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U (Children – Residence order)

[2016] EWCA Civ 1332

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Barristers
Rex Howling KC

Court
Court of Appeal

Practice Areas
Private Children Law
Judgment of McFarlane LJ dismissing a mother's appeal against the decision of Keehan J that one of the children should move from her care to live with the father.

Background
There were four children subject to private Children Act proceedings: two girls (aged 16 and 14) and two boys (F, aged 12, and Y, aged 6).

The parents married in 1999. In 2011 the mother alleged the father had been violent towards her. After the police took no further action, the parties attempted a reconciliation in 2012 and the family proceedings subsisting at that stage were withdrawn by consent. Unknown to the mother or the children, in 2012 the father underwent a second religious marriage to another lady. The mother did not find out about this until mid-2014 when the parties separated.

The mother made a series of allegations of violence against the father, following on from this revelation. This resulted in an arrangement whereby the youngest child, Y, lived in the father's care from 11 September 2014 and the older three children lived with the mother. The older three children were wholly sided with the mother and were refusing to spend any time with the father.

The proceedings came before Keehan J, who presided over 14 hearings. The two most important hearings were a fact-finding hearing in March 2015 and a final hearing in March 2016 (the subject of the appeal).

Fact-finding hearing
The Court of Appeal set out the findings made by Keehan J in March 2015, directly quoting the judgment on that occasion [§5]. The judge made a series of findings against the mother, namely that (1) none of her allegations against the father were true; and (2) she was prone to be an unreliable witness who exaggerated and embellished allegations, and had lied.

After the fact-finding
Keehan J had then directed the instruction of Dr Eia Asen, the child and adolescent psychiatrist at the

Anna Freud Clinic [§6-9]. Contact progressed very slowly on both sides. The mother had a first unsupervised contact in January 2016 with the youngest child. That contact was of note [§10-11] as Y's hair had been cut in a rough and ready fashion. The mother blamed the father. The father blamed the mother and relied on a transcript of the tape recording of the contact, obtained by way of sending Y (then aged 5) into the contact with a concealed recording device.

Dr Asen prepared full reports. He concluded that the very negative view that the mother had with respect to the father, as evidenced by the findings, continued effectively unabated, and he was concerned about the mother's apparent actions at the January contact if it was she, rather than the father, who had taken the scissors to Y's hair [§12]. The recommendation was that, if the court found the mother to have cut Y's hair, there was little hope that the children could be protected from being exposed to the mother's emotionally damaging mindset. Therefore, all four children should live with the father, but – given the two girls' ages and degree of entrenchment – only F should be made subject to a child arrangements order to live with the father. [§13-14]

The final hearing
Keehan J conducted a two-day final hearing in March 2016. He heard evidence from the parents and from Dr Asen. There was no Cafcass officer. The case was adjourned for one week for written submissions and brief oral submissions. The judge gave ex tempore judgment that afternoon. He made a finding that the mother had cut Y's hair [§18-19] He made further findings that: there was no prospect of the mother promoting a positive relationship between the children and the father; and there was no prospect of the mother desisting from actively involving the children in her campaign against the father. He made an order in the terms recommended by Dr Asen. [§20-22]

The appeal
The appeal was heard by McFarlane LJ. The mother's primary grounds were as follows.

First, that the court should have appointed a rule 16.4 Guardian to represent the children separately. No formal application was made during the proceedings, although it had been mooted [§26]. The Court accepted that, with hindsight, there might have been grounds to appoint a guardian, but it was not a given and it was not open to the mother to complain now that this issue was not raised when she had been represented throughout. [§27-28]

Secondly, that the judge failed to conduct a sufficient welfare analysis:

(a) In having had 100% judicial continuity the judge therefore should have conducted a welfare evaluation with his eyes open to all factors, not simply those identified early on in the proceedings [§31];

(b) The judge acted as though the father was unimpeachable, relying solely on the adverse findings against the mother, but he was not [§32]. The judge was too tempted to approach it as a 'one point case' [§34];

(c) Dr Asen provided a psychological viewpoint, but did not purport (rightly) to conduct a full welfare analysis or provide a welfare recommendation. That left a fundamental structural error in the case [§33].

The Court of Appeal agreed with the arguments advanced on behalf of the father in rejecting this ground:

(a) The court had to look to the legal context of appeals. An appellate court should be wary before entering into detailed textual analysis of a judgment, particularly if given ex tempore. Also, the court should have regard to the "seniority and experience" of the judge giving such a judgment. In this case, the judge had not been asked to give a longer explanation of his reasoning after giving judgment

[§37-39].

(b) The case had been conducted over two years with 14 hearings all before Keehan J. He knew the personalities of the parties and the facts of the case [§41]. He was “steeped in this case”. To submit that he had somehow failed to engage with the welfare factors was a “bold submission” [§43]. Dr Asen and his team, too, had been immersed in the details of the family for several months [§42].

(c) Although some findings had been made against the father, there were no findings that he was actively a source of potential harm to the children [§45].

Thirdly, that there was no account given of the children’s wishes and feelings beyond saying that the three oldest children sided 100% with the mother. F had not been asked about being separated from his sisters and Y’s wishes had not been sought [§35]. The Court of Appeal did not consider this to be a valid ground of appeal in circumstances where the judge had been perfectly aware of the clear evidence as to the wishes and feelings of the key children in the case. Y’s wishes and feelings were of limited relevance given that it was beyond contemplation that he would have been moved to live with the mother in light of the findings [§44].

To read the judgment, click here.