Neutral Citation Number: [2024] EWHC 948 (Fam)

Case No: FA-2023-000338

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24 March 2024

Before :

MR JUSTICE CUSWORTH
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Re: A and B (children: expert's reports)

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Dr Proudman (instructed on a direct access basis) for the **Appellant**
The **Respondent**, acting as a Litigant in Person
Ms Krishnan (instructed by Blaser Mills Law) for the children's guardian.

Hearing date: 20 March 2024
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JUDGMENT

This judgment was handed down remotely on 22 April 2024 and by circulation to the parties or their representatives by e-mail and by release to The National Archives on 23 April 2024.

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This judgment was delivered in public. 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 OR the parties must be strictly preserved. All persons, including representatives of the media and legal bloggers, must ensure that this condition is strictly complied with. Failure to do so may be a contempt of court.

Mr Justice Cusworth :

1. This is an appeal against an order of HHJ McPhee sitting in the Family Court at Watford on 13 December 2023. It was not a final order, but an order made under Part 25 of the Family Proceedings Rules 2010, for the appointment of a psychologist to undertake a '*family assessment (including a full psychological assessment of both parents)*' of 2 children, A aged 11 and B aged 7, to include the psychologist '*seeing the children (with or without either parent) if this is deemed appropriate and necessary for the completion of the assessment*'. The application had been made by the children's father on 11 December 2023.

2. The joint instruction directed was of a Dr. Mark Hardiman. His CV had been identified by counsel for the children by the r.16.4 guardian immediately before the hearing, and was preferred to the father's proposed expert. Unfortunately, the CV was only made available to the mother at the door of the court, and she says, and I accept, that she did not have the opportunity to consider it until later. The CV was evidently sent to the court and the parties at 2.38pm on the day of the hearing. In it, Dr. Hardiman describes his 'main interest' as in '*the assessment of families affected by high conflict post separation parenting and/or allegations of parental alienation'*.

3. A letter of instruction was attached to the order. Dr Hardiman was to receive a copy of the entire court bundle, including the court's prior judgments, save for a 'schedule of findings of fact' that had been prepared. The principal fact-finding judgment which underlay the process had concluded with a judgment as long ago as 22 February 2021, within which Judge McPhee had himself incorporated earlier findings made by DJ Sethi. Further findings were then made in a judgment on 18 November 2021. A 'Revised and Consolidated Schedule' was then prepared by the children's solicitor incorporating those various findings. Although there were a number of specific findings going back over a number of years, their essence was that the father had behaved in ways that were controlling, manipulative and aggressive towards the mother. Whilst the mother was not always beyond criticism, despite feeling embattled by the father's behaviour, she had nevertheless continued to promote the children seeing their father.

4. In the order of 13 December 2023, the report directed was referred to as a 'global psychological assessment', and by the judge at the outset of his judgment as a 'global *holistic* psychological assessment'. He described the scope of the assessment sought by the father in his judgment as '*to see each member of the family and to provide guidance to the court and useful information for all parties including the children's guardian'*.

5. The context of that decision was this. There had been long-running private law Children Act proceedings before the judge, around arrangements for the children to see their father. At present, they are not seeing him. The father sought the appointment of the psychologist, after an earlier application for such a report by the guardian had been rejected by the same judge on 7 February 2023. There had been a number of other attempts by the judge to find an outside agency or programme that might enable contact between the children and their father to restart, but each attempt had so far failed. The father's case as put by Mr Glaser KC was that, if the matter proceeded without further assessment of the whole family, there was unlikely to be an order made which would allow the children to spend time with their father.

6. The mother is now appealing the judge's decision, having opposed the appointment before him. She argued then that the children had seen too many professionals already, and that she herself does not want to take part in any such assessment. The children are separately represented by a guardian, who supported the order and resists the appeal, but for slightly different reasons to the father. She herself had been sufficiently concerned about the number of professionals who had already engaged with the children that she had determined not to see them again herself ahead of the hearing before the judge.

7. The guardian's position at the original hearing was that the adults only, in the first instance, should be assessed. And then that the assessor should determine whether to later involve the children. Despite the judge expressing reservation about the appropriateness of this course – which he said bore a risk of the court 'abrogating the responsibility' of taking the final decision, that was the position which he eventually

arrived at. He also accepted that there was 'a real difficulty' about agreeing an assessment without a final date.

8. At the original hearing, the children were represented by junior counsel Ms Krishnan, the father was represented by Mr Glaser KC, and the mother was in person. For the appeal, whilst Ms Krishnan still appears, the father now appears in person, and the mother is represented by Dr. Proudman of counsel. However, when she drafted her skeleton argument in support of her appeal, and her grounds of appeal, the mother remained in person.

9. By s.13 of the Children and Families Act 2014:

> (6) The court may give permission as mentioned in subsection (1), (3) or (5) [*for the admission of expert evidence or the examination of children in children proceedings*] only if the court is of the opinion that the expert evidence is necessary to assist the court to resolve the proceedings justly.
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> (7) When deciding whether to give permission as mentioned in subsection (1), (3) or (5) the court is to have regard in particular to—
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> (a) any impact which giving permission would be likely to have on the welfare of the children concerned, including in the case of permission as mentioned in subsection (3) any impact which any examination or other assessment would be likely to have on the welfare of the child who would be examined or otherwise assessed,
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> (b) the issues to which the expert evidence would relate,
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> (c) the questions which the court would require the expert to answer,
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> (d) what other expert evidence is available (whether obtained before or after the start of proceedings),
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> (e) whether evidence could be given by another person on the matters on which the expert would give evidence,
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> (f) the impact which giving permission would be likely to have on the timetable for, and duration and conduct of, the proceedings,
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> (g) the cost of the expert evidence, and
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> (h) any matters prescribed by Family Procedure Rules

10. It is important to consider what the judge had said in his judgment on the guardian's original application on 7 February 2023. At that time both parents were opposing a psychological assessment of themselves, and the judge accepted that neither could be forced to undergo such an assessment. He said at paragraph 10 of his judgment that:

'The parents would have to consider whether to not comply with that direction citing their article 8 convention rights and risking an adverse inference being drawn against them…I have to say that is not an avenue I feel that I want to go down in respect of this litigation which has gone on really for so long'.

11. He continued at paragraph 11:

'…it is an unnecessary intrusion now into the lives of both parents to undertake a psychological assessment of both of them. They are both intelligent and articulate people. I do not believe that I need any help with their cognition. The way in which they interact with each other I have seen played out now over a number of years and I am not clear that a psychological assessment is going to give me any further information about the way that these parents act and behave towards each other and the impact upon the children of their behaviour.' He was not '*convinced that it is necessary to come to a just conclusion or to resolve the issues that*' presented, to direct the assessment.

12. 10 months later, the judge then dealt with the father's application seeking substantially the same relief, but in the context that further attempts to restart the relationship between the children and their father meanwhile had not succeeded. He recorded that the father had undertaken a domestic abuse perpetrator's programme, but that it '*has not assisted him in having contact with the children'*. He recorded that an ICFA programme undertaken had produced just one video call between the father and the children, and accepted Mr Glaser's submissions about the importance for the children's sense of self-identity to have a relationship with their father.

13. He also however acknowledged the mother's objections to being assessed, and the limitations on the report if the mother determined not to proceed. Whilst acknowledging that this was a matter for her, he said that he 'could take a view' as to why she had decided not to comply. He did not explain what impact this might have on any outcome for the children. He said that he expected her to comply, both with an

assessment for her and the children, if he ordered it. He also expressed the view that the report would cause some significant delay and that '*there would be a significant impact upon the children of the introduction of another person to assess them, to go over the history of the case, to ask them questions that they have answered on a number of occasions likely before'*. He balanced that by saying that this was to be '*an assessment by a person skilled in a discipline that is as yet untried and untested*'.

14. As to the issues to which he wanted the expert evidence to relate he concluded that it would relate to '*the psychological profile of each of the parents and their approach to each other and their approach to the children'*. And assessment of the children '*may assist in understanding the reluctance of those children… to continue spending time with their father*'. He went on to acknowledge that he had a problem identifying the questions which the court would require the expert to answer, and added that '*the father seeks to ride on the coat tails of the letter of instruction given by the children's solicitor earlier this year and add one or two additional questions which I have not seen*.' He was unclear as to why no letter of instruction had been filed.

15. Finally, having noted that there had been no other psychological assessment of the family, at paragraph 32 he expressed his real concern at the introduction of an additional person into the lives of the children, but then concluded:

'The balance is that the children are not seeing their father at the present time. So, I have come to the conclusion that I am now of the opinion that the expert evidence is necessary to assist me to resolve the proceedings justly'.

16. One thing that the judge does not address in his judgement is any suggestion that there has been any deliberate influencing of the children by their mother, although this featured as an important element in Mr Glaser KC's submissions for the father before him, and remains a key issue for the father now: whether there have been what he described to me as 'alienating behaviours' by the mother that may have contributed to the current problems in making arrangements for the children to spend time with him.

17. This expression was explained by Sir Andrew McFarlane P in *Re C (Parental Alienation: Instruction of an expert)* [2023] EWHC 345 (Fam) at para.103 where he said:

> Before leaving this part of the appeal, one particular paragraph in the ACP skeleton argument deserves to be widely understood and, I would strongly urge, accepted:
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> > 'Much like an allegation of domestic abuse; the decision about whether or not a parent has alienated a child is a question of fact for the Court to resolve and not a diagnosis that can or should be offered by a psychologist. For these purposes, the ACP-UK wishes to emphasise that "parental alienation" is not a syndrome capable of being diagnosed, but a process of manipulation of children perpetrated by one parent against the other through, what are termed as, "alienating behaviours". It is, fundamentally, a question of fact.'
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> It is not the purpose of this judgment to go further into the topic of alienation. Most Family judges have, for some time, regarded the label of 'parental alienation', and the suggestion that there may be a diagnosable syndrome of that name, as being unhelpful. What is important, as with domestic abuse, is the particular *behaviour* that is found to have taken place within the individual family before the court, and the *impact* that that behaviour may have had *on the relationship* of a child with either or both of his/her parents. In this regard, the identification of 'alienating behaviour' should be the court's focus, rather than any quest to determine whether the label 'parental alienation' can be applied.

18. In that context, however, it cannot be appropriate for a court, having heard evidence over a number of years from these parents, and not having found evidence of any such alienating behaviour by the mother, now to turn to psychologist to see if any such behaviour can be unearthed. The judge himself did not expressly say that that was his purpose in directing the assessment. Further, he nowhere suggested that he had formed any different view about the utility of such evidence to him as that which he had expressed in February, and set out at paragraph 11 above, to the effect that:

'*…I am not clear that a psychological assessment is going to give me any further information about the way that these parents act and behave towards each other and the impact upon the children of their behaviour'.*

19. In his welfare judgment of 18 November 2021 the judge had found, despite high parental conflict, that:

'...this is not anything like a case of parental alienation. One of the issues that persuades me of that is that the mother still allows the children to go to the father and be with him unsupervised, even though I suspect, that in her heart, she feels that the safer thing for the children would be, from time to time, not to go; that is in respect of their physical and emotional welfare. But she understands the need for the children to have a well-balanced view of their father and to see their father. The children are, on any account in her care, developing well.'

20. Thereafter, in his judgment of 6 October 2023, which immediately preceded the judgment under appeal, the judge focussed his disappointment on the deficiencies in the various programmes which the father had undergone in good faith to seek to address his past abusive behaviour. The judge evidently had sympathy for his efforts and was able to discern some elements of progress in his responses, but the programmes themselves had not enabled him to reach the point where he could spend time with the children. The matter was adjourned for the still then ongoing ICFA programme to conclude, and it was the disappointing outcome to that programme which led to the father's application on 11 December 2023, 2 days before the next hearing, for the appointment of a psychologist. But in all of this, there were no fresh finding to suggest that the mother's approach was in any way responsible for the impasse.

21. I have carefully considered the guardian's position, as advanced by Ms Krishnan. She reminded me of the judgment of Baker LJ in *Re AV (A Child) (Expert Report)* [2020] EWCA Civ 346, where he said at paragraph 21:

'The judge's decision was made in the course of exercising her case management powers. It is right to emphasise again that this court does not lightly interfere with case management decisions. A party applying for permission to appeal to overturn a case management decision made within the judge's discretion must cross a high threshold. It is also right to acknowledge that the judge's approach to the issue was very much in keeping with current thinking about the use of experts in family cases, now reflected in s.13 of the 2014 Act. Judges are expected to scrutinise carefully all applications for the instruction of an expert, and only allow them when satisfied that the expert's opinion is necessary to assist the court to resolve the proceedings justly.'

22. She also pointed me to the '*President's Memorandum: Experts in the Family Court'*, of 11 October 2021, where the test of necessity is explained as follows:

> 'Such expert evidence will only be "necessary" where it is demanded by the contested issues rather than being merely reasonable, desirable or of assistance (Re H-L (A Child) [2013] EWCA Civ 655). This requirement sets a higher threshold than the standard of "assisting the court" …'
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> 'The Family Court adopts a rigorous approach to the admission of expert evidence. As the references in this memorandum make plain, pseudo-science, which is not based on any established body of knowledge, will be inadmissible in the Family Court.'

23. The guardian accepts that had it been the judge's intention for the expert to consider '*disputed allegations or parental alienation*' that would be a '*determinative flaw*' in the direction made. She suggested that the father's counsel had sought to include reference to Dr Hardiman's expertise in parental alienation as a pre-amble to the order, but that the judge had declined to do so. She relies on the fact that one of the issues which the expert is invited to consider is the parties' acceptance and understanding of the findings already made. However, she was constrained to admit that nowhere in the judgment does the judge justify the appointment by reference to any concerns in that regard.

24. The Guardian sought to justify the order made, at paragraph 25 of the skeleton argument submitted on her behalf, by arguing that:

> 'The necessity arises out of the exhaustion of all other resources which would provide evidence or a 'route forward' for the family, Welfare reports had generated no progression of contact, ICFA had generated no progression of contact, and the Guardian was left having to determine whether there was any other mechanism which might. The instruction of an expert offers an opportunity to answer this, to date, unanswerable question, and the Guardian supported the instruction on the basis that it is necessary to explore that opportunity.'

25. In effect, the guardian was suggesting that the appointment of a psychologist was justified as a last resort because all else had failed, which presented an 'opportunity' to explain why the arrangements were failing. On that basis, a court could find itself instructing a psychologist to 'generally' assess both parents in very many cases where children were not seeing their absent parent, in the hope that something might turn up to unlock the problem. That is not in my judgment what is meant by the test of necessity, nor does it show any consideration of the careful balancing exercise mandated by s.13 (7) of the 2014 Act, and especially subsections (a), (b) and (c), in

circumstances where the guardian herself had determined not to further interview the children because of concerns that they had already been over-exposed in the proceedings to professional assessment. And, given the absence of any such further questioning, the guardian had been content to rely on a position statement, rather than the filing of a further report.

26. Indeed, there is nowhere in his judgment of 13 December where the judge does provide any other explanation as to why the input of a psychologist would be necessary to enable a just conclusion to the proceedings. Rather he laments the fact that other avenues attempted have proved unsuccessful, and he expresses concern that in the absence of progress an order for ongoing time to be spent between the father and the children may not be possible. He does not identify what necessary issues any psychological assessment of the mother would now address; and although authorising Dr Hardiman to see the children only if he considers it necessary, he does not explain why he has found that the balance falls in favour of such further investigation, over his earlier expressed concern about yet further professional involvement with them, other than his general expression that the children should be seeing their father, but are not.

27. The judge has not attempted to explain why his earlier determination that a general psychological assessment would not be of any value to him, given his own experience and assessment of the parents, no longer held good. The fact that other avenues have failed to produce a positive outcome cannot of it itself render the obtaining of such evidence necessary, without the identification of certain issues about which expert evidence is required. The judge's answer to that question, at paragraph 22 of his judgment, was simply that: '*They would relate to the psychological profile of each of the parents and their approach to each other and their approach to the children'*. These were precisely the issues in relation to which in February 2023 the judge had said he was not clear that a psychological assessment would give him any further information about.

28. In those circumstances, and despite acknowledging the high threshold that any appeal against a case management decision must meet, I am driven to conclude that the judge

has not in his judgment identified any proper basis upon which the appointment of Dr Hardiman can now be considered a necessity in the context of these proceedings. I will not therefore go on the consider the impact of the various procedural shortcuts taken, such as the late production of the Doctor's CV and the lack of discussion at the hearing about the proposed terms of the letter of instruction.

29. I will therefore allow the mother's appeal and set that part of the judge's order aside – paragraphs 4-8, and paragraphs 10 and 13. The directions at paragraphs 12 and 14 shall be amended to remove reference to Dr Hardiman accordingly. The order for indirect interim contact at paragraph 9 should continue.

30. In the event that the father wishes to make application for any further directions or evidence to be considered ahead of the final hearing, then he should apply back to HHJ McPhee without delay. The final hearing will remain listed in May. I will consider submissions on paper from the parties in relation to any further consequential directions in relation to this appeal which any of them may now seek, including as to appropriate anonymisation of the judgment.