

JERSEY / JUDGMENT

In the matter of Freya (Child access)

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Child access – final hearing of application by the petitioner for contact with the children. [2015]JRC002 Royal Court (Family) 7 January 2015 Before : J. A. Clyde-Smith, Esq., Commissioner and Jurats Fisher and Ramsden Between A Petitioner And C First Respondent And Advocate D. Gilbert (representing Ava, Isla and Freya (the children) through their guardian Jane Ferguson Second Respondent The Petitioner appeared on his own behalf. The First Respondent appeared on her own behalf. Advocate D. Gilbert appeared for the Second Respondent. IN THE MATTER OF FREYA (CHILD ACCESS) AND IN THE MATTER OF THE CHILDREN (JERSEY) LAW 2002

judgment

the commissioner: 1. This is the final hearing of the application of the petitioner (hereinafter called “the father”) for contact with his three children. By directions given on 18th July, 2014, the issue before the Court has been reduced to the question of whether there should be an order for contact between the youngest child Freya (this is not her real name, who is now aged 13) and the father. 2. Prior to that directions hearing, the first respondent (hereinafter called “the mother”) had by letter dated 15th May, 2014, written on her behalf by Voisin who then represented her, given the impression that she would be arguing for all contact between the father and Freya to cease, but it became clear in discussion that she did not seek to prevent such contact. She helpfully confirmed that Freya wished to continue to see the father and had given no indication that such contact should cease. Her position was that there should be no order for contact as sought by the father and the guardian. The Commissioner therefore ruled that the sole issue before the Court would be whether or not there should be an order for contact between the father and Freya. In the interests of proportionality, there would be no fact finding undertaken by the Court, which would proceed on the basis that Freya did wish to continue to see her father. 3. In her skeleton argument filed for the hearing before us on the 20th November, 2014, (apparently the earliest time that the parties were able to get a date before the Court), the mother (who was now representing herself) reconfirmed her position that she does not seek to prevent contact between the father and Freya (there is no application on her part to that effect) but she does not support it, because she alleges that Freya has been harmed by contact with the father, that the guardian and the Children’s Service have failed to safeguard her from that harm, and that the father has breached all of the Court orders made or undertakings given. In the mother’s view Freya is of an age where she is capable of making her own decisions as to when she sees her father, which she, the mother, will not obstruct. 4. The mother wrote to the Court on 18th November, 2014, seeking an adjournment on the ground that she had not been provided with the skeleton arguments of the father and the guardian. When told that her application would not be

granted on the papers, but would have to be made at the hearing, she informed the Bailiff's Judicial Secretary that she would not be attending the hearing and would appeal if the hearing proceeded. 5. At the hearing on 20th November, 2014, the mother did not appear. The Court was informed that she had a "sick bug". Pursuant to Rule 17(4) of the Children Rules 2005, the Court elected to proceed in her absence. The mother obviously had reasonable notice of the date of the hearing and the Court was satisfied that the delay in adjourning to fix yet another date (which would probably take the case well into 2015) was not in Freya's interests. Furthermore, it transpired that the mother had herself been late in filing her skeleton argument, leaving the guardian to file the appropriate bundle (which was the mother's responsibility). Advocate Gilbert had done her best to get her skeleton argument to the mother, but she would not allow it to be sent by email. It therefore had to be delivered by courier. Furthermore, the position of the guardian had not altered in the intervening period and the Court had the benefit of the mother's skeleton argument. The father did not file any papers, essentially supporting the position of the guardian, which was that the existing interim order for contact should be made into a final order. 6. The Court reached the conclusion that it was minded to make a final order as suggested by the guardian but wanted to give the mother a further opportunity of addressing it at a short hearing on 27th November, 2014. The mother filed a further skeleton argument and did attend to address the Court on that date. She maintained her position and asserted that she would not prevent or discourage Freya from seeing the father. No order was the appropriate way for the Court to proceed. 7. This case has a long history and the mother has numerous complaints about the guardian, who at one stage she attempted to have recused, the Children's Service and by implication, the Court. This is not the forum for a general review of the process as the Court has limited the issue before it to whether or not an order for contact between the father and Freya should be made. Therefore, this judgment will undoubtedly disappoint the mother. This is in no way intended to be disrespectful of her concerns, but we are here to make a decision on this one issue in the interests of Freya, whose welfare is our paramount concern. We will, however, summarise some of the background as it has coloured the decision the Court has reached.

Background

8. The breakdown of the relationship between the mother and father in 2008 was acrimonious, and their relationship would appear to have remained acrimonious to this day. One cause of the breakdown was the father's use of pornography in the home and the risk it posed to the children. Reports were commissioned from the child psychologist, Dr Young and the adult psychologist, Dr Briggs in early 2009. In short Dr Briggs concluded that the father posed no risk to the children and the mother was able to accept this. The mother had, however, told Dr Briggs that it was unlikely that she would be able to turn her instincts around or convince herself that the father was not a risk (see paragraph 6 of the guardian's report of 14th September, 2009). That instinct appears to have underlined much of which has followed. 9. The position in 2009 was that the two older children Ava and Isla (these are not their real names) were refusing to have contact with the father. Freya was having contact with him and it is a feature of this case that she has maintained her relationship with the father

throughout. The problem in 2009 was how to encourage Ava and Isla to rekindle their relationship with the father. With considerable assistance from the guardian and the parties, the Court was able to make an order by consent on 29th October, 2009, which, supported by extensive undertakings from both the mother and the father, provided a mechanism for Ava and Isla to undertake counselling and therapy, with a view to their re-establishing contact with the father. Contact between the father and Freya therefore was not an issue at that time, and on the same date, the Court made an interim order, by consent, that the father should have unsupported contact with her of at least six hours per week, as agreed by the parties; that interim order has remained in place ever since.

10. Numerous hearings followed. Ava's counselling was completed but there was no change in her position; she remained implacably opposed to contact with the father. For a variety of reasons, Isla's therapy did not commence until June 2010. At a hearing on 10th June, 2010, the Court felt able to avoid a five day final hearing as there was no issue with Freya, who was seeing her father, and the only way for contact between the father and Ava and Isla to be rekindled was through counselling or therapy. The Court indicated that a final report should be produced by the guardian in due course as to why counselling failed to achieve its objective of re-establishing contact between the father and Ava and what else could realistically be done to that end. The report would also cover the position of Isla once her therapy had finished; assuming her position also remained unchanged. The Court also required a final report for Freya. It stressed the need for finality to the proceedings and the role of the guardian to be brought to an end.
11. Numerous issues followed, but in relation to Freya, it is relevant to note two in particular:- (i) In November 2010, the mother without any notice stopped Freya having overnight contact with the father. It was reinstated by the Court on 15th December, 2010. In its judgment of 17th January, 2011, In the matter of B [2011] JRC 010, the Court was critical of the mother for interfering in the established routine between Freya and the father unilaterally and without warning and without first referring her concerns to the guardian. Her concern, the Court found (at paragraph 7) was that Freya was being sexually abused or being groomed by the father for that purpose, although she made no direct accusation to that effect. The guardian went to see Freya, with a legal representative from Crill Canavan, and advised the Court that there was no reason why overnight contact should not be reinstated immediately. Quoting from paragraph 12 of the judgment:- "In her evidence, Mrs Ferguson explained that it was not necessarily concerning to see sexualised behaviour in children of this age as there could be all sorts of reasons for it, but she reiterated that if she had any fear or concern that things were not as they should be, she would have delved deeper and referred the matter immediately to the Services. In her view, the mother had always feared either that the father had, or will abuse the children and no one would be able to stop her thinking that. If she does think that, then any little matter will be used as evidence to support her concerns. She saw no merit in engaging the assistance of expert advice, such as that of Dr Young, the child psychologist who had previously advised in the case, as she could not see what he could add. The school had expressed no concern about [Freya]. Why subject the child to the intrusion

of another expert when all the child wants to do is to see the father.” (ii) On 29th June, 2011, the mother called the NSPCC with concerns about Freya’s sexualised behaviour and the matter was referred to the Children’s Service for investigation. In its report of 31st August, 2011, the Children’s Service found that there was no supporting evidence in terms of the mother’s allegations of sexualised behaviour and potential abuse; if anything Freya had expressed a wish for more contact with the father. On the contrary their concern was the long-term impact on the emotional and physical health of all three children if such similar concerns were to be presented again by the mother without supporting evidence. They said it was highly important that any further Court involvement is brought to a close “to prevent any further invasive professional involvement of the children”.

12. The mother wrote to Mr D Mills, the author of the report from the Children’s Service, on 9th September, 2011, complaining of serious errors and omissions in the report. In his response of 22nd September, 2011, Mr Mills said this at paragraph 16:- “16 It is my opinion that [Ava] and [Isla] have been alienated from having contact with their father. It is also my view that since [Ava] has not been having contact with her father her sexualised behaviour has appeared to cease, and now that Freya is having contact with her father similar allegations are being made with no supporting evidence to corroborate the allegations, especially from [Freya] who has made no allegation and is more than happy to see her father. You have quoted the guardian in stating that “[the father] posed a risk in relation to sexual abuse’, however, during our discussions you clearly did not state that [the father] has sexually abused the children but in my view you were strongly suggestive of this fact without labelling it so.” He confirmed in closing that the Children’s Service had found no supporting evidence to substantiate the mother’s concerns at that time.
13. As it transpired, Isla’s therapy did not end until January 2012, and although the guardian was not inactive during the subsequent period, there was a delay before the filing of her final report of 28th February, 2014, for which she apologised. From that report, the Court learned that in May 2013, Ava (who is now aged 18), had initiated contact with the father and was now living with him permanently; she has maintained contact with the mother.
14. A number of more recent incidents had taken place in relation to Freya in particular:- (i) On an occasion on holiday with the father, Freya had seen the father’s partner naked; it is clear that this was entirely accidental. (ii) Freya had returned home to the mother on a number of occasions with bruising. On one occasion Freya’s bruising was attributed to a child who lives with the father’s family. (iii) On a car journey with the father, she had asked to use his mobile phone to access Facebook and, without his permission, explored instead his various Apps, including his photographs where she came across graphic photographs of the genitalia of the father and his partner. She also apparently saw messages upon a dating App which were “a bit rude” and on a later occasion, she saw a derogatory email the father had sent about the mother.

15. The guardian interviewed the father and Freya. In relation to the indecent images, the father was rightly upset with himself for having allowed this to happen. He had apparently forgotten that the photos were there and has now had them removed. He has undertaken in writing not to allow Freya to use his mobile phone again. The mother does not accept his explanations.
16. In her final report of 28th February, 2014, the guardian addresses all of these and the other concerns raised by the mother, and although critical of the father, especially in relation to the indecent images, (a criticism we endorse), does not recommend that contact should be altered in any way. The guardian's position in Court was that in view of the mother's long-standing opposition to contact, it was in Freya's interest for a final order to be made along the lines of the interim order, because without that, there was a very real possibility that contact would cease, which would not be in Freya's interests. Decision
17. The law in relation to contact was summarised in *G v A* [2005] JLR 93 where Birt, Deputy Bailiff said this at paragraph 66:- "The Law 66 In relation to access, as with other matters concerning children, the best interests of the child are paramount. It is equally clear that it is almost always in the best interests of a child to have access to both parents. In *Re S Contact: Promoting relationship with absent parent* (4), the Court of Appeal conducted a wide-ranging review of the importance of access. In the course of her judgment, Butler-Sloss, P. quoted with approval ([20904] 1 FLR 1279, AT PARAS. 19-20) the following statements made in other cases:
 - (a) *Re T* (Parental responsibility: contact) (6) ([1993] 2 FLR at 459, per Butler-Sloss, P.): 'It is the general proposition, underpinned undoubtedly by the Children Act 1989 – and indeed the father has correctly reminded us of the importance of continuing relationships between children and their parents – that it is in the interests of a child to retain contact with the parent with whom the child does not reside. The courts generally set their face against depriving a child of such contact and urge reluctant caretaking parents to make contact work, however difficult it may be for that parent who very often does not understand the importance of that continuing contact.'
 - (b) *Re O* (Contact: Imposition of conditions) (2) ([1995] 2 FLR at 128, per Bingham, M.R.): '...[I]t is almost always in the interest of the child that he or she should have contact with the other parent. The reason for this scarcely needs spelling out. It is, of course, that the separation of parents involves a loss to the child, and it is desirable that that loss should so far as possible be made good by contact with the non-custodial parent, that is the parent in whose day-to-day care the child is not'".
18. The Court has not conducted a fact finding hearing and can therefore make no formal findings in relation to the mother's allegation that the father has breached "every Court order and undertaking and every JAFICAS undertaking". It seems to us, however, that the suggestion that the father is in wholesale breach of every order made and undertaking given is exaggerated. The most serious allegation relates to Freya seeing these indecent images of

the father and his partner on the father's mobile phone, an incident which the father admits. In the consent order of the 20th October, 2009, he had given an undertaking to the Court that he would "take appropriate measures and care to safeguard all or any of the Children from exposure to any pornographic material..." and there can be little doubt that he failed to safeguard Freya on this occasion.

19. The mother went on to make this submission to us, namely, why, in view of the father's breaches, he should be rewarded by contact with Freya? This is fundamentally the wrong approach. As Birt, Deputy Bailiff, said at paragraph 77 of *G v A*:- "77 But none of this is relevant to the question of access. Access is not a reward for some mythically perfect parent. It is in a child's interest to have a loving relationship with both parents, however imperfect they may be. It is only in extremely rare cases that a court would be likely to hold that a parent's influence was so undesirable that access should be denied altogether."
20. Just as contact should not be seen as a reward for a parent, so it should not be used as a punishment of a parent. This incident with the indecent images was very regrettable and we can accept would have been disturbing to Freya. It was extremely foolish for the father to have such images on a domestic device such as his mobile phone, which a child with her natural curiosity is likely to explore, albeit that he says he had forgotten these photos were on his phone. However, regrettable as this incident was, it would not suffice to deprive Freya of contact with the father, contact which she clearly enjoys and wishes to continue.
21. Having considered the mother's skeleton arguments and all her submissions, it seems to us that she remains implacable in her view that the father is a risk to all of the children. We have no doubt that, but for the interim order in respect of Freya made on 20th October, 2009, contact would have been interfered with by the mother if not curtailed altogether. Despite the difficulties that have been encountered, the relationship with the father is important to Freya and she wishes it to continue. In our view, despite her now being thirteen, it is simply too early to remove the foundation upon which contact has been based. Freya lives with the mother and in view of the mother's implacable beliefs, there is a real risk that she will interfere with the relationship between Freya and the father, as she has done in the past, notwithstanding her protestation that she will not do so.
22. We are fully cognizant of the no order principle enshrined in Article 2(5) of the Children (Jersey) Law 2002 and have no doubt that making an order for contact would be better for Freya than making no order at all. The order, based on that put forward by the guardian at the hearing on 18th July, 2014, is as follows:- "(i) That the father shall have unsupervised contact with Freya, as agreed between the mother and the father, but taking into account Freya's wishes, such contact not to be less than six hours a week, unless agreed by the father; and (ii) That there should be no order as to contact between the father and Isla; (iii) That all previous orders made by the court in this matter are hereby set aside. The Court noting as follows:-

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- (i) that Ava now resides with her father and that contact between Ava and her mother takes place in accordance with Ava's wishes; and (ii) that Isla continues to express a wish not to have contact with her father."
23. We considered whether we should put a limit on the duration of the order, but have decided not to do so. As Freya gets older, her wishes will carry more and more weight, and with even the minimum of cooperation between the parents there should be no need for the matter to be referred to the Court again.
24. This being a final order, the file will be closed and the role of the guardian will come to an end. Authorities Children Rules 2005. In the matter of B [2011] JRC 010. G v A [2005] JLR 93. Children (Jersey) Law 2002.
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