

Re C (A Child) [2011] EWCA Civ 261 (02 February 2011)

Case No: B4/2010/1751

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM NORWICH COUNTY COURT
(HIS HONOUR JUDGE RICHARDS)

Royal Courts of Justice
Strand, London, WC2A 2LL
2nd February 2011

B e f o r e :

LORD JUSTICE THORPE

and

LADY JUSTICE BLACK

Between:

In the matter of C (A child)

(DAR Transcript of

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The Appellant Father appeared in person, assisted by a McKenzie Friend.

The Respondent Mother appeared in person.

HTML VERSION OF JUDGMENT

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Lady Justice Black:

This is an appeal by the father of P, who was born on 14 May 1998 (she is 12 nearly 13), in relation to an order of HHJ Richards on 11 June 2010 which brought to an end the contact that there had been between P and the father and refused to order a transfer of residence to the father or to grant a shared residence order to him and P's mother or to grant parental responsibility to the father's present wife.

The parents separated in 2001 when P was just three years old. Since then issues between the parents over P have rarely if ever gone away. There have been something like 27 applications and approximately 50 hearings in front of about a dozen judges at one level or another. There have been at

least two previous visits to this court, although they ended in refusals of permission to appeal on each occasion.

An order was made in October 2006 granting residence of P to the mother and staying contact to the father to take place on alternative weekends with extended staying contact during the school holidays.

In October 2009 the mother applied to vary the contact order on the basis that P did not want to have contact with her father. Her father cross-applied seeking to further his relationship with his daughter. A report from a CAFCASS officer was commissioned on P's wishes and feelings. That report was provided by Mrs Harrison on 1 March 2010. For the purposes of the report Mrs Harrison saw P three times. She had interviews on 27 January 2010 and 3 February 2010 in order to ascertain P's views about the contact and she had a meeting with her on 25 February last year to go through the contents of her report.

The picture that P conveyed was that she attended contact because the court had told her that she had to. Her wish, she said, was to cease all contact with the father. She gave examples of things at contact that she was unhappy and anxious about. All her comments were negative. She said she had told the father that she did not want to go when he collected her but she feels intimidated by him and his wife. They frequently make derogatory comments about her mother, she said, and she does not feel valued or praised by them. Mrs Harrison said:

"The overall impression from P was that contact with her father gives her no sense of self-worth"

Mrs Harrison read the report of Dr Martinez, a psychologist, who reported in May 2006 after seeing P and her parents. Dr Martinez found that P had a very close bond with her mother at that time and considered that any disruption to that would be detrimental to P's wellbeing. P also had a close relationship with her father but was concealing her feelings about this in order to prevent her mother being hurt by the fact that she might like her time with her father. Dr Martinez thought P was suffering from a degree of confusion as a result. She was aware of the tension and disharmony between her parents and was trying to protect her mother to the detriment of her own emotional health. Her dream for the future was that her parents would resolve their difficulties, so that she could love them both without feeling guilty about letting either of them down. Dr Martinez advised that it was imperative that the parents find a way of communicating functionally for P's present and future wellbeing. She recommended that contact continued.

When Mrs Harrison asked P about Dr Martinez having said that she, P, wished at that time to see her father, P was surprised. She thought she had said for a long time that she did not want to see her father and no-one had listened. She said she wanted to stop seeing him and did not think she would want to resume contact. Mrs Harrison concluded that P's feelings about her relationship with her father had deteriorated since Dr Martinez's report and from her description it did not appear that the contact was meeting her emotional needs.

Mrs Harrison spoke of the recognised developmental stages for children, explaining:

"There are recognised developmental changes in the children of separated parents who have experienced heavily conflicted residence and contact disputes. At the age of seven years there is evidence that children have loyalty conflicts and strong alignments with one parent may be less evident. When children move into middle childhood if the conflict continues alignments become more apparent and the child may be less concerned about hurting their parents. Hearing negative comments about a parent a child has invested their emotional security in is likely to strengthen a child's alignment to that parent. Children in this age group also begin to express their views with more authority and confidence."

Mrs Harrison said that in her opinion:

"From P's perspective contact with her father is perfunctory and based on a court order"

Mrs Harrison found no indication of a sibling alliance with P's stepmother's young daughter, M. In terms of advice Mrs Harrison said that the court may wish to consider suspending contact as an interim measure.

Mrs Harrison did not give evidence at the hearing before the judge. That hearing lasted for a day. Both of the parents gave evidence and also the father's wife. At the end of the hearing the judge gave the most careful and thoughtful of judgments. We are told that that judgment was reserved, and it bears all the hallmarks of having been the product of most anxious deliberation on the part of the judge. It expresses very clearly the dilemma of this case and the many others like it. There was, as the judge said, no right answer; he was left looking for the least worst option for the child. Given the evidence, it is understandable that he ruled out the option of transferring residence to the father. He considered himself left with the stark options of continuing contact, with the result that P would remain in the centre of the parental hostility and her mother's heightened and expressed anxiety, or stopping contact

and depriving P of the love and society of her father, whom the judge found she loves and who can make a contribution to her upbringing and development.

The former of these options, that is continuing contact, the judge thought would be contact organised "in the face of a clearly expressed wish by a 12-year-old child that it should not happen"

Whatever he decided, the judge knew that it would have a profound effect on P. He approached the decision with P's welfare as his paramount consideration as he was bound to do. He summed up the various factors as he saw them in a passage of his judgment that runs from paragraph 74 to paragraph 85. In the course of this he asked himself whether there were any other enquiries or investigations that should take place. He concluded that P would be likely to be resistant to that. He made the very sound point that further psychological welfare enquiries would mean introducing yet another professional into her life, continuing the litigation and intruding into P's life, which he had to balance against the likely outcome which in his view would not be a change of heart by P. He took the view that P had put an end to the battling and conflict of her parents by rejecting one of them, her father. He said:

"84. In those circumstances and for those reasons I propose to discharge the order of October 2006 and make no order for contact.

85. I do so with a very heavy heart but find some crumb of comfort in the thought that P will be more likely than not to make contact with her father in her own time and in her own way. Sadly it is likely to be surreptitious and behind her mother's back. "

He also expressed the view, with which I have considerable sympathy, that:

"87. Increasingly I am coming to the view that there are some exceptional cases in which the Court can simply do no more. Every avenue has been tried and exhausted"

The question is whether the judge was entitled to conclude that that point had been reached in this child's life. Had the evidence as to her emotional position and her feelings been fully evaluated and had all the possible avenues been exhausted in the light of that?

In order to consider this I need to explain an element of the evidence. There is in the bundle a series of emails between P and her father and his wife. They were passing between them at the same sort of time as the interviews with the CAFCASS officer were taking place and they are in conspicuously

relaxed and loving terms. The one on 1 February 2010, for example, which came between the two interviews that Mrs Harrison had with P, includes this:

"I had a great weekend and cannot wait to see you soon.

Take care

Lots of love [P] "

This e-mail was sent on a Monday and the weekend reference relates to the weekend with the father and step mother. There are others in similar terms.

The father says that he told Mrs Harrison, the CAFCASS officer, about the emails but she does not appear to have had access to them. She certainly does not refer to them in her report and she may not have registered their potential importance. They show such a different picture from the one that P was portraying to the CAFCASS officer that they required consideration and analysis by Mrs Harrison both in relation to what they might reveal about P's real wishes and feelings and what they meant in terms of how matters should be handled in the future.

The failure to deal with this issue was therefore a gap in the CAFCASS report. It could perhaps have been remedied had the CAFCASS officer given oral evidence but she did not do so. Doing the best that we can to work out why she was not at court to do so, it seems that the judge may well have been in a very difficult position. It seems that there was an application to the District Judge at some stage prior to the hearing for him to order the attendance at the hearing of the CAFCASS officer. The father seems to say in his notice of appeal that the District Judge did order that but that that order never made its way into the order drawn up by the court. The mother's version is, I think, that he referred the decision as to whether the CAFCASS officer should attend to the judge to deal with at the outset of the main hearing.

As we all know, the pressure on the time of family courts is immense and the judge, faced with the absence of the CAFCASS officer for whatever reason, would not simply have been able to adjourn this case to later in the week so that the CAFCASS officer could attend. We understand that he did consider case management matters at the outset of the hearing but we do not have a transcript to show us precisely what was loosely determined and what reasons he gave for what he decided. Amongst the matters he did decide was an application by the mother, filed very shortly before that hearing it seems, for P to be spoken to by the judge or the CAFCASS officer about the e-mails. There was also an

application that P should be separately represented. The mother said in her application form that without someone independent speaking to P they would be back to square one. The father says that he supported that application. The judge did not grant it. This seems in part to have been because of the lateness of the application and no doubt the judge's justifiable anxiety about delay and the implications of continuing uncertainty for P. And in part, we are given to understand, he also thought he had the material that he needed.

The e-mails were in the bundle and plainly were referred to in the evidence before the judge. According to the judge, the mother's evidence was that the emails were sent for a quiet life and that P would be nagged by the father had she not sent them. The mother said she did not think that they had any value at all and her view was that P had been used by her father and the emails were simply a clever ruse to undermine the CAFCASS report. That is contained in paragraph 33 of the judgment.

The father referred to the emails and said that they showed P's normal interest in her extended family. He said they represented her true feelings rather than what she told the CAFCASS officer, which was fuelled and directed by the mother. That is paragraph 39 of the judgment.

The judge says in that paragraph that:

"The father denies that the emails had been tampered with by him or were false or made up in order to support his case."

This notion had presumably been put to the father by the mother. As far as I can see, the judge did not make an express finding about that point, but it is clear from his findings at paragraph 62, particularly subparagraph (2), that he did not believe the emails were faked. He said he was satisfied that the email correspondence reflects what he had said in subparagraph (1) of paragraph 62, that is:

"I am satisfied that P has in the past showed love and affection for her father. She has positively enjoyed his company and has found it fulfilling. She has been relaxed with him. She has been loving towards him"

And he went on to say that the email correspondence supported his conclusion that P loves her father.

Included in the father's grounds of appeal is a complaint that the judge misdirected himself in refusing the parties and himself, the judge, an opportunity to examine the CAFCASS officer. He also argues that the judge was wrong to consider that there were only three options open to him. In fact, the father argues, there were more. He could for example have sought further welfare or expert reports.

I have the greatest sympathy for the judge, conscious no doubt that the hearing would be likely to be lost if the CAFCASS officer attended and would certainly be lost if she was invited to see P about the emails with the attendant inevitable delay, acutely aware that the continuation of litigation was putting pressure on P and sensing that P had now firmly nailed her colours to the mast in relation to contact. However, it does seem to me that there were two reasons why the CAFCASS officer's attendance was necessary. Firstly, her recommendation was against contact albeit that she recommended at that stage a temporary suspension. In this difficult case this was by no means the only possible recommendation and it was one with which the father disagreed. It was a draconian order and one which, particularly given the judge's finding that it was more likely than not that if contact was stopped P would still make contact with her father in her own time and in her own way surreptitiously and behind her mother's back, the father was entitled to explore with the CAFCASS officer in the witness box. Secondly, the emails needed to be considered by the CAFCASS officer in case they changed her view on P's wishes and feelings or on the way forward.

In the circumstances it seems to me that the appeal should be allowed on that basis and the matter should return to the circuit judge for a further hearing.

I would be particularly anxious that the parties and in particular P should not lose the expertise of HHJ Richards both in general and in relation to this case. He can build on the knowledge, when the matter comes back to him, that he has built up about P and her parents and continue his careful evaluation of what is in P's best interests.

We canvassed with the parties during the appeal hearing whether it would be helpful for P to have her own solicitor. Up to a point the mother was enthusiastic about this, but only I think if the matter was to return to court in any event, which she would resist. I think she recognised that if P was joined as a party with a guardian and solicitor, there would be someone to put P's position quite independently of both of her parents, which would be a good thing. This is a course which is often helpful to the court, the parties and the child in very difficult cases such as the present one. As the matter is to return to

HHJ Richards in any event, I would take this course in preparation for that hearing and make the necessary orders to that effect now so that things are got moving.

Thought will need to be given to the question of what, if any further involvement, Mrs Harrison, the CAFCASS officer, will have in these circumstances. It may be that she will still be required for cross-examination in which case she would certainly need to see the emails in advance. It may however be that her role will be subsumed into that of the guardian. There should be a directions hearing before HHJ Richards at the earliest opportunity so that he can get the case on the right track before the resumed hearing.

In all the circumstances, and for the reasons I have given, I would therefore allow the appeal. I should add a cautionary note that I have by no means formed any view at all as to which way this matter will go when HHJ Richards reconsiders it with the entirety of the evidence.

Lord Justice Thorpe:

I agree. I also wish to record my appreciation of the conscientious care that the judge brought to this very difficult case.

Order: Appeal allowed