

## H (A Child) [2011]

### [2011] EWCA Civ 585

07/04/2011

#### Court

Court of Appeal

In proceedings where the father sought contact with his daughter, H, the mother appealed a decision by the Recorder stating grounds that there had been a fundamental procedural unfairness in the recorder introducing into the proceedings in October 2010 and into his October 2010 judgment, findings against the mother which he had been minded to make in May 2010 but which he had forborne to make for the sake of the child's prospects in respect of contact with the father.

The appeal on paper was initially refused but then renewed before Munby LJ after he had given judgment in L-W in November 2010. L-W held that where a respondent to contact enforcement proceedings asserts that contact did not take place because of the child's reluctance or refusal, the burden of proving that the child had not refused or was not reluctant rested on the applicant. The burden was not on the respondent to prove the child's reluctance or refusal and therefore the recorder had been in retrospective breach of that authority.

In light of that judgment the mother's appeal was successful and the Recorder's order was amended to remove those parts that fell foul of L-W.

In addition, counsel for the appellant sought clarification of Thorpe LJ's comments in S [2011] where, in quoting Re B (A Child: Contact), Thorpe LJ stated that [the] contact order cannot be made unless it can be attached to a residence order providing there for the child to live with a person. Thorpe LJ clarified the issue by stating that what the statute requires is not in every case that there should be a residence order to which a contact order exists, but that there should be a person defined, or capable of definition, with whom the child lives. He gave an example where if parents agree that the mother should be the primary carer but do not trouble to get a residence order enshrining her role, a contact order can still be made against her as the person with whom the child lives.

Contact proceedings where findings which the judge at first instance had been minded to make but had not actually made, were introduced. Appeal successful and order amended. Important guidance also given by Thorpe LJ re. court's power to make contact orders where no residence order exists.

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Permission

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