

Re G (Children) (2012)

[2012] EWCA Civ 1434

07/11/2012

Barristers

Joy Brereton KC
Michael Gration KC

Court

Court of Appeal (Civil Division)

Practice Areas

Private Children Law

Summary

A judge had erred in varying a shared residence order, on the recommendation of a guardian, when there was no application before him for a variation. He had also failed to consider a party's need for advice and protection as a litigant in person. Where the parties were unrepresented, the children's guardian should be vigilant to avoid procedural or other unfairness.

Facts

The court was required to determine issues concerning child contact in a case between the appellant (W) and the first respondent (G).

W and G had been in a same sex relationship. During their relationship G had conceived two children from anonymous donor insemination. W and G separated and a shared residence order was made. G, in breach of the order, had relocated with the children from the Midlands to Cornwall. Several years of litigation followed (see G (Children) (Residence: Same Sex Partner), Re [2006] UKHL 43, [2006] 1 W.L.R. 2305). G sought to terminate W's contact with the children and W issued a fresh application for contact. The parties could no longer afford legal representation. An expert (X) recommended the immediate resumption of contact and a therapeutic programme for the children. Contact was resumed by consent and W's application was adjourned for a year. During that time a new guardian was appointed. Contact again broke down and W complained to the new guardian. He had met the children twice, and they told him that they did not wish to have contact with W. He recommended that the shared residence order be replaced with a sole residence order in G's favour. The judge accepted his recommendation. The Court of Appeal was required to determine whether the judge was right to vary the shared residence order, thereby depriving W of parental responsibility and terminating contact.

The Court praised the advocates involved (all of whom save the Counsel for the Guardian were acting pro bono) for the quality of representation on the appeal.

Held

(1) The judge's variation of the shared residence order should be set aside on the basis of procedural unfairness. There had been no application before him for a variation of the shared residence order. The notion of a variation had come from the guardian, not the parties, and it emerged only three days before trial. It was not endorsed by any legal submissions. Neither he nor the judge seemed to consider W's need for advice and protection as a litigant in person. Had she been represented, her counsel would have opposed the variation not only on grounds of substance but also on grounds of procedural unfairness (see paras 36-37 of judgment). (2) W's application had been adjourned on the basis of a shared endeavour between the parents, the old guardian, X and the court. If all went according to plan the parties were to re-assemble after 12 months to decide the future. If it did not go to plan, it was extremely important for the court to be informed. G had no incentive to return to court, and W had failed to do so. In those circumstances the new guardian had a clear duty to take the initiative. He knew that W had no representation and she was appealing to him to act. The maintenance of the relationship between the children and W had been declared by X and by the courts to be of the first importance (paras 41-43). (3) The children's wishes were an important factor, but there was a danger in taking them too literally. Their criticisms of W had no objective foundation. She had always been a warm and loving parent who had never failed them. There was also a clear mismatch between what they said and how they behaved: the new guardian had himself noted the warmth of the interaction between the children and W which froze as soon as he made himself known. The children were aware of G's antipathy to W and to contact. The judge had to have regard to the assessments of all of those previously involved with the case, and to G's intention to estrange W from the children. He had failed to sufficiently take account of the importance of the relationship between the children and W, and the damage that would be caused to them by its loss. X was an internationally renowned expert but had been given no opportunity to assess the breakdown or advise on the prospects of reparation. He had declared himself ready to return to the challenges that the case presented and had access to charity funding for that purpose. The judge's order was therefore premature and was set aside. W's application was remitted for retrial. A direction was made for the immediate re-engagement of X (paras 47-50). (4) (Obiter) The instant case illustrated the difficulties that courts faced when the parties were unrepresented, particularly in complex cases. The children's guardian, as the only party with the benefit of legal advice and representation, should be vigilant to avoid procedural or other unfairness to one or other of the unrepresented parties (para.32).

Permission

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