JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S MISCELLANEOUS APPEAL NO. 14 of 1984

BEFORE: THE HON. MR. JUSTICE ROWE, P.
THE HON. MR. JUSTICE CAREY, J.A.
THE HON. MR. JUSTICE CAMPBELL, J.A. (AG.)

BETWEEN B.A.M.

AND C.G.

Re: 'D' (an Infant)

D M. Muirhead, Q.C., and Mrs. Angella Hudson-Phillips for mother.
Dennis Morrison & G. Steer for father.

January 17 & 24, 1985

CAREY, J.A.:

The parties in the matter were lovers and the relationship which began in 1973 and came to an end in 1980, produced a child 'D' in respect of whom an order for access by the father was made in the Family Court for the Corporate Area. This appeal by the mother who was awarded custody of the child is against that order as also an order for maintenance. The orders were in the following terms:

> "(1) That the Respondent do have access to the child D at the Respondent's home at 3 o'clock in the afternoon on every Sunday and for one (1) hour, such access to commence on the 9th day of January, 1983;
>
> (2) That the Respondent do pay the sum of $400 per month towards the maintenance of the said child until he attains the age of eighteen (18) years, such payment to commence on the 31st day of December, 1982."

An appeal by the father against these orders was abandoned. So far as the order for access was concerned, it is right to point out the limited nature of that order, viz., a one hour visit every Sunday at 3:00 p.m. at the mother's house.

In order to appreciate this matter, we would briefly

rehearse the salient facts. When the parties met, the mother was then married and living with her husband. That union had produced four children, who in 1982, were aged 16, 14, 12 and 11 years respectively. The marriage ended in divorce in 1981. In late 1980 or early 1981, the mother had met another man to whom she is now married and for whom she has had a child. Two of the children of the earlier marriage, 'D' and the most recent child, live with her and her new husband. As indicated, she has been awarded custody of the child 'D'. Although it is clear that there is still some bitterness on the part of the mother towards the father, she testified before the learned judge of the Family Court that if the court made an order for access, she would do everything to ensure that the father saw the child.

On behalf of the mother, Mr. Muirhead relied on the following grounds of appeal, viz,:

> "1. That the said part of the Judgment and Order of the Learned Judge is contrary to the weight of the evidence.
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> 2. That the learned Judge erred and/or misdirected himself in law in rejecting the evidence of Dr. Janice Evans.
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> 3. That the Learned Judge erred and/or misdirected himself in law in failing to order the Respondent to pay towards the maintenance of the said child, in addition to the named sum, his school fees, medical, dental and optical expenses."

He complained of an inaccuracy in the note taken by the learned judge but what was suggested as being the accurate note, made no significant difference to the effect of the evidence as a whole. He referred to two cases, viz., Re E (P) (an infant) [1969] 1 All E.R. 323 and Re W (minors) [1979] 3 All E.R. 154, which he urged should incline the court to consider the past, present and future conduct of the father.

We do not think it is necessary to detail this conduct because learned counsel in no way suggested that the conduct identified by him, rendered the father unfit to have access to his son. But we propose to examine the cases cited to see what

assistance, if any, can be derived from them. It is however necessary to emphasize that in the jurisdiction dealing with care and control, every case must be decided on its own facts and little assistance is gained by considering decisions in cases where orders were made in altogether different circumstances. See M. v. M. & G. [1962] Sol. Jo. 877.

With reference to the first case cited Re E. (P.) (an infant), this case concerned the illegitimate son of an 18 year old girl. There was an affiliation order in effect against the father who was granted access to the child for two hours every Sunday morning. The father, who was quite devoted to the child, visited the child every week and proposed marriage to the mother. She declined his offer and indeed married another man. The child lived with his mother and her husband. They had another child and applied to adopt the mother's child. The father who opposed the application applied under the Guardianship of Infants Act 1886 and 1925 for custody of the child. The father did not suggest that either of the applicants was unfit to adopt the child but wished to be able to maintain contact with the child. It was held by the Court of Appeal, Civil Division, that the advantages for the child of being adopted and thereby ceasing to be a bastard outweighed the loss of his connection with his real father. The court accordingly confirmed the order granting adoption and dismissal of the father's application for custody. That case is plainly distinguishable from the present appeal before us. It was not, as is the situation before us, viz., a case of an application for access, but for custody. The contest was adoption by the child's mother and her husband vis-a-vis custody by the father. One of the reasons which inclined the Court to refuse the order for custody in the father, was that by adoption the child would cease to be a bastard. For my part, I would hardly consider that a compelling reason in this country. Illegitimacy has not had the same social disadvantages or stigma

in this country as in England. Indeed the term 'bastard' was abolished by an Act of Parliament. The Bastardy Act became the Affiliation Act. The Status of Children Act has endeavoured to remove the legal disabilities of illegitimate children. So, the circumstances of the case cited being so wholly different, we do not think that any assistance can be derived from it.

We can now examine Re W (Minors) (Wardship: jurisdiction). In this case relating to two infant children, care orders under the Children & Young Persons Act 1969 were made because of the unsatisfactory atmosphere in their parents' home. After the children were placed with foster parents, it was discovered that visits by the mother of these children caused stress to the elder child. The local authority considered long term fostering as in the best interests of the child and notified the mother of their decision. Indeed the mother was made aware of the fact that she would no longer be granted access to the children. The mother thereupon initiated wardship proceedings so as to enable the court to review the decision to deny her access. The judge discharged the wardship. On appeal the mother contended (so far as is relevant to the present appeal before us), that a natural parent had an inalienable right of access to her child. On this point Bridge, L.J., said:

> "I cannot accept that there is any such inalienable right, a right of access of a maternal parent to a child."

That case is again plainly distinguishable from the present appeal, as it concerns a totally different set of circumstances from the present. So far as the opinion of Bridge, L.J. (as he then was) is concerned, we find it unexceptionable. In our judgment, while access is the basic right of every parent, circumstances might well justify a court in its decision to make an order to deprive a parent access to his child but we would think that the circumstances must be exceptional.

Mr. Dennis Morrison who argued with commendable economy

and lucidity called our attention to the case of S. v. S. & P. [1962] 2 All E.R., where our view is confirmed by the following passage from the judgment of Willmer, L.J., at pp. 3 - 4, where he said:

> "I agree with the view expressed by the commissioner that to deprive a mother altogether of access to her own children, particularly to two small daughters, is 'a very strong thing to do.' I should be disposed to go so far as to say that the court should not take that step unless satisfied that she is not a fit and proper person to be brought into contact with the children at all."

And another excerpt which is taken from the judgment of Danckwerts, L.J., where he observed:

> "An order depriving a mother of any access to her children is a very exceptional order, and one which personally I have very seldom heard made. ....."

This was a case where on the divorce of a husband and wife, custody was granted to the father. The mother after she had remarried the co-respondent applied for access but this was refused on the ground that the mother was an unsatisfactory parent for -

> "(i) from time to time during her married life the children were left to run about in their night clothes at 11:30 a.m.;
>
> (ii) her close friendship with another man before the co-respondent; and
>
> (iii) she was more interested in her personal affairs than the children."

The Court of Appeal held that these were not sufficient reasons for depriving access to the mother who was a person not shown to be unfit to have contact with her children. This decision is, we think, helpful in the present case.

Mr. Muirhead argued that the learned judge had wrongfully rejected the evidence of the expert called by the mother, but we are content to say, in agreement with Mr. Morrison, that the order which the learned judge made was certainly in keeping with

one of the recommendations of the expert. She had in giving evidence said this:

> "If natural father seeks to impose on 'D', knowledge of his father, this could create confusion in the mind of child. I would advise father in such a situation to visit child in home environment when mother is present. If that is impossible, I suggest that he waits until child is nine or ten years old when child could fit knowledge of father into his conceptual pattern."

That argument was not the strongest urged upon us by Mr. Muirhead and we need say no more about it.

The circumstances of this case are unusual and remarkable and presented the trial judge with a difficult and delicate problem in balancing. We appreciate that cases involving custody orders are difficult, not only for the parties concerned, but also for the judge required to provide a solution. Sometimes parents are unimpeachable, nevertheless, an order has to be made. It is true, orders for a joint custody can be made, but these are seldom made, so far as we are aware, within this jurisdiction. Here, although custody was not a problem, the mother did not wish the father to have access. The court was thus called upon to consider the wishes, not only of this mother but also of the father, expecially where it is not proven that he was unfit. The mother of the child 'D' although she plans with her husband to apply for adoption, has not yet done so, we were told because of the pendency of this appeal. The question of whether or not an adoption order should be made was not before the court below, nor is it before us. The mother has had children by three different men, the father is now married and that union has produced a child. It is in the interest of all parties that nothing be done to prevent the father seeing his child. It is in the welfare of the child that he should know who his father is and that the father be in contact with his child; it is his basic right.

The order of the court below was very limited in scope; testimony to the care which the learned judge of the Family Court gave in solving a difficult problem. There is unchallenged evidence that the child who has lived with his mother all his life, has adjusted to the fact that his mother was first married to a man who the child at one time called "Daddy." He has also adjusted to the fact that his mother's present husband is a person whom he calls "Kevin." The mother's older children called 'D's' father "Uncle Clive." Despite all this apparent upheavel, the child, on the evidence of his mother and father and the expert is a well adjusted, normal, healthy child.

Seeing then that no exceptional circumstances have been shown to the court why the father should be denied access to his child, we are of the view that the order of the judge as to access should not be disturbed.

It was also urged that the order for maintenance should be varied by ordering in addition the payment of school fees, medical, dental and optical expenses. We do not propose to interfere with the order of the trial judge. As we understood the matter, a global sum was ordered to prevent any difficulties arising between the parents. The history of the matter shows some degree of rancour, certainly on the part of the mother. Everything should be done to encourage as much peace and harmony as is reasonable in the circumstances. We do not accept that anything has been shown to persuade us that the sum ordered is inadequate for the maintenance of the child and the provision of the expenses referred to above.

The appeal is therefore dismissed and the orders of the court below as to access and maintenance confirmed. The cross appeal by the father was as previously indicated abandoned.