Neutral Citation Number: [2006] EWCA Civ 348
B4/2005/2198

IN THE SUPREME COURT OF JUDICATURE
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM NORTHAMPTON COUNTY COURT
(HIS HONOUR JUDGE WAINE)

Royal Courts of Justice
Strand
London, WC2
31 January 2006

B e f o r e :

LORD JUSTICE THORPE
LORD JUSTICE SEDLEY
LORD JUSTICE THOMAS

IN THE MATTER OF G (A CHILD)

(DAR Transcript of
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MR S LYON (instructed by Harding Swinburne Jackson & Co, 58 Frederick Street, SUNDERLAND, SR1 1NF) appeared on behalf of the Appellant.
MS J BRERETON (instructed by CAFCASS Legal Services, LONDON E14 9SH) appeared on behalf of the Respondent.

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1. LORD JUSTICE THORPE: The respondent had a very brief relationship with the appellant which resulted in the birth of an only child on 4 February 2000. Shortly after that they married, but the marriage endured only a matter of months and on the separation a residence order was made to the mother. The father sought a contact order in October 2000 and since that beginning, there have been more or less continuous proceedings in one court or another. There was a milestone hearing on 4 and 5 July 2002 before HHJ Mitchell in the Northampton County Court, which produced a draft of orders that were subsequently reviewed by the Court of Appeal in early 2003.

2. For the purposes of this judgment, the only issue considered by the Court of Appeal to which I need refer was HHJ Mitchell's rejection of the father's application for direct

contact, allied with a five-year prohibition under Section 91(14) of the Children Act 1989. The Court of Appeal considered the argument that the judge had prematurely closed the door on direct contact. It rejected that argument, referring in detail to the recommendation of the then CAFCASS officer, Mr Cooper, to the effect that the difficulties between the parents presented a risk to the healthy emotional development of the child and that it was time for the court to relieve the child from the pressure of arranged meetings with her father. It was time for the court to say "enough is enough".

3. HHJ Mitchell had reached that conclusion, having preferred the evidence of the mother to that of the father and found a number of incidents of harassment of the mother proved. He found that it was the conduct of the father and of the father alone that had led to the breakdown of direct contact. The judge had also found, having heard the oral evidence, that the father was not able to put the child's needs before his own wish to score points on occasions of contact and show the mother who was in charge. The Court of Appeal noted that additional allegations of domestic violence during the marriage had not been the subject of any judicial investigation or finding. The court differed from the judge only in the breadth of the Section 91(14) prohibition. It was not contended in the Court of Appeal, on the mother's behalf, that the prohibition should go beyond the making of an application for a residence order and accordingly it was agreed that in place of the prohibition there should simply be a recital that there should be no further application before January 2004.

4. In January 2004, there was a letter request from the father's solicitors for direct contact, which was rejected by the mother. In fairness to the father, it can be observed that he did not actually issue an application until August 2004, but thereafter there were continuing proceedings culminating in a hearing before HHJ Waine on 12 July 2005. The shift from HHJ Mitchell to HHJ Waine was the consequence of an application made by the father in the interim for a transfer to the High Court. That application was refused by Kirkwood J, although he directed that the case, remaining in the Northampton County Court, should be listed in front of another judge; hence, HHJ Waine.

5. It seems that there have been a number of changes of CAFCASS officer, four in total. Mr Cooper, who had prepared reports for HHJ Mitchell, was replaced by Diane Clark, who prepared the reports for the hearing before HHJ Waine. One curiosity of the case is that at the directions hearing on 23 June HHJ Waine, although providing for the completion of the evidence by 7 July, directed that there be a 30-minute hearing on 12 July at 10.00 am for further directions. So that was the anticipation of the parties when they appeared before him on 12 July, the father represented by counsel, the mother by her solicitor.

6. Apparently, they were told that other business had settled, and that the court would take advantage of the void to dispose of this outstanding case as a final hearing. The judge heard oral evidence and delivered his judgment. He declined to advance to direct contact. However, he increased the frequency of the father's indirect contact to six communications, father-child, and three communications mother-father, in the interim to July 2006, with a further advance thereafter to 12 communications a year from father to child.

7. The father, as a litigant in person, filed a Notice of Appeal on 3 October. The delay was excusable, since he had first approached this court on 10 August. Wall LJ, hearing him on 7 December, granted permission, identifying arguable points in a short judgment,

which unfortunately was not made available to the mother's solicitor until 16 January. In those circumstances, the mother being unable to attend herself because of child care obligations and not having public funding, her case has been put only by a written skeleton prepared by her solicitor, Miss Moore, on a pro bono basis and very helpfully faxed to the court this morning. In her concise and able submissions, Miss Moore endeavours to uphold the judge on all points.

8. The issue before us today is a very narrow one, as it was before HHJ Waine on 12 July. He defined the issue clearly in paragraph 5 of his judgment, when he said:

"The father has sensibly taken the view that this is not yet the time when there should be direct contact. He appreciates that, as he has not seen the child since the early part of 2002, there will have to be a measured approach to direct contact. All he is really asking for today is that the indirect contact should continue. I say in parenthesis that there is no problem about that on the mother's side. But he asking that the CAFCASS officer, Diane Clark, should have a full and proper opportunity to see the child and to discuss matters."

9. It was that last submission that was opposed by the mother and rejected by the judge, with an explanation that appears in paragraph 13 of his judgment. What he said was this:

"If we reached the position that Diane Clark says yes, there should be direct contact, and that seems to be the wish of the child, but the mother says in effect 'I will not allow it to happen' then inevitably, the court is on a collision course with the mother, which must either lead to the court backing down at some later stage, or sending the mother to prison. There really is no other way out of the situation and one hesitates long and hard before creating a situation where that may happen."

10. That rationalisation is criticised by Mr Lyon, and his criticism is supported by Miss Brereton, who appears for CAFCASS Legal, in a generous response that they have made to a request by Wall LJ for representation here. Despite the points made by Miss Moore in her skeleton, I believe that criticism to be well founded and effectively unanswerable. It reflects an altogether too old-fashioned approach to the difficulties that these cases present. The judge had found that this was not a case of implacable hostility on the mother's part. She was performing admirably as a single mother for the child. She was entirely supportive of the arrangements for indirect contact. Her explanation for continuing opposition to direct contact the judge found to be sincere, if not rational.

11. As Miss Brereton has pointed out, this court in the case of Re S [2004] 1 FLR 1279, has comparatively recently reiterated the obligation on the court to pursue all possible avenues to the resumption of direct contact. In particular, she refers to paragraph 46 of my judgment in which I said:

"Whatever the difficulties, however scant the prospects of success, the courts must not relent in pursuit of the restoration of what had been a natural relationship between father and daughter, absent compelling evidence that the welfare of the child requires respite."

12. HHJ Waine did not have that, or other recent authorities in mind, probably for the simple reason that they were not cited, for the equally simple reason that the advocates had not come to court anticipating a trial. For all those reasons, I consider that the judge was wrong on that narrow point. I would, accordingly, allow the appeal and direct Diane

Clark to meet again with the child to enable her to complete her enquiries, and to report more fully to the court. I should, perhaps, further explain that direction by saying that there were considerable difficulties in arranging a pre-hearing meeting. The judge considered that the mother's explanation for those difficulties was, to some degree, valid, for he said:

"Those factors have in my view undoubtedly led to a delay in terms of Diane Clark being able to see the child. […] I am sure that the mother has used her circumstances to put back meetings with Diane Clark and she could have taken a more constructive and more pro-active role in getting those meetings underway."

13. The consequence of that was that Diane Clark had only met the child on a single occasion and understandably wished to see more of her to get to know her better, to enable her to ascertain her wishes and feelings and to enable her, perhaps, to pave the way towards her reintroduction with her father. The anticipated consequence of the direction is that Diane Clark will have one or more meetings as she deems necessary and will then submit a further report to the Northampton County Court.

14. What happens thereafter remains to be seen and will depend upon what steps the parties take, and what directions the court then gives. However, I would like to point to the importance of ensuring that any future contested hearing between these parties does not fail for want of clear findings on important outstanding issues. Whether it be necessary on any future occasion to investigate and rule on domestic violence during the marriage is something that may have to be considered. On the one hand, there is the very clear ruling from this court in Re L and related cases given in 2001, to the effect that in any case where an allegation of domestic violence of any substance is raised, it must be the subject of a preliminary issue trial. On the other hand is the length of time that has passed since the parties co-habited.

15. Another very fundamental issue that was raised before HHJ Waine but was not ruled upon was whether the father, as he asserted at pages 77 and 78, learned from past experience and freed himself of all the failings that the HHJ Mitchell found or whether, as the mother asserted, he was incapable of such profound change. HHJ Waine, in this judgment, simply noted the issue but made no finding on it. If there is to be a contested hearing following the delivery of any supplemental report from Diane Clark, the judge giving directions will have to consider whether or not time should be allowed for oral evidence and findings on that issue.

16. LORD JUSTICE SEDLEY: I echo Thorpe LJ's appreciation of the helpful written submission made by the mother's solicitor, acting pro bono. It has ensured that the mother has not gone unheard today, but I agree for the reasons give by Thorpe LJ that this appeal should be allowed and the order which he proposes made.

17. LORD JUSTICE THOMAS: I agree with both judgments.

Order: Appeal is allowed.