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HH v BLW (Appeal: Costs: Proportionality) [2012]

1 FLR 2013, 420; [2012] EWHC 2199 (Fam)

28/06/2012

Barristers
Jane Rayson

Court
High Court (Family Division)

Practice Areas
Private Children Law

Summary
Application for permission to appeal against a district judge's order for costs against a father in contact proceedings. Application refused on the basis of the proportionality of the appeal to the sum in issue.

Facts
This was an appeal against a costs order made by a district judge in the Principal Registry.

The appellant father had made an application for contact with his daughter who was almost 16 years of age. Since prior to the application and up to the first hearing, the mother's solicitors had maintained a stance that they would seek an order for costs against the father, on the basis that the child's age meant that her wishes about contact would be determinative and she did not wish to have contact.

The First Hearing Dispute Resolution Appointment (FHDRA) took place on 14 March 2012. Shortly before this hearing, there was further inter partes correspondence in which the mother's solicitors again threatened to seek a costs order against the father in the event that he did not withdraw his application.

The father declined to do so and so the FHDRA took place, at which the child attended and spoke with the CAFCASS Officer. During this meeting, she expressed a clear unwillingness to see her father, particularly in the run-up to her GCSE examinations, although she was amenable to there being some indirect contact. Having heard this, the father did not oppose an order that there be 'no order' on the application for contact.

The mother's solicitor applied for costs and the district judge gave a judgment, awarding costs and saying:

"Am I sympathetic on a human basis to any parent concerned about their child? Of course the court is, but this is a court and it is costly to bring proceedings. This is not a meeting house. Although [counsel for the father] said that he simply wished to come here to establish the child's wishes and feelings, it is not appropriate to use this court simply to do that through the means of conciliation. I appreciate the

establishment of wishes and feelings of the child is part and parcel of the process, but the father should have stood back and asked himself whether really there was any chance at all – whatever she said to the CAFCASS officer – of the court being willing to make any order at all. I agree with [the solicitor for the mother] that this was an entirely misconceived application where the result and conclusion was absolutely foregone. She is nearly sixteen years of age. It would be highly unusual for the court to make an order and the father should have thought about that…."

Held

Holman J, hearing the appeal against the order for costs, described the criticism of this passage by counsel for the father in the appeal as 'justified'. He referred to Paragraph 1.5 of the Revised Private Law Programme which describes the FHDRA as "a forum for the parties to be helped to reach agreement as to, and understanding of, the issues that divide them" and "a forum to find the best way to resolve issues in each individual case".

Holman J was therefore critical of the district judge's comments that the court is not 'a meeting house' and that 'it is not appropriate to use this court simply to [establish the child's wishes and feelings]'. He pointed out that there was no other way for a parent to engage the services of CAFCASS to ascertain and report on a child's wishes other than by issuing an application. He observed that the father's course of action was reasonable, in seeking to use the services of CAFCASS to speak to the child before he simply accepted that there was to be no contact. The fact that the child was close to 16 did not mean that the six months preceding her six month birthday would not necessarily be used by the court to promote contact.

Holman J did not therefore share the view that the application was 'misconceived'. Considering whether permission ought to be granted to appeal, he accepted that such an appeal 'would have a real prospect of success' (which is not to say that it would definitely succeed). However, the hurdle on an appeal from a discretionary decision as to costs is a very high one.

Holman J then refers to rule 1.1 of the Family Procedure Rules 2010 and the overriding objective. He considered that the costs of a full appeal, even though the father's representatives had undertaken to act pro bono, and the use of hard-pressed court time, would be disproportionate to the sum of £2,468 that was in issue. On the grounds of proportionality alone he therefore refused permission to appeal.

Permission

Family Law Week