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IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION
[2022] EWHC 2479 (Fam)



No. SE21P71590
DE21P07020
DE21P07046

1st Mezzanine Queen's Building
Royal Courts of Justice
Strand
London, WC2A 2LL

Wednesday, 30 March 2022

Before:

MRS JUSTICE LIEVEN

(In Private)

B E T W E E N :

JAMES MACDOUGALL

Applicant

- and -

(1) KE

(2) SW

(3) EG

(4) THE CHILDREN

(via their Children's Guardian)

Respondents

MS HEWITT (instructed by Nottingham Family Law) appeared on behalf of the Applicant.

COUNSEL (instructed by Howells LLP) appeared on behalf of the First Respondent.

COUNSEL (instructed by Bhatia Best Solicitors) appeared on behalf of the Second Respondent.

THE THIRD RESPONDENT did not appear and was not represented.

MR HOLLINGSWORTH (instructed by Cartwright King) appeared on behalf of the Children's Guardian.

J U D G M E N T

MRS JUSTICE LIEVEN:

- 1 This matter is a private law issue where the father of the children, James MacDougall, concerned has applied for contact or there are variations sought in existing contact agreements. There is also a non-molestation application. The matter is set down for a two-day final hearing before me in person in Derby on 11 and 12 April. There is a very extensive history to this matter which I am not going to rehearse, given that this is a short CMH.
- 2 Today the father is represented by Ms Hewitt of counsel who applies, first of all, to adjourn the final hearing and, secondly, for the appointment of an intermediary. The application to adjourn is resisted both by the respondent/applicant mothers in this matter, and by the Child's Guardian.
- 3 The position in respect of the application for an intermediary is that the father has been involved in criminal proceedings, *inter alia*, for harassment and in those proceedings an intermediary, Dr Modi, has been appointed and has produced an intermediary assessment. Those proceedings have been adjourned; as I understand it, they have now been adjourned two or three times, the most recent one was the criminal trial due to be heard on 8 March and has now been adjourned to 21 April.
- 4 Ms Hewitt relies upon Dr Modi's intermediary assessment for the argument that there should be an intermediary appointed in this case, and the second ground of her adjournment application relies on that need for an intermediary. Dr Modi has indicated he is not available for 11 and 12 April.
- 5 It is extremely unfortunate, in those circumstances, that the intermediary assessment was not served upon the Guardian as it should have been when the father's solicitors sought to rely upon it. It is essential in matters like this that documents are served on time on the parties who need to see them. I understand why the intermediary assessment was not served upon the mothers given what might be perceived to be confidential information within it. I would probably have found it should have been served on the mothers in any event, but there is no excuse for not serving it upon the Guardian. Happily, Mr Hollingsworth on behalf of the Guardian is a quick reader, and he and I both managed to read it at the beginning of this hearing. But in future, such assessments should be served on the Guardian; the Guardian is an officer of the court and would be bound by any duties of confidentiality.
- 6 Turning to the two applications, in respect of the application to adjourn, the first ground that Ms Hewitt relies upon is the fact that the criminal trial has been adjourned because of the stress that the father felt on the day of the trial, and she argues that the criminal trial should be heard first. The criminal trial, as I have said, has been adjourned already at least twice and there is no guarantee that it will go ahead on 21 April. On the other side of the balance in respect of adjournment is the fact that these three mothers have been engaged in this litigation for a very considerable amount of time. It is causing great stress to them and, through them, the children and there is a real need for this matter to press ahead to final hearing.
- 7 I see no justification for adjourning this matter simply because the criminal trial has been adjourned.
- 8 The somewhat more complicated issue is that relating to the intermediary. As I have said, there is an intermediary assessment in the criminal proceedings which has found that an intermediary is necessary, and the intermediary who was appointed, Dr Modi, is not

available on 11 and 12 April. The position is further complicated by the fact that at the present time the father's Legal Aid certificate does not extend to the final hearing. It appears likely that this is because the Legal Aid Agency have taken the view that the merits of his case are very limited, particularly in the light of the CAF/CASS report. However, there are very particular reasons why, in my view, it is important that Mr MacDougall is represented at the final hearing. I will ensure that the recitals to this order reflect the importance of Mr MacDougall being represented, not least the fact that this case has implications on a number of other children and the fact that Mr MacDougall will undoubtedly, given the complexity of the issues, find it difficult to represent himself.

- 9 However, I have to, at this stage, consider the situation where Mr MacDougall is not represented at the final hearing. Dr Modi's intermediary assessment sets out a number of Mr MacDougall's difficulties, including his learning difficulties and his position on the autistic spectrum. However, I note that in the recommendations at paragraph 7.1 of Dr Modi's report, the assessments are, and I read:

"Using language that JM can understand, and seeking clarification that he has understood the questions.

Asking single questions that are not leading along a predetermined pathway.

Avoiding unnecessarily repetitious, irrelevant or confusing questions.

Short duration of sessions in court with longer breaks to allow time to clarify with defence counsel matters they do not understand [well, that is in the context of a criminal trial].

Overall shorter hearings on a given day to allow him to assimilate the information that has been presented, most importantly allowing time on the trial day to platform the rapport with JM so that he remains cooperative to participate with cognisance during his trial.

The opportunity to cross-examine via teleconferencing so as not to be intimidated by the court environment, and being able to concentrate and focus on what is being asked.

Many analogies JM would take literally, but his spheres of reference allude to social simplicity."

Then, Dr Modi makes some notes.

- 10 In my view all those recommendations are matters that a judge, properly informed and acting appropriately, would ensure in a case such as Mr MacDougall's in any event. I can assure both Mr MacDougall and those representing him that I will have closely in mind those recommendations raised by Dr Modi.
- 11 During the course of her submissions, Ms Hewitt also made reference to an email that had been received by her solicitors from Dr Modi, setting out further concerns. It is difficult to overstate the court's frustration at being referred to matters such as that during the course of a hearing. I note the email in question was dated 15 March, during the course of proceedings. Again, if this email was to be relied upon, it should have been sent both to the court and to Mr Hollingsworth well in advance of this hearing. I should make clear that

absolutely no criticism is intended of Ms Hewitt who has throughout this litigation acted in an exemplary manner.

- 12 But both I and Mr Hollingsworth have had time to read that email, and I therefore refer to it. In that email, Dr Modi refers to having many concerns with regards to the safeguarding of Mr MacDougall where the court appearances are extremely and genuinely stressful for him, I quote, "To the point of being inhumane". His diagnosis is said to be complex, and Dr Modi says that the events which followed when he met Mr MacDougall were shocking and potentially very dangerous. Dr Modi says that Mr MacDougall should have a medically qualified intermediary, I quote:

"I am medically qualified where I will also state that the appointment of other intermediaries who are mostly speech and language therapists, reply[sic] teachers or the wife of a judge, would seriously compromise safeguarding when not having relevant qualification. Any intermediary appointed must be medically qualified, where I professionally do not recognise a speech and language therapist to be part of a clinical faculty."

- 13 I have to say I see nothing in the intermediary assessment of Mr MacDougall which would justify the need for the appointment of a medically qualified intermediary. Mr MacDougall has some learning difficulties and, as I have said, is on the autistic spectrum. The recommendations that Dr Modi made in his earlier report certainly do not justify a medically qualified intermediary.
- 14 In my view, trying to look at this case as a whole, I do not accept the need for Mr MacDougall to have an intermediary in the family proceedings. Family proceedings are not the same as a criminal trial, both in terms of the formality of the proceedings, the nature of the questioning and the degree to which it is appropriate for the judge to intervene to ensure that questioning is done on a level, and in a way that may be, to quote from another document, "Not an Old Bailey type cross-examination".
- 15 Having read the intermediary's assessment and Dr Modi's email, and having had some interaction with Mr MacDougall over at least two previous hearings, I do not think that it is essential to protect his interests by having an intermediary. I do consider it would be appropriate to try to achieve legal representation for him. But if there is not legal representation then I will have to ensure that protective measures are taken within the court to ensure that Mr MacDougall can have a fair trial. This may involve the judge being more proactive than might normally be the case, but the task of ensuring a fair trial is one of the fundamental duties of any judge.
- 16 In that balance I also take into account, as I must, the interests of the children and of the other parties. If Dr Modi is appointed as an intermediary in this case then this trial will yet again have to be put off, and that is contrary to the interests of both the children and of the mothers.
- 17 I make clear that if during the trial it becomes clear to me that Mr MacDougall cannot have a fair trial then, of course, I will adjourn the matter. However, on the evidence before me I do not accept that that will be the case, at this stage.
- 18 For all those reasons, I am not going to adjourn this matter and I am not going to order the appointment of an intermediary. So, we go ahead on the 11th and 12th. We will have a recital in this order that, again, reiterates the judge's view that she thinks it is important that

Mr MacDougall is represented. I will take steps to communicate with the Legal Aid Agency to see what can be done there. I will also ask my clerk, who is on this call, to enquire of Derby the facilities for Mr MacDougall giving evidence in a separate room, if that should be considered appropriate at the time.

- 19 I am going to order a transcript of that judgment, and it will be put on Bailli. I hope that there are a couple of fairly useful points on case management and intermediaries.

POSTSCRIPT

Unfortunately, it has taken me some time to approve this transcript. In the interim the hearing went ahead. Ms Hewitt represented Mr MacDougall pro bono, for which I am exceptionally grateful to her. There was no suggestion by her that the trial had not been fair or that the lack of an intermediary undermined Mr MacDougall's ability to participate. To a significant degree this was because Ms Hewitt undertook her role as counsel with great care and skill and ensured that her client was fully involved. We had frequent breaks in that hearing, not only for Mr MacDougall, but also because one of the mothers was herself vulnerable.

At the end of the hearing I decided that Mr MacDougall should be named in the judgment (see *MacDougall v SW & Ors* [2022] EWFC 50). Therefore, he is also named in this judgment.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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This transcript has been approved by the Judge.