

Re B (Child Evidence) (2014)

[2014] EWCA Civ 1015

22/07/2014

Barristers

Alex Verdan KC

Court

Court of Appeal Civil Division

Practice Areas

Private Children Law

Summary

The guidance in W (Children) (Family Proceedings: Evidence), Re [2010] UKSC 12, [2010] 1 W.L.R. 701 concerning whether a child should be called to give evidence was applicable to both private and public law family proceedings. A judge had not erred in ordering a CAFCASS adviser to speak to a child and provide a report before forming a view as to whether it was appropriate for the child to answer questions concerning allegations of domestic violence.

Facts

The appellant father (F) appealed against a judge's case management decision concerning whether his step-daughter (D) should give evidence in private law family proceedings.

F had brought proceedings for an order for contact with his five-year-old son (S). S's mother (M) asserted that F had been violent during their relationship. M wished D to give evidence about three incidents which she had allegedly witnessed. D was aged 13 and lived with M. The judge ordered a CAFCASS adviser to visit D to explore whether it was appropriate or in her best interests to answer questions or give evidence, and if so, in what format. The CAFCASS adviser was ordered to prepare a report after meeting D so that the judge could give further consideration to the issue.

F submitted that the judge had failed to give sufficient weight to the factors set out in W (Children) (Family Proceedings: Evidence), Re [2010] UKSC 12, [2010] 1 W.L.R. 701, and the essential test was whether justice could be done without questions being put to the child. F also argued that D's evidence was not essential but was only of peripheral importance.

Held

(1) The judgment in W (Children) concerned care proceedings in which the child who had relevant information was the subject of the proceedings. However, there was no reason in principle why the approach in W (Children) was inapplicable to private law proceedings, W (Children) followed and B (A Child), Re [2014] EWCA Civ 843 applied. The factors that had to be taken into account in determining

whether a particular child should give evidence were divided into two broad categories. The first was concerned with the nature and quality of the evidence, and required a consideration of what was to be gained, in terms of the fair and accurate determination of the case, from calling the child. The second category concerned the risk of harm to the child from the process of giving evidence, to which great weight had to be given. The balancing exercise set out in *W (Children)* was not only concerned with the interests of the adult parties and the child who might have evidence to give, but also with the interests of the subject child (see paras 16-20, 25, 29 of judgment). (2) There could sometimes be merit in a step-by-step approach which enabled more information to be gathered before making an irrevocable decision. In deciding what steps to take, the apparent nature, quality and relevance of the evidence were material, but the court might not know enough in the early stages to form a concluded view about such matters. The material that might be forthcoming from D was not “peripheral”. On M’s case she was a direct witness to incidents of significance. Evaluating evidence about past events in a case where there was little incontrovertible evidence pointing one way or another was a refined process. It was often not possible to predict which pieces of evidence would hold the key to the truth. Accordingly, the court could not dismiss the possibility that D’s contribution might be of importance (paras 27, 31). (3) The judge’s evaluation and decision could not be said to be wrong. It was unfair to suggest that she had failed to take into account the potential limitations of D’s evidence. Further, she had not determined what use was to be made of any material emanating from D. A number of options remained open to the judge ranging from refusing to allow the process to go any further, to permitting M to call D to give evidence in court. In between were various possibilities. Before taking any further decisions, the judge might wish to hear short evidence from the CAFCASS adviser of her impressions of D and her assessment of the impact that further involvement, or non-involvement, would have upon D and upon family dynamics generally. Whether to request the adviser to put specific questions to D was a matter to be approached with considerable sensitivity, and thought would have to be given to how the answers to those questions were to be recorded, and how they could be challenged in the fact-finding hearing (paras 32, 37).

Permission

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