

## Re R (A Child) (2009)

**[2010] 1 FLR 509; [2009] EWCA Civ 445**

22/05/2009

### Court

Court of Appeal

### Summary

A judge deciding whether to grant a residence order had erred in rejecting the recommendation of a CAFCASS officer without hearing evidence from her.

### Facts

The appellant mother (M) appealed against a decision granting a residence order in respect of her son (L) to the respondent father (F). M and F had separated when L was two years old, and L lived with M after the separation. When L was nine years old, M suffered exhaustion which resulted in the parents agreeing that he would stay with F for the foreseeable future, and that he would move to a school closer to F's house. Shortly afterwards F sought the residence order. By the time of the hearing L had lived with F for some seven months. A CAFCASS officer had considered the case and in her report recommended that L should live with M, stating that L had indicated a preference for returning to M. L had said that he wanted to be with M when she gave birth to the baby she was expecting shortly after the hearing, and the CAFCASS officer inferred that he had a subconscious need to reassure himself of his position in that family unit. The judge heard from the parents, but not from the CAFCASS officer or L himself, and found that L was settled with F and could reassure himself of his position through contact and from the security of his life with F. M argued that the judge had erred (1) in his treatment of L's wishes; (2) in rejecting the recommendation of the CAFCASS officer without hearing evidence from her.

### Held

(Ward L.J. dissenting) (1) The judge had erred in failing to listen to L's wishes. He had referred to L's expressed wish to return to M and so he could not be said to have overlooked entirely that important element, but there was a difference between acknowledging the existence of a factor and taking it properly into account. There was no indication that the judge had evaluated L's wishes, that he considered to what extent his age or maturity affected the weight to be attached to them or that he considered how heavily they weighed in favour of returning him to M; on the contrary, he appeared to have recorded and disregarded them. L's wishes could not be determinative, but they should have been properly taken into account, *L (A Child) (Contact: Domestic Violence), Re* (2001) Fam 260 CA (Civ Div) and *D (A Child) (Abduction: Rights of Custody), Re* (2006) UKHL 51, (2007) 1 AC 619 applied. Moreover, L's wishes were well supported by the more mature understanding of M and the CAFCASS officer that the birth of his new half-sibling was not a good time to break up his residence with M. (2) The judge had not discussed the CAFCASS officer's recommendation in any detail and failed to explain the grounds on which he disagreed with her conclusion, which he was required to do, all the more so in the officer's absence.

Whilst there could be no hard and fast rule in a matter of such kind, especially where the attendance of the CAFCASS officer would require an adjournment, in general, unless there were strong reasons to do otherwise, judges should, if minded to depart from an experienced CAFCASS officer's recommendation, test their misgivings with the officer in the witness box before reaching a decision; the judge did not appear to have considered doing that, A (A Minor) (Children: 1959 UN Declaration), Re (1998) 1 FLR 354 CA (Civ Div) applied, CB (A Minor) (Access: Attendance of Court Welfare Officer), Re (1995) 1 FLR 622 CA considered and C (Section 8 Order: Court Welfare Officer), Re (1995) 1 FLR 617 CA (Civ Div) distinguished, because the judge there had heard from the child and had not declined to follow the officer's recommendation. The impression was that the judge had been overwhelmingly influenced by the fact that L had settled well with F and that that factor led him to brush aside other factors. The CAFCASS officer had been aware that L had settled, but in the light of other matters it had not led her to recommend that he should remain with F. That fact alone could not justify disregarding the other factors, or failing to hear from the officer before rejecting her recommendation. (3) (Per Ward L.J.) Bearing in mind that the judge was exercising his discretion, the appellate court could not say that he was plainly wrong not to have concluded that L's wishes tipped the balance in favour of residence with M: it was but one of the factors to which he had to have regard. The judge had also been well able to conduct his evaluation without the attendance of the CAFCASS officer. He could not be criticised for failing to adjourn solely for the purpose of what was likely to be an anaemic discussion with her.

## Permission

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