approximately 6 days a fortnight with his father and eight days fortnight with his mother. It is against this order that she appeals.

The fact finding hearing

5. The mother made nine allegations against the father and the father made six allegations against the mother. The Recorder found only two of the mother's allegations to be proved, and one of the father's. There is no challenge to that part of the decision.

6. The Recorder found that the father had berated the mother for removing her head covering during an engagement ceremony, although he found that he had been influenced by family members. He also found that the father had subjected the mother to coercive and controlling behaviour through covert audio surveillance in the family home between August and November 2019. 681 hours of recordings were made in total, and included conversations between the mother and father (when he knew they were being recorded and she did not) and also when the father was out of the house and the mother was speaking to friends and family. He also found that the mother had said (on the covert recording) 'I may have trained him (ie the child) to say that he doesn't want to go'.
7. At the end of his fact finding judgment the Recorder said as follows 'Now yesterday I did say that I would make comment with regards to each finding as to whether or not it had any impact upon either of the parties' ability to look after the child when looking at the welfare principles of course. Having looked at the allegations, the allegations which I find proven in my judgement do not impact upon either of the parties ability to look after their child. I make that very clear here and now'.

#### The welfare hearing

8. Following the fact finding hearing the parents each filed statements and a further report was prepared by Cafcass. The Cafcass Officer considered that there was a medium risk of the child suffering from harmful conflict and a low risk of domestic abuse. She said this was due to the parents inability to compromise and negotiate, and the making of allegations against each other. She said that if he was not shielded and protected from this behaviour it was likely to impact his emotional wellbeing. The longer parental conflict and tension was to continue, the greater the likelihood of long term psychological difficulties.
9. She recommended a two week rota for contact with the father, with staying contact every other weekend and some mid week afternoons.
10. The father sought shared care with his having the child for 6 nights in every 14. The mother's position shifted somewhat between the filing of her statement and the hearing. In her statement she said that the child needed a main home and suggested a stepped arrangement whereby the child had day time contact with the father on a Saturday until the father

had completed counselling or any course recommended by Cafcass, and then to progress to contact every two weeks, one of those to be visiting on a Saturday, and the other staying from Saturday to Sunday. During the hearing there were some amendments to her position but they still included a lead time for staying contact. It should be said that in between the making of her statement and the court case the father had decided to move close by to where the mother and the child were living.

11. In his judgment the Recorder was critical of the mother. At the time of the welfare hearing the child was being investigated for epilepsy, and the mother was asking for contact to be delayed until the outcome of a planned EEG was known. The Recorder considered the mother had ‘latched onto’ that in order to delay greater contact. He said that the mother had ‘throughout this case focussed more and put her energies on to the hostility towards the father rather than focus on who is at the heart of these proceedings. ....People need to move on, which I made crystal clear at the fact find: to move on, put the fact find behind you in order that you can look at the child’s best interests’. In paragraph 43 he gave as examples of the mother’s inability to move on concerns set out in her statement about the father’s behaviour in recording her, which she said had left her very anxious that he would be looking for ways to gather evidence against her and try and remove the child from her care. She also said she feared he would say negative things to the child and that his behaviour was obsessive. At other points in the judgment he referred to the mother’s entrenched and blinkered position.
12. The judge concluded that there should be a shared care arrangement. He referred to the case of Re R (Residence: Shared Care: Children’s Views) [2006] 1 FLR 49, noting that the failure of parents to cooperate is not a reason not to make a shared living arrangements where, in all other respects, this would be the right order for the child. He ordered that the child should spend 6 nights every fortnight with the father, and 8 with the mother. He said that the father-child bond could only improve with the increased time and that the parties could have routines and boundaries which mirrored each other.

### The appeal

13. On behalf of the mother, Ms Hawkins submits first that the Recorder failed to take into account the impact on the mother and therefore the child of the behaviour of the father in covertly audio recording her over a very lengthy period of time (681 hours), and then taking the recordings to

the police in an attempt to substantiate allegations he made that the mother had assaulted him. Ms Hawkins submitted that not only had the police chosen not to take the matter any further (albeit initially the mother was arrested, handcuffed and interviewed) but also that the Recorder himself had found the allegation(s) not proved on the balance of probabilities. This led to a real question as to the father's motives and behaviour which the Recorder should have taken into account in the welfare evaluation.

14. Ms Hawkins also submitted that the Recorder had been unduly critical of the mother and had failed to take into account the many positive things that she had said about the father's relationship with the child, including many statements in her evidence and elsewhere. She had never failed to make the child available for contact, and save for some differences as to the pace and some minor 'tweaks' her proposals were broadly in line with that of the Cafcass Officer. Ms Hawkins also contended that the Recorder's findings about the mother's conduct surrounding the child suffering absence seizures was erroneous and unfair, especially when some late communication was the fault of the legal representatives rather than the lay parties.
15. Ms Hawkins further argued that the Recorder had failed to give sufficient reasons for departing from the recommendations of the Cafcass Officer, and that he had appeared to treat a shared care arrangement as if it was in the best interests of the child by default rather than be reference to the particular circumstances of this case, and that he did not give any or any sufficient weight to the conflict (which she said was mostly instigated by the father) that existed between the parents.
16. On behalf of the father, Mr. Butterfield submitted that the Recorder had been quite clear that the father's behaviour did not amount to that which was coercive or controlling, or abusive in any other way. Not every instance of bad behaviour will amount to domestic abuse. The fact finding judgment was not appealed, and in any event, he submitted that it had not been argued on the mother's behalf at the welfare hearing that the judge should take those findings into consideration. Indeed, no finding had been sought at all in relation to the father's motives in making a complaint to the police about the mother. In any event, the mother accepted there should be contact (including unsupervised staying contact) and therefore the impact on the mother and child of the findings was not therefore a central matter. It is not open, Mr. Butterfield submitted, for points to be taken on appeal which were not taken at first instance.

17. Notwithstanding the Recorder's statement at the end of the fact finding judgment, the Cafcass Officer had conducted a risk assessment and found that there was a low risk of domestic abuse, and a medium risk of harm to the child as a result of parental conflict.
18. As to the Recorder's assessment of the mother's attitude and the evidence overall, Mr Butterfield identified several passages in the judgment which he submitted demonstrated the Recorder had carried out his task with care, and assessed the material he had before him. It is not necessary for a judge to recite each piece of evidence that has been heard. As to the reasons for departing from the recommendation of the Cafcass Officer, the Recorder had spent some 'options when coming to a determination as to the order that would best meet the child's interests. The Recorder heard evidence during the course of two hearings, and had the benefit of hearing the parents give evidence on two separate occasions. He read every page of the very lengthy trial bundle. An appeal court should be very slow to set aside an order in these circumstances, and could only do so if the order made was unsustainable or wrong.

### The law

19. The first and most important point in an appeal is that the function of a court sitting on appeal is distinct from the court of first instance. The task of this court is to determine whether the judgment is sustainable. This principle is enunciated in a number of cases, the best known of which is *Piglowska v Piglowski* [1999] 1 WLR 1360.
20. As Lord Hoffmann stated at paragraph, the exigencies of daily courtroom life are such that the reasons for the judgment will always be capable of being better expressed;
- “reasons should be read on the assumption that unless he has demonstrated to the contrary, the judge knew how he should perform his functions and which matters he should take into account”*.
21. Lewison LJ stated in *Fage UK Ltd & Anor v Chobani UK Ltd & Anor* [2014] EWCA Civ 5, paras.114 to 115:
- “Appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so. This applies not only to findings of primary fact, but also to the evaluation of those facts and to*

*inferences to be drawn from them.....The reasons for this approach are many. They include*

*i) The expertise of a trial judge is in determining what facts are relevant to the legal issues to be decided, and what those facts are if they are disputed.*

*ii) The trial is not a dress rehearsal. It is the first and last night of the show.*

*iii) Duplication of the trial judge's role on appeal is a disproportionate use of the limited resources of an appellate court, and will seldom lead to a different outcome in an individual case.*

*iv) In making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping.*

*v) The atmosphere of the courtroom cannot, in any event, be recreated by reference to documents (including transcripts of evidence).*

*vi) Thus even if it were possible to duplicate the role of the trial judge, it cannot in practice be done.*

*115. It is also important to have in mind the role of a judgment given after trial. The primary function of a first instance judge is to find facts and identify the crucial legal points and to advance reasons for deciding them in a particular way. He should give his reasons in sufficient detail to show the parties and, if need be, the Court of Appeal the principles on which he has acted and the reasons that have led him to his decision. They need not be elaborate. There is no duty on a judge, in giving his reasons, to deal with every argument presented by counsel in support of his case. His function is to reach conclusions and give reasons to support his view, not to spell out every matter as if summing up to a jury. Nor need he deal at any length with matters that are not disputed. It is sufficient if what he says shows the basis on which he has acted."*



### Discussion and conclusions

22. The Recorder's two judgments demonstrate the care he gave to this case, where the parties made numerous allegations against the other and the question of the division of the child's time (as well as the name given to the order) was hotly disputed. The facts in issue were detailed and very lengthy. As so often happens with parties who have been in conflict for an appreciable length of time, there was a wealth of detail supplied by each parent as to the behaviour of the other. In all those circumstances, an appeal court should tread very warily.
23. Nonetheless, I consider that the Recorder was wrong to decide at the stage he did that his findings did not impact upon the parties care of the child. His decision came at the end of the fact finding hearing, and before the welfare assessment. The findings that he made against the mother (her comment which was caught on an audio recording) about coaching the child when he was older, and against the father about berating the mother for removing a head covering could have been dismissed as isolated incidents but the same could not be said of the audio recordings. They were carried out over several months. 681 hours of covert recording is a very large amount and a very substantial invasion of the mother's privacy, unsurprisingly causing her anxiety and distress. The Recorder dismissed the father's case that he had conducted the surveillance because he was concerned about the mother's mental health and/or that he believed the mother to be plotting against him to deprive him of a relationship with the child. That immediately begged the question as to his true motivation. The father did address the matter briefly in his statement following that hearing but that was never the subject of any scrutiny.
24. In the mother's statement prepared for the welfare hearing she set out the effect that the surveillance had had on her. She said that the father had spied on her whilst knowing she was isolated from family and friends and that he had used the recordings to have her arrested. She said that she could have lost her job, and possibly the care of their child, if she had been arrested and charged. She said that the father had taken a covert screen shot during a supervised video call, and that she was very worried that the father would find new ways to try and gather evidence against her for future proceedings to remove the child.
25. It is clear from this statement that the issue of father's behaviour and the effect on the mother was before the court at the welfare hearing. There was reference to it in the position statement prepared by Ms Hawkins too.

I accept Ms Hawkins' submission that it is not usually profitable to keep pressing a point which does not find favour with a judge, but this does not mean the point was not before the court. It very much was.

26. The matters contained in the mother's statement needed to be assessed for they were highly relevant to the welfare determination, but the Recorder was critical of the mother for bringing them up at all. I do not accept Mr. Butterfield's submission that the fact the mother agreed to unsupervised contact meant that the matters were now otiose. There is a difference in the dynamic between parents of a small child having a main base with one parent and staying with or visiting the other on the one hand, and almost equal shared care on the other. If the mother was right as to the father's motivation in carrying out the covert surveillance and reporting her to the police, then it could have a bearing on whether it would be right to place the child in the middle of a more or less equal shared care arrangement. The Recorder had, however, prematurely decided that the behaviour had no bearing on the outcome at all.
27. It is true that the Cafcass Officer conducted a risk assessment, although it is quite clear from her oral evidence that she knew what the Recorder had already decided. In any event, she did not recommend shared care because of the conflict between the parents, a recommendation the Recorder did not follow.
28. In my judgment the course taken by the Recorder led to him prematurely excluding material and relevant evidence from consideration at the welfare stage and I will therefore allow the appeal on Ground 1. I do not intend to deal with the remaining grounds, for the proceedings will need to be remitted for rehearing before another judge.