Neutral Citation Number: [2005] EWCA Civ 1090

IN THE SUPREME COURT OF JUDICATURE
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM SOUTHAMPTON COUNTY COURT
(HHJ MILLIGAN)

Royal Courts of Justice
Strand
London, WC2
Tuesday 21st June, 2005

B e f o r e:

LORD JUSTICE WARD,
LORD JUSTICE SCOTT BAKER

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M (CHILDREN)

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(Computer-Aided Transcript of the Stenograph Notes of
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(Official Shorthand Writers to the Court)

THE APPLICANTS APPEARED IN PERSON
MR L ARNOT (instructed by Messrs Stones, Devon EX1 1UG) appeared on behalf of the
Respondent
J U D G M E N T
(As approved by the Court)

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1. LORD JUSTICE WARD: This is an appeal which has caused the court considerable anxiety. It is another of the apparently intractable disputes over contact that, in this case, teenage children should have with the absent parent. In many ways the story is ultimately familiar, save that in this case the absent parent is the mother, not the father.

2. The children are C, born on 20th November 1989, so he is some five months away from attaining the age of 16, at which point the court's jurisdiction over him will end, unless there are exceptional circumstances demanding otherwise. H is 13 years old, having been born on 8th March 1992. There are aspects of the case which I will enumerate, which make it essential, in our view, that for the sake of the children no publication should be permitted such as will reveal their identity. It would do untold harm if the name of the children were to be blazoned over the newspapers so that they are teased and mocked at school, and so we impose a reporting restriction which I know will be honoured.

3. The case arises in this way. The parents married in July 1989. The father is now, I think, 44, or thereabouts. The mother is 41. They separated in May 1994, soon after an incident took place which has featured largely in this case, much larger than it deserved. What happened is dealt with by the judge in paragraph 11 of his judgment. It seems that the mother suffered a depressive illness with obsessive compulsive traits being exhibited and her misfortune, and the family's misfortune, is that under that compulsion, being concerned about possible harm which might have been suffered in a film she had been watching, she felt compelled to test it out by picking up poor H by the side of the head on some three or four occasions. That led to the Social Services being involved. It led to the separation of the family and it led to that activity, conducted at a time of illness, to be referred to as the strangulation of H. Now that, as the judge recognised, was the most dreadful mischaracterisation of what took place. True the facts may have been that H was picked up in that way, but equally true by a mother in the depths of depression and suffering from the malign effects of the illness, which has since been contained, indeed which was contained long, long ago, leaving this mother now as well as the next person. The tragedy which begins the story is that this incident has been blown utterly out of proportion.

4. Now remarkably, and this is a fact which seems to have escaped attention, notwithstanding that incident, nonetheless contact did take place at regular intervals between the mother and the children, who had moved to live with their father after the separation. There was an order made on 30th January 1996 that the children were moreover to have staying contact with their mother during a week of their school holidays. That took place until Christmas of 1996 when H showed reluctance to go on that staying contact.

5. The next event of crucial significance, in the sad history of the family, comes in the summer of 1997 when, pursuant to the order which had been made, the children were to go to their mother for a week's staying contact. The order had provided for the mother to collect the children, but in the events that happened a maternal aunt, with an elderly relative, arrived at the father's home for contact because the mother herself did not drive. The father, with pedantic precision based on the terms of the order, refused to release the children to the mother who was not there to collect them. She came back on 11th August. C was reluctant to see his mother. She picked up H to take her to the car and there was a huge altercation between the mother and stepmother.

6. I do not know when PM, a respondent to this appeal, became the second Mrs M. We were told this morning that their association began about two years after the separation. I hope it is pure coincidence that that seems to be, or soon became, the beginning of the difficulty about contact, but be that as it may, there was confrontation between the mother and stepmother, each alleging the other was behaving improperly. The Stepmother, if I may call her that, went to retrieve H from her mother's arms. There was a tug of war. The mother ended up with red marks on her arm. The child was taken back inside. The mother returned, calling through an open window, and the aunt banged on the front door.

7. This has become known, in the father's household, as "the abduction of H", which again is a flagrant mischaracterisation of what took place, and the judge has so found. He is quite satisfied that there was no intention on the mother's part to abduct the child at all,

or to take her away, otherwise than pursuant to the contact which had been agreed. As the judge described it, this is:

"... a monster misunderstanding all round, with extremely unfortunate consequences so far as these children are concerned."

The unfortunate consequences are that that was the last the children have seen of their mother. That was 8 years ago.

8. Remarkably, therefore, the position was reached as a result of that incident in which at best, on any view of it, the stepmother was as much to blame as the mother. The result, nonetheless, is that C, then only seven, and H, then only five, refused further contact for fear that the mother who had attempted to "strangle" H would abduct them. Until that point at time they had been expressing some wish to see their mother. So the judge recognised and found that the curiosity in the case is that as he said, in paragraph 6:

"There is plainly no doubt that these children are entirely alienated from their mother, even if, as Mr M urges upon me, there is some glimmer of light at the end of C's tunnel [and this is important] And there is a thread running through the CAFCASS reports of a good bond and relationship between the children and their mother, that they feel unable to express such a view to their father or stepmother, being aware of father's anxieties and anger concerning the mother. ... And so with the thread running through the reports of the children's essential attachment to and love of their mother, their feeling unable to express it to their father, [I hope he is listening] runs a consistency of views expressed by these children of an extremely hostile nature towards their mother and of an extreme disinclination to have anything to do with her whatsoever."

9. That hostility was clearly demonstrated in the CAFCASS reports. The judge ordered that there should be a child psychiatrist to report with interim contact by post in the meanwhile. That led to a report from Dr McColl. He spoke of the hostility, picking at some of the comments from his report. He refers to C being very critical of the mother, being struck by the force of C's views and expressing the opinion that H shows no persisting disturbance of mood or behaviour:

"She has clearly been distressed by difficulties over contact with her mother, but her problems are limited in nature. C shows some mild to moderate traits of anger, distressed emotion and disruptive behaviour. It is not possible to be precise about the cause of these features, but I think the most reasonable explanation is the effect of the combination of his own temperament, and his reaction to the conflict between his parents."

10. He was of the opinion that the level of behavioural and emotional disturbance did not warrant specialist assessment. He felt rather than involve mental health professionals in the children's life:

"It is a role for the responsible parents themselves, that is Mr M and his wife."

He was of the firm view that contact with mother was desirable. He said:

"It is very unhealthy for children to maintain a fixed and highly critical view of a parent..."

This is a report dated 18th March.

11. He filed an addendum to that report in October 1998. This is much more concerning as I read it. He there reveals that since May 1998 C had had to be referred to the Southampton Child and Family Guidance Clinic. Now the father tells me today that he was the one who initiated that, and I am sure that was a wise move on his part. The clinic noted features of anxiety and obsessionality that tallied with the descriptions of behaviour at home and in school. C had strong feelings of attachment to his father, a more mixed relationship between him and his stepmother and very strong feelings held by C about his mother. Towards her he described very critical feelings, although he was able to express feelings of love and concern.

12. Those symptoms of anxiety and obsessionality could perhaps be attributed, in part, to his own temperament and in part to his response to the history of discord in the family. C indicated that although he did not wish to see his mother, and that was H's view as well, he for his part, did contemplate changing his mind in the future.

13. The psychiatrist felt that contact would be very disturbing and inappropriate and he could not recommend it. He recommended instead a moratorium of two years and to give the children, as he put it, "a maturing and moderation in the children's views without external pressure". He said if no contact had been made over the next two years the issue should be explored again.

14. Thus, faced with that report, the order was made in October 1998 that there be no direct contact for two years, but that the mother should have indirect contact, at reasonable intervals, sending letters and cards, etc; the father indicating his willingness to supply that information to the children.

15. Time went by. The matter came back before the court in February 2001. A further welfare officer's report was ordered and that report was procured. That led to investigation by the court welfare officer. She reported that the children wanted no contact with their mother. C became agitated when spoken to about it. He stated that last time that had happened he had started cutting his hair and having nasty moods. He burst into tears and turned to his father for comfort. H was equally adamant. It was the view of the welfare officer:

    "... I have no doubt that there has been no encouragement at all over the past two and a half years by the father and stepmother to see her [the mother] in a more positive light, rather than the reverse. The children were completely unaware that their mother had been sending them cards at regular intervals despite the father's avowal to the contrary."

16. I hope that Mr M will pause and take time to reflect on the lack of wisdom in his conduct over that period in time. This was supposed to be a moratorium, free from the presence of the mother, but during which it was his parental responsibility to dilute the children's anxieties, to promote the better image of the mother, and contrary to that he simply hid from them the fact that their mother had been writing to them. Some might even call that a pretty wicked thing to do.

17. The judge made an order that the children should have this indirect contact through the court welfare officer, and that was attempted. But when the court welfare officer went with presents from the mother to the children, she was met with what the judge described as "stony faced hostility" from everyone in the father's household". The children flatly refused even to open the presents and the father, with a weakness which I condemn, refused to require the children to open their mother's presents. I do not regard that as strong manly fathering. I regard it as a weakness and a failing on his part. It may be highly old-fashioned of me to express the view, but there are times when children do what they are told and this was an occasion when he should have said to his children: "You open those presents. They come from your mother. Open them." But he failed to do so.

18. In the result the judge made an order on 11th January 2002 that this mother, whose love for the children had been demonstrated over these difficult years, was to have no direct or indirect contact. The father was to send school reports and general reports of progress and school photographs. The last photographs she has had of the children were apparently in January 2000.

19. In April 2004, this application by the mother was made for a review of the contact and for assistance to the court in judging it by having a further expert's report, by having a guardian appointed for the children, either CAFCASS or NYAS, whoever they are, and for the transfer of the matter to the High Court. After sundry directions, including a further report by CAFCASS, the matter came on before Judge Milligan on 1st March of this year, Judge Milligan having been the judge to whom I have made reference, in dealing with all of the previous hearings since his first involvement in April of 1998.

20. The court welfare officer reported that the children remained as implacably hostile, as ever, if not more so. The court welfare officer reported that the parents' view was that the mother was so out of control the children were scared stiff of her and they insisted they wanted no communication from her. H said that if their mother even wrote to her she would throw the letters away without reading them. She never wanted to see her mother. All her memories were bad. She didn't want her mother coming within a hundred miles of her. One is driven to ask what bad memories the child could really have, given that she would have had no personal memory of the so-called strangulation and probably precious little memory even of the events of August 1997 when she was five.

21. C admitted that one day he might become curious about his mother, although it was unlikely. Their view, and this shows the depth to which they have been alienated, was that their mother must still be unwell because she was making this application to see them. What a travesty of the truth. Nonetheless, the court welfare officer, though finding that the children had been harmed and would be harmed by not having contact, came to the conclusion that more harm would be done by forcing any such step on the children and she recommended that there be no contact at all.

22. HHJ Milligan, having heard her and heard the argument, made the order now under appeal: there be indirect contact by letters or cards not more often than quarterly, but to an accommodation address, and secondly, that to facilitate and support such indirect contact, the father was to provide biannual reports on the children's lifestyle and activities, including a recent photograph on at least one of those occasions, and a copy of their annual school reports, amended so as not to show the school address. Thirdly, the

mother's applications for the appointment of a child psychiatrist, for the appointment of a Guardian to the children and for the transfer of the case to the High Court, be dismissed.

23. Mr Arnot, on her behalf, has the difficult task of persuading me that in the exercise of his discretion the judge was plainly wrong. The gravamen of his judgment was this: he expressed himself critically of the father in many respects, some of which I have recounted. He was concerned that in two letters before the court the children expressed themselves in inappropriately adult language in a context suggesting at least some adult input. He noted the father feeling aggrieved at the criticisms, or implied criticisms, made of him as a father, but nonetheless he did criticise him for creating the antipathy which exists.

24. He expressed the sad truth of the case is that nothing seems to have changed in the last eight years. He noted everyone, that is except the father, stepmother and children, were satisfied this was a loving and concerned mother, very much so in fact. He recorded the welfare officer saying that the children have: "A fixed and highly critical view of this mother bordering on hatred". The judge said it should be a matter of very greatest concern to this father and stepmother, and I emphasise concern to the father and stepmother that the children could have such extreme views of a birth parent, whatever may have passed in terms of adult conduct in the past. Children cannot, it has to be remembered, choose their parents. What they need is a relationship with the parents they have, and Ms Davies, the CAFCASS officer, agreed with Mr Arnot that there was a clear risk of long-term harm in these children's adult lives and relationships; that going on in the present frame of mind was thoroughly unhelpful for them; that there were interventions which could be considered; but the essential problem is this, that he identified to be the children's age; the second problem was their mind-set. Of that he said this:

"Ms Davies could detect no attempt on father's part to alter this extreme mind-set."

Elsewhere he said in paragraph 16:

"I accept the assessment of Ms Davies and both her previous colleagues that there is no evidence seen by any of them of this father taking any active responsibly parental steps to draw them away from this thoroughly unhealthy mind-set."

He found, as a fact, paragraph 18:

"I can find no reason why these children should have been allowed or should need to remain in a fixed and extremely [hostile] attitude towards their mother. I understand that what is called the strangulation incident must have been extremely worrying, not to say frightening, for father, as it no doubt was for mother. But there can be no excuse for the fact that years and years later that incident is still talked about or still thought of, certainly by H and C, as an attempt by their mother to strangle them. There should have been ample time for it to be seen in the context of a mother who was extremely unwell, who loves them dearly, and so that the last thing in the world she would ever wish to do would be to cause them any harm. It must and should have been possible for a completely different view to emerge of that incident on the part of these children."

25. He found that the father should have found ways of drawing the children away from their extremely hostile attitude. The issue which he posed, and rightly posed, was this at paragraph 20:

"Should the short-term disruptive harm that will necessarily result from any positive steps be allowed to overbear the equally plain long-term harm that will be done to these children if their extreme views are not resolved or at least modified. If no relationship is restored, they will suffer present and future emotional harm from their negative view of their mother and from their lack of a relationship with her. As against that, if further attempts are made now, given their fixed and extreme views, the short term disruptive effect may be such as to be greater than the longer term loss and, indeed, to negate any future possibility of a resolution. I think it sad, not to say tragic, that these children have no relationship with their mother, notwithstanding what has happened and the reasons for it. I have said and I find that it should certainly have been possible that these thoroughly unhelpful and extremely negative views could have been resolved or at least abated over the period in question. These children needed to see that their father understood what their mother had done, forgave her for it, respected her critical importance as a blood parent. I am not satisfied that any of those things have happened."

Then the judge made an important acknowledgment, he said:

"I agree with her that intervention, with the wisdom of hindsight, should have been made sooner. I agree with [the mother] with the greatest sadness that in the circumstances as they now are, it is too late for any direct intervention such as Mr Arnot advocates to have any prospect of present success, so that the probability is that they would, alas, result only in a further entrenchment, no change of view, and considerable short-term disruptive harm.

If the children had been younger I would have been of the view that the balance of harm test, if I may call it that, should have been resolved in favour of further intervention. Given the age that they have reached, the fixed nature of their views, their entrenched hostility to any proper resolution, the risk to their present equilibrium balance would be disproportionate to any benefit gained."

He accordingly made the order. His approach in doing so had been to respect recent decisions of this court which he summarised in this way:

"... roughly speaking they show a need to adopt a different approach, not to tolerate delay, be prepared to be robust and pro-active in children's best interests and to have in mind when contact has broken down, the possibility of transfer up and separate representation."

26. It has to be shown that the judge was plainly wrong. That is a high test. Their Lordships have recently reminded the Court of Appeal of the limited circumstances in which we can interfere. Here it seems to me the judge has fallen into error. True it is that these are children whose views ordinarily carry great weight, but we have to bear in mind not only their age, but their understanding. Their understanding in this case is corrupted by the malignancy of the views, with which they have been force-fed over many years of their life, until so blinded by them that they cannot see the truth either of their mother's good qualities or of the good it will do them to have some contact with her.

27. There is, it seems to me, a further error in the judge's approach. He has acknowledged the harm these children are suffering and will continue to suffer and he has acknowledged (with the benefit of hindsight, true) the failings of the court properly to have dealt with that problem. I am afraid I am critical of that failure. I have recited the history and it does not bear much repetition, but having allowed two years of relief from mother's direct pressure, that period expired in October 2000, that was the time to be more robustly interventionist, to ensure that the court delivered what the father promised to deliver, but failed to deliver, namely a change in attitude.

28. It seems to me that when considering the alternatives the judge failed, perhaps in fairness to him, because the point was not put, I think, that there was a way in which the court could perform its duty to these children, whose welfare is paramount, by requiring a limited form of psychiatric or psychological assessment. Here is evidence that this boy needed the treatment of the Child and Family clinic at an early stage in his life. We know absolutely nothing about his psychological state at the moment. We know that he is deeply depressed. He referred to his tearing his hair, or cutting his hair. He burst into tears at a stage in this investigation. None of that suggests, notwithstanding a good performance at school and a balanced view on many fronts, that he is a truly happy boy.

29. There is, it seems to me, an opportunity for the court to perform its duties and not to abdicate them by requiring that an expert view the papers and report to the court on, in his psychiatric or psychological opinion, the views of the court welfare officer, that more short term harm would be done than long-term benefit gained, and report as to whether or not he should see the children and conduct a full inquiry. At least in this way the court will act upon the best advice and be best able to retrieve a bad situation created, in part, by the court's failure to be able to deal with the position in earlier years. That is an error which justifies us in interfering with that part of the judgment.

30. I have given this judgment at length because although I detected some consent from the father when this idea was floated, I am not sure to what extent he truly does agree to that course of action. Having heard my judgment I will in fact ask him whether he agrees it because if an order of this court can be marked by consent it may have a huge important psychological impact on the children if they are told by their father that he has agreed to this course of action, rather than have it imposed upon him. However, if he does not agree to it for my part I would allow the appeal and direct that an expert to be agreed by the parties, or, in default of agreement, nominated by the judge, report on the advisability of a full inquiry after seeing the children into the prospects of future contact.

31. As to the judge's orders that the home address and school address should be withheld, the father has to his great credit (and having been extremely critical of him, let me be equally emphatic in giving him praise for this change of heart) accepted that there is no longer any reason why the home address and school address should be withheld. So to that extent the orders of 1st March need to be amended so that the words "by means of an accommodation address" are deleted from paragraph 1 of the order and the words "so as not to show the school address" is likewise removed from paragraph 2 of the order.

32. The question then remains: what is to happen to the report which I have just directed should be obtained? In my view that report should be referred to the judge. The question is, which judge? I am quite satisfied that this case has all of the qualities enumerated in

paragraph 3.3 of the president's direction on representation of children in family proceedings. It is an intractable dispute. There is irrational and implacable hostility and the children are suffering harm. So pursuant to that direction the court should consider not only whether to join the child as a party but to transfer the case to the High Court.

33. In my view, Judge Milligan having done his best to resolve the problems, and they are now sufficiently grave and sufficiently serious for the High Court to take control, I therefore would transfer this matter to the High Court, direct that the High Court Judge nominate the expert to report in default of agreement and the High Court Judge to consider whether or not to order the guardian or NYAS to represent the children. The order for indirect contact, by means of letters and cards, should remain until further order is made by the High Court Judge, varying it as it becomes appropriate in the light of the new developments.

34. Mr Arnot may need to assist the court by endeavouring to hand in a memorandum reflecting that agreement, if my Lord agrees, but on those terms I would allow the appeal.

35. Could I add the last word only: in the course of the hearing we were told that in the last few days, or so, C indicated a willingness to speak to his maternal grandfather. I welcome that step wholeheartedly. Grandparents are important. There seems to be an amicable enough relationship between paternal and maternal grandparents. That is exactly the kind of catalyst which could be usefully deployed to begin the long, long journey towards reconciliation between the children and their mother. I urge the parties not to lose sight of it.

36. When the father said that grandfather's response to C: 'I am 75. I would like to see you before I die' was inappropriate, I would like father to reflect for a moment how C may feel if, having taken this small, yet in the circumstances of the case, gigantic step towards his mother's family, the grandfather should die before C has had the chance to see him. It is what C might think about it, not what the grandfather might think about it, that seems to me to be the singularly most important factor in that exchange and the one which should be worked on. The boy has enough baggage not to carry a sense that he took that step too late.

37. So I urge the father please to rethink that aspect of his case and I urge the father and the stepmother to build on the small steps that they have taken today by indicating some preparedness to agree to the limited report, and to begin this as the beginning of a very long hard journey.

38. LORD JUSTICE SCOTT BAKER: I agree that in the absence of the father's consent this appeal should be allowed for the reasons given by my Lord. I also agree with the order that he proposes. The present lamentable state of affairs whereby these children want nothing to do with their mother, cannot, in my view, be allowed to continue without the court doing everything it can to break the deadlock.

39. I am left with the clear impression that the children's implacable hostility to their mother has been allowed to reach the present state because of the conscious or unconscious attitude of the father and his second wife, Mrs PM. Children sometimes need to be told what to do and it seems to me probable that with firmer action in the past by the father

and PM the children's implacable attitude would not have developed to the point that it has. With hindsight, as the judge accepted, it would probably have been better if the court had taken more decisive action in the past. Be that as it may, it remains to be seen whether the point of no return has now been reached. If it has, the father has, in my judgment, done a grave disservice to his children.

40. How may the present impasse be broken? I agree with my Lord that professional help is required. I note that the most recent psychiatric report was that obtained as long ago as October 1998. An appropriate expert will need to be identified by the parties, or, in default, by the court. He should report initially on consideration of the papers only and will have to consider, amongst other things, whether his seeing the children is likely to justify the risk of any damage to them in doing so. It occurs to me that the father and PM may themselves require expert assistance as to how they should help the children to change their present attitude. Whether they have the insight to appreciate this is, in my view, doubtful.

41. In my view the judge was plainly wrong in making the order that he did. He should have transferred this seemingly intractable dispute to the High Court and directed a psychiatric or psychological assessment from an expert experienced in dealing with families with children with problems of this kind. Where, as in this case, the court has the picture that a parent is seeking, without good reason, to eliminate the other parent from the child, or children's lives, the court should not stand by and take no positive action. Justice to the children and the deprived parent, in this case the mother, require the court to leave no stone unturned that might resolve the situation and prevent long-term harm to the children.

42. The order proposed by my Lord seems to me to be the best, if not the only, action to break the current deadlock. I too would therefore allow this appeal.

Order: Appeal allowed; expert to be appointed to produce report of prospects of future contact; matter to be remitted to High Court for directions; High Court Judge to nominate expert if expert not agreed by parties; Order of HHJ Milligan (01.03.2005) amended to delete paragraphs 1 and 2; order for indirect contact in para 3 remain until further order made by High Court Judge to vary it; Appellant to provide list of experts to Respondents within 14 days to be agreed within 28 days; no order for costs.