

Re M & B (Children) (2000)

[2001] 1 FCR 116

25/07/2000

Court

Court of Appeal

Facts

The principles to be applied in considering an application for indirect contact in a case involving domestic violence were the same as those recently stated as applying to applications for direct contact in such situations.

Mother's appeal from the order of Mr Assistant Recorder Oldham made 28 March 2000 that there be indirect contact between the father and the parties' natural daughter ('C'), on a twice yearly basis and refusing to make any order under s.91(14) Children Act 1989 requiring the father to obtain leave prior to pursuing any further application under the Act. C was born in October 1991 and lived with her mother and an older half-brother in a family unit also comprising the mother's new partner to whom she was to be married. The relationship between C's parents had been characterised by unusually high levels of domestic violence during the period 1988 to 1994. Criminal proceedings were brought against the father in respect of some of the incidents when he was convicted of rape, indecent assault and actual bodily harm resulting in a sentence of 18 months imprisonment. In addition there was an application for a civil committal following the father's breach of various injunctions made for the protection of mother and in respect of which he was committed for the maximum period allowed, though he later purged his contempt. Experts were eventually instructed to prepare a psychological report in respect of the mother and in the event a joint report was agreed between them. Both agreed that the mother had suffered from post traumatic stress disorder and secondary depression which were likely to resolve if there was no further contact with the father. Both agreed however that the symptoms were likely to recur if there was any future contact. The assistant recorder continued what was the status quo (indirect contact twice yearly) and refused to accede to the mother's application for an order under s.91(14) of the 1989 Act. The Mother appealed on the grounds that (i) the judge had failed to express, and thus acknowledge, the price to be paid for the order (even for contact twice yearly), namely a recurrence of the mother's symptoms, (ii) the judge had erred in ignoring the wishes and feelings of the child who was by now 8 years old, (iii) the judge had erred in directing himself that the observations of Wall J in Re K and Re M could be disregarded on the basis that those cases dealt with direct contact and (iv) the judge had failed properly to make findings of fact regarding the history of the violence.

Held

HELD: (1) It could not be accepted that the assistant recorder had, inferentially, carried out a balancing exercise between the benefit to the child of twice yearly indirect contact and the price to be paid. This price was the indirect harm to C of living with a primary carer suffering from the emotional and

psychological conditions brought on by a recurrence of her symptoms. (2) The assistant recorder gave himself the clearest misdirection in ignoring the wishes and feelings of the child. It was incumbent on him to have regard to the clear wishes and feelings and whilst it was true that C's views were no doubt influenced by her mother's reaction, that reaction, given the history of violence, had not been unreasonable. However the views of C should not have been dismissed as irrelevant. (3) The assistant recorder misdirected himself in ignoring the guidance given by Wall J. In fairness to the assistant recorder he had determined this case before the report of the Children Act subcommittee had been available and before the recently given Court of Appeal guidelines given in a collection of cases dealing with the inter-relationship between domestic violence and contact. But even at that embryonic stage the assistant recorder should have paid far greater regard to the father's past misdeeds, his absence of contrition and his failure to acknowledge that he was the adult in need of professional help in relation to his emotional and psychological condition. Even in an application for indirect contact these were material considerations. (4) Regarding the assistant recorder's failure to make findings in respect of the history of violence, in fairness to him, the importance of this had not been emphasised. (5) Having clearly misdirected himself, the assistant recorder's conclusions rested upon fractured foundations. The Court of Appeal was well placed however to embark upon a proper determination given that neither party objected to the findings of fact made. (6) This was a father who was seeking to establish a relationship rather than to continue one which had been transiently interrupted. The child had had no contact with her father since 1995 (when she was four years old) and had no specific recall of her father save for some unpleasant memories. Regard had to be had to the fact that the value of the arrangement was questionable. The dominant consideration was the importance of maintaining the mother's emotional and psychological stability during C's minority. The experts opinion regarding a recurrence of the mother's symptoms in the event of contact weighed far heavier in the scale than any other relevant consideration. (7) Further, the mother should have been given a period of respite in which to fortify herself before any future application was made by the father. The assistant recorder was wrong therefore to reject her application for an order under s.91(14) of the 1989 Act particularly if it were time limited, the appropriate period being two years. (8) Applications for injunctive relief in the form of non-molestation orders were misfounded. There was no evidence of any threat by the father; all there was, was the history.

Appeal allowed. Application for indirect contact dismissed. Order made under s.91(14) Children Act 1989 to remain in force for two years. No order on application for injunction.

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