

IN THE SUPREME COURT OF JUDICATURE
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
FAMILY DIVISION
(MR M HOROWITZ QC SITTING AS A DEPUTY HIGH COURT JUDGE)

FAFMF 98/1026/2

Royal Courts of Justice
Strand
London WC2

Tuesday, 2 February 1999

Before:

LADY JUSTICE BUTLER-SLOSS
LORD JUSTICE BROOKE
LORD JUSTICE CLARKE

RE D-R

(Computer Aided Transcript of the Palantype Notes of
Smith Bernal Reporting Limited, 180 Fleet Street,
London EC4A 2HD
Tel: 0171 831 3183
Official Shorthand Writers to the Court)

NICHOLAS O'BRIEN (Instructed by Bennett & Ryan, Isleworth, Middlesex, TW7 4DS) appeared on behalf of the Appellant (Father)

ANGELA HODES (Instructed by Capsticks, London, SW15 2TT) appeared on behalf of the Guardian ad Litem

SAMANTHA RING (Instructed by Scott-Moncrieff, Harbour & Sinclair, London, EC1M 3JB) appeared on behalf of the First Respondent (Mother)

J U D G M E N T
(As approved by the Court)

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LADY JUSTICE BUTLER-SLOSS: The appellant is the father of a young woman, L., born on 12 August 1979 who has the misfortune to suffer from cerebral palsy with severe impediment of her

cognitive and communication faculties. Her parents did not marry but lived together for a number of years. The parents separated in 1987 and their parting was acrimonious and the relationship between them remains hostile. They have an elder daughter who is estranged from her father. The father had contact with L. for a number of years but it was effectively frustrated by the mother who brought it to an end in 1995. Despite applications by the father to the family proceedings court, there has been no contact since 1996. There were other factors, such as the breakdown in the father's health and the impossibility of concluding proceedings before L. became 18, when a contact order under the provisions of the Children Act could not be made. The father therefore sought a declaration under Order 15 rule 16 invoking the inherent jurisdiction of the High Court. This was set out by the deputy high court judge at page 1 of his judgment in the following terms:

"Firstly, a declaration that the defendant, his former partner and the mother of the second defendant, L. ... is acting unlawfully in refusing him direct contact with L. ... Secondly, a declaration that it is lawful for him, the plaintiff, to arrange direct contact with L. ... , such contact being in the interests of L. And thirdly, an injunction restraining the defendant, and by that, of course, is meant as she later became the first defendant, whether by herself or asking or encouraging anyone else to do so from impeding or interfering with the plaintiff having contact with L. ... and, by way of supplement at paragraph 4, further or other relief."

The mother opposed the application for a declaration. The Official Solicitor represented L. and supported the mother. Mr Michael Horowitz QC sitting as a deputy high court judge dismissed the application on 2 July 1998. Although he expressed doubts about the precise formulation of the summons before him and the relief sought, he decided to look directly at the welfare issue whether it was in the best interests of L. to have contact with her father. He said at page 10C of his judgment:

"The evidence I have heard and the material I have read have enabled me to form a clear view."

The future arrangements for L. were to go to a college in Northampton for a three year course. The

assessment of L. by the college as reported by the Official Solicitor was:

"As to their assessment of L. and I was told of it in a report given to me by [the Official Solicitor], of his conversation with ... the principal. The view of his staff from assessment was that L. is quite an immature young woman and it is a priority to develop her self-image and self-esteem as a young woman rather than as a little girl. This is no reflection whatsoever on the mother, but it is an indication that the time has come for L. to move on."

The Official Solicitor obtained a psychiatric report on L. from a psychiatrist specialising in learning disability. There are three passages in the judge's judgment which are helpful to indicate L.'s position.

The description of the psychiatrist is at page 2C:

"[She] suffers from mild cerebral palsy and severe learning disability (mental retardation). She is ambulant, can use stairs slowly, though reluctant to do so. Her vision, hearing and general health appear to be satisfactory. She requires practical help and general support in daily living and has the potential to increase these skills. She has some manual dexterity, but again requires help while working on a range of projects. Her literacy and numeracy skills are limited and her concentration span limited.

... She is more confident when communicating with people she knows. She will often smile and nod as if agreeing while she has not understood the question. She relies on her daily routine to understand what is happening to her."

Also at page 5:

"She is not capable of understanding the application her father has made or exercising a real choice in relation to it. Any preference she may indicate is likely to happen spontaneously in the 'here and now' and can only be interpreted by people who know her well, have regular contact with her and who can then use this information objectively to make decisions in L.'s best interests."

Then at page 13:

"Her father is not currently a part of her life. We were not able to elicit any memory of her father, nor were we able to elicit any significant response emotionally to her mother. However we were able to observe how she related to her mother and some of the expectation L. may have of her mother's role in her life. For example, she understood and expected that her mother would take her to school after the session

ended."

From the report it can be seen that the professional view is that L. is not able to express her own view about contact with her father. That appears however not to be the view of either parent.

The deputy high court judge found the mother to be a devoted carer of L. who has done well in her care. She retained a deep anger and suspicion about the father and his motivation and could not see that he had any good qualities. The judge took into account as a relevant factor the continuing hostility and strong objections and anxieties of the mother to the father renewing contact with L. The mother was strongly supported in this view by the elder sister.

The deputy high court judge found the father to have good intentions towards his daughter but that he was not a man of great insight or sensitivity nor was he astute in observing L. or responsive to her needs. He found in respect of that relationship at page 14F:

"My overall impression from what I was told by the father and confirmed when I listened to [the sister's] evidence was that contact went reasonably well in the sense that it filled time and there were moments of pleasantness. L. would draw, so would father; they would watch television, they would have dinner. But I have, I am bound to say, hesitation in concluding that it was a rich and deep experience for L. What unfortunately, therefore, has emerged is that the father is not a significant part of L.'s picture of the world and cannot be compared, it seems to me, to people such as ... [the] relief carers who have been a part of her life for about fourteen years."

The view of the college to contact was provided by the Official Solicitor:

"... the more measured view, which I find persuasive, is the view of [the principal] ... as relayed to me by [the Official Solicitor] in his evidence before me. {The principal's} concerns were that this would be her first time away from home for an extended period. ... she has had overnight stays [with the relief carers]; she has been on more than one trip to Lourdes with a church group but, of course, going to [the college] is away from home on a quite different and structured basis, and it does require her to settle down.

[The principal] ... said, again on the basis of the written assessments of staff whom he knows at his establishment, that he could see no advantage to L. having contact with a father she had not seen for over three years bearing in mind her learning difficulties and her difficulties with communication. He added that she would have a great deal to cope with in facing the challenges of improving her skills and becoming mature and there could be disadvantages of introducing yet a further person into her life. It was not obvious to him what the compensating advantages would be. When I add to that, as I have indicated I can and must, the mother's anxieties should contact be instituted, it seems to me that I cannot find that it is in L.'s welfare interest for contact to be restored and continued."

The judge decided that he should not allow contact. He was also concerned that the declaration was a blunt instrument and how was any declaration that contact was in the best interests of L. to be enforced. Counsel for the father had not pursued before the judge the application for a mandatory injunction.

In this Court, Mr O'Brien, who appeared below, sought to persuade us that the judge erred in his approach to his exercise of discretion. He accepted that statutory based contact orders ceased at the latest at 18 and that the court no longer had the *parens patriae* jurisdiction over mentally incapacitated adults. He argued that the question of contact is governed by common law and there was a right to a relationship between father and daughter which ought to be protected. The effect of that right was to create a presumption that the father daughter contact should be exercised. The judge failed to recognise that presumption and to give it weight. Further the judge was wrong to accept the view of the Official Solicitor that there were no advantages to L. in contact. The judge had said (at page 15C):

"One really should be asking, has this man, albeit a man I am sure full of love and commitment as he sees it to her, assumed a significance in her life or is he likely to do so if a contact order was made?"

The judge was wrong in Mr O'Brien's view in his formulation of that test. There were positive features in a loving father having some relationship with his adult child, the natural love and affection which he could give. There was a history of that relationship until the contact was brought to an end.

It was a relevant factor that it was the father in the special position of father in contrast to a more remote relationship. It must be in the interests of an incompetent adult to retain contact with the close family. Although he recognised the difficulties of implementing contact, it was hoped that if the declaration was made it might encourage the college to arrange facilities for contact on their premises.

The deputy high court judge formed a clear view as to the merits of this application. Unless he was wrong in principle it is not for the Court of Appeal to second-guess his approach to the exercise of discretion. In the court below none of the counsel for the three parties challenged the jurisdiction of the court to hear the application and the case proceeded on the merits. It is not necessary for this Court to decide whether there is jurisdiction to entertain an application to declare that contact with an incompetent adult child is or is not in her best interests. It is also not necessary to consider the suitability, if there is jurisdiction, of invoking the discretionary declaratory procedure in order to facilitate or regulate contact within the disfunctioning family circle. Issues which may have to be considered at another time are, as the judge pointed out, the lack of teeth in a declaration, the inflexibility and inability to monitor or vary its contents, the extent to which, if it can be granted, it should be backed up by prohibitory or mandatory injunctions with the 'appalling vista' of enforcement and contempt proceedings, see Re V 2 FLR 195 per Sir Stephen Brown, President at page 202.

I propose therefore to follow the approach adopted by the deputy high court judge and look directly as to whether he erred in his approach to the best interests of L. The starting point must be that L. is an adult, but an adult under a disability. If she were competent there would be no question of enforcing a relationship between her and her father. He would have a right to a relationship as far as she consented to it and no further. Since L. is under a disability and is not in a position to consent, following the principles set out in the Re F Sterilisation Mental Patient [1990] 2 AC page 1 line of cases, it becomes a question of - is it in her best interests to have contact with her father? If there was no conflict between the members of the family, it would be natural and desirable for L. to have the love

and support of those members of her family willing to give that to her. In the case where there is conflict, the best interests of an incompetent adult require the court to look at all the circumstances, which include the history and former relationship of the father and daughter, the current situation and the prospects for the future. There is, in my judgment, no presumption of the right to contact between a parent and an adult child, even one under a disability. But the relationship of father and daughter is clearly a relevant factor and may, in some cases, be a most important factor. That relationship must be weighed in the balance together with all the other relevant circumstances of each individual case. In the present case, the deputy high court judge took into account that the father had good intentions, the history of living under the same roof and some years of contact, his love for his daughter but his lack of sensitivity and foresight. He took into account the hostility of the parent with primary care of the daughter, supported by the elder sister. He considered the highly relevant concerns of the college that a seriously disabled and immature young woman was going for the first time to live in a residential college with all the difficulties of adjustment and that initiating contact after a considerable gap would add an extra burden at an unsuitable time. The Official Solicitor as Guardian ad Litem of L. opposed the making of the declaration. The judge found that L. had a limited understanding of fatherhood and that the father was not and would be unlikely to be significant to her. Although the implementation of any contact is not strictly relevant to the issue of best interests, the extent to which the father would have an opportunity to have a relationship with his daughter which would be of value to her would to some extent at least depend on her primary carer who was implacably opposed to renewing contact and had a degree of anxiety about it. There would be real problems in making contact effective and a danger of disruption for L. from the consequences of contact on her mother and on her which itself might not be in her best interests. In my view the judge correctly identified the relevant factors and weighed them in the balance. I can detect no error of principle and no ground for this Court to intervene in a decision-making process which is pre-eminently a matter for the trial judge.

I would dismiss the appeal.

I would add however that this case discloses the inadequacy of the procedure adopted by the father, which, even if he had succeeded, might well not have been likely to have given him an effective contact. Ever since the lapse of the parens patriae jurisdiction over the mentally incompetent on the coming into force of the Mental Health Act 1959 and its successors there has been a huge gap in the non-mental health care of those who cannot care for themselves. That gap has been bridged to some extent by the House of Lords and this Court in Re F and succeeding cases. But it is a poor substitute for a statutory framework to provide proper health both to the incompetent adults and to their families.

LORD JUSTICE BROOKE: I agree.

LORD JUSTICE CLARKE: I also agree.

Order: Appeal dismissed with first respondent's costs; no order as to costs in respect of the Official Solicitor; legal aid taxation of the appellant's costs; Section 18 order against the Legal Aid Board; appellant's contribution assessed as nil; appellant's application for leave to appeal to the House of Lords refused. (This order does not form part of the approved judgment)