

Re H (A Child) (2011)

[2011] EWCA Civ 585

07/04/2011

Barristers

Private: Elizabeth Coleman

Court

Civil Division

Practice Areas

Public Children Law

Summary

The decisions in S (A Child) (Contact Order), Re (2010) EWCA Civ 705, (2011) 1 FLR 183 and B (A Child), Re (2001) EWCA Civ 1968 were not to be read so as to require that in every case enforcing contact that there should be a residence order, simply that the person with whom the child lived should be defined. If parents agreed which of them was the primary carer but did not pursue a residence order enshrining that role a contact order could still be made.

Facts

The appellant mother (M) appealed against findings and declarations made in the course of contact enforcement proceedings brought by the first respondent father (F). M and F had been involved in a contact dispute over their daughter (D), who lived with M. There was clear evidence that she wanted to spend time with F but that, on occasion, M had frustrated contact. In May 2010, the recorder was required to decide a narrow point as to whether F's contact with D should be supervised, per M's wishes, or unsupervised, per F's contention. He decided in favour of F, but refrained from making detailed findings in respect of M's past conduct. The resulting contact order was breached, M contending that D had not wanted contact with F. In the consequent contact enforcement proceedings, the recorder made a series of findings and declarations against M. The Court of Appeal subsequently gave its decision in L-W (Children) (Enforcement and Committal: Contact), Re (2010) EWCA Civ 1253, (2011) 1 FCR 78, the essence of which was that where a respondent to contact enforcement proceedings asserted that contact had not taken place because of the child's reluctance or refusal, the burden of proving that the child had not resisted contact rested on the applicant, not on the respondent to prove the child's reluctance or refusal. M contended that the effect of L-W (Children) was that the recorder had, albeit retrospectively, applied an incorrect burden of proof in making the findings and declarations that he had. F, supported by the second respondent guardian, submitted that there was clear evidence that M had continued to frustrate the execution of contact arrangements, and that certain declarations and findings made by the recorder could simply be modified in the light of L-W (Children). M further sought clarification of the decision in S (A Child) (Contact Order), Re (2010) EWCA Civ 705, (2011) 1 FLR 183, commenting on observations in B (A Child), Re (2001) EWCA Civ 1968 that a contact order could not be made unless it

could be attached to a residence order, which she argued suggested that F's contact enforcement application under the Children Act 1989 s.11 should not have been entertained in any event since a residence order had not been made in her favour under s.8.

Held

(1) The essential issue in the instant case, that of when and where F and D should meet, had become bogged down by issues surrounding the burden of proof. A simple disposal of M's appeal was nevertheless possible by setting aside such of the recorder's findings which fell foul of the subsequent judgment in L-W (Children), and modifying his finding that M "is frustrating contact" to M "has on occasion frustrated contact", L-W (Children) followed. That was all that was necessary to dispose of the appeal. (2) What was envisaged in B (A Child) was that a residence order settled with whom a child should live and a contact order bound that person into contact arrangements with the non-resident parent. That was all the court had had in mind in S (A Child). The Act did not require that in every case enforcing contact there should be a residence order, but that the person with whom the child lived should be defined. If parents agreed which of them was the primary carer but did not pursue a residence order enshrining that role a contact order could still be made, B (A Child) and S (A Child) explained.

Permission

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