

Re D (A Child) (2001)

[2001] EWCA Civ 1827

14/11/2001

Barristers

Judith Murray KC

Court

Court of Appeal

Practice Areas

Private Children Law

Summary

The judge at a directions hearing erred by extending an existing contact order in the absence of full arguments and evidence. A costs order was also set aside on the ground that the judge approached the issue of costs in family proceedings on the wrong basis.

Facts

Mother's appeal from the decision of Mr Recorder Parry on 11 October 2001 at Birmingham County Court extending a contact order and making an order for costs against the mother. Contact between the father and the three-year-old child ('D') was agreed by an order for visiting contact on 3 August 2001. However, without referring to the court or the father, three weeks later the mother decided to suspend contact and subsequently applied for an order suspending the visiting contact agreed. At the directions hearing, the recorder had the benefit of a report from the Children and Family Court Advisory Service ('CAFCASS'), which concluded that D was happy and comfortable during contact sessions with the father. The report further stated that D would find overnight contact with the father enjoyable. The recorder concluded that the mother had no grounds to suspend the contact order. However, while accepting that a staying contact order was an extension of the existing order, the recorder concluded that the court hearing the substantive issues in January 2002 would be assisted if it had information on how D reacted to staying overnight with the father. Accordingly, the judge extended the visiting contact order to a staying contact order. He also made a costs order against the mother on the grounds that in the ordinary course of events, even in family proceedings, it was usual for the losing party to pay the costs of the application.

Held

HELD: (1) It was possible on an interim application for directions for the court to make a definitive order if the evidence was all one way and absolutely clear. (2) On a hearing for directions where a parent had stopped contact and there was no evidence of why contact had been stopped, the court was in a position to reinstate contact without the need for substantial evidence. However, to extend a contact order in respect of a three-year-old child was a considerable step. the child required stability until a court, armed with the benefit of evidence, concluded otherwise. (3) There was some evidence to that effect contained

in the CAFCASS report and if the mother had not objected to the making of the order, it would have been open to the court to make it. However, on the mother's objection to the making of a staying order, it was necessary for full enquiries to be undertaken. The mother was entitled for her concerns to be put before the court and both sides' arguments should have been investigated. (4) The court in January 2002 might have concluded that a staying order was the correct order to make. However, the recorder acted prematurely by making the order in advance of full arguments and evidence. The recorder's extension of the contact order was accordingly set aside. (5) With regard to costs, if the recorder had set out all the factors that he felt were relevant to his decision to make a costs order against a legally aided mother in family proceedings, which was an unusual order to make, it would have been difficult to justify setting his order aside. However, the recorder approached the issue of costs on the wrong basis. He should have approached the issue on the basis that the general rule regarding costs did not apply to applications or appeals made in family proceedings (see, inter alia, CPR 44.3(3)). (6) Accordingly, the costs order could not stand as the recorder approached the issue in error. Exercising the discretion afresh, this was not an unusual case in which the legally aided mother should pay the costs. The recorder's costs order was accordingly set aside and substituted with one of no order for costs.

Appeal allowed.

Permission

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