Re C (Children) [2010] EWCA Civ 239 (04 February 2010)

Case No: B4 2010/0193

IN THE COURT OF APPEAL (CIVIL DIVISION)

ON APPEAL FROM BOW COUNTY COURT

HER HONOUR JUDGE WRIGHT

Royal Courts of Justice

Strand, London, WC2A 2LL

4th February 2010

B e f o r e :

LORD JUSTICE THORPE

LADY JUSTICE ARDEN

and

LORD JUSTICE DYSON

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IN THE MATTER OF C (Children)

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Mr Mark Batchelor (instructed by Woodford Wise) appeared on behalf of the Appellant.

Miss Susan Stamford (instructed by Aitken Associates) appeared on behalf of the Respondent.

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HTML VERSION OF JUDGMENT

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Lord Justice Thorpe:

This application with appeal to follow if permission granted arises out of proceedings in the Bow County Court, private law proceedings between mother and father in relation to the welfare of their three children, who were born respectively in August 1996, February 2000 and August 2005. The judge who has been dealing with this case is HHJ Wright. She conducted a three-day hearing on 2, 3, 4 November 2009, at the end of which she issued what I will call an immediate order dated 4 November, a prohibited steps order. Subsequently, the principal order disposing of the issues in relation to the children was dated 7 December. The effect of the judge's conclusion was that the two older girls should remain with their father but that the youngest should return to her mother.

Within the order of 4 November is the prohibited steps provision, that the parents, both of them, were forbidden from taking any or all of the children to see any representative, professional or any other

person to ascertain the wishes and the feelings of the children or to record any report made by the children without the knowledge of their guardian or solicitor and their consent until further order. Within the principal order there is the continuation of that prohibited steps, and a provision, paragraph 4, that directed the issue of disclosure of the circumstances of the father's contact with Stephen Timms MP and a local councillor, Joy Laguda, concerning the children to be listed for consideration on 15 January 2010.

At the hearing of 15 January, an order was made by the judge, the first paragraph of which required the father to disclose to the guardian's solicitor by 29 January all letters and e-mails sent between himself and Mr Stephen Timms and the local councillor. That order was the subject of a judgment which I will consider in greater detail in due course.

Two days before compliance was required, a notice of appeal was filed in this court and it was considered by my Lord, Wall LJ, on the papers, when he directed an oral hearing on notice with appeal to follow if permission granted. He further directed that it should be listed today before three judges of the court with a half-day time estimate.

That is a bare account of the proceedings, but what lies behind it is the following chronology and sequence. Because of the difficulties of the case, on 18 March 2009 the three girls had been joined as parties to the proceedings and the CAFCASS officer who had previously advised the court was appointed to act as their guardian ad litem. Thereafter the guardian saw the children in May and I think on more than one occasion filed reports with the court.

The father involved Mr Stephen Timms in circumstances that have not been fully investigated, but we do know as a result of a helpful letter written by Mr Timms of 12 September 2009 that on that day the three children were brought to see him by their father, presumably in Mr Timms' constituency surgery. The letter continues, and this is the record of the meeting:

"I spoke to all three together but asked each separately which of their parents they would like to live with after the current process. They all said they would like their father to look after them and that he has been looking after them for a year or so."

He then recounted the direct speech of each of the children in turn. In brief summary each said that they were happy with their kindly father and unhappy with their mother who beat them up without justification (if there could ever be justification for such a chastisement) and generally made them unhappy. Indeed one of the children put it very graphically:

"Really negative stuff -- really hurts -- makes me think why I am living? things which really hurt your mind"

Mr Timms plainly had some understanding of the ongoing litigation, for that must be what he referred to when he said "after the current process". I infer that he understood that they were private proceedings within the family for he addressed his letter to the Director of Children's Services for Newham Borough Council, somebody that he clearly knew already because he opens the letter "Dear Kim" and closes it "Yours sincerely, Stephen". The final paragraph is his suggestion to the director:

"Could you arrange for these views to be presented to the court, which I understand is considering arrangements for their future care in the coming week?"

The arrangements that the father made for the children to be interviewed by Mr Timms were quite unknown to the children's guardian and indeed to the children's mother and the emergence of this event at the trial led to the imposition of the prohibited steps order to which I have already referred. The guardian naturally expressed interest in the extent to which Mr Timms had been involved and particularly in the e-mail communication between the father and Mr Timms. The guardian did not seek disclosure of anything written by Mr Timms. She sought only disclosure of material from father to his Member. She further sought disclosure only to herself so that she could, as it were, offer a safeguard against the distribution of material that was not relevant to the proceedings and might be prejudicial to the father.

The hearing of 15 January was ordained by the earlier order and, accordingly, counsel prepared positions statements. The father has been represented by Mr Batchelor, who on 14 January lodged with the court a 49-page position statement in which he rationalised the father's opposition to the guardian's application. He raised a number of points of general application. He particularly stressed the confidential nature of the relationship between a citizen and his elected representative, the privacy attached, which was not lightly to be overridden. He further asserted that the proceedings had effectively terminated with the judgment of 4 November and, with so little still outstanding, it would be disproportionate to order disclosure.

The well-constructed judgment of HHJ Wright clearly recalls her appreciation of the father's case. In paragraph 7 she records that the father resisted disclosure of e-mails to and from Mr Timms on the basis that it was an invasion of his privacy. In relation to that it is worth adding that Mr Timms helpfully set out his position in two letters to the guardian's solicitor, making it plain that he had no objection to opening his file but he had consulted his constituent. So there was never any suggestion that an order should go against Mr Timms or that anything that Mr Timms had written should be disclosed. The guardian's case was always subject to disclosure of the father's communication and subject to the safeguard that disclosure should only be to her.

That must be emphasised in any evaluation of the father's claim that disclosure would constitute an invasion of his privacy. The judge in the following paragraph neatly summarised the father's case as advocated by Mr Batchelor. She said:

"In this case the father objects to disclosure on the basis it is a breach of his privacy, it is disproportionate, the documents are private between him and his MP and it will not assist the Court in reaching any determination in the proceedings"

In paragraph 9 the judge recorded the guardian's case:

"The guardian wishes to know and understand more clearly the nature and content of the communication between the father and his MP by e-mail and letter concerning the children within these proceedings. The Guardian has every reason to be concerned about the extent to which the father was involving outside parties in the issues concerning the children within these proceedings, particularly because the children are still resistant and reluctant to have staying contact with their mother which is causing them harm. There is every reason therefore to make an order in the terms sought by the Guardian. The father accepts, through his counsel, the court has a discretion as to whether or not to order disclosure."

In my judgment the citations which I have selected illustrate with great clarity that the judge had properly understood the rival submissions and impeccably balanced them in arriving at a discretionary conclusion.

Her order is simply not open to challenge in this court on any of the broader issues that Mr Batchelor has sought to raise. He has filed a very full skeleton argument. He has assembled an impressive list of authorities, but really they are all beside the point which we have to address, which is a very simple point, the point that arises in the majority of family appeals that come to this court: namely is the

judge plainly wrong, or has the judge misconducted the balancing exercise for arriving at a discretionary conclusion? As I have already said, plainly this was not an erroneous conclusion. Plainly the balancing exercise was properly conducted.

A number of generalities may be drawn from this case. First of all, where children are making extreme allegations against the absent parent, allegations found by the judge to be exaggerated and untrue, the possibility of alienation by the primary carer is large and needs to be investigated. Plainly the guardian was not only entitled but bound to see whether the communications between the father and both his Member and his local councillor shed any light on that fundamental question.

The second generality that I would draw is as to the involvement of elected representatives of a parent involved in private law proceedings. I fully understand a citizen who wishes to discuss what may be his predicament, what may be his despair, with his local member or his Member of Parliament. That is, I believe, commonplace not only in public law proceedings but also in private law proceedings. What must be questioned is the wisdom of a pre-arranged interview between the Member of Parliament and the children with the plain express purpose of ascertaining their wishes and feelings. That is a central issue in every private law case and every public law case too. The Act requires the court to investigate, to weigh and to make findings on that crucial issue. But the court is assisted not only by the evidence of the parties but by the evidence of the independent and qualified officer who will either be the CAFCASS officer or the guardian ad litem.

It seems to me that whatever responsibility a Member of Parliament may feel in relation to the constituent, great care should be taken before acceding to a request that the children be brought to a constituency surgery to enable the Member to ascertain their wishes and feelings. What is the purpose of that? What will the Member of Parliament do with the information? Before acceding to such a request, any Member of Parliament would be wise to seek clear information as to the nature of the proceedings within the family justice system, the stage that they have reached and what other steps have been or will be taken in order to ascertain the wishes and feelings of the children. I do not know whether Mr Timms had been informed that the children had been separately represented since 18 March. Certainly the guardian was not informed by the father of his intention to take the children to see Mr Timms for this purpose. I do not for the moment make any criticism of the manner in which Mr Timms dealt with the information that he elicited from the children. It is implicit that he had understood that these were private law proceedings and it was not only fit, but also no doubt his duty, to draw the statements of the children to the notice of the Director of Children's Services, who has a primary role in child protection in the locality. Equally responsible were his communications with the guardian, but it does seem to me that any Member of Parliament has to ask himself the question: why am I being asked to do this? Am I being manipulated by my constituent or may I be in danger of manipulation, am I invading territory that has been rightly assigned by Parliament to other

professionals? After all the appointment of a guardian is a statutory appointment under the Children Act 1989 and Rule 9.5 and it gives rise to duties in the guardian.

The third matter that I draw from today's hearing is the use or rather the abuse by counsel of the facilities of this court and the services of the court usher. Mr Batchelor had continued his legal research overnight and come with three additional authorities which he wished not only to be in the long line on the bench before him but also on our bench. Accordingly he requested the usher in this court, 67, to copy all three authorities three times. By chance I came upon the usher as she completed the first copy of the first authority which ran to 58 pages. I immediately called a halt. I inquired whether this was the first time that she had been asked by counsel to provide this service, and I was dismayed to hear from her that it is a regular practice and that in innumerable family appeals members of the Bar expect her or invite her to provide this service. I would like to make it absolutely plain that it is no part of the usher's duty to photocopy authorities for members of the Bar, nor is it a proper charge on the resources of this court. The father in this application is publicly funded and, if the presentation of his case requires the photocopying of any documents, then that should be done outside the building as part and parcel of the costs of preparing the case.

Having drawn those three generalisations and only because I have drawn those three generalisations I will grant permission but refuse the resulting appeal.

Lady Justice Arden:

I agree with all that has fallen from my Lord, Thorpe LJ. I would just like to add a coda about Article 8 of the European Convention on Human Rights lest it be thought that I have not taken that Article into account in reaching my decision. As is well-known, that Article guarantees to every individual respect for his private and family life, his home and his correspondence, which would of course include e-mail communications with a Member of Parliament, but that right is a qualified right. A public authority may interfere but it cannot interfere unless three conditions are fulfilled. First, the interference must be in accordance with law. That condition is satisfied because of CPR 31. Secondly it must be necessary in a democratic society for a number of specific objectives including protection of health, which would necessarily include the well-being of these children. And thirdly, the interference must be proportionate with the aim to be achieved, and for the reasons given by my Lord, Thorpe LJ, the judgment of the judge met that requirement in particular by providing that the disclosure was to be to the guardian alone in the first instance.

I join, for the reasons given by my Lord, Thorpe LJ, in giving permission and dismissing this appeal.

Lord Justice Dyson:

I agree with both judgments.

Order: Application granted; Appeal allowed