B4/2005/2308

Neutral Citation Number: [2006] EWCA Civ 144
IN THE SUPREME COURT OF JUDICATURE
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM WATFORD COUNTY COURT
(HER HONOUR JUDGE HUGHES Q.C.)

Royal Courts of Justice
Strand
London, WC2

Friday, 27 January 2006

B E F O R E:

LORD JUSTICE LAWS

LORD JUSTICE WILSON

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IN THE MATTER OF C (A CHILD)

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(DAR Transcript of
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MR G CAMERON (instructed by Messrs Collins, 20 Station Road, WATFORD, HERTFORDSHIRE, WD17 1AR) appeared on behalf of the Appellant father

MR P MCCORMACK (instructed by Messrs Jane Kaim-Caudle & Co, 9 Devereux Drive, WATFORD, HERTFORDSHIRE, WD17 3DD) appeared on behalf of the Respondent mother.

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J U D G M E N T **LORD JUSTICE WILSON:**

1. The court is asked to consider whether a judge who, at an early stage, came to the firm view that a father lacked sufficient parenting capacity to have contact with his young child on an unsupervised basis gave him a fair hearing when he sought to contend otherwise.

2. The father applies for permission to appeal against the order made by HHJ Hughes QC in the Watford County Court on 3 October 2005 upon his application for an order for contact with his daughter, L, who was born on 15 September 2003 and was therefore just two

years old. This court has directed that, were permission to be granted, the hearing of the substantive appeal should follow immediately.

3. As they do today, Mr Cameron appeared before the judge for the father and Mr McCormack appeared for the mother, with whom L was, and is, living. The judge's order was that the father should have supervised contact of not less than two hours each week and that the supervisor should have power to increase that amount of contact and to decide on its location following consultation with both parents. The judge directed that she should conduct a review of her order about six months later, namely on 11 April 2006, at a hearing which in court she estimated at two hours but which, for some reason, has been reduced in the written order to an estimated one hour.

4. The hearing on 3 October 2005 had been fixed to be the substantive hearing of the father's application. We have a verbatim transcript of what was said at the hearing. By reference to the transcript, Mr Cameron complains that the father, who had expected to give oral evidence, was so firmly discouraged from doing so by the judge that he had, in effect, no option but ultimately to agree through Mr Cameron not to do so; and that the judge's view of the need for continued supervision of contact was expressed so quickly and so conclusively that he, Mr Cameron, was not given a fair opportunity to make submissions to the contrary.

5. The father, who has until recently been studying music technology at a college of further education, is aged 44. The mother, who is entirely occupied with caring for L, is aged 26. They met early in 2002 when both were residents in a half-way house for those afflicted by mental ill-health. A consultant psychiatrist reports that the mother unfortunately suffers from schizophrenia, triggered or at least exacerbated by past misuse of drugs. A consultant clinical psychologist reports that the father has a narcissistic personality disorder, on top of which he has a depressive illness, apparently connected to his having been the victim in his business life of a substantial fraud and having in consequence suffered a financial downfall.

6. In February 2003 the parties began to cohabit and in September 2003 L was born. In April 2004 the mother left the father and, taking L with her, went to stay with her parents. She now lives with L in independent accommodation. In the light of the vulnerabilities of both parents, officers of the social services department of Hertfordshire County Council ("the local authority") sought to support the family from the early stages of the mother's pregnancy onwards and, following the separation, they have continued to support each of them in various ways.

7. After the separation the mother was reluctant for the father to have contact with L. Within two months of the separation the father caused solicitors to write to her, inviting her to make proposals for contact. For several months there was no reply. Then, notwithstanding a letter from solicitors instructed by her to the effect that she opposed contact, the mother began, early in December 2004, to allow him to see her. Until 22 December 2004 he saw L

regularly at the mother's home. On 22 December, however, there was a verbal altercation between the parents because the father had learnt from the mother that she had mislaid a life storybook relating to L which they had begun to compile for her during the pregnancy and which he regarded as precious. The mother called the police and alleged that the father had threatened to kill her. The allegation led to a criminal charge against the father that he had threatened unlawful violence towards her. Ultimately, in April 2005, having heard the evidence of the mother and of the father in relation to the incident, the magistrates in Watford, applying of course the criminal standard of proof, found the father not guilty of the offence.

8. Meanwhile, on 19 January 2005, the father issued the application for an order for contact with L, which came before the judge for substantive despatch on 3 October. He also included an application for an order for parental responsibility for her. In March 2005 both parents filed statements relating to the contact issue. It is important to note what the mother did and did not say. She alleged that the father had been violent towards her on numerous occasions during their relationship and had displayed very controlling behaviour towards her, probably attributable to the difference in their age. She made allegations of sexually inappropriate behaviour on his part towards L as follows:

> "On another occasion I recall the [father] putting his finger in [L's] vagina when he was bathing her. I confronted him about this and he stated that he was cleaning faeces that were in there. I advised him at the time that this was not appropriate and there were other ways to clean [L's] bottom … Further, I had concerns in the manner in which the [father] behaved when he was dressing her."

She concluded her statement in the following words:

> "I am extremely concerned for my safety when I am in the presence of the [father]. I believe that his motives for seeing [L] are not genuine and I am therefore concerned that, if he was to have any form of contact, this would be on a strictly supervised basis. I do not wish to have any contact with the [father] due to controlling, abusive and violent behaviour towards me."

The mother made no allegation in her statement that the father was incompetent on a practical level to cope with the demands of L during contact periods.

9. In his long written statement, directed not to be sequential to that of the mother, the father sought to chart the history of their relationship; argued that the mother's conduct was volatile and unstable; alleged that they had both been delighted about the birth of L; contended that he had played a big part in caring for her prior to the separation; and asserted that the mother had been characteristically inconsistent as to whether to allow him to have

contact with L following the separation.

10. In the light of their existing involvement in the problems of the family the local authority, rather than CAFCASS, were directed to prepare a report on the issue of contact. On 16 April a senior social worker in the local authority signed a report. In it she recorded that in interview the father wholly denied the allegations of violence towards the mother and of sexually inappropriate behaviour towards L and that he alleged that the mother's conduct was unpredictable and that she at times demonstrated a paranoid propensity to make untrue or exaggerated allegations against him. Supported by his key worker, who described him as a doting father, he sought to stress to the social worker the importance in his life of L. In her interview with the social worker, the mother repeated her allegations of domestic violence against the father and stated that his practice of washing L's genital area with his fingers did not seem normal.

11. By reference to local authority records, the social worker reported that, prior to the separation, both parents had participated in parenting L. She recorded that both parents had indicated that the father had been involved in L's care from birth; and that initially the parents had had a good relationship but that it had then become volatile. She reported that in her view the mother was able to meet L's needs satisfactorily and that the father presented as an active father with a genuine love for L. She recorded the mother as saying that she would not agree to contact between L and the father but that, were the court to order it, it would have to be supervised. In her conclusions the social worker said:

> "[The mother] has made allegations of inappropriate sexual behaviour towards [L] from [the father] which he strenuously denies. *In view of this* I would not at this stage wish to suggest that [L] should have unsupervised contact with her father. I would like to recommend … supervised contact [at a local authority family centre] for two hours every fortnight … The court should consider reviewing this at a later stage … Parental rights should be granted to [the father] as this will enable him to take an active role and be fully informed of issues that may relate to [L's] development." [Italics supplied.]

It will be noted that there was no reference in the report, whether by way of allegation on the part of the mother or, still less, by way of acknowledged concern on the part of the social worker, that the father was incapable of coping with L on a practical level during any periods of unsupervised contact. On the contrary, the implication in the report was that he was entirely competent in that respect.

12. On 10 May 2005, at a directions hearing, a district judge followed the recommendations of the social worker. He awarded parental responsibility of L to the father and directed that he should have interim supervised contact with her at the family centre for two hours every

fortnight. He directed that the father's application for an order for contact be heard on a substantive basis by a circuit judge on 3 and 4 October, with an estimate of one and a half days, and directed that a pre-trial review be conducted on 22 September.

13. On 8 September 2005, pursuant to a further direction made by the district judge, the local authority filed an addendum report. It was a report upon the success of the five occasions of fortnightly supervised contact between L and the father which had taken place following the order dated 10 May. It is important to note that it was a report not by the qualified social worker who had made the initial report but by Mrs Prowse, a family support worker, who had supervised the contact at the centre and who, while holding a qualification in nursery nursing, had no social work qualification. She reported that the contact sessions had been a positive experience and that L had appeared to form a relationship with the father; that there was a happy atmosphere at the sessions; that the father brought nutritious lunches for L and interacted well with her in the course of their play; that he had shown a good awareness of safety issues; and that L interacted verbally with him and at times took him by the hand but did not seem to ask him for a hug or a kiss. Mrs Prowse observed that L had not presented the father with any challenging behaviour so that she had been unable to assess his ability to react appropriately to it. In her conclusion she wrote:

> "I feel that both [the father] and [L] have developed a positive relationship through attending these sessions of contact.
> However it is clear that [the father] has not yet experienced a wide range of behaviour and circumstances involving [L], and I have been unable to assess his ability to cope as a result. For example, children of this age often protest as they are being strapped into a push-chair or car-seat. I have not been able to observe how [the father] would manage such a situation and I feel it could be stressful for him.
> In addition, [L] has not learnt to separate knowingly and happily from [the mother]. Whilst [L] appears to be a very settled and placid little girl at the moment, it would be unusual if she did not get upset and distressed at some point in the future and if this happens she might then be inconsolable if she cannot find her mother and is not used to being comforted by someone else. Again I feel this situation could be stressful for him and he could lose confidence if he does not have a support strategy to support him if necessary."

Mrs Prowse went on therefore to recommend that supervised contact should continue, that it should be expanded so as to take place at times outside the centre and that there should be a review after three months. I should add that Mrs Prowse used the word "supported" rather than "supervised" but the difference of degree inherent in the two words is irrelevant to the proposed appeal.

14. The question, therefore, as to whether the father could cope on a practical level with the demands of L during unsupervised contact periods arose for the first time only in Mrs Prowse's report, filed less than a month prior to the substantive hearing. The question had not been prompted by anything said by the mother.

15. On 22 September 2005 HHJ Hughes QC duly conducted the pre-trial review. At that hearing she indicated that Mrs Prowse should attend the substantive hearing to answer questions but that the social worker who had written the report in April 2005 should not do so. The judge told the parties, by counsel, that she expected them to concentrate on the future rather than the past; and she reduced the estimate of the substantive hearing to one day, beginning at 10.00 am, and thus directed that the listing for the second day, 4 October, be vacated.

16. Counsel tell us that, when they arrived at court on 3 October in time for the hearing at 10.00 am, they discovered that a four-day care case had been listed before the judge at 10.30 am that day.

17. I will have later to consider whether the issues which the mother had raised in her statement, namely those relating both to alleged violence on the father's part towards her of such a nature as to be relevant to contact issues and to allegedly inappropriate sexual behaviour on his part towards L, were satisfactorily dealt with at the hearing in one way or another. Nevertheless, in the light no doubt of the judge's indication at the pre-trial review, counsel for both parents agreed outside court that there was likely to be no need for the mother to give evidence. Early in his brief opening of the matter to the judge, Mr Cameron did, however, state that the matters set out in the parents' statements were "obviously still issues". Thereupon the judge indicated that she would discourage the parents from seeking findings about any of those matters because they were history, because L needed to have contact with the father and because matters should move forward constructively. Mr Cameron then indicated that he would wish shortly to call the father to give oral evidence; and the judge accepted that he should do so. The judge, however, indicated, without opposition, that it would be preferable for Mrs Prowse to give evidence first.

18. In answer to initial questions by the judge Mrs Prowse quickly suggested, although her report had not made this clear, that the father's supervised contact might reasonably be increased from fortnightly to weekly; but she suggested that the length of it, namely two hours, should remain the same. She also made clear that her recommendation of a review after three months was a reference to a review by the local authority rather than by the court; and she suggested that the court might review the progress of contact after about six months.

19. The judge invited Mr McCormack, on behalf of the mother, to question Mrs Prowse first, on the basis that, in the judge's words, "apparently the mother will agree to anything that is

eventually advanced." Mr McCormack expressly accepted that proposition. When it became Mr Cameron's turn to ask questions, he divided them into enquiries about the quality of the supervised contact to date and enquiries about the need for future supervision. Mrs Prowse accepted that supervised contact was unnatural and probably inculcated in the father a sense of pressure. She had explained that, following the filing of her report, there had been two further sessions of supervised contact; and Mr Cameron extracted from her the concession that they had been "astonishingly good contact sessions, with remarkably few problems." She agreed with him that the father came early, sometimes almost too early, for the contact sessions; prepared for them well; brought toys, sometimes too many, and lunches for L; upon her arrival, reacted to her appropriately and calmly; had never in her presence spoken inappropriately to her; and during the sessions behaved entirely appropriately towards her most of the time but sometimes almost gave her too much attention. Then the judge asked the following question:

> "But it's not very easy for him, is it? He has never been a parent before; the child is two years of age and there is quite an age gap between him and the child. He hasn't really lived very long with the child. I mean, he does not probably know everything that he needs to know."

With that proposition Mrs Prowse agreed. As we will see, that proposition was to encapsulate the judge's decision that the contact needed to remain supervised. Mrs Prowse went on to explain that the father to date had had "a very easy ride" with L but she agreed with Mr Cameron that such was partly because the father had made things easy for L.

20. In due course, and perhaps in particular in the light of the judge's interjection, Mr Cameron moved to the second part of his cross-examination. There was the following exchange:

> **Mr Cameron** (to Mrs Prowse):
> "I take it that it is not your opinion that every new father's contact with their child alone should be supervised?"
>
> **The judge:**
> "Well, that's a difficult one, isn't it? … The circumstances here have to be taken into account and the difficult relationship between the parties has to be taken into account and the mother's apprehension and the father's enthusiasm have to be balanced and have to be taken into account. That's really how it is."
>
> **Mr Cameron** (to Mrs Prowse):
> "… what is it about [the father] that makes you consider that his contact should be supervised, whereas another new parent's contact with their child should not be supervised?"

Mrs Prowse:
"The fact that we have been asked to do supervised contact from the start."

…

Mr Cameron:
"And why do you think you have been asked to do supervised contact?"

Mrs Prowse:
"I presume, as your honour said, it is to do with the relationship between the parties, the past history of which I know some but not a lot. But I was asked to do a specific piece of work and sometimes we don't know the ins and outs of why that has happened. We simply have to deal with what is in front of us."

Mr Cameron:
"So you have not sought particularly to investigate the ins and outs of why supervised contact is happening?"

Mrs Prowse:
"No, I haven't; no."

Mr Cameron:
"So the reason you are saying contact needs to be supervised for another three months is because contact started being supervised?"

Mrs Prowse:
"Yes."

The judge:
"And because there is progress but it's not global progress. She doesn't know how the father will react in more difficult situations."

…

Mr Cameron (to Mrs Prowse):
"But, given that [the father] has coped, I think we are all agreed, quite excellently with the contact that he has had so far, there is no particular reason to doubt that he would not cope excellently with those situations, should they arise, and you have agreed that part of the reason they haven't arisen is maybe because he has been an appropriate carer. But is there any reason to doubt that he wouldn't cope excellently with those situations?"

Mrs Prowse:
"I really don't know."

Later, when Mr Cameron put to Mrs Prowse that his proposal was for short periods of unsupervised contact, building up slowly and incrementally to staying contact, Mrs Prowse stated:

> "I would be very reluctant to suggest that [the father] should be taking [L] out on his own. I think there should be some kind of safety net because I think that he could find it very, very stressful."

21. At the conclusion of the evidence of Mrs Prowse, the judge said:

> "Now, Mr Cameron, you have indicated that you want to call your client. I would like to give your client the opportunity to have one further consideration with you and your solicitor before he gives evidence -- and maybe the situation is worsened rather than improved -- one more consideration for thinking about what the purpose of contact is, and how it can be built up. What is suggested … is not a punishment for him. It is not something devised specifically for him for some reason which no-one can understand. It is devised because of the … background circumstances and indeed the fact that the relationship between these parties broke down while the child was very small, your client has no previous children and he has got to get to know his daughter."

In answer to Mr Cameron the judge reaffirmed that she did not wish to hear evidence from the father but would do so if he insisted upon it.

22. Following a short adjournment there was the following exchange:

> **Mr Cameron:**
> "[The father] is clearly frustrated about matters, understandably in my submission. He has been told all along that, since the very start of proceedings where an allegation was made against him which he disputed immediately and social services investigated, at some point that will be contested and that issue will be decided and, until then, because nobody can know what the truth of the matter is, he should have supervised contact."
>
> **The judge:**
> "I do not know why he has been advised that from the beginning. There is no need for a determination. No-one is suggesting that he has done anything

wrong. As I explained to you before, the reason for the supervised contact is that one has to proceed with caution. … I don't know why he has been advised that because it is not right."

…

Mr Cameron:
"In that situation I have advised him [that] the court does not need his full evidence … He would like to have his voice heard and he would like to say a few things."

…

The judge:
"Now, I'm very happy to listen to his evidence, but what is he going to be able to do? What is he trying to do to persuade me for unsupervised contact? Because I am simply, on the evidence of that social worker, not going to be able to be persuaded … I know he wants unsupervised contact. I know he wants it yesterday. But I cannot deal with that in the [light of the] evidence of the social worker that it is early days and contact is going well but it needs to have the softly-softly approach. What can he say to me that is going to move me from the position that I am in? That doesn't mean judges have rigid views …"

Mr Cameron:
"My client … understands that he has no chance of persuading you to allow him unsupervised contact from this moment … He does understand, however, on advice, that there are parameters within which the court might make an order, for example that before another hearing … there be some unsupervised contact, maybe shortly before that period."

The judge:
"But, you see, I can't legislate for that because the social worker has said no court review before six months … What I can say is the social worker is to keep her eye on the situation with a view to there being unsupervised contact. If she feels there can be a couple of periods of unsupervised contact before her next report, fine, that's what can happen … but I cannot say today that that will happen in March because I don't know how things will progress."

23. Thereupon Mr Cameron asked for a further short adjournment in order to take instructions from the father. After about 15 minutes the judge, by her usher, required the parties to return to court but, on Mr Cameron's application, she granted him a yet further adjournment of five minutes. When the court resumed, Mr Cameron announced that the father would not give evidence. This exchange followed:

Mr Cameron:
"I am not sure, your honour, if you would like me to make submissions on [the father's] behalf."

The judge:
"About what?"

Mr Cameron:
"Well, in accordance with procedure in these matters, this is the final hearing."

The judge:
"Well it's not a final hearing, because I am going to put it down for review in six months' time … Why would you want to make submissions?"

Mr Cameron:
"… How the father feels the court should be guided in its decision on what happens in the furtherance of this case."

The judge:
"If [the father] doesn't give his evidence I assume that [he] accepts what I have said will happen in the next six months. If he doesn't accept it, he had best give his evidence. I don't know where we are going."

Mr Cameron:
"[The father] does not accept the exact details of what you have said. He accepts that it is obviously the case that he will not be successful today in seeking unsupervised contact from today … He does hope that I can persuade you, through submissions, to veer to his side on the small questions that may be unanswered, such as hours and times."

The judge:
"Well, the hours are set down, because the social worker says: 'I do not agree to an increase' ... I am happy to say a minimum of two hours …"

Mr Cameron:
"… Might your honour permit me to make some suggestions on [the father's] behalf?

The judge:
"Well, I will let you start, but if it is going to go back to all the history and issues I shall stop you and, if it is going to be non-productive, I think I probably will not be patient enough to sit and listen to it until the end."

24. After a few further exchanges, there was the following:

> **Mr Cameron:**
> ”Your honour, I have sought to make further submissions. If that is the judgment – ?”
>
> **The judge:**
> ”Yes, but I don’t know why you are making submissions. He is getting a minimum of two hours once a week. If the supervisor thinks it should be four hours, then he will get four hours. So I don’t know what your client is balking at.”
>
> **Mr Cameron:**
> “The reason I seek to make submissions is that my client has come to seek the court’s assistance in getting contact … because of problems in his relationship with the mother and the mother preventing that contact from happening … From the first directions hearing my client has been told that … the court will proceed … by ordering a section 7 report. That took 16 weeks, during which – ”
>
> **The judge:**
> “Mr Cameron, you are not advancing your client’s case. You are prevaricating in a way which is not very acceptable to me, I having told you what I am doing. And I am now telling you that you are pushing at a closed door because I have given as wide a flexibility as I can to the supervising officer … I cannot see why you are continuing to address me. You are achieving nothing and in fact you are almost beginning to exacerbate the situation by constantly referring back to the need for the section 7 report and starting off about the war between the parties, which I am absolutely not interested in.”
>
> **Mr Cameron:**
> “Can I just make sure it is clear I am being told that I am pushing at a closed door?”
>
> **The judge:**
> “Yes, Mr Cameron, you are pushing at a closed door. And you may take that wherever else you wish to take it.”

Thereupon, without giving any summation of the matter which could be described as a judgment, the judge made the orders under proposed appeal.

25. Although it is only a subsidiary part of Mr Cameron's argument that the judge dealt unsatisfactorily with the allegations which the mother had raised as to the father's violence towards her and inappropriate sexual behaviour towards L, I have given that aspect considerable thought. I have had in mind, in particular, this court's recent reaffirmation in Re: K and S (Children), [2005] EWCA Civ 1660, of its decision in Re: L, Re: V, Re: M, Re: H (Contact: Domestic Violence), [2000] 2 FLR 334, that, where a parent does raise and maintain such allegations, then, if they are disputed and may, if true, affect the court's decision as to contact, the issues cannot simply be shelved but have to be determined. There is no doubt that the mother raised such issues as being relevant to contact; that, by his answers to the social worker who prepared the initial report, the father quickly denied them; that, if true, the allegations, in particular the sexual allegation, *might* affect the decision; that the social worker's recommendation for interim supervision of contact was based upon the fact that the allegations, in particular the sexual allegation, were as yet unresolved; and that the district judge's interim order for supervised contact and his setting up of a hearing for one-and-a-half days before a circuit judge were driven by the pendency of the issues and the need for their resolution. Until the late filing of Mrs Prowse's report, which raised the new question as to his ability to cope on a practical level with unsupervised contact, the father and his advisers reasonably expected that the hearing before the circuit judge would relate to those issues. With great respect to her, I cannot understand the judge's expressed surprise that such had been their understanding.

26. Nevertheless I am relieved in the end to be able to conclude that the judge's handling of the issues raised by the mother's allegations was satisfactory and indeed sensible. For, in the light no doubt of the judge's indication at the pre-trial review of her preference to look forward rather than backward, the mother must have been taken to have accepted, no doubt on advice including in relation to the burden and standard of proof, that, while not withdrawing the allegations, she was not continuing to press them in the contact proceedings. Such is the only construction which can reasonably be placed upon the mother's decision, confirmed by Mr McCormack to the judge, not to give evidence and instead in effect to abide the outcome of the issue as to the father's ability to cope on a practical level. Perhaps I should add that in my view the judge would have been well advised to cause Mr McCormack to confirm definitively on the record that, while not withdrawing the allegations, the mother had no intention, whether at that hearing or at any future hearing, to seek to establish them. But such was implied; and today, before us, Mr McCormack confirms that by the time of that hearing he had obtained clear instructions from the mother not to seek to establish the allegations then or thereafter.

27. In this regard Mr Cameron's subsidiary complaint is that the judge gave the father no opportunity to disprove the allegations against him. But, in that by implication they were no longer relied upon in the proceedings, the judge was in my view entirely correct to exclude evidence about them; and indeed Mr Cameron scarcely even tried to invite the judge to hear evidence on those matters.

28. The fact that the issues in relation to contact by reference to which the case had been assembled for hearing thus suddenly fell away meant, however, that the only remaining issue, namely the new issue raised by Mrs Prowse, was an issue which neither parent had addressed in writing, and upon which the mother did not apparently wish to comment in oral evidence. At the centre of the proposed appeal is Mr Cameron's complaint that the judge unfairly prevented the father from addressing the new issue in oral evidence and/or by a closing submission by himself, Mr Cameron, on the father's behalf. In my view it is plain from the passages of the transcript quoted above that the judge did prevent the father from giving evidence, and Mr Cameron from making submissions, by applying a degree of pressure upon the father to agree not to give evidence and upon Mr Cameron to sit down, which gave neither of them any real option other than to do so.

29. Mr Cameron's case can be summarised as follows:

(a) The father's practical ability to care for L for short periods was questioned only very late.
(b) It was questioned not by a qualified social worker but by Mrs Prowse, a family support worker, who was unaware of the entirely different reason for which supervision had initially been regarded as necessary.
(c) In her concern to shut the hearing down at an early stage the judge wrongly indicated that she had no power other than to make orders in accordance with the recommendations of Mrs Prowse.
(d) The father is an intelligent, middle-aged man, whose devotion to L was not in issue and whose handling of her during the supervised periods of conduct had been, in effect, exemplary.
(e) It was, to put it at its lowest, highly arguable that, with the benefit of hindsight, there had never been a need for supervision of contact and that, in particular, there was no continuing need for it.
(f) In those circumstances the judge was required, both by elementary principles of fairness at common law and indeed by her duty to afford him a fair hearing under Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, to allow the father to give evidence on the new issue and to allow his counsel to argue his case on his behalf.

30. In seeking to defend the manner in which the judge despatched the application Mr McCormack relies heavily upon the decision of this court in Re: B (Minors) (Contact) [1994] 2 FLR 1. In that case two girls, aged 17 and 12, were in the care of the local authority. In making the care order the judge had provided that their stepfather should have contact with them in the discretion of the local authority. Thereupon the younger girl made allegations of sexual impropriety against the stepfather, analogous to allegations previously made by the older girl. Both of them indicated that they did not wish to have further contact with the stepfather; and the local authority indicated that they did not propose to arrange further contact with him. Thereupon the stepfather applied for an order for defined contact

and the case was referred to a judge for him to consider, as a preliminary point, whether the application should go forward for hearing on oral evidence. He read the written evidence, heard oral argument at length and dismissed the application without oral evidence. The stepfather's appeal was unsuccessful. In a passage of her judgment which is generally regarded as of supreme value for judges exercising jurisdiction in relation to children, Butler-Sloss LJ said at 5f-h:

> "In my view a judge in family cases has a much broader discretion … to conduct the case as is most appropriate for the issues involved and the evidence available … There is a spectrum of procedure for family cases from the *ex parte* application on minimal evidence to the full and detailed investigations on oral evidence which may be prolonged. Where on that spectrum a judge decides a particular application should be placed is a matter for his discretion. Applications for residence orders or for committal to the care of a local authority or revocation of a care order are likely to be decided on full oral evidence, but not invariably. Such is not the case on contact applications which may be and are heard sometimes with and sometimes without oral evidence or with a limited amount of oral evidence."

31. At 6a-d Butler-Sloss LJ indicated that, in deciding whether to conduct a full investigation with oral evidence, a judge should consider:

(a) whether there was already sufficient evidence to make the decision;
(b) whether the proposed further evidence was likely to affect the outcome of the proceedings;
(c) whether the opportunity to cross-examine witnesses was likely to affect the outcome;
(d) whether a full investigation, including any consequential delay, would be injurious to the welfare of the child;
(e) whether the applicant for a full trial had real prospects of success; and
(f) whether the justice of the case required a full investigation.

32. At 7f Butler-Sloss LJ observed that the stepfather had had no prospect of succeeding in his application, even if it had proceeded on oral evidence; and at 9c-d Sir Francis Purchas observed that the judge would have been bound to conclude that he could fairly do justice between the parties, as well as secure the welfare of the girls as much as possible, by determining the application without oral evidence.

33. Judges exercising jurisdiction in relation to children have, in my view, a broader discretion in the mode of their conduct of the hearing than do judges in the exercise of a conventional civil jurisdiction. Put another way, the sort of hearing which might be adjudged unfair, and therefore unlawful, in an ordinary civil context may, nevertheless, be lawful in a child

context. The difference is largely attributable to the facts that, although of course the welfare of the child is not the paramount consideration in the judge's determination as to how to conduct the hearing, it is a relevant consideration; and that, unless to do so is essential to a proper determination of future arrangements for him, the child's welfare will not be served by taking a course likely to fan the flames of the animosities of the adults who surround him. Furthermore this court must consistently strive to be imaginative about the reasons, often deliberately left unexpressed at least in part, why a trial judge in a child case takes a particular decision, whether substantive or procedural; and it must also be constantly alive to the need, and even in the absence of need at any rate to the entitlement, of the judge often to act robustly in the exercise of this jurisdiction.

34. The judge in this case has vast experience of children cases and commands deep and widespread respect. I am driven to conclude, however, that, notwithstanding the width of her discretion, she exceeded it by refusing to allow evidence or argument on a demonstrably arguable issue, namely whether there was a need for continued supervision of contact. It is important to note that this was not arranged as an interim hearing but as the final hearing, for which, no doubt because of its substantial time estimate, the father had waited for nine months following the issue of his application. The father had never put his case, even in writing, upon the new issue belatedly raised by Mrs Prowse, the unqualified family support worker, and he could not be criticised for having failed to do so. In her desire to achieve swift conclusion the judge even found herself carried away into saying, which of course was nonsense, that the suggestions of Mrs Prowse precluded the court from making provision otherwise than in accordance with them.

35. I fear that the judge's entirely uncharacteristic failure to conduct this hearing lawfully stems from the fact that, notwithstanding that, even when reduced, the time estimate for the hearing was one day, the listing officer of the Watford County Court had fixed for her to hear a substantial care application only half an hour after the start of the hearing in this case. For all we know, there may have been the greatest urgency about the judge's need to embark at once on that hearing. I know, however, from my own long and recent experience of family trial work that, if under pressure of one sort or another to conclude a particular hearing, a judge is at particular temptation to seize upon ways and means of cutting it short. The curtailment here went far too far: the necessary enquiry into the only remaining live issue was never properly undertaken.

36. Accordingly I would grant permission to the father to appeal; allow the appeal; so vary the judge's order for contact as to express it to be interim; and provide that the substantive hearing of the father's application should take place on 23 February 2006, being a date which we understand to be acceptable to the listing officer of the Watford County Court, with an estimate of four hours and a direction that there be no back-to-back listing of other work. Although I know well that, notwithstanding my necessary criticisms of her, this judge would be entirely able to afford the father a fair hearing on that date, he will consider otherwise; and it would be fairer for him, and indeed perhaps less awkward even for the

judge herself, if we were to direct that the hearing be conducted by another circuit judge with analogous family expertise.

LORD JUSTICE LAWS:

37. I agree that this application for permission should be granted and the appeal should be allowed, for all the reasons given by Wilson LJ. In our system, which remains adversarial, it is an elementary duty of the judge to ensure a fair hearing, as much in family cases as in any other. That is entirely consistent with the broader procedural discretions enjoyed by family judges, as Wilson LJ has described them. What fairness requires in the particular instance is, of course, another matter. In this case, most unhappily, the judge has failed in that duty in the respects set out by Wilson LJ. I agree, also, that we should make the orders proposed by him.

Order: Application granted and appeal allowed.