B v C

Case No: LS13P08829

High Court of Justice Family Division

18 March 2016

[2016] EWHC 1586 (Fam)

2016 WL 03564033

Before: The Honourable Mr Justice Keehan

Date: 18/03/2016

Hearing dates: 18 March 2016

Representation

Miss Markham for the Applicant.

Miss Kushner for the Respondent.

Judgment

Mr Justice Keehan:

Introduction

1 I am concerned with one child, A, who is three years of age. His mother is B and his father is C. The parents have both made multiple applications for child arrangements orders.

2 At this hearing the father seeks a child arrangements order regularising the time he spends with A, namely from Thursday after nursery to Monday morning when he takes the child to nursery. The mother seeks permission to make an application to relocate permanently to Israel and, in the alternative, if permission is refused, she seeks a reduction in the father's contact so that he would see A on alternate weekends from Friday afternoon until Saturday evening, in addition to periods of holiday contact of no more than seven consecutive nights on any one occasion. The father opposes the mother's application for permission to relocate and for a reduction in his contact with A.

The Law

3 When considering the applications before me I have well in mind that the welfare best interests of A are my paramount consideration, s.1(1) of the Children Act 1989 ("the 1989 Act"). I take account of each of those matters set out in the welfare checklist, s.1(3) of the 1989 Act. I have regard to the Article 6 and Article 8 rights of each of the parents and of A, but note that where there is a tension between the Article 8 rights of a parent on the one hand and the Article 8 rights of the child on the other the rights of the child prevail: *Yousef v The Netherlands [2003] 1 FLR 210* and *Nazarenko v Russia [2015] 2 FLR 728* .

4 In respect of the mother's application to relocate to live permanently in Israel I take account of the decision and principles summarised in the Court of Appeal case of *Re C (Internal Relocation) [2015] EWCA Civ 1305* and in particular at paragraphs 53, 54 and 57-60 where Black LJ observed,.

“One can see from the authorities and indeed from this case that the courts are much preoccupied in relocations, whether internal or external, with the practicalities of the child spending time with the other parent or, putting it another way, with seeing if there is a way in which the move can be made to work thus looking after the interests not only of the child but also of both of his or her parents. Only where it cannot and the child's welfare requires that move is prevented does that happen. Once welfare has been identified as the governing principle in internal relocation cases there is no reason to differentiate between those cases and external relocation cases. In my view the approach set out in K v K and Re F (Relocation) [2012] and Re F [2015] should apply equally to internal relocation cases. Clearly, however, the outcome of that approach will depend entirely on the facts of the individual case. At one end of the spectrum it is not to be expected, for instance, that the court will be likely to impose restrictions on a parent who wishes to move to the next village or even the next town or some distance across the county and a parent seeking such a restriction may well get short shrift. At the other end of the spectrum, cases in which a parent wishes to relocate across the world, for example returning to their original home and to their family in Australia or New Zealand, are some of the hardest cases which the courts have to try and require great sensitivity and the utmost care.

The present appeal has caused me to consider how a proportionality evaluation would actually work in the context of a relocation case. We are now entirely familiar with the role of proportionality in relation to public law children proceedings, its impact upon whether the court sanctions an interference in family life by the state in the guise of the local authority. Interference would not be permitted if it would violate the rights of the child or parents to respect for their family life under Article 8 of the ECHR .

Proportionality also has a well-established role in contact disputes where, as can be seen notably in Re A , the court can have an obligation to ensure that appropriate steps are taken to enable the family tie between parent and child to be maintained. It is not difficult to see how Article 8 influences the outcome in that situation. The court has to strive harder.

However, the situation in a relocation case is more problematic. Often, whichever way the decision goes, there will be an interference with the Article 8 rights of a parent. If the father is allowed to take the child to live at the other end of the country there may be an interference with the mother's Article 8 right. If, on the contrary, he is refused permission to move, there may be interference with his Article 8 right.

Both parents may be disinclined to back off and middle courses are not often easy to find in these problematic cases. As Lord Justice Ryder implies, the problem may be worse in the international context. Australia is more difficult than another town in the United Kingdom, but even moves within the United Kingdom can be seriously disruptive of established arrangements. Left with a significant interference with Article 8 rights, whichever way one turns, what can the court do and what should it do?

Nazarenko v Russia was put before us as a recent example of the approach of the European Court of Human Rights to balancing the rights of parents and children. At paragraph 63 the court put it this way:

> “ Article 8 requires that the domestic authority should strike a fair balance between the interests of the child and those of the parent and that, in the balancing process, primary importance should be attached to the best interests of the child which, depending on their nature and seriousness, may override those of the parents”.

Nobody has suggested that Section 1 of the Act, the welfare principle and welfare checklist, is incompatible with the Strasbourg jurisprudence and when one looks at the way in which relocation cases are approached in the courts of England and Wales it seems to me that it is an approach which is broadly in line with what is expected by the European Court of Human Rights. The interests of the parents are not ignored but, if it is not possible to accommodate everyone's wishes, the best interests of the child dictate the outcome.”

Background

5 The parents are well-educated, intelligent and articulate. They are both academics at universities in the East Midlands. The early background to the proceedings is set out in the judgment of His Honour Judge Lea of 16 March, 2015. In paragraphs 6 to 10 of that judgment he says as follows:

> "As I have already stated, the mother was threatened with divorce proceedings within months of A's birth. The separation of the parties occurred on a family holiday to Israel in July 2013. There have been court proceedings firstly in Israel and then here ever since. The proceedings in Israel were begun by the father who issued divorce and custody proceedings alleging that the mother's state of mental health posed a significant risk both to him and to A. The mother sought a return of A to the United Kingdom and to stay the Israeli proceedings under the Hague convention.
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> On the 6th September, 2013 the Family Court in Tel Aviv ordered A's return. The father appealed against this order but his appeal was withdrawn with consent after the appellate court made it clear that A must be returned to the United Kingdom. A returned with the mother on the 11th October, 2013.
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> There have been continuous proceedings with orders made, excluding those made without the attendance of the parties, on 10th October, 16th October, 25th October and 8th November when her Honour Judge Butler QC gave a judgment, 10th December, 20th December, 6th January, 7th February, a hearing on 31st March and 1st April when there was a judgment given by Recorder Stephen Bellamy QC and further orders on 14th May, 21st May, 30th July, 8th August and 2nd December.
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> There will be a significant financial cost to the parents of this litigation as well as an emotional cost, although neither parent before me appeared worn down by the litigation. Both appeared all too eager for the fight. I would question whether it is a proportionate use of the court's finite resources for a case to occupy so much judicial time when the sole issue now for the court is to determine how A's care should be divided between his parents and where the level of care that the parents are able to provide has been described in the Section 7 assessments as well beyond the standard of good enough parenting.
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> Louise Whittle has been involved firstly as the court appointed CAFCASS Officer and latterly as guardian. The history of the parental dispute can usefully be seen through her reports. At the time of writing her first Section 7 report filed on 25th February, 2014 A was living with his mother with contact to his father. There was considerable acrimony between the parents, resulting in the handovers taking place at a central police station in Nottingham under the gaze of CCTV cameras. A's then nanny was to be present. The parents had to communicate in writing regarding any matters affecting A's welfare.
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> Contact had included since January two overnight staying contacts. Father reluctantly agreed to consider some form of mediation in order to reach agreement about contact but this was at prejudice to his clear assertion that the mother could not adequately care for A as he asserted she was mentally ill and he therefore asked that A should accordingly be living with him. I note that Miss Whittle recorded her concern that if the father believed the mother was mentally ill he did not manage his own behaviour in a way which would support her and reduce the stress placed on A.
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> There was one significant positive which Miss Whittle noted which has continued throughout:
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> > "My observation of A with both his parents is positive. He is relaxed and happy in their care and demonstrated secure attachments to both. I have observed both parents providing him with emotional warmth, good stimulation, age appropriate toys and healthy food. I have not witnessed anything in either party's care of or interactions with A to cause me concern".

The evidence as to this is clear. It is corroborated in the Section 17 assessment of Thomas Beasley who states:

> "A is a child who is extremely well cared for. His parents provide him with a high standard of basic care. He receives an excellent level of stimulation and both parents demonstrate a warm and loving relationship with A. A is a child who is developing well and meeting appropriate developmental milestones. These points are extremely important to recognise as they not only provide evidence to draw conclusions regarding other aspects of his parent's care, they also need to be counterweighted against any more negative aspects of his care.
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> If each parent truly believed the other capable of caring well for A, it is difficult to see why they could not agree an amicable provision of his time since, as long as A was spending a sufficient amount of time with each parent to promote the necessary child/parent relationship, the precise quantum of time would be immaterial and could be adjusted according to their own timetables. I can only conclude that the parents do not accept that each is able to provide good care to A despite the evidence before them that A is, at least for the present time, thriving in all respects. It has to be remembered that A is still only two.
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> My real anxiety is that if the levels of animosity and bitterness between his parents persist, it is inevitably only a matter of time before A becomes aware of his exposure to the ongoing dispute which will then begin to impact very negatively upon his emotional and behavioural development. The parents have many years of A's childhood ahead of them to ensure if they so choose but their evident unhappiness with each other will eventually but inexorably become his burden.

Miss Whittle concluded that, given the father's insistence that the mother was mentally ill, the proceedings should be adjourned for a psychiatric assessment of the mother by a qualified expert to comment upon the impact of any condition she may have to impact upon her ability to parent A. This was required not because of the mother's current presentation and behaviour but because the father refused to accept that she might now be well.

Miss Whittle felt the father, who presented as a very intense man, would possibly benefit from some form of counselling to address his stress management. She advised the parents should seek mediation and recommended that A should remain living with his mother and there should be no change to the relatively new contact arrangements so that A had more time to adjust to the changes in his routine and to overnight contact at his father's home.

On 1st April Recorder Bellamy QC after a contested hearing ordered that the contact arrangements of A should change from two separate nights to two consecutive nights each weekend from Friday to Sunday. On 21st May it was ordered that A should spend from Monday morning to Friday morning each week with his mother and the balance of the week with his father.

In due course Dr Nicholas Stafford, a consultant psychiatrist, was instructed to assess the mother's state of mental health. In his first report he expressed the opinion that the most likely mental health diagnosis at the time of her marital breakdown was a combination of depressive symptoms which did not completely fulfil the diagnostic criteria for depression according to her psychiatrist but did according to her GP, a degree of anxiety and some exhaustion from a combination of a difficult birth, lack of sleep due to her son's breastfeeding patterns and marital stress. The mother was functioning well with her family responsibilities and her work in a post that required a range of skills. Dr Stafford concluded there were no long-term mental health issues and therefore no chronicity to her condition

I note that in her email of 10th July Miss Whittle records the father through his solicitors asked Dr Stafford further questions which he dealt with in a second report which concluded no differently from his first report, that the father still did not accept that the mother was not mentally ill. I shall refer to this aspect of the evidence in due course.

Miss Whittle in this email described this as a fraught and complex case with both

> parents repeatedly making applications to the court and unable to communicate in a constructive way for A. She noted there was to be a final hearing at the beginning of August and her recommendation to the court would be that A should continue to reside with his mother who had been his carer since birth and continue to spend two nights with his father. She noted that A had struggled to adapt to overnight contacts but attributed this to the acrimony and atmosphere between the parents at handovers.
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> In her report for the final hearing before me there was a significant shift in Miss Whittle's approach to the case. She noted in his Section 17 assessment Mr Beasley commented that both parents expressed concern that each was prioritising their negative view of each other over A's needs but it was extremely difficult to say with any certainty the extent to which the accounts given by the parents were accurate. Miss Whittle stated this had also been her view but that independent evidence from child professionals had shed more light on the behaviour of the parents. By this Miss Whittle was referring to the evidence of G at the University Nursery that A had been attending since mid-October. G was critical of the mother preventing A from settling at the nursery. I shall deal with her evidence in due course.
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> This negative report about the mother contrasted sharply with a glowing report from H about the father from the playgroup A attends when with his father. Based on this, Miss Whittle concluded that the father was better able than the mother to understand and support A's emotional and social needs. She accordingly recommended that A should spend five days a week in the father's care and the balance of the week with his mother.
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> Thus, before me and in his final written submissions Ms Kushner for the father sought a change in the current arrangements so that A would in future spend five nights with his father who it is said is better able to meet his needs. Miss Markham on behalf of the mother submits the status quo should continue as a child arrangements order as A is thriving. He is happy, healthy and well developed. Mr Lee submits on behalf of the guardian that her recommendation of five nights with father and two nights with the mother should be followed and made into a court order."

6 In that judgment His Honour Judge Lea observed of the parents that:

> "They had very different personalities. The mother comes across as emotional, wearing her heart on her sleeve. At times when giving her evidence she seemed inappropriately light-hearted although I would attribute this to her being nervous to a court process in which she is very concerned about the outcome. The father was cold, where the mother was warm, very logical and unemotional. Both plainly have very clear and different opinions about many aspects of A's upbringing. I am quite sure the father remains convinced that the mother is mentally unstable and that his acceptance of the medical opinion of Dr Stafford is a tactical decision taken because he has no evidence with which to challenge the opinion other than his own belief".

I note that in the court in Tel Aviv a finding was made that the father was convinced of the justness of his opinion and his version of events. I noted this as well:

> "He is not a man who will easily change his opinion. Of particular concern was his assertion that he does not trust the mother and does not trust her to care for A. It is perhaps for this reason the father insists that all parental communication should be in writing and all handovers are filmed by him and by CCTV footage".

I respectfully agree.

7 In his conclusions Judge Lea said this:

> "This is, as was conceded, a finely balanced case with a range of possible outcomes. When questioned by me Miss Whittle did not appear to have considered the consequences that might follow from an order based upon her recommendation given that the father would treat it, and I have little doubt about this, as a clear vindication of his long-held criticisms of the mother.

> I am quite sure that the father persists in his view that the mother has mental health issues and his decision not to contest the opinion of Dr Stafford was based upon advice that in reality there was no evidence to put before the court to contradict that opinion. I note the extensive efforts made by the father's solicitors to try to get Dr Stafford to change his opinion based on further information provided to him. I have little doubt the father harbours a suspicion that the mother is still hiding something from her past medical history. Indeed, in his statement he states the mother's behaviour still worries him and he notes that Dr Stafford has concerns that the mother was not truthful in her disclosures to him and that relevant psychiatric documents remained concealed".

Then, a little later:

> "It is submitted by the father that to maintain current arrangements would give the mother as equal a sense of triumphalism as would the change sought by the father. I disagree. The parents have very different personalities. The mother, in my judgment, is better able to put aside her own feelings for the sake of A than the father".

8 Then in a postscript, after further litigation, to that judgment dated 27 August, he added this:

> "At the present time the evidence suggests that A is thankfully of an age where he is not fully aware of the hostility between his parents. This will change. When parents cannot agree with each other, when they have different ideas from each other, they should not discuss these differences with their children. Children should never hear one parent talking negatively about the absent parent. The antipathy of the parents towards each other here is such that I cannot imagine that they will only talk positively to A about each other. He will pick up on this as he grows older. He will be affected by it. His self-esteem will be damaged because he is the product of both his parents".

9 Since then there have been unfortunate events at the handover of the child at the start of the father's contact when the parties had seen fit to involve the police.

Evidence

10 I heard evidence from the father, the mother and the mother's fiancée, Mr P, I read the statements of the witnesses and the exhibits as I was invited to by counsel or to which I was taken during the course of the hearing.

11 The mother's father is terminally ill in Israel. Whilst the prognosis is clear, the maternal grandfather's doctor has declined, says the mother, to give any estimate of life expectancy. All of the maternal family live in Israel, as do all of the paternal family. For wholly understandable reasons, the mother wishes to spend an extended period of time living with A in Israel to assist her mother in caring for and nursing her father but further she told me that in light of her father's illness she has had a change of priorities and wishes to live closer to her family in Israel.

12 I have no doubt that another factor is the fact that her fiancé, Mr P, has long had plans to return to live in Israel. There is clearly an element, as the mother readily accepted, of seeking to distance herself from the acrimonious relationship with the father, which I accept she has found increasingly burdensome and stressful to deal with. This element raises a disconcerting issue that the mother is seeking not only to distance herself from the father but also his role in A's life.

13 During the course of the evidence I raised with the mother a possible middle course between granting and refusing her application for relocation, namely to permit her to live with A in Israel for the next three months or so but then to adjourn her application to relocate for a period of twelve months in order to establish a regular and consistent pattern of contact with the father. The mother told me she would prefer that course to be adopted rather than have her relocation application dismissed. It was not, however, an option that the mother would readily advance or accept.

14 The mother offers the father holiday contact if she is permitted to relocate to Israel but not for

more than seven consecutive days because she asserts that A could not cope with being away from her for longer periods. In my view, that stipulation has more to do with the mother's interests and feelings than it does with the interests of A.

15 Mr P is divorced. He has three grown up children whom he raised as a single parent after the breakdown of his marriage. He has lived in this country for the last 30 years and is a businessman. Mr P has long had long-term plans to return to live in Israel in any event before he met the mother. They became engaged some three months ago and their wedding is set for the 18 August next. Mr P is committed to providing for the mother and for A. From his own experience he acknowledged that he would be a carer for A but not his father. He was quite relaxed about A having contact with his father and, if needs be, to being involved in the handover and collection of A to and from his father. Mr P was very willing to accept the father's counsel's suggestion that he should meet with the father.

16 I have no doubt that the father greatly loves A and greatly values the time he spends with his son. I am sure the feeling is mutual. The father told me that the mother's plans to relocate to Israel would be devastating for A and for him. He said such a plan would traumatise the child. He reiterated throughout his evidence that A's home is in this country, he has friends here and his routine is stable in this jurisdiction.

17 The father gave his evidence in emotional and dramatic terms. He demands and requires enormous detail about plans for contact and variations thereto. The father demands strict adherence to the time he spends with A and will not tolerate any deviation there from. I regret to find he is completely obsessive about all aspects of his contact with A and with the mother which reflects the views and the findings of His Honour Judge Lea.

18 I was dismayed to hear the father say that such was his level of mistrust of the mother that he doubted whether the maternal grandfather had terminal cancer. The implication is that the mother has invented a false story about her own father. I consider that to be so very unlikely that I discount the same but it provides a graphic example of the father's functioning and approach to the mother. She was visibly distressed during this part of the father's evidence.

19 When asked about why he had not let A spend Mother's Day with his mother or to permit the mother to arrange a weekend birthday party for A, the father's response was in terms, “I need to be compensated for time lost with A”, in some ways not an unreasonable approach but on the facts of this case the father's obsession with his rights is very concerning. I gain a real sense that his rights come before A's welfare best interests.

20 The father could not explain why, when he was given the mother's response to his contact proposals this morning, they were not mentioned in his evidence until he was cross-examined. His failure to do so, given his demand for clarity and accuracy, is troubling, particularly when he had earlier asserted that he had had no response to his proposals from the mother. Father says that his department at work is in agreement to him working part-time in the short-term which may increase his ability to have contact with A if he were to move to live with his mother in Israel.

Analysis

21 I do not consider a close analysis of the parents' rival contentions about who is responsible for or who is to blame for various recent difficulties in contact is either helpful or necessary. In broad terms, as His Honour Judge Lea found, the one is as bad or as difficult as the other. That said, I do find, as did His Honour Judge Lea, that the father is unreasonably and unnecessarily obsessive and difficult in his dealings with the mother and most particularly over the issue of contact with A. His bombardment of the Nursery with emails is but one example of this type of behaviour and is, I suspect, the most likely ultimate cause of the nursery declining to maintain A's placement after 15 April, 2016.

22 Both parties have referred to issues in late 2015 in respect of difficulties in respect of the handover of A at the start of the father's contact. The police reports tend to support the father's version of events but I am not satisfied that the police officer concerned knew or appreciated the history of this matter, nor that his accounts accurately reflect the complex acrimonious relationship between these parents in respect of this child. I do not intend these remarks to be a criticism of the police officer whom I accept was doing his best to provide an accurate but limited

account of events. Having the benefit of a wider survey of all of the evidence, I have reached a different conclusion from him.

23 The mother and the father both deeply love A. A obviously greatly loves and much enjoys being with his mother and with his father. I find no fault in the ability of either parent to care for A on a day-to-day basis. They are both very dedicated parents. Sadly, what neither can do is to see beyond this personal conflict and to see or recognise the vital role that they both have to play in A's life.

24 I have considered the consequences of refusing the mother's application to relocate. It would permit the father to maintain frequent and regular contact with A. It would come at the price, however, of the mother not being able to resettle in Israel with her fiancé, it would leave her feeling vulnerable to the father's excessive number of emails and enquiries and/or complaints. I am in no doubt that A would continue to be well-cared for in these circumstances, albeit that his mother would be under considerable emotional and psychological pressure.

25 If I granted the mother's application to relocate, I have no doubt that he would be well-cared for in Israel and that he would have access to an excellent quality of education. At the age of three, the impact, adverse or otherwise, of A of having to be conscripted to serve in the Israeli army when he attains his majority is of no or at least of very limited significance. I remind myself that A's first language is Hebrew and he is far more confident and fluent in speaking Hebrew than he is in speaking English.

26 If the father remains living in this jurisdiction the impact on the frequency of his contact with A will be very considerable. There would be a very substantial reduction in the contact. I have to bear in mind, however, that the mother is not proposing to relocate to a country with which the father has no connection. Both of the parents view Israel as home, almost all of their respective family members live in Israel, both parents have been, for a variety of reasons, frequent and regular visitors to Israel either with or without A. The father has his parents and other close family members with whom he could stay and/or live if the court granted the mother permission to relocate to live in Israel.

27 The essential features of this case are:

(a) Both parents very much love A;

(b) Both are well able to provide for him and to meet his day-to-day needs;

(c) Materially in terms of housing, education and lifestyle, there are no significant advantages or disadvantages for A whether he lives in this jurisdiction or in Israel;

(d) His first language is in Hebrew, albeit he can communicate in English;

(e) The maternal and paternal family members are based and live in Israel;

(f) Those family members and most particularly his maternal and paternal grandparents are known by and are familiar figures to A;

(g) The parents are frequent visitors to Israel;

(h) I am satisfied that the mother's motives in seeking to relocate to Israel are genuine;

(i) I accept that a consequence of the mother's relocation would, if the father remained in this jurisdiction, relieve her to some degree of the strains and pressures of their consistently hostile relationship;

(j) If A moves to live with his mother in Israel the frequency and regularity of his contact with his father would be greatly reduced;

(k) On the other hand, A and the father would have the benefit of lengthy periods of holiday contact during Hanukkah, Rosh Hashanah, Passover and the summer holidays in addition to other periods when the father is able to travel to Israel. What may be lost in frequency will not, in my judgment, be lost in quality of contact or impair the relationship between the father and A;

(l) A refusal of permission to relocate will have an adverse impact upon the mother's emotional and psychological well-being which may adversely affect from time to time A;

(m) I see no prospect of the acrimonious and hostile relationship between the parents improving if the mother remains living in this jurisdiction.

Conclusion

28 I have given the competing applications very careful consideration. On reflection, my suggested middle course of adjourning the mother's application to relocate for a period of twelve months is not in A's welfare best interests. To adjourn that application to ensure that there is a stable and consistent pattern of contact with the father before further considering the relocation application would, in my judgment, run the very real risk of the father causing further difficulties in respect of contact in an attempt to undermine and/or thwart the mother's application to relocate. I fear the father would, albeit contrary to his own and A's interests, seek to portray the mother as exceedingly obstructive in allowing him contact with A and thus to assert that such difficulties would continue or be the greater if the mother were permitted to live with A in Israel. In my view, I have to grapple now with whether I should grant or refuse the mother's relocation application.

29 I have to balance the advantages to A of his mother being permitted to relocate with him to Israel against the adverse impact on the frequency and regularity of the father's contact. I have also to balance those factors with the advantages of refusing the mother's application against the disadvantages. The father would have the opportunity to maintain regular contact but that would come at a cost to the mother's new family life and her emotional and psychological well-being. I am satisfied that the mother will promote contact between A and his father because she acknowledges the importance to A of having a close relationship with his father.

30 Overall I am satisfied that it is in A's welfare best interests to grant the mother's application to relocate with A to live in Israel. I will give the parties time to reflect on this judgment to see if they are able to agree issues of contact. If not, I will resolve the issues either on paper or at a short directions hearing.

31 Both of the parties are familiar with making applications in the Israeli courts. I trust the father will take some reassurance that he will continue to spend time with A if I require the mother to obtain mirror orders in Israel. The father will then, if the need should arise, be able to enforce the provision for him to spend time with A in the Israeli courts.

32 For those reasons I propose to grant the mother permission to make an application to relocate. Pending a finalised order, I grant permission to the mother to take A to Israel so that she may assist her mother caring for and nursing her father. Once the issue of contact has been agreed or ordered and a final order drawn, I will grant permission to the mother to relocate permanently to Israel with A.

33 That is all I propose to say.


Westlaw UK