

Neutral Citation Number: [2015] EWCA Civ 689

Case No: B4/2015/0893

**IN THE COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM THE FAMILY COURT SITTING AT CAMBRIDGE**  
**His Honour Judge Yelton**  
**CB11P01879**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: Tuesday 7<sup>th</sup> July 2015

**Before :**

**LORD JUSTICE EHERTON**  
**(Chancellor of the High Court)**  
**LORD JUSTICE BEAN**  
and  
**LADY JUSTICE KING**

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**Between :**

**Re S (a child)**

(Transcript of the Handed Down Judgment of  
**WordWave International Limited**  
A Merrill Communications Company  
165 Fleet Street, London EC4A 2DY  
Tel No: 020 7404 1400, Fax No: 020 7831 8838  
Official Shorthand Writers to the Court)

**Alison Underhill** (instructed by **Haywards Solicitors**) for the **Appellant**  
**Laura McGinty** (instructed by **Rustons and Lloyd Solicitors**) for the **Respondent**

Hearing date: Tuesday 23<sup>rd</sup> June 2015

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**Judgment**

**As Approved by the Court**  
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**Lady Justice King :**

1. This is an appeal by a father, AP, against the terms of a Child Arrangements Order made by His Honour Judge Yelton at the Family Court sitting at Cambridge on the 25 February 2015. The judge's order provides for a little girl, YS (born on the 4 October 2007) to have indirect contact with her father by way of letters, cards and gifts. The father's application for direct supervised contact with YS was dismissed. It is against the judge's

refusal to allow the father to have direct contact with YS that he now appeals. The mother seeks to uphold the judge's decision.

2. The principal issue in the appeal is whether the judge adequately explained the reasons why he felt it necessary to depart from the recommendation of the CAF/CASS officer that there should be direct contact between father and child, albeit that such contact was to be supervised for the indefinite future. An ancillary issue is whether the outcome of the case was determined by the apparent adherence by the judge to some blanket principle that long term supervised contact is not in the best interests of a child.

### **Background**

3. The mother and father met when the mother was 15 and the father 21. They lived together for a brief period, but had separated by the time YS was born when the mother was 18 years of age.
4. In the early part of 2009, the father was convicted of two offences of making pornographic pictures of children. The convictions related to the downloading of photographs of young teenagers, (as opposed to pre-pubescent girls). The father was sentenced to 30 months imprisonment and placed on the Sex Offenders Register. The father does not accept that he was properly convicted; he says that a third party who had access to his computer must have been responsible for downloading the offending images. Notwithstanding his continued denial of the offences for which he was convicted, the father accepts that as a consequence of that conviction, any contact with YS must be supervised indefinitely.
5. Prior to his conviction the father had contact with YS. The judge found the contact to have been 'sporadic', although there is not found in the judgment any analysis of the extent of contact prior to its cessation, and no findings were made as to the competing accounts as to the extent and quality of contact given by the parties in their respective statements and in oral evidence. Contact, it is agreed, continued after the father was convicted and the mother took YS to visit him in prison on, it is said, at least four occasions. Following his release, contact continued at the homes of both the father and the mother. The mother stopped contact due to what the mother said was the father's unreliability (as opposed to his offending).
6. The father made an application for contact to be restored on the 22 December 2011. The case did not progress smoothly, not least because in 2012 the father was convicted and imprisoned for a short period of time for an offence of burglary. Given the father's earlier conviction for downloading child pornography, an independent risk assessment was ordered by the court and prepared by Charles Fortt, a director of Family Risk Assessment Limited. The report was before the judge.
7. Having assessed the father, Mr Fortt concluded:
  - i) The father is strongly attracted to adolescent girls but there is no evidence of paedophilia. There is not significant evidence of risk of contact offending against a pre-pubescent child. There could be a significant risk of sexual abuse to older female minors.
  - ii) The risk of physical and sexual harm to YS is small.

Mr Fortt went onto say:

"There is no parenting circumstance where risk to a child from a parent is said to be nonexistent, so risk could not be lower than this if the father had any kind of direct relationship with her."

8. The CAFCASS officer, Mrs Oliver, prepared her report against the backdrop of this risk assessment. Mrs Oliver expressed her concern that whilst the father might pose a minimal sexual risk to YS at the moment, the risk could change once she grows older and reaches adolescence.
9. During the course of her enquiries Mrs Oliver saw YS, who she described as being "excited and happy" at the prospect of seeing her father. Mrs Oliver concluded that there should be direct contact with the father providing it could be safely supervised either by an agreed family member or another trusted adult.
10. Mrs Oliver filed a further report on the 25 November 2014. This addendum was ordered specifically to look at the nature and duration of any meetings between YS and her father and the identity of a supervisor. For this purpose contact had been made with Pyramids Contact Centre, which is a National Association of Child Contact Centre (NACCC), accredited contact service. Pyramids can offer long term one to one supervision. They would initially help YS to prepare for the resumption of contact and subsequently facilitate supervised contact both within the centre itself and in due course, if appropriate, within the community. Pyramids is a private facility for which the father would have to, and is willing, to pay. Mrs Oliver concluded that, in her judgement, Pyramids could provide professional supervision which would safeguard YS; its facilities would match the changing needs of YS and could continue on an indefinite basis. Her recommendation in her addendum was therefore that a child arrangements order should be made, allowing for YS to spend time with her father on a supervised basis.
11. For the purposes of the hearing, the father accepted the recommendation of Mrs Oliver and did not seek any form of order which progressed to unsupervised contact within any specified time period.
12. Unfortunately, Mrs Oliver was on long term sick leave and unable to attend court. The replacement CAFCASS officer was not familiar with the case and was unable to assist the judge. The mother's application for an adjournment to allow for the new CAFCASS officer to prepare a report was refused on the grounds of delay. The judge read Mrs Oliver's reports.

### **The Judgment**

13. The judge properly recorded that Mrs Oliver was of the view that there should be contact and he accepted the proposition that a parent not living with a child should, in general terms, see the child unless it is in the child's interests that contact does not take place. He noted that the mother has said that since she was seen by Mrs Oliver YS has said that she does not wish to see her father. According to Mr Fortt's risk assessment, YS said this in the context of an unpleasant argument about an X-box. The judge does not seem to have differentiated between this view, expressed when she was cross with her father, and YS's earlier view expressed privately to a CAFCASS officer, before concluding that no reliance can be placed on YS's views. The judge rightly observed that it is important that children are not burdened with being the decision maker in contact disputes such as this.

14. On reading the totality of the judgment, it seems that the application for direct contact was refused largely, if not entirely, because in order for such face to face contact to take place, supervision would be necessary in the long term. The judge having said that supervision as a way to reintroducing contact is very different from finding that any order will always have to be supervised, went on to say:

"It seems to me that it is a strong argument against contact if contact has to be supervised on a long term basis as opposed to a short introductory basis."

15. The judge went on to say at para[18]:

... in general terms children ought to see their parents. On the other hand, in this case the factors which mean that it has to be supervised contact seem to me to militate against contact and I do not think Mrs Oliver really addressed that on a long term basis. I would be perfectly happy with an order that said that there should be supervised contact for six months followed by contact in the community. But that is not the applicant's case and that is not what CAFCASS said should happen in any event. What I've heard seems to me that it would not be a desirable course, bearing in mind that even if the applicant has turned a corner as he says in his witness statement, his previous history is not very comforting, in fact on the contrary.

16. The judge seemed therefore to be saying that because, on the facts of the case contact would have to be supervised in the long term rather than for an introductory period, that in itself means there should be no direct contact. The judge concluded that "there should not be direct contact at the present time" but that "It may will (sic) be possible when YS is older". The judge gave three reasons for refusing to order direct contact, a decision reached notwithstanding the recommendation of Mrs Oliver at para 14:

"i) ...for the reasons already set out I do not think that supervised contact on a long term basis is appropriate.

ii) Secondly as I think it is likely to disturb the child.

iii) Thirdly it is likely to disturb the mother and the mother has to look after the child and it is always important in these cases to consider the effects on the parent looking after the child on a full time basis.

I do see arguments on the other side, I have thought about them carefully. But bearing in mind as I do all the matters set out in section 1(3) of the Children Act, I take the view that the application at this stage should be dismissed."

17. Following the handing down of the judgment, those representing the father wrote to the judge on the 16 March 2015 seeking clarification; in particular, it was suggested that the judge had not given adequate reasons for his decision to reject the application for direct contact contrary to the recommendations of the CAFCASS officer. The letter further asks the judge to elaborate his findings by reference to the welfare checklist (s1(3) Children Act 1989), and as to why, given the Article 8 rights of the father, the order made was proportionate in all the circumstances.

18. The judge replied by way of memo indicating that he did not feel that his judgment needed elaboration, having set out his three reasons for not ordering contact in his judgment.

## **The Appeal**

19. Argument before the court has focused on the three reasons given by the judge for his decision and set out above.

### **(i) Long term supervision**

20. The judge referred in (i) to "reasons already set out" as to why long term contact with supervision is not in YS's interests. Within the judgment such reasons can only be found in the judge's reference to "a strong argument against contact if contact has to be supervised on a long term basis as opposed to a short introductory basis" (paragraph 14 above), which reads as a general objection on the judge's part to the long term supervision of contact and makes no reference to any features of this case which would render such a programme of contact to be inimitable to YS's welfare. Miss Underhill on behalf of the Appellant submits that, in the absence of such reasons and in circumstances where there was no evidence that long term supervision would be harmful or contrary to YS's interests, the court is unable to draw any conclusion other than that the judge rejected the recommendation of the CAFCASS officer as a matter of principle, namely the very fact that contact would need to be supervised long term means the application for direct contact must fail.
21. Ms McGinty on behalf of the Respondent mother, whilst accepting that the judgment did not set out clear reasons for rejecting the recommendation of the CAFCASS officer and having accepted that there is no general principle that direct contact is not in the best interests of a child where long term supervision will be necessary, submitted that the judge's reasons can be inferred by reference to the background facts of the case.
22. As was accepted by Ms McGinty, there is no general proposition that there should be no direct contact if the welfare of the child in question requires that contact to be supervised over a long period of time. It is undoubtedly the case that, all other things being equal, unsupervised contact will be the goal for any child, allowing as it does for a more natural relationship between a child and an absent parent than that which is subject to supervision, no matter how benevolent or unobtrusive such supervision may be.
23. There are and will be cases where long term supervision of contact is in the interests of a child – examples which immediately spring to mind are children placed in long term foster care by the courts but who continue to have supervised contact with their parents; or the increasingly common situation, where children are placed with family members following care proceedings and the natural parents continue to have contact supervised either by the local authority or family members. Both these examples relate to public law proceedings but have no less application to private law cases, particularly where there are child protection issues but there is no need of local authority involvement because the caring parent, as here, has proved that they are capable of protecting their child. The reality is that, with ever decreasing resources and the closure of contact centres, long term supervision will rarely be a realistic option in private law cases such as this; that does not mean however that in an appropriate case such a route should not be deployed as a means of allowing a child to continue to have a relationship with her absent parent.
24. The courts have said time and again in any number of ways that contact is almost always in the interests of a child. Lady Justice Macur in *Re M (Children)* [2013] EWCA Civ 1147 said :

"A child's continuing relationship with a non residential parent is highly desirable and contact should not be denied unless the child's welfare demands it. Domestic violence is not, in itself, a bar to direct contact, but must be assessed in the circumstances as a whole.."

25. More recently Lord Justice Christopher Clarke in *Re R ( A Child) [2014] EWCA Civ 1664* said:

"[16].. the court has in a series of cases stressed the importance of contact between parent and child as a fundamental element of family life, which is almost always in the interests of the child, and which is to be terminated only in exceptional circumstances, where there are cogent reasons for doing so and where there is no alternative"

26. If, as I find, the fact that there will have to be long term supervision of contact is not in itself a reason to refuse face to face contact, the court must identify and set out, by reference to the evidence, its reasons for refusing contact. In addition, where, as here, the judge has the benefit of a specialist risk assessment and two reports from an experienced CAFCASS officer, it is important that the judge's reasons for rejecting their recommendation are clearly articulated in the judgment. The judge did not give any reasons for rejecting the recommendation of Mrs Oliver other than to comment that "I do not think that Mrs Oliver really addressed that" ( ie supervision) "on a long term basis".
27. I turn then to consider whether either of the other two reasons given by the judge provides evidence based cogent reasons for the judge to have rejected the recommendation of the CAFCASS officer based as it was on the specialist risk assessment.

**(ii) Disturbance to the child or the mother as a consequence of contact being re-introduced.**

28. There was no direct evidence that either YS or the mother would be disturbed by the re-introduction of contact or of the nature of such supposed disturbance. Ms McGinty submitted that the issue of disturbance arose out of the fact that the mother was concerned that the father might be unreliable and that the judge had found contact to have been sporadic; these features could she submitted, properly have led the judge to conclude that direct contact would disturb both mother and child and was not therefore in YS's interests.
29. In my judgment, before a court concludes that a child may not see its absent parent as a consequence of that child or its caring parent being 'disturbed' there must be direct evidence before the court as to the nature and anticipated extent of such disturbance. Such evidence must be sufficient for the judge to make findings and, thereafter, for him or her to set out why that evidence leads him to conclude there should be no direct contact. If this is not done there is a danger of mere inconvenience determining child arrangements; in this context I note that Mrs Oliver, having met the mother, wondered whether contact had in fact been stopped "just because it had become too inconvenient and cumbersome for the mother and her family, who felt that the effort required was all on their part".
30. When parents live apart there are bound to be choppy waters; if there has been no contact for a significant period of time, how can its reintroduction be other than unsettling for both child and carer? But that is not in itself a cogent reason for refusing contact, nor is

any sense of 'inconvenience' or of 'interference' to a parent's newly formed family life which is a common side effect of facilitating regular direct contact. Only in the most extreme circumstances will 'disturbance' to either child or parent merit a child arrangement order which does not provide for a child to see its absent parent.

31. In the present case the mother said at trial that she wished to refuse contact because of the 'risk' and her fear of the father being unreliable in relation to contact arrangements. All the evidence was that the risk to YS was minimal and would be managed by supervision, even aside from the fact that the mother had herself facilitated contact for several years after she knew that the father had downloaded child pornography. Fear of unreliability in itself cannot be a reason to refuse contact without findings by the judge, based on evidence, that there is a real risk of unreliability on the part of the father such that it would destabilise and adversely affect YS and/or the mother to the extent that the welfare of YS required there to be no contact, rather than some contact; even if the contact was somewhat haphazard and frustrating for all concerned. In the present case there was neither evidence nor findings to support such a conclusion.
32. The judge said that he was "bearing in mind" the welfare checklist; often in cases such as this the analysis found elsewhere in a judgment means that no further reference to the checklist is required. Here, where there was no such analysis, the judge's failure to elaborate by reference to any of the specific factors left the reader with the bald finding that mother and child would be "disturbed" by the reintroduction of contact with no evidential basis or judicial analysis to anchor the finding of 'disturbance'; a finding which was to lead in part to the making of the draconian order that YS would not be able to see her father.

### **Conclusion**

33. It follows that I accept the argument of Miss Underhill that the judge failed adequately to give reasons either for his rejection of the recommendation of Mrs Oliver or generally for refusing the father's application for direct contact. In so far as the reason for dismissing the father's application for contact to be reinstated was, as it would appear, to be a principled objection to long term supervised contact, such an approach is in my judgment, wrong in law.
34. Accordingly I would allow the appeal and remit the matter for rehearing. The matter is to be listed in the first instance for urgent directions before the Designated Family Judge for Cambridge.

### **Lord Justice Bean :**

35. I agree.

### **Lord Justice Etherton :**

36. I also agree.