Re A-T (Children) [2008] EWCA Civ 652 (14 May 2008)

Case No: B4/2008/0718

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL (CIVIL DIVISION)

ON APPEAL FROM THE PRINCIPAL REGISTRY OF THE FAMILY DIVISION

(HER HONOUR JUDGE PEARLMAN CBE)

Royal Courts of Justice

Strand, London, WC2A 2LL

14th May 2008

B e f o r e :

LORD JUSTICE THORPE,

LORD JUSTICE WALL

and

LORD JUSTICE STANLEY BURNTON

IN THE MATTER OF A-T (Children)

(DAR Transcript of

WordWave International Limited

A Merrill Communications Company

190 Fleet Street, London EC4A 2AG

Tel No: 020 7404 1400 Fax No: 020 7831 8838

Official Shorthand Writers to the Court)

Ms K Hudson (instructed by Messrs Hanne & Co) appeared on behalf of the Appellant.

Ms S Branson (instructed by Messrs Duncan Lewis & Co) appeared on behalf of the Respondent.

HTML VERSION OF JUDGMENT

Lord Justice Thorpe:

There have been protracted proceedings since January 2006 between Fosso Taga and Sadatou Idowu, in relation to contact to the two children of their relationship, Abdou, who is six, and Issa, who is three-and-a-half. The parents come from Cameroon and are more comfortable in French than in English. The proceedings have been conducted through an interpreter as far as Mother is concerned. Ms Hudson, who applies to this court on behalf of the Guardian from an order made by HHJ Pearlman on 14 March 2008, tells us that there have been 19 hearings in the course of the last two years and the longest interval between any two was three months. Father has made seven applications. There was a fact-finding hearing in February 2007 which resulted in clear findings that he had been responsible for domestic violence during the relationship. That was hardly a surprising outcome given that he had been arrested for an offence of common assault, convicted and initially sentenced to a term of imprisonment. Despite that, it is regrettable that the father continues to deny any episode of past violence against the mother of his children. So when the case came on for hearing before HHJ Pearlman it was undoubtedly listed as a final hearing and it was the reasonable expectation of the parties that something like a substantial conclusion would be achieved.

The basic complaint that Ms Hudson advances this morning is that the judge failed to grasp the nettle and make the final order that the history and the facts so clearly demanded. The order made by the judge is quite a lengthy order. It starts with recitals or expressions of hope that Father would attend anger management, Mother would attend counselling, and also the judge's wish that a consultant child and adolescent psychiatrist be instructed to consider: (a) the best way to tell the children about the existence of their father; (b) the effect on the children of not knowing that their father exists; (c) what the children should be told; and (d) to make recommendations as to supervised contact. The expression of wish is followed by the recital that the parties did not seek to instruct an expert and the court accepted that it had no jurisdiction to order the expert to be instructed. There was then a recital of the court's hope that the father would take up indirect contact and then it was said to be ordered by consent that Father had parental responsibility and then further ordered residence to Mother; Father's applications for residence and leave to remove the children dismissed; Father's application for contact adjourned to 6 October with a time estimate of two days reserved to HHJ Pearlman, with leave to Father to file a report on anger management, Mother on counselling; an addendum report from the adult psychiatrist who had given oral

evidence; leave to each of the fathers to file further statements and ultimately leave to the Children's Guardian to arrange supervised contact.

So in a well-prepared argument Ms Hudson says that all that the judge set up was completely unrealistic and served only to increase the costs and, more importantly, to prolong the litigation which was having an adverse effect on the mother's fragile health. What above all was needed was tranquillity for the mother, her future safeguarded from continuing litigation. So the course taken by the judge was either impermissible or clearly contrary to the interests of the children since it jeopardised the mother's stability by continuing litigation stress. Her submission is fully supported by Ms Branson, who appears before us today for the mother. Dr Taga, the father, has not appeared. He has explained that he has had to return to the Cameroon for family reasons and he has submitted a careful skeleton argument which demonstrates his grasp of how litigation proceeds in the family courts. He says that this is an appeal against an interim order and the Court of Appeal has, accordingly, a questionable role. Secondly, that the judge was not bound by the recommendations of the Guardian and in any event the Guardian's recommendations were based on an expert's report which was plainly wrong. He distinguished the approach of Dr Sturge and Dr Glaser in the reported case of In Re L, Re V, Re M, Re H [2000] 2 FLR 334 on the grounds that here we have an unusual ingredient, namely the mother's belief that she is threatened by the father's witchcraft and then finally he seeks to introduce arguments as to the mother's criminality in the Cameroon. In arriving at my conclusions I have given full weight to the written submissions of Dr Taga but do not consider that they begin to meet the force of the points that Ms Hudson has marshalled. The problem with the judge's endeavour to prolong the judicial struggle to achieve something like normality for these boys is that all the steps that she either hoped or wished to see accomplished in preparation for a two-day further hearing were either unachievable or quite unrealistic. I do not, and would not wish to be taken to, endorse the judge's recital that the court had no jurisdiction to order the instruction of a child and adolescent psychiatrist but the provisions of the order make it quite clear that the court's wishes, as expressed in the order, were not going to be achieved as a result of what was written in the following recitals. So it was simply an empty wish. Equally, the idea that the father would engage in anger management was totally unrealistic, since he had throughout been in denial and was obviously going to continue in denial. The judge's provision that the mother should engage in counselling might at the date it was written have had more apparent

realism but Ms Branson says the subsequent approach to the mother's G.P. has resulted in no referral, on the doctor's assurance. There is simply no counsellor in the relevant health trust who is capable of delivering counselling. So it seems to me obvious that Ms Hudson succeeds in her basic submission. It was simply an order that expressed the judge's laudable and courageous approach. She was not going to give up on these two children. But her design for the way ahead simply crumbles at the first touch. It leaves a pointless two-day listing for October.

So I would grant the permission sought and allow the appeal to delete all these unrealistic or unachievable directions. However, we have more information than had the judge. We have asked today the Guardian what is Abdou's knowledge of Dr Taga, his father? The Guardian says she does not know because he has not asked. Ms Branson, however, on instructions tells us that A well knows his father and would recognise him in the street. His father has on occasions called into the school. But she also tells us that her client would have no difficulty at all in working further with the Guardian and with allowing the Guardian to work further with the children. Reservations that she had of the Guardian at an earlier stage have fortunately evaporated. So, given that we are making no order for contact, given that we are striking out a leave to the Guardian to arrange supervised contact, we are creating a situation for the future in which the children may be puzzled, certainly Abdou may be puzzled, to know what is going on and why he cannot have a relationship with his father.

To meet that situation it seems to me to be plainly in the interests of the children to put in place in substitution a family assistance order addressed to the Guardian, to include the mother and the children but not the father and in relation to Dr Taga make a section 91(14) prohibition with a 12-month duration. The family assistance order will have a six-month duration and there will be liberty to either the mother or the Guardian to restore the case to HHJ Pearlman should either of them think that necessary. That is the disposal I would propose.

Lord Justice Wall:

I agree. This is a truly intractable contact dispute with a number of additional complications not found in other cases. I have considerable sympathy for Ms Hudson's primary submission which is, in effect, that the court has done everything it possibly could. The father steadfastly refuses to recognise the findings of violence against him. He wants immediate face-to-face contact. He is quite indifferent to any other consideration and in the submissions which he has put forward in writing today he made it quite clear that his views about the mother remain exactly the same as those which emerge from the papers. On the other side the mother has a fixed belief that contact between the father and the children will be significanrly harmful to them and one immediately wonders what a court in these circumstances can do.

However, to take that view is, I think, to overlook what the case is really about. The case is not about the parents: it is, of course, about these two children. Like my Lord, whilst I have great sympathy for Ms Hudson's submission, and whilst I think what the judge, laudably, was trying to do is wholly impracticable, it seems to me that before the court finally departs from the case – if that is what is going to happen - it does have a responsibility to ensure that a small amount of additional work is done between the children and the guardian, and for the guardian to remain in the case so that the work can be done.

I think there is great force in Ms Hudson's point that the mother needs time between the bouts of litigation in which she can, it is hoped, form a perhaps less extreme view of the father, even if the father himself does not himself change his attitude. Therefore I am in complete agreement with my Lord that the section 91(14) order is appropriate in relation to him, which means that he will have to apply to the judge for permission if he wishes to make an application, and will have to demonstrate to the judge that there is a case which it is reasonable for him to advance. That is something, in my judgment, which is right for him to have to do. Equally, from the children's perspective it seems appropriate

the Guardian should work with them to help them adjust to the situation in which they now find themselves.

Like my Lord, however, I would set aside paragraphs 4 to 11 of the judge's order and substitute the orders that my Lord has proposed. I would also prefer myself to reserve for another occasion the judge's apparent acceptance of the proposition that she had no jurisdiction to order or direct the Guardian to instruct a child psychiatrist to assist her in the case. Speaking for myself, and going back to my own first-instance experience, I seem to recall taking that course on a number of occasions, and not having the jurisdiction point raised against me. Therefore I would like to reserve that point and leave it open, but - be that as it may - we are not going down that road. Our intervention is limited to that which My Lord has proposed and therefore I would make the orders that he suggests.

Lord Justice Stanley Burnton:

I agree with the order proposed by my Lords for the reasons they have given.

Order: Application granted; appeal allowed.