

JERSEY / JUDGMENT

B v N [2002] JCA 135 (18 July 2002)

[2002] JCA 135

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COURT OF APPEAL 18 July, 2002 . Before: The Hon. M. J. Beloff, Q. C., President; C. S. C. S. Clarke, Esq., Q. C. ; and D. A. J. Vaughan, Esq., C. B. E., Q. C. Between B Petitioner/RESPONDENT And N Respondent/APPELLANT Application for leave to appeal out of time and appeal by the Respondent/APPELLANT from the decision given by the Royal Court on 2 nd July, 2001, ordering: 1. that should the Respondent/APPELLANT decide to proceed therewith, the adjourned application for access be expedited and heard before the Inferior Number within two months of the date thereof; 2. that the Respondent/APPELLANT's application to appoint a child psychologist to assess the children be dismissed; and 3. that Respondent/APPELLANT pay the wasted costs of the adjournment and the costs of the application to appoint a child psychologist on a standard basis. Advocate C. J. Scholefield for the Respondent/APPELLANT. Advocate P. D. James for the Petitioner/RESPONDENT.

judgment

the PRESIDENT:

Introduction

1. This is an appeal by N ("the father") against the Judgment of the Royal Court dated 2 nd July 2001 ("the Judgment") The Royal Court expedited the father's adjourned application for access to two minor children of his former marriage to B ("the mother") and ordered that the access application should be heard by the Inferior Number within two months of the date of the Judgment. The Royal Court however also dismissed the father's application to appoint a child psychologist to examine the children in order to investigate allegations of Parental Alienation Syndrome ("PAS"). (I have assumed throughout that the references to a psychologist should be construed as a reference to a psychiatrist.) it is this refusal which lies at the heart of this appeal. Brief Facts 2. The background to this matter is as follows: The father and the mother were married in 1985 and divorced (on the grounds of one year's consensual separation) in 1999. There are two children of the family. A daughter, E, was born on the 1 st January 1990 and a son, T, was born on the 28 th August 1991. 3. The issue of the father's access to the children has intermittently engaged the Royal Court since 1995. There were before the Royal Court, and are now before this Court, a series of reports from the Child Care Officers, Welfare Officers, the Children's Officer (the Supervising Officer), and a psychiatrist, Dr Coverley. A variety of orders have been made and arrangements devised to

ensure access. It is not necessary to detail the entire history; it is convenient to take the story up from the autumn of 2000. 4. On the 29th September 2000 Mr Wherry, the Supervising Officer, invited the Royal Court to discharge the Supervision Order which it had made on 28th August 1997. He concluded that the children had indicated over a period that they did not wish to have contact with the father, and while the children found the Court Welfare Officers visiting less traumatic they still showed a degree of distress when he visited. Mr Wherry was of the opinion that neither party had fulfilled the suggestions made in the last Court Report; in particular the mother had not kept the father informed on a bi-annual basis of the children's progress, and the father had not contacted the school regarding their progress. He said that "the children are happy in their present environment and if they wish to see their father they know how to initiate contact". 5. On the 4th May, 2001, the father issued a summons for access and continuance of the Supervision Order. 6. In or about the beginning of May, 2001, the father's legal advisers started research into relevant case law in support of the Access Hearing and encountered certain references to Parental Alienation Syndrome (PAS), which occurs where the resident parent alienates the child against the other parent (see various articles in the Journal, Family Law: The Emerging Problem of Parental Alienation: Willbourne and Cull, December 1997 p.307; Parental Alienation Syndrome

- A Judicial Diagnosis: Maidment, May 1998 p. 264; Parental Alienation Syndrome and UK Family Courts: Tony Hobbs Part I March 2002; Part II May 2002). PAS has received judicial recognition in other jurisdictions. 7. On the 27th June, 2001, three days before the Access Hearing, the father issued a summons before the Master of the Royal Court seeking the appointment of a child psychiatrist to examine the children with a view to establishing PAS. The Master refused the father's application and transferred all issues to the Royal Court to be dealt with by the Inferior Number at the Access Hearing. 8. On the 28th June, 2001, the father issued a summons for directions ordering the appointment of a child psychiatrist. 9. Shortly before the Access Hearing the mother agreed to the adjournment of the application for access but resisted all other applications, in particular the appointment of a child psychiatrist to examine the children. 10. On the 2nd July, 2001, the Royal Court made the orders against which the appeal is made. Overview 11. Notwithstanding a series of Orders and arrangements made by or through the Court, it is now more than five years since the father had real contact with his children, This must cause significant concern for several reasons: first, that a matter critical to the welfare of those children remains unresolved; secondly that the very efflux of time has worked to the disadvantage of the father; thirdly that the Court's orders appear, without adequate reason or response, not to have been heeded either in the letter or in the spirit. It is quite clear on the evidence before the Royal Court and this Court that the children are adamantly opposed to contact with their father. It is less clear what has caused this state of mind. The father attributes this to the mother (aided and abetted by her parents), having a desire to sabotage access because of hostility to the father; the mother, for her part, denies any such desire. Should the father be granted leave to appeal out of time? 12. We first have to consider whether to allow the Application for Leave to Appeal out of Time. 13. Under Rule 3 of the Court of Appeal (Civil)(Jersey) Rules,

1964 ("The Rules"), the time limit for appealing is one month from the date on which the Judgment or Order of the Court can then be pronounced. In this case more than 5½ months had elapsed until the 18 th December, 2001, when the father issued his summons. 14. Under Rule 16 the Court has power to enlarge the time appointed by the rules for doing any act or taking any proceedings " as the justice of the case may require ; and such enlargement may be ordered although the application for the same is not made until after the expiry of time appointed or enlarged." In *Barker -v- Barclays Bank* (25 th April, 1989) Jersey Unreported CofA, this Court held that in exercising its discretion under the Rule the Court should have regard to the following factors: the extent of the delay; any explanation for it; the prospects of success of the appeal and the risk of prejudice to the other parties to the proceedings. 15. The main reason put forward for the delay in this case is that the father, through his lawyers, was seeking to resolve the impasse as to access by negotiation rather than litigation - a tactic derived in good faith but born more of hope than of experience. In the Courts' view, it would have been prudent for a Notice of Appeal to have been lodged in time while negotiations continued. However in a matter of this kind where the interests of children are involved, the Court would hesitate to decline to entertain an appeal by insistence on strict fidelity to time limits - although the efflux of time may impact upon its substantive judgment. It has been aptly said that finality in matters concerning children is important: but refusal of leave would in this case postpone rather than promote finality. Because of the good sense shown by both Advocates in the course of the hearing, it is unnecessary to consider this preliminary issue further. They were content for the Court to adjudicate upon the appeal. Merits 16. The core of the Royal Court's judgment lies in the following passages: [11] The problem is that we are not yet certain of what has caused the alienation ... "... Advocate Fitz (the guardian ad litem)" reminded us that any further examination by psychologists would not, in her view, be viewed in any way positively by the children. Such examination would be harmful." [12] We cannot ourselves see that the Order sought by Advocate Le Quesne would achieve anything. That is not to say we are in any way opposed to a father having access to his children, but we want to make certain that such access is in the long term not harmful to the children, and is couched in such a form that will not be unenforceable or unenforced at the whim of a third party. [13] It is for that reason we order that this case is adjourned to be listed not later than 2 months from today, and it might be useful if a psychologist (or psychiatrist) is present in Court to assist the Court in reaching a workable decision. [14] We do not, of course, insist on such a course because the question of costs must be in the minds of parties neither of whom is wealthy." 17. It is well established in an interlocutory appeal concerning the welfare of children that the principles applicable to the Court of Appeal's jurisdiction when reviewing a judge's exercise of discretion were the same as those which applied to its general appellate jurisdiction (*G-v-G*

[1985] 2 All ER 225). This is because, so often, the judge, in a fraught family dispute, is choosing the better -which is not the same as a good - solution. 18. Any Court seized of this matter takes account of the well-established principle that, save in exceptional circumstances, to deprive a parent of access is to deprive a child of an important contribution to its

emotional and material growing up in the long term. On this matter the Courts of England and Wales and of this jurisdiction speak with a single voice: Rayden & Jackson's Law and Practice in Divorce and Family Matters (17 th Ed'n: 1997) paras 40.42; W -v- H (1980) JJ 13, C -v- D

(2000) JLR 334 . Re O (Contact: imposition of conditions) 1995 2 FLR 124 . F -v- F Contact committal : (1998) 2 FLR 237. 19. Notably in Re F (Contact Restraint Order)

(1995) 1 FLR 956: Waite LJ said: "The starting point, as always, is that every child has a right to be brought up in knowledge of his non-custodial parent. That is a right which the courts are determined to preserve, and they will not - save in the most exceptional circumstances - allow a custodial parent to deprive the child of a benefit of it through his or her own obduracy"

- or (I would add) by adopting an attitude which results in the child becoming averse to contact with the non-custodial parent." It is notable too that Dr Coverley in her psychiatric report in 1997 said, consistently with the jurisprudence: "I do feel the children might suffer long term emotional harm if they do not see their father; even absent parents play significant roles to their children's development and if the children do not have knowledge of a parent they will still have fantasies." 20. It is, therefore, in the light of that principle and in the context of the parties' respective argument that we consider the Royal Court's

judgment.

21. On the major issue the parties to this appeal are at present wholly at odds. The mother is opposed to the father having any access to the children; the father wishes to have such access. On the ancillary issue - as to how the major issue is to be resolved - there is a far closer measure of agreement. The mother says that the father should re-list the summons for access and seek an additional order from the Royal Court to appoint a psychiatrist who could assist the Royal Court on the matter of PAS in accordance with the judgment, i.e. to identify, presumably on the basis of the material presently before the Court, including the various reports, whether this could be a case of PAS. If the Royal Court decided on such assistance that this could be a case of PAS, then presumably it might reconsider the father's application to appoint a psychiatrist to examine the children to see if this was a case of PAS, and then make recommendations to resolve the present impasse as to access. The father says that such an appointment should be made forthwith. 22. The difficulty with the mother's proposal is, firstly, that it merely postpones resolution of this issue further, in as much as it invites the Royal Court rather than the Court of Appeal to order a review by a psychiatrist of the relevant material. The difficulty with the father's proposal is that it exposes the children to what might be a traumatic, or at any rate, an unwelcome experience, without any confidence that it is justified on the state of the evidence at present, or that it would have any beneficial result. Counsel for the father invited us to infer the presence in this case of PAS from the material presently before the Court: but in our view, in the absence of an experts' analysis of it, the Court could not conscientiously do so. 23. Given that the

Royal Court had recognised in 1997 the value of a psychiatrist's report; that it had been five years since such a report had been commissioned; that the Court itself claimed unawareness of the source of the children's alienation; and that Parental Alienation Syndrome was conceded to exist as a phenomenon by the mother and had been raised as a possibility in this case by the father, in our judgment it would have been logical for the Court itself to have specifically requisitioned such a report, in advance of, rather than merely contemplated the possible presence of a psychiatrist, paid for by the parties, at the adjourned hearing. In five years (especially given their ages) the children's personalities may have changed; and may change still more in the future. The Royal Court will surely need the best assistance available to reach a conclusion on the issue of access, which is properly a matter for it. 24. It seems to us that the Royal Court does not appear to have considered

- or, if they considered, rejected without justification - the option of the Royal Court itself obtaining an updated report by a psychiatrist rather than leaving it to the father to commission one. To that extent their exercise of discretion was flawed. 25. This option, once selected, would have the following useful consequences: In the first instance the psychiatrist could advise on the basis of all presently available material as to whether PAS is or is not a possible explanation for the children's present attitude to their father, and whether examination of the children by him or her is required and make other appropriate recommendations. With the assistance of this report, and subject, of course, to submissions by Advocates for the respective parties and the guardian ad litem on the children's behalf, the Royal Court would be in a position to give appropriate directions including (if it saw fit) for examination of the children by a psychiatrist. (If the report contained such a recommendation, the advocates agreed that it was likely to be influential in the Royal Court's thinking.) 26. In order therefore that there be no further unnecessary delay we propose to allow the appeal to the extent of ordering that a psychiatrist (we understand that Dr Coverley is available) prepare a report if possible by 1st October on the basis of all material dealing with the matters we have referred to in the previous paragraphs. 27. This sequential approach appears to us to be in entire harmony with the approach of the English Court of Appeal in the case of C (Children)

(2002) EWCA Civ 292 (where the issue of PAS was raised) per the President at para 12. It accelerates the proceedings in a way that neither the Royal Court's nor even the mother's proposal achieve - and I have already commented on the depressing delays that have bedevilled them so far. It ensures that any order for psychiatric examination of the children (which remains a possibility) is not prematurely made on the basis of inadequate evidence. It preserves the interests of both the mother and the father, but most vitally, those of the children themselves. 28. We trust that matters now proceed with all deliberate speed and that the issue of access is resolved as soon as possible, with due regard to the guiding principle to which we have earlier referred. 29. We compliment both Advocates on the thoroughness of their preparation, and their realistic approach to this difficult matter. Conclusions 30. We accordingly make an Order in the following terms: (i) That leave to appeal out of time is granted. (ii) Save as provided in (iii) the appeal against

the judgment dated 2 nd July 2001 be refused. (iii) That an appropriate psychiatrist (Dr Carolyn Coverley, if available) be appointed to examine all the relevant papers in this matter (a bundle of such papers to be produced forthwith for such purposes by the Advocates of both parties) and to report to the Royal Court, on the basis of such papers, whether there is evidence of any parental alienation syndrome or other matter relevant to the issue of access by the father to the children which needs to be considered, and to make such recommendations as are appropriate, in particular whether examination of the children or any other persons is necessary or desirable to enable the Royal Court to make a decision in this matter. Such Report is to be produced to the Royal Court as soon as practicable. (iv) Following receipt of such a Report, the matter is to be returned to the Royal Court for directions, in particular as to whether there should be examination of either or both of the children or any other person, and what further reports (if any) should be produced. Such directions should be heard as soon as possible and to be attended by the guardian ad litem for the children. Authorities Willbourn & Cull: The Emerging Problem of Parental Alienation (Family Law: December, 1997: p.307). Maidment: Parental Alienation Syndrome - A Judicial Diagnosis (Family Law: May 1998 p. 264. T Hobbs: Parental Alienation Syndrome and UK Family Courts. (Part I: March 2002: Family Court; Part II: May 2002: Family Court). Court of Appeal (Civil)(Jersey) Rules, 1964: Rules 3, 16. Barker -v- Barclays Bank (25 th April, 1989) Jersey Unreported CofA. G-v-G

[1985] 2 All ER 225 . Rayden & Jackson's Law and Practice in Divorce and Family Matters (17 th Ed'n: 1997): paras 40.42. W -v- H (1980) JJ 13. C -v- D

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