

**An appeal by a father in a contact case. Appeal allowed.**

The father, in a long contact case, had requested that his daughter should have separate representation through NYAS. The trial judge had refused to sanction this. In his judgment, Wall LJ rejects the judge's action on the grounds that the court must not 'give up hope' in such cases, and that he should have allowed NYAS to at least consider whether this was a suitable case for them to handle.

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IN THE SUPREME COURT OF JUDICATURE

IN THE COURT OF APPEAL (CIVIL DIVISION)

ON APPEAL FROM CHICHESTER COUNTY COURT

HIS HONOUR JUDGE BARRATT

Royal Courts of Justice

Strand

London, WC2

Wednesday, 26 April 2006

B E F O R E:

LORD JUSTICE WALL

LORD JUSTICE MAURICE KAY

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IN THE MATTER OF B (A CHILD)  
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(DAR Transcript of

Smith Bernal Wordwave Limited

190 Fleet Street, London EC4A 2AG

Tel No: 020 7404 1400 Fax No: 020 7831 8838

Official Shorthand Writers to the Court)

MS J WADDICOR (instructed by Messrs Edward Hayes, 22 West Street, Chichester, WEST SUSSEX PO19 1HZ) appeared on behalf of the Appellant.

MR H TRAVERS (instructed by Messrs Glanvilles, 13 East Street, Havant, HAMPSHIRE PO9 1AA) appeared on behalf of the Respondent.

## J U D G M E N T

(As Approved by the Court)

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1. LORD JUSTICE WALL: This appeal raises a short but sensitive point in a child case. Mr B appeals against part of an order made – or rather, perhaps I should say, an order not made – by HHJ Barratt QC sitting in the Chichester County Court on 10 February 2006. The judge gave permission to appeal himself. The proceedings before the judge relate to Mr B's application for contact with his daughter, S, who was born on 17 January 1994 and is thus 12. The other party to the proceedings is S's mother, Mrs W. The family structure is quite complex because S is one of five children born to Mrs W. She is the only child of the marriage between Mrs W and Mr B, which was Mrs W's second marriage. By her first marriage she has two daughters, I, aged 16, and B, aged 14; and subsequent to her separation from Mr B she has had two further children by Mr C, who sadly died in a road traffic accident in February 2004. Those two children are T, aged six, and J, aged two.

2. One of the complications, therefore, is that the two eldest children, I and B, have a clear recollection of Mr B and the time, albeit brief, that he was involved with their mother, and their recollection of him is not a happy one. Proceedings in relation to S have been going on for some considerable time and the judge was well acquainted with the proceedings. Mr B has not in fact seen S since August 1997, when she was approximately three and a half. It is clear from the documentation, and particularly from a judgment which the judge gave in 2003, that a great deal of time and resources have been put into the case, including instruction of a well-known child psychiatrist, Dr Michael Heller. It is in many ways a classic intractable contact case. Mr B is of the view that there is no good reason why face-to-face contact should not now be introduced between himself and his daughter, although he accepts that the process will need to be carefully handled and that contact will initially need to be supervised. On the other hand, Mrs W is firmly opposed to any form of direct contact and relies in her opposition on what are said to be S's wishes not to see her father. It is also apparent from the chronology that the parties' relationship was brief and extremely unhappy. They did not live together after S was born, and so from the perspective of both parents there has been no real period of normal family life.

3. The order currently governing Mr B's contact with S was made on 10 June 2003 by HHJ Barratt although, as I indicated earlier, his knowledge of the case goes back to 2001. In June 2003 the order which he made was to dismiss Mr B's application for contact and order indirect contact between Mr B and his daughter in the form of cards at birthday, Easter and Christmas; photographs to be sent by the mother, Mrs W, to him; and the provision by him of a personal video recording of himself and his life for the purpose of the video being shown to his daughter by a social worker, and provisions being put in place to ensure that the material was suitable before it was shown to her. The judge also made a family assistance order designed to last until January 2004. He made an order under section 91(14) of the Children Act and gave Mr B permission to appeal against that particular provision.

4. Mr B duly exercised that right of appeal, and on 11 November 2003 this court, in a constitution comprising Thorpe and Scott Baker LJ, allowed the appeal. The case is in fact reported as *Re B*

*(Section 91(14) Order: Duration)* [2003] EWCA Civ 1966, [2004] 1 FLR 871. That report is therefore on the record to be read if need be. For present purposes I propose to cite only one paragraph of the headnote when, in allowing the appeal, the reporter summarised the court's views in the following words:

"Where a child was effectively denied or inhibited from an ordinary relationship with her father by the determination of her mother to excise her father from her life, the court should never abandon endeavours to right the wrongs within the family dynamics. The order made by the judge gave the wrong message. This was not a case in which the father had in any way abused the family justice system so as to disturb or undermine the mother's primary care. The judge had specifically found that the father had acted responsibly in pursuing his desire for an ordinary relationship with his daughter by contact applications."

The court accordingly substituted a shorter period of two years for the five which had been imposed by the judge.

5. Thus it was that the present round of litigation began, following the expiration of the section 91(14) period in July 2005. What has happened since then is that there has been a further CAFCASS report, and at an interlocutory appointment the judge gave permission for a paper exercise to be conducted by a Dr Peter Dale, a psychologist, to advise if there was any practical assistance that could be afforded to the parties to facilitate contact. It is right to say, and this is a point made strongly by Mr Travers on behalf of Mrs W, that in his 2003 judgment the judge was critical of the father. He made a number of comments about the father's personality, and he made it reasonably clear in that judgment that, were contact to be reintroduced, it would be necessary for the father himself to undergo some form of therapy to enable him to realise the sensitivities of the issues involved and to curb his own behaviour in relation to them. Mr Travers makes the point that the father has not accepted that advice and regards such therapy as being unnecessary. That is countered by Ms Waddicor, who points out that when Dr Dale suggested joint therapy and assessment by either himself or a similar professional, it was the mother who refused and the father who was willing to undertake it.

6. Be that as it may, the position when it reached the judge for the purposes of this appeal was effectively that there was a CAFCASS report which was hostile to an order for contact. The child had been interviewed. There had been, in the interview, as the CAFCASS officer reports, a glimmer for a moment that the child might herself be interested in meeting her father in controlled circumstances, but when left over a period to consider that further, S communicated with the reporting officer to the effect that she had thought about it and did not want to see her father. She also reported that I and B had told her that he had been horrid to them, and she gave particular instances of their experience which obviously she had been told about. Nonetheless, the CAFCASS officer reported that she did not think that S would be unduly influenced by her sisters.

7. However, on 28 November when, as I say, she spoke to S over the telephone, S's response was, "We are all right as we are. We have just got over the death of the brother and sister's father and are getting back to normal as a family." The officer told the child that she would report to the court and suggested that S should give serious thought to the opportunity of meeting her father in order to make a more informed choice about the future. S said she knew she could contact the officer if she changed her mind. In those circumstances, the report of the CAFCASS officer concluded with a recommendation that there should be no order for contact. She could not support a contact order and it would not be in the interests of the child to enforce contact. Indirect contact, she reported, should continue in the form of letters and cards and S should be encouraged by her mother to respond.

8. The report from Dr Dale of 25 January 2006, which recommended therapy for the family, contains one interesting reference in that he had plainly discussed with the CAFCASS officer the question of separate representation, and he reports at paragraph 10.2:

"Ms Chapman agreed with my analysis that Mr B has never behaved in such a way as to justify his total exclusion from the life of his child. I wondered – given [S's] age and the longstanding contentious nature of the proceedings – whether [S] would benefit from separate legal representation. Ms Chapman said she would give consideration to this suggestion."

That, however, as I understand it, is not a consideration which has been expressed in any way in writing. Her report, of course, substantially antedated the conversation.

9. Thus it was that an application was made to the judge for the papers to be disclosed either to CAFCASS Legal or NYAS on 10 February 2006 on an interlocutory appointment pending the final hearing of the proceedings. Mr B, through counsel, suggested that S should be separately represented, or at the very least an approach should be made to NYAS or to CAFCASS Legal and the question of separate representation canvassed with them to see if either perceived it as a way out of the deadlock. This court, of course, has considerable experience of NYAS, the National Youth Advocacy Service, which represents children in difficult contact and residence cases and which is able to obtain funding for their representation and has access to expert advice in the way that, in the old days, the Official Solicitor of the Supreme Court had in difficult child cases. Moreover, there is a recent Practice Direction from the President, details of which it is not necessary to go into, in which categories of case suitable for separate representation are identified. One of them is, of course, a case in which there is an implacable opposition to contact or what one might call intractable or implacable hostility.

10. The judge gave a short and extempore judgment of which we have only a note, albeit a note which is approved by him. He relied, of course, as he was entitled to do, on his knowledge of the case. It is, I think, interesting, in view of the submissions which Mr Travers made to us about the father's personality, that although they feature briefly in the judgment they do not, as it were, in my view at least, take centre stage because the judge opens his thinking, having briefly identified his previous role, by saying:

"The facts of the current problem with which the Court is currently concerned is the intractable hostility of the mother. This is evidenced today, in her opposition to any route which could be explored by Dr Dale. Another factor that has greatly militated against that is the child herself has expressed the clear and definite unwillingness to entertain contact with her father. The third factor is what the child has seen and heard. That may have caused her to have the view of her father's personality that she has.

"Suffice to say, what I said in 2003 about the problems with Mr B's personality. As an example, take the statement made by Mr B in support of this application. Paragraph 15 refers to the absence of compensation for the trouble and costs incurred in the preparation of the video. This video was shown to the child. It allowed the child to form a view, to form an opinion of her father. The decision I have to make is, in view of Dr Dale's advice, what is the viability of re-introducing direct contact, the timetabling and the cost. This option, however, is not supported by the mother."

11. Pausing there, it is right to say that the father, in my view either very unwisely or as a manifestation of the personality difficulties which Mr Travers emphasises, in his statement appears to request substantial compensation for the time and trouble taken in making the video, which he indicates took him an extraordinarily large amount of hours and caused him a great deal of personal

difficulty. That, as Mr Travers is entitled to say in the context of this case, strikes one as being disproportionate, and one would have thought that a father anxious to see his child and given the opportunity to present her with a video of him would have done so willingly and perhaps without the elaboration which the father has demonstrated. Whether that is a manifestation of his personality difficulties is a matter which may need to be examined further in due course.

12. The judge then records in his judgment that he has been asked for NYAS to be approached, and he rightly points to the fact that this not only engages human rights but the paramount concern, being S's interests. He then refers to Dr Dale, but without referring to the question of Dr Dale's recommendation or (at its lowest) his thought that there should be separate representation, and expresses concern – and this seems to me the ratio of his judgment – to which he returned, that there would be an element of destabilisation and some emotional stress to the child, and potential harm, in the process of NYAS becoming involved.

13. The judge, it seems to me, as I say, gives the ratio of his judgment at page A44(c) of our bundle in which he says this:

"In my judgment, if I pursue the possibility of the separate representation, it seems to me there will be a real risk of de-stabilisation. It will not be respectful to the child's wishes. There are continued opportunities for indirect contact, which should be encouraged, and it seems to me that subject to the decisions that I have made it is not in the best interests for [S] to have separate representation. All indications are that direct contact is going to be very difficult. I see no purpose in there being separate representation. I say this with great sadness and hesitation. I do not propose NYAS or CAFCASS as separate representation, as on the face of it, the position is very clear.

"The Father may not pursue his application on this occasion. He can come back on any occasion when it is sensible and reasonable to do so, and continue the approach of indirect contact in the form of videos and cards etc. He should not expect any compensation, if he was to approach the matter sensibly".

He then says to Ms Waddicor directly, "I am afraid I am against you."

14. It is right, I think, to say that in the context of his decision, the judge makes it clear that he is well aware of the dicta of this court on a number of occasions to the effect that the court "should never give up hope". Nevertheless, he asks, is it practical? Can this be done here in the context of the welfare checklist and what the CAFCASS officer has said?

15. I am very conscious of a number of things when approaching the judge's judgment. First of all, he had a very detailed knowledge of the case. Secondly, he was of course exercising a discretion. He had in the past seen and heard the parties. I am also conscious that he was making what can in some senses be described as a case management decision. All those are strong factors militating against disturbing the exercise of his discretion. The question therefore in my mind is whether or not the discretion has been exercised in a way which is within or without the band of reasonable disagreement; or alternatively, whether in reaching his decision he has either given undue weight to factors to which he should not have given weight, or ignored factors which were highly relevant.

16. In my judgment, although it is a moderately fine balance, I have come to the clear view that the judge was wrong not to allow at least the papers to be disclosed to NYAS for the purpose of NYAS advising as to whether or not this was a case in which it thought it appropriate for S to be separately represented. The position is that there is a hearing on Friday of this week. The final hearing is fixed for Friday, with a day set aside. It is most unfortunate that this appeal has not come on earlier and

therefore that we are faced with the prospect of either aborting that hearing or allowing it to go ahead. Speaking for myself, I accept Ms Waddicor's submission that if we dismiss this appeal, the outcome on Friday is in effect a foregone conclusion. The judge has already rejected the prospect of NYAS. He has a strong report from the CAFCASS reporting officer to the effect that direct contact is not practicable. He has a refusal by Mrs W to engage in therapy. He has the views of the child as reported to him by the CAFCASS officer and he is, in my view, almost certainly bound to say on Friday, if that is the evidence before him, that the end of the road has indeed been reached and that there is no point in further attempts at direct contact.

17. In my judgment we have not reached that stage yet. Firstly, although of course the CAFCASS officer, I have no doubt, accurately reports what S has said, the judge does not in my view give any real weight to the real possibility that S, properly encouraged and properly advised, might well think it in her interest to have an interview with her father. The hiatus between her original statement and the telephone conversation with the CAFCASS officer does, to my mind, strongly support the proposition that, despite what the CAFCASS officer says, S is influenced by what is said to her at home. Secondly, on destabilisation, I think Ms Waddicor is entitled to say, as she does, although there may well be an element of destabilisation in the adjournment of the final hearing, the exercise which is proposed is a purely paper one and that if NYAS come up with the answer, having considered the papers, that they do not think this is a case in which they should or could become involved, that may well indeed be the end of the road and the matter would then have to be withdrawn, or not pursued.

18. So, in summary, I have come to the view that this is not a case where we have as yet reached the end of the road and the judge was wrong to think we had. It would be clear, to my mind, that if the matter were to proceed further, and were NYAS to advise, it is likely that they would give advice to the father in particular, in relation to the personality difficulties which the judge has identified. If the father did not take notice of what NYAS were saying in that respect, or take notice of any expert instructed by NYAS in that respect, then that might itself be a strong reason for the matter not proceeding any further. In other words, I say to the father that by allowing this appeal (if we do) and by allowing the papers to be sent to NYAS for an opinion, we are by no means indicating that there is a green light and by no means are we indicating that this is a panacea or even necessarily an effective solution to the problem.

19. This is a difficult and intractable case and in my view, NYAS' involvement is likely not only to recognise that factor, but is also likely to insist that the father recognises it in a particular way, by acting in a particular way, or by taking a particular course. In this context, I think Ms Waddicor is also entitled to make the point that she makes forcibly in her skeleton argument, that this may well be the last chance in terms of the father's application. This child is now 12. It is clear the mother is not going to move in her opposition to contact. In those circumstances, if the judge now simply reasserts the indirect contact order, the likelihood is that the position would not move at all during the next years of S's adolescence, and as she approaches her majority. This is therefore, I think, arguably on the father's behalf, the final opportunity which he has to see if contact can be achieved.

20. In these circumstances, as I say, I have come to the conclusion that the judge was wrong. I have considered very carefully as to whether or not I am being over-influenced by my own experience. I think it likely that, had I been sitting at first instance in HHJ Barratt's position, I would have involved NYAS. That is no doubt partly because of my own experience of NYAS, and because of their ability to adopt a sensitive and hands-on approach to intractable problems. Of course, I recognise that is not the test. The test is not whether I would have made the order, but whether the judge was wrong not to do so. For the reasons I have attempted to give, I think he was. This is not the end of the road. This may well be the last chance. The principal reason he gave for not involving

NYAS was disruption which, in my view, can be substantially mitigated by the exercise being one conducted on paper. There is in the CAFCASS report something not emphasised by the judge, a glimmer of hope that S may take the view she should meet her father in suitable and controlled circumstances. In all those circumstances, balancing, as I attempt to do, the short term harm and destabilisation to the family against the longer term interests of the child, I have come to the conclusion that the judge has got the balance wrong and that the balance required at least the papers being sent to NYAS.

21. I add this: that in my judgment, the way the matter should now proceed is that the court should give permission for the papers to be sent to NYAS, with, no doubt, letters by both parties' solicitors and a copy of the judgment we give today, which will be transcribed. NYAS' report as to whether or not they wish to become involved should then be placed before the judge and indeed NYAS itself, if it believes it should become involved, should then make an application to HHJ Barratt for permission to be joined as S's guardian. That will remain a judicial act and not one which this court can dictate; and therefore it will be open, in my view, for there to be argument on the subject, if NYAS does apply to intervene, as to whether or not they should be permitted to do so. I would hope that if NYAS take the view they can act positively in the case and benefit both parties and the child, that there would not be opposition, but that is not something I can determine now or dictate. That will be a matter for the judge to consider when he has the matter back in due course.

22. In those circumstances, in my view, the judge having rightly given permission to appeal, I would allow the appeal. I would set aside the judge's refusal to grant permission to disclose the papers to NYAS. I would grant that permission and I would direct that, within a reasonable period – as to which we can hear counsel – NYAS should be directed to respond and advise the court as to whether or not it thinks it is an appropriate case in which it should intervene. If it decides to intervene, that application should then be listed before the judge. If it declines, the matter should be re-listed before the judge if there is an issue to be decided. Alternatively, if the father seeks to withdraw, he should then be permitted to withdraw. In any event the hearing on Friday, it seems to me, should be vacated. No doubt the detail of the order can be discussed with counsel once my Lord has given judgment. But that is the course that I would, myself, propose.

23. LORD JUSTICE MAURICE KAY: After some hesitation, I have come to the same conclusion. The judge in the county court, who has long familiarity with this case, explained why he was against separate representation for S. He did so in the passage which my Lord has set out in his judgment. What caused my hesitation was an initial feeling that if we were to allow this appeal, we might simply be substituting our view as to the appropriate order for a permissible and properly reasoned view on the part of the judge in the county court. In the end, however, I have overcome that initial feeling. It seems to me that the judge had well in mind that the court, in his words, "should never give up hope". However, what he seems not to have had in mind, or if he did, did not accord due weight to, was the view which S had expressed to the CAFCASS officer in November 2005, in which S manifested "a glimmer of interest" in the possibility of direct contact. Whilst it is true that S soon resiled from such a position in a telephone conversation, it seems to me that that glimmer of interest ought to have informed a different decision on the part of the judge on this issue of representation. On any view, the father has a difficult case, but on the basis of that glimmer of interest and a conclusion to which I have come, that this is almost, rather than actually, an end of the road case, the interests of the child require at least consideration by NYAS of whether they should become involved as representatives of S.

24. For those reasons I would also allow the appeal, and I agree with the form of order which my Lord has indicated.

Order: Appeal allowed.