

Re W (Children) (2008)

[2008] 2 FLR 1170 [2008] EWCA Civ 538

20/05/2008

Barristers

Barbara Mills KC

Court

Court of Appeal

Summary

A judge had erred in refusing a mother's application to remove her three children permanently to Sweden, as he had failed to give sufficient weight to the children's wishes and feelings, and had reached his welfare conclusion on an unsustainable basis.

Facts

The appellant mother (M) appealed against the refusal of her application to remove her three children permanently to Sweden. M and her former husband (F), who divorced in 2006, were both Swedish nationals. The family lived in a spacious home in London. The children were aged 15, 13 and 11, and were particularly intelligent and mature. M wished to return to Sweden, where housing and private education for the children would be much cheaper. The children supported the move to Sweden. Their wishes and feelings were advanced in the report of a CAFCASS officer. The CAFCASS officer applied her own analysis to the children's statement, with the result that she ended up advising the judge to exercise a degree of caution in evaluating the children's stated wishes. The judge had raised the possibility of meeting the children, but the matter was not pursued and M's counsel did not press the point. M submitted that the judge had erred in weighing up the financial factors, in particular the effect that refusal of her application would have upon the London home that she and her children would be sharing. M further argued that the judge did not sufficiently consider the wishes and feelings of the children.

Held

HELD: (1) (Per Thorpe L.J.) The judge had erred in finding that M would have enough equity to acquire an "acceptable" or "satisfactory" house in London if the family home had to be sold. (2) (Per Thorpe L.J.) The participation of children in private law Children Act proceedings was a matter of particular topical concern. The Family Justice Council's sub-committee "The Voice of the Child" was strongly in favour of judges seeing children much more frequently than in the past. The eldest child, in particular, was an autonomous person with clear rights, and was entitled to be heard. That could be achieved in three ways: separate representation, discussion with the judge, or through a CAFCASS officer. That third method had caused the eldest child to feel that her wishes were insufficiently considered by the judge, because they were diminished by the very professional whom she trusted to advance them. That conclusion might have been avoided had the judge had a meeting with the children. It was regrettable that the judge had

been dissuaded from that course. (3) (Per Wilson L.J.) The wishes and feelings of the children had not been satisfactorily weighed by the judge, probably because they were conveyed to him by a CAFCASS officer who was making a recommendation which conflicted with those wishes. The difficult position of the CAFCASS officer might have given rise to a strong argument for the separate representation of the children by a guardian ad litem other than her, or she could have sent a copy of her report to the children and asked for their written comments on it for transmission to the judge. Alternatively, their interviews with her could have been videotaped and shown to the judge. The discretion of judges to meet children privately was largely untrammelled by authority, and was the exception rather than the norm. It was a matter of concern that Thorpe L.J.'s expression of opinion that it was regrettable that the judge did not meet the children might pre-emptively alter the current neutral state of affairs, especially considering that the judge had not been pressed to see the children and was not criticised by counsel in the appeal for not having done so. (4) (Per Charles J.) Although the views of the children, and in particular the eldest, had not been given sufficient weight, it was not clear that a meeting between the judge and the children would have been appropriate or would have provided a fair solution. Before any meeting between the judge and a child took place, the following needed to be carefully addressed: (a) the format, structure, content and purpose of the meeting; (b) the role of the judge; (c) the participation and presence of others; (d) what was to be passed on to anyone not present; (e) how matters asserted by a child to the judge were to be tested; (f) whether anything that was not passed on to the parties could be taken into account by the judge; (g) what explanation was to be given to the child before and after the meeting.

Appeal allowed

Permission

Lawtel 