

**IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM PETERBOROUGH COMBINED COURT CENTRE
(HIS HONOUR JUDGE YELTON)**

Royal Courts of Justice
Strand
London WC2A 2LL

Thursday, 26 November 2015

B e f o r e :

**LADY JUSTICE HALLETT
LORD JUSTICE McFARLANE
SIR ERNEST RYDER, SENIOR PRESIDENT OF TRIBUNALS**

IN THE MATTER OF F(CHILDREN)

*DAR Transcript of
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(Official Shorthand Writers to the Court)*

Ms H Stevens (instructed by Adams Harrison) appeared on behalf of the **Applicant**
The **Respondent** did not appear and was not represented

J U D G M E N T
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1. LORD JUSTICE McFARLANE: This is an appeal brought by the mother of two children following a determination made by His Honour Judge Yelton sitting in the Cambridge Family Court on 22 July 2015. These were private law proceedings. The couple, who are not married, had separated in January of 2015 and initially the mother left the matrimonial home and the father had the care of both of the children. The children are a girl, E, born in April 2002 and therefore now 13 years of age, and a boy, S, ten years younger, born in January 2012 and therefore now just three and three quarter years of age.
2. Following an occasion when the father failed to return the children to the mother following a period of time with him, the mother visited the matrimonial home and removed the youngest child. The eldest child, the girl, E, refused to go with her, and thus a status quo was established from the end of February whereby S lived with the mother and E lived with the father. The mother around the same time had made applications for orders under section 8 of the Children Act to the local Family Court and initially, at a hearing before His Honour Judge Yelton on 25 March 2015, that status quo was held, with orders consolidating the placement of the two children with each of their parents

separately, and orders for contact for E to see the mother and for S to see the father. The two parents are not accommodated very far from each other.

3. Fortunately so far S is concerned the contact arrangements worked, and S has throughout had a regular arrangement of seeing the father and E. E, however, has steadfastly refused to attend contact with the mother, and thus it was that that was one of the principal issues that came on for determination at the hearing conducted by judge Yelton on 26 July.
4. A Cafcass officer was appointed. She provided a report to the court in May. She recommended, amongst other matters, that sustained attempts should be made by both parents, assisted if necessary by professionals, to achieve contact between E and the mother. The Cafcass officer was critical of each of the two parents on the basis that neither of them had discharged their parental responsibility to the children in an effective way, and had allowed the standoff to develop and become established with E not seeing her mother at all. The Cafcass officer also recommended that the parents should each attend Parenting Information Programme Sessions ("PIPS") and also a Mediation and Information Session ("MIAM").
5. The mother was concerned that the father's activities towards her included on one occasion coming into her property and on other occasions observing her and, to use the word, "stalking her". She obtained at a without notice hearing a non molestation injunction against him on 3 June 2015.
6. In the buildup to the hearing before Judge Yelton, the father had made a range of allegations about the mother, the most significant of which was that she was involved in an affair between herself and the father's son; that is, effectively the mother's stepson. He, whose first name begins with the initial B, is aged 26. Judge Yelton indicated that that was a factual issue, as to whether there was an affair or not, that needed to be tried, mainly because the girl E had apparently come to believe that her mother was indeed involved in a sexual relationship with B and that that was one of the primary reasons given by E for not wishing to have any contact at all with her mother.
7. The hearing on 22 July fell into two parts. The father, as a litigant in person, appeared at court to prosecute his allegation of an affair between the mother and B. The mother appeared, obviously, to put forward a denial, which was her case. She was represented by counsel, Ms Hazel Stevens, who also appears before this court today. The mother's legal team had issued a witness summons requiring B to attend and he did indeed attend, albeit, as the transcript shows, highly reluctantly. The judge heard evidence from B and from the mother. The father declined to give any additional evidence himself.
8. The judge found that there was absolutely no basis for the allegation of an affair between the mother and B, and held that that allegation was not proved. In the very short judgment that he gave on the point, he said this:

"There is almost literally no evidence to support that proposition ... [the father] has built a sand castle out of nothing, it seems to me."

And then later:

"There is no evidence to support the proposition that anything improper has ever occurred between them, and we have a linear [binary] system on these matters. You either find that something happened or it did not, and I am satisfied that it did not and I am satisfied that the atmosphere between these two has been poisoned by [the father's] unreasonable and irrational belief that that is what has occurred."

So that was the conclusion of the factual evidence.

9. The Cafcass officer was in attendance at court. She had heard the evidence of B, which included matters that went beyond his simple denial of an affair, and she had also witnessed the father's cross examination of B in the course of the fact finding process. When, shortly before the luncheon adjournment, the Cafcass officer was called to the witness box, she expressed significant concern about what she had heard. She asked for time to consider her position, but she said the following to the judge:

"It is quite distressing to have been watching, and I am now very concerned about E."

10. An adjournment was granted over the luncheon period, and the Cafcass officer continued her evidence immediately thereafter. Although it would be easy to ask the transcriber to transcribe this, it is not straightforward, so I propose now to read into this judgment what the Cafcass officer said, effectively in her evidence in chief on this point:

"I have to say I was a little bit shocked after this morning and needed to just sort of put my concerns into how they would actually impact upon E. So what I have done is looked at my thinking and what I think, you know, the impact upon E will be. Clearly from B we heard that his dad introduced him to cocaine. His witness was a cocaine user. That is going to lead me to question: is he still involved in the drug culture and has E been exposed to any of that? The way [the father] has kind of conducted the case, the level he has gone to to find out information that he thinks he thinks, is an obsession, you know. It is stalking, in my view, and he is not open, he is not open to any other point of view. He just he will continue to build his case. If it does not fit with his theory he kind of dismisses it. So that is going to significantly impact upon E's emotional welfare if that is how he is with her. She has clearly been involved in his obsessions and he is clearly not going to be able to help her think differently about her mum. His whole manner was far more intimidating and aggressive than I had previously witnessed, and towards his own son was really quite shocking. There was no empathy. Is this E's experience of him? It leads me to question is she sort of supporting his view because she is frightened of him, or does she fear rejection from dad? I think she feels rejected by mum and if she rejects dad then who is she left with."

Then after a short interjection from the judge she continues:

"And dad told me that he had to bring her [to court] because he has got no one else. Well, that is not healthy. She is a child, and this is his battle, not E's. E is losing her relationship with her mum and with the whole maternal family. She is not getting any balanced view. He is not going to be able to help her realign her thinking, and that is going to again significantly impact upon her emotional wellbeing. In my view E is suffering significant harm and there needs to be some sort of professional input."

11. The Cafcass officer suggested three options: firstly, that E's home should be changed as a result of a court order so that she went to live with the mother and S. It was accepted by all parties, including the judge, that that was not realistic at that hearing; secondly, that the Local Authority should be involved in some way; and/or thirdly, that a guardian should be appointed for E in a continuation of these proceedings under Family Procedure Rules rule 16.4.
12. The hearing continued after the Cafcass officer's evidence. The judge did not hear any further formal evidence from any party, and much of the rest of the hearing was taken up with oral submissions by the father acting as a litigant in person. At no stage in the hearing did the judge revert at all, or in any way, to reference to the striking evidence, as I view it to be, given by the Cafcass officer. The entire focus of the judge's intervention and interaction with both the father and with the mother's counsel was to consider whether the father's application for S to move to live with the father should be considered and granted. The question of E's contact to the mother does not feature in the transcript of the remaining part of the hearing.
13. At the conclusion of that process, the judge immediately gave judgment. In the beginning of his fact finding judgment, the judge had made the following opening remark:

"This is a very difficult family case."

However, the judgment on the welfare issues relating to the two children is strikingly short. The early part of the judgment is taken up with a résumé of the facts. It is of note that the judge says the following in paragraph 2 with reference to the Cafcass officer's evidence:

" ... but that she feels that E's attitude towards her mother has been poisoned by (and I am not saying she used that word; it is my word) her father's attitude towards her mother, and having heard the father had morning I am satisfied that that is the case but I agree with him that it appears that E took against her mother from the very beginning of the end of the marriage when the mother left in January of this year, but her attitude has become more entrenched since and certainly early on there were a number of things that the mother did which were not conducive to that relationship continuing."

So far as E, the judge continues at the beginning of the next paragraph:

"So the issue it seems to me (because clearly E has to continue living with the father and I do not think at the moment I should make any contact order in relation to E other than as may be agreed between the parties, and I will come back to the question of what if any action needs to be taken in respect of her in a moment) is whether or not S should go and live with his father."

14. Pausing there, that was the announcement of the judge's decision that he was not going to make any contact order with respect to E unless it might be agreed between the parties. No analysis had been offered by the judge at all on the question of E's contact to the mother prior to the announcement of that conclusion. Secondly, with regard to the potential for the parties agreeing contact between them, it has to be observed that the judge went on to continue the non molestation injunction, which permitted no contact

between the parents other than for the purposes of contact; secondly, the judge had been exposed to the father's highly negative view of the mother throughout the course of the court hearing day on that date, and thirdly, at that time, the father was in fact subject to conditions of police bail which prevented him from having any contact at all with the mother.

15. The judgment continues with the judge dealing with issues relating to S, to which I need not refer, and then there are only two paragraphs dealing with E. They are paragraphs 7 and 8:

"7. Then the question is: what, if anything, should be done in relation to E and the fact that she feels rejected by her mother and that she could suffer significant harm (and of course I have got to bear in mind her age)? Mrs Horsnell said there were three things that could happen. One would be to appoint a guardian, but on the other hand I think that this case ought to be ended as soon as possible. I do not agree with the submission of Ms Stevens that I should not make a final order because it is undoubtedly the case that far too many people have been involved in this and there have been all sorts of allegations of one sort or another made by one against the other and the sooner that is put to sleep the better. I have put the most poisonous allegations to sleep earlier this morning.

8. Secondly, that a residence change would not work. I think that the only thing that I can suggest as being helpful is if it was referred to the Local Authority social services department and they took an interest in E to see whether or not she could reconcile herself to seeing her mother again. What is certainly right, it seems to me, is that her mother is in a better state than she was when all this litigation first began, but I am not making an order in that respect. I am inviting the Cafcass officer to do that. It seems to me the best way of doing it."

16. One matter that is of note in the judge's analysis is that he does not include any detailed account of the evidence that the Cafcass officer had given shortly after the luncheon adjournment. Insofar as it is referred to, it incorrectly records the evidence as being that E "could" suffer significant harm, whereas the officer's evidence was that E was currently suffering significant harm, and was in need of professional input. It is also of note that the judge in the course of those findings indicated that he considered that he had put "the most poisonous allegations to sleep earlier this morning".
17. Ms Stevens, as part of the appeal that she mounts on behalf of the mother today, criticises the judge for failing to require the father to give evidence during the hearing, and in any event failing to invite the father to clarify whether or not he accepted that the finding of fact made by the judge was now to be adhered to and effectively put the allegation to rest. My reading of the transcript is that insofar as the father referred to the matter, he did not indicate that he was accepting the truth of the judge's finding, and that therefore there was no longer to be any reference to his allegation of an affair between the mother and B. Further, so far as E is concerned, the judge did not consider any mechanism by which E could be told of his fact finding about the affair, and that therefore there was no information before the judge to indicate that in E's mind, as it were, that allegation was now a matter that could be "put to sleep".

18. The judge goes on to consider the future of the non molestation injunction, and he extended the injunction for a further 12 months. In the course of that part of the judgment, he said this:

"What I am entirely satisfied about, having heard the evidence this morning, is that [the father] has harassed [the mother] and has followed her and tried to get evidence about her and matters of that sort, and on those grounds it seems to me that the non molestation order should continue for a further nine months."

As I have indicated, the order in fact continues it for 12 months.

19. Following the hearing, solicitors acting for the mother wrote to the judge, inviting him to expand upon the reasons that he had given for not following the Cafcass officer's recommendation. The judge responded immediately that day in a short email as follows:

"I dealt with this in my judgment. I said the matter should be referred to the Local Authority to assist E, but no order should be made."

20. The mother issued her notice of appeal seven days later. Permission to appeal was granted on paper by Hayden J on 9 October and this afternoon the full hearing of the appeal has been listed. The father has not attended. He has not communicated in any substantive way with the Court of Appeal in terms of filing a skeleton argument or describing his position with respect to the appeal. Having looked at some correspondence that has been put in by the mother's legal team, and having seen the communications from the court office of the Court of Appeal, I am satisfied that the father knows that today is the hearing date for this appeal and that he has simply chosen not to attend. Ms Stevens says that there have been some five or six communications with him from her solicitors on the topic of the appeal, and none of them have been responded to in any terms, despite the fact that the father is in communication with the mother's lawyers on other matters.
21. So my Lady, my Lord and I have continued to hear the appeal in the father's absence and heard short submissions from Ms Stevens. Those submissions were short partly because of the clarity of her skeleton argument, and in my view the force of the points that she makes. They can be distilled, as she did in her oral submissions, to the following three submissions: firstly, that the judge failed to follow any of the established guidelines for courts approaching issues of contact where contact is effectively being denied. The judge should have kept the case alive, or, if coming to a final decision to refuse contact, which in effect Ms Stevens rightly submits was the case here, very clear reasons were required. Secondly, she submits that the judge failed to address any part of section 1 of the Children Act 1989, and in particular the welfare checklist, or give reasons for departing from the Cafcass officer's recommendations. Thirdly, she is critical of the judge's failure to require the father to give evidence in chief and be cross examined.
22. Each of those points in my view is soundly made by her. Unfortunately, in my view, the judge's approach to this important issue of whether this 13 year old girl, who prior to January 2015 had lived for all her life with her mother, where the evidence indicated that prior to January 2015 there had not been any great difficulties in their relationships, whether this girl should now continue to be in the position I have described, with no

contact with her mother, and maintaining seemingly a highly negative view of the mother and her belief as to the mother's conduct.

23. Taking points shortly if I may, first of all, having read the transcript, the issue of contact between E and the mother was simply not canvassed in any way by the judge during the substantive hearing, other than to passively receive the evidence of the Cafcass officer.
24. Secondly, the judgment fails in any way to record the gravamen of the Cafcass officer's evidence about E, to which I have already made reference. The passages that I have quoted are in my view striking and include the professional view that E was currently suffering significant harm and in need of some form of professional input. The judge simply failed to take up that evidence and evaluate it in the course of his judgment.
25. Thirdly, the Cafcass officer in her report had set out a careful and well thought out programme by which the parents could be led hopefully to some form of rapprochement, at least so far as allowing E to have contact with the mother. A recommendation for PIPS and MIAMs was also made. Again, the judge does not refer to this at all and gives no reason for departing from those recommendations.
26. Fourthly, so far as the evidence given by B is concerned, I would share the Cafcass officer's concern about that. It included a number of very worrying features; not least the allegation made by B that the father used hard drugs and had introduced B to hard drugs. More generally, and perhaps even more worryingly, B's evidence displayed a highly polarised situation within the father's family, with a highly negative view of each other being presented to the court by the father and B. B described the father as a "bully" and described him as deliberately manipulating relationships within the family in a destructive way. The judge simply does not deal with that evidence at all. Whether he was struck by it or not, as the Cafcass officer plainly was, we simply do not know.
27. Fifthly, as the judge had not asked the father about his response to the finding of fact, the judge had no basis for holding that that matter could now be put "to sleep". In my view, the transcript indicates that the opposite was the case. There was certainly no ground for understanding that the key issue which was preventing E from contemplating seeing her mother was no longer an issue in E's life.
28. Sixthly, having described, perhaps correctly, that this was "a very difficult family case", and that the judge was "satisfied" that E's attitude towards her mother had been "poisoned" by the father's attitude to the mother, and his conclusion during the course of the hearing that the father was "clearly, clearly, clearly" harassing the mother and was obsessed by her, would indicate a need for further judicial involvement, and at least analysis of those factors with respect to E's contact to the mother, and yet the judgment is wholly lacking in that respect.
29. Ms Stevens is right to say that if the judge had tried to analyse the case within the structure provided by section 1(3) of the Children Act, or by applying a human rights analysis under Article 8 of the ECHR, the judge might have brought in those factors to his consideration and we, as readers of his judgment, would understand how he had dealt with them in coming to his conclusion, but I am afraid the shortness of the judgment means that we have no idea whether the judge undertook that exercise, or, if he did, what the result was.

30. Finally, given his finding as to the state of the parents' relationship, and given the continuation of the non molestation injunction, it was in my view fanciful to consider that E's contact with the mother would in some way be "agreed" between the parties. The effect of the judge's order, in the circumstances of the adult relationships in this family, for there to be no order for contact other than contact as agreed was, as Ms Stevens submits, effectively to say that there would be "no contact".
31. I am therefore entirely persuaded, albeit with a heavy heart, that this judicial process was wholly inadequate for the important issue before the court relating to E's future contact with her mother. The appeal must succeed. The outcome must be that the case now needs rehearing before a different judge. Having made inquiries, for my part I would direct that the case be referred to be heard by the local designated family judge, His Honour Judge Peter Green, in either Peterborough or Cambridge.
32. Ms Stevens submits that the court now should make E a party to those proceedings and, to avoid further delay, appoint a guardian for her. I agree. I cannot see any reason for not taking that step. There is a need for E to have a separate voice in these proceedings, other than a voice through her father. I therefore, if my Lady and my Lord agree, would make a direction under section 16.4 today.
33. We have also considered in the course of Ms Stevens's submissions whether a section 37 direction should be made to the Local Authority. After the hearing before the judge, they were in fact contacted by the Cafcass officer, but they apparently declined to become involved. For my part, I would not therefore now take the step of making a section 37 direction. The first stage should be for E to become reengaged with her guardian and with the solicitor acting on her behalf, and for matters to be taken forward by that team. It may be in the future that the judge who now takes this case forward considers that further involvement by the Local Authority is required, but that is a matter for that judge and I do not make a section 37 direction today.
34. Time ticks on. It is now coming up to nearly 12 months since the separation of this couple and this 13 year old girl has not seen her mother for much of that time. The Cafcass officer was worried about the state of her understanding of relationships and the ability for her to become drawn into the father's world view and unable to break away from it. This case is now pressing. I would therefore direct that it is to be listed at a convenient date in December before His Honour Judge Peter Green for immediate directions.
35. That is my judgment.
36. **SIR ERNEST RYDER:** For the reasons given by my Lord, I agree that the appeal must be allowed and I also agree with the directions he proposes.
37. **LADY JUSTICE HALLETT:** With the same heavy heart, I too agree with my Lord's judgment and with the directions he proposes.