

K and S (Children) (2005)

[2005] EWCA Civ 1660

16/11/2005

Barristers

Barbara Mills KC

Court

Court of Appeal

Facts

A judge's failure to take into account the decision in *L (A Child), Re* [2001] 2 W.L.R. 339 in relation to matters of harassment and domestic violence when making a contact order was a serious deficiency.

The appellant mother (M) appealed against the order made on her application to remove her children from the jurisdiction to Australia and cross-applications by their fathers for residence and contact. M had had a child by the second respondent (K) and then married the first respondent (S) and had two further children. M and S had separated and M had made various allegations to the police about S's harassment and intimidation, which M said took place in front of the children. S had been bailed on conditions pending criminal proceedings for harassment but the criminal trial had subsequently been abandoned by the prosecution. In the family proceedings the judgment was in favour of the fathers and orders for contact between the children and their respective fathers were made. The judge made no findings of fact in relation to the incidents of harassment and violence by S, which were denied. The judge took into account the report of the CAFCASS reporter (Y). M had complained about the work of Y and there was an independent investigation leading to a report that was the foundation of an application by M to appeal against the judge's order out of time. M submitted that the judge had relied heavily on the report of Y, which had been shown to be flawed, and that the judge had wrongly failed to make any findings on the crucial issue of domestic violence and harassment.

Held

HELD: The judge had relied heavily on Y's report and had failed to deal with certain complaints about Y by M. However, the criticisms of Y's report went mainly to procedure rather than substance. Y should have directed the judge to the significance of the pending criminal proceedings that would have helped the judge to perceive the importance of clear findings on the allegations of domestic violence once the criminal trial had been abandoned. The judge had failed to make clear findings in relation to matters of harassment and domestic violence as required by authority, *L (A Child), Re* (2001) 2 WLR 339 considered. The failure to have any regard to *Re L* was a most serious deficiency. However, the deficiency had been manifest from the date of the judgment and M had failed to apply for permission to appeal in time. Even after the report into Y's work no application had been made. The application had only been made after a further hearing before the judge and an order expanding the pattern of contact.

The delay was difficult to mitigate and impossible to overlook. The mother's application to relocate was only indirectly affected by the defect in the judgment and the defect did not bear on the judge's conclusions and orders in relation to the first child. In the circumstances, the welfare of the children prohibited an unlimited retrial. However, there was no inhibition on setting a clear task for the court to investigate the issue of violence and harassment that had not yet received a judicial determination.

Appeal dismissed.

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