Case No: B4/2009/1315

Neutral Citation Number: [2009] EWCA Civ 994
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE WILLESDEN COUNTY COURT
(HIS HONOUR JUDGE COPLEY)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Wednesday, 15th July 2009

Before:

LORD JUSTICE THORPE
and
LORD JUSTICE MAURICE KAY

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IN THE MATTER OF C (Children)

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Dr M T Deignan (instructed by Hornby & Levy Solicitors) appeared on behalf of the **Appellant**.

Ms A Spencer (instructed by Debenhams Ottaway Solicitors) appeared on behalf of the **Respondent**.

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Judgment

Lord Justice Thorpe:

1. There is in this case quite a complicated history. The application and appeal all concern issues surrounding a father's contact to the only relevant child, Raphael Miguel.

2. The parents, father and mother, met in 2002 and commenced co-habitation in 2004. It seems that their relationship was stormy and marred by violence perpetuated by father on mother. In May 2005 the mother reported to the police that the father had threatened to kill her. The father was bound over for a period of twelve months. Before its expiration he was arrested for assault and the parties separated. In May 2006 the mother obtained non-molestation orders for herself, for Raphael and for an older born child of hers. In June 2006 the father was convicted of common assault. In July he was sentenced to a community punishment order plus compensation and costs. He unsuccessfully appealed that conviction. In November 2006 he pleaded guilty to an offence under the Protection from Harassment Act and was fined for the offence and for breaching his bind-over.

3. So that can be summarised as a bad history of domestic violence.

4. In April 2007 the father applied for contact to Raphael. The case came in front of HHJ Copley in May, and over the last two years the case has been consistently in front of him, except for one occasion when it was before a recorder. It is unnecessary to record any of the several litigation events prior to 8 December 2008 when HHJ Copley refused the mother's application for a fact-finding hearing. His essential reasoning was that such a hearing would be unnecessary and unhelpful to the future conduct of the case. He emphasised that the historic events had been the subject of conviction and punishment in the criminal justice system, that there had been no allegations of further violence and that contact was already underway and moving in a broadly satisfactory direction.

5. An application for permission to appeal that order was lodged in this court and was dealt with by Wilson LJ on paper. In refusing the application on 9 February, Wilson LJ said that the application was misconceived. He pointed out that the President's practice direction of 9 May 2008 required a judge to consider the extent to which domestic violence would be relevant before directing a fact-finding hearing. He said that it would add nothing of relevance for the court to determine ten allegations of earlier domestic violence between 2004 and February 2006. He stressed that in the period of almost three years since April 2006 the mother made no substantial allegation of violence and harassment. He further observed that supported contact was already taking place and the question that remained was the extent to which third party involvement could be relaxed. He concluded:

   > "The suggested fact-finding hearing would be unhelpful and indeed destructive and, had the judge made a direction for it, I would have granted [father] permission to appeal against it."

6. That robust and conclusive rejection was not accepted by the mother's litigation team, who exercised their right to an oral hearing. That took place on 1 April before a judge of the Division who was transiently serving as a judge of this court. It was Holman J, and he upheld Wall LJ's provisional refusal. However, he had before him a document that had not been before Wilson LJ, namely a CAFCASS report in which the CAFCASS officer had said at paragraph 26:

> "I cannot see how contact can move on when there has been no risk assessment carried out in respect of the safety of contact both for Raphael and for his mother."

7. Holman J, during the course of what was a comparatively lengthy judgment, suggested that the report of the CAFCASS officer fundamentally altered the territory of debate and that a renewed application to HHJ Copley might well succeed. With that encouragement counsel attended on 27 April and laid before the judge a consent order which included a provision for a fact-finding hearing. The judge was at the end of what had been a full day and without much opportunity for inspection or consideration he simply accepted counsel's draft. However, on reflection he noted that he had inadvertently ordered the fact-finding hearing that on 8 December he had refused. Accordingly he recalled the order before it had been perfected and called counsel in for a fuller hearing. That took place on 3 June and resulted in a refusal of any fact-finding hearing, an adjournment over to 29 June with a direction that father provide an up-to-date report from the Hertfordshire Anger Management Association and a request to CAFCASS to file an addendum report. The judge's reasons for so ordering have been transcribed and are before us. Before that adjourned hearing could take place another application was made to this court for permission to appeal, and Wall LJ on 2 July directed an oral hearing on notice with appeal to follow. In the light of the filing of the appellant's notice very little has happened in the Willesden County Court. The CAFCASS officer did not feel able to serve an addendum and on 29 June HHJ Copley adjourned to await the outcome of this application.

8. This afternoon we have had the advantage of an extremely skilful oral presentation from Ms Deignan, who has been in the case throughout. She, together with her instructing solicitors, has prepared an impeccable appeal bundle incorporating all the necessary material. The bundle is extensive and runs to many dividers, AA through to EE and then from A through to E, and Ms Deignan knows her way around every corner of the bundle so we have been greatly assisted by her submissions which have by their clarity and accuracy considerably reduced the length of this hearing.

9. She says that the judge fell into fundamental error on 8 December. She makes that bold submission despite the caustic reasoning of Wilson LJ. She says that the judge has confused the principle of whether there should be contact with the separate question of how contact should be progressed. She says that the judge has erred in his emphasis on the passage of time and the absence of

fresh allegations. She says that the judge has placed undue reliance on the father's undertaking as an answer to the mother's anxieties at the possibility of future domestic violence and the risks of it. She says that as a matter of principle it was simply not open to the judge to take the comparatively dismissive line that he did on 3 June. By then he had before him the CAFCASS officer's very clear conclusion that there could be no progress without a fact-finding hearing.

10. Ms Deignan's submissions have been answered by Ms Spencer in a concise skeleton argument. She says that the hearing on 27 April preceded under the impression that a reference to the domestic violence programme could only be made after a fact-finding hearing. This error was held by counsel, by the judge and by the CAFCASS officer. Subsequently, says Ms Spencer, it has been clarified that the programme does not require a fact-finding hearing in the case.

11. Ms Deignan in reply challenges that and she points to an ambiguous email from the CAFCASS officer of 26 June in which she said:

> "The only thing I could add is that the [programme] wouldn't necessarily need further facts to be found in order to complete an assessment given [father's] criminal convictions though they would have been helpful particularly given [father's] position in respect of them when I saw him."

Although that may be somewhat ambiguous it seems to me on balance to confirm Ms Spencer's submission.

12. What the judge did not have before him is a document which I think is highly pertinent. It is a definition of the Domestic Violence Intervention Programme that is run in partnership between CAFCASS and the Quorum contact service. The programme is defined in this way:

> "DVIP's perpetrator programme takes a total of 32 sessions to complete. It is delivered mainly in small groups meeting weekly for three hours. Most sessions begin at 7pm in the evening.
>
> There is a fortnightly, ongoing follow up group available for all those who have completed the programme"

13. I have no hesitation at all in rejecting Ms Deignan's skilful submissions. A number of things need to be made plain. First, the obligation on the judges in the County Court to conduct fact-finding hearings where there have been allegations of domestic violence arise from the judgments of this court in the conjoined appeals of Re L, V, M and H (Contact: Domestic Violence) [2000] 2 FLR 334. At that date, now nine years ago, this court considered a situation in which it was widely said by researchers that district judges up and down the

country were ignoring the investigation of past violence on the grounds that it was all history and that the focus should be on the future progress of contact. Accordingly in our judgments we said that ordinarily speaking the history was of considerable importance and should be established before the exercise of judicial discretion as to the future.

14. Those judgments had a wide impact and perhaps the members of this court gave insufficient attention to the burden that they were placing on judges and district judges in the County Court up and down the jurisdiction. Accordingly the President subsequently issued practice guidance, I think in 2008, and that is the guide to which Wilson LJ referred in his reasons for rejecting the first permission application.

15. Subsequently, in an observation in the course of her speech in the case of B, Baroness Hale of Richmond stated that the court must "consider the nature of any allegation or admission of domestic violence and the extent to which any domestic violence which is admitted, or which may be proved, would be relevant in deciding whether to make an order about residence or contact and, if so, in what terms". So absolute a pronouncement risked to throw yet greater burden on an already over stretched trial system, and accordingly the President in 2009 issued an amendment to the practice direction making plain that it was a matter of discretion for the judge and the judge did not have to order a fact-finding preliminary hearing provided he gave reasons for declining so to do.

16. It is well known that judges in the County court, both circuit and district judges, feel that any extension of their obligation in this area jeopardises the service that the court can give in other areas, and during the debate of the specialist judiciary at this year's President's conference it was emphasised that the obligation to order a fact-finding preliminary hearing remains always discretionary, provided that the judge refusing sufficiently explains him or herself.

17. Now this seems to me a paradigm case in which the judge has done precisely what he ought to do and precisely what he is entitled to do, namely to exercise a broad commonsense discretion and in refusing the application to make proper explanation of his reasons. The judge quite rightly emphasised that this was a case in which prior domestic violence had been established in the criminal justice system and had been the subject of conviction and punishment. He further emphasised that there had been a bind-over in the criminal justice system and that in the family justice system there was a current undertaking by the father to refrain from any violence or harassment. This was a case in which there had been no allegation of fresh domestic violence of any significance since April 2006. This was a case in which there had never been any suggestion of violence to the child in question. This was a case in which contact had been established at a contact centre and was progressing. This was a case in which the father had successfully completed an anger management course. Given all those circumstances, the judge had to weigh them against the plea for investigation of ten acts that predated the criminal convictions, and with due regard to all the resource consequences.

18. It is well known that the family justice system, both in the public law and in the private law dimensions, is stretched to breaking point. Judges have an obligation to safeguard and to husband the judicial resources of the court. It is also well known that the cost to the taxpayer of funding in the family justice field is worryingly high and that the government is determined to contain it. The direction of an unnecessary hearing is wasteful both of judicial resources and of public funding in publicly-funded cases.

19. If that were not enough, I would add that highly relevant to the exercise of the judicial discretion was the detail of what a reference to domestic violence intervention project involves. It could be said that this is not relevant to the exercise of discretion once it is conceded that referral is possible on the foundation of the criminal convictions alone, but a programme of this duration and intensity is another significant cost to the public purse. This father has successfully completed an anger management course, and I simply cannot follow and certainly not accept the assertion of the CAFCASS officer to the effect that the issues tackled in an anger management programme have no relevance to the issues that would be tackled in the DVIP programme. The modules in the DVIP programme include stopping physical violence, emotional abuse, effects of domestic violence on partners and children, responsible parenting, harassment and stalking, sexual abuse, jealousy and tactics of isolation. They may indeed be said to be separate ingredients but obviously the control of passion is part and parcel of each programme.

20. All that said, I am completely clear in my mind that the judgment of 3 June is a classic example of the exercise of a case management discretion. I support the judge's view that the management of current cases is for the judge and not for the CAFCASS officer. I think that the judge was not only well within the ambit of the generous discretion that he exercised, for what it is worth, in my independent judgment he was absolutely right to refuse to set up the fact-finding hearing that was sought.

21. Given that some of the observations that I have made in this judgment are of some general application, and only for that reason, I would grant permission but refuse the consequent appeal.

Lord Justice Maurice Kay:

22. Far from being vitiated by error the judgment of HHJ Copley on 3 June 2009 is in my judgment relevant with robust, pragmatic common sense appropriate to the management of this particular case and its circumstances. For the reasons given by my Lord in his judgment, with which I wholly agree, I too would dismiss the permitted appeal.

Order: Application granted; appeal dismissed