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ROYAL COURT
(Samedi Division)

139.

17th July, 1997

Before: Sir Peter Crill, K.B.E., Commissioner,
and Jurats Vibert and Jones

Between:	Y	Plaintiff
	P	Defendant

Application by the Plaintiff for an Order granting him unsupervised access to the two children born to the Defendant of whom the Plaintiff is the father.

Advocate A.R. Binnington for the Plaintiff.
Advocate R.J.F. Pirie for the Defendant.

JUDGMENT

THE COMMISSIONER: This hearing concerns the children of two unmarried people, a son, 'J', and a daughter, 'C', who are now 4½ and 3½ years old respectively. I read from the Court's judgment of 30th April, 1997:

> *"Following complaints from the mother in February, 1996, statements were taken and submitted by the States of Jersey Police to the Children's Department and at that time, although the parties had separated, unsupervised access had been allowed voluntarily. That access was stopped.*
>
> *The father of the children then brought an Order of Justice in March, 1996, seeking unrestricted access. A number of reports were commissioned by Order of the Court but in fact were not available - we have not been told the reason for this delay - until December, 1996. There was no interim report. In the meantime, in July and August, 1996, there were five sessions of supervised access.*
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> *Finally, in December, as I have said, the first report in respect of these children was issued and an Order was made by the Deputy Greffier (Family Division) in that month for six sessions of unsupervised access in the new year of 1997. There was a further report dated 20th February, 1997, and the hearing took place on 26th February.*
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> *Subsequently this Court was asked to review the decision of the Greffier Substitute to allow unsupervised access to the children after a period of supervised access".*

We gave our judgment on 30th April, 1997, after reviewing the authorities submitted to us by counsel. We directed that the matter be returned to the Greffier Substitute with a direction for a full oral hearing with Mr. Richard Jones, a Child Psychologist, and Miss Claire De Brito, a Child Care Officer, to give evidence, both of whom had previously given evidence in writing.

Today, we have heard evidence to assist the Court in deciding what should be done. The issue is whether there should be unsupervised access to the children.

First, I would like to say that in both English Law and Jersey Law the principle which governs matters of this sort is that the interests of the child are paramount. We have borne that very much in mind in looking at this case.

The principal allegation by the mother is one of sexual abuse inasmuch as it is said that she was told by child, 'C', (who demonstrated what she was saying by actions) that the father had masturbated in front of her. It was admitted by the father that on one occasion both the children had seen him with an erection, but, he said, that was because he had been taking a shower with the mother. It is really in respect of the allegation of masturbation, in front of the child, that we have to consider this case as this is the most serious allegation made.

The law on the subject is reasonably clear and I quote from the case of Re H and R (Child Sexual Abuse: Standard of Proof) [1995] 1 FLR 643 C.A. at p.659 where Millett LJ said this:

> ***"In the course of his judgment, the judge referred to the headnote in Re W (Minors) (Sexual Abuse: Standard of Proof) [1994] 1 FLR 419, where it is stated, inter alia:***
>
> > ***'Charges of sexual abuse in civil proceedings must be proved to a standard beyond a mere balance of probability, but not necessarily a standard as demanding as the criminal standard.'***
>
> ***That formulation is erroneous and dangerously misleading. It ought not to be repeated. In civil cases, contempt proceedings apart, there is only one standard of proof: proof on the balance of probabilities. It is never necessary to prove facts to a standard beyond the balance of probabilities. The correct formulation is that of Waite LJ in Re M (A Minor) (Appeal) (No. 2) [1994] 1 FLR 59 and repeated by Balcombe LJ in Re W (above):***
>
> > ***'...***
> >
> > ***(2) The standard [of proof] is the balance of probabilities.***
> > ***(3) The more serious the allegation, the more convincing is the evidence needed to tip the balance in respect of it.'***
>
> ***The difference lies in the cogency of the evidence needed to tip the balance, not in the degree to which the balance must be tipped".***

It is clear, therefore, that the Jurats, who are the judges of fact in this case, have to decide whether, applying these tests, they are satisfied that there was an incident, as described by the mother, concerning the father and child 'C'.

In order to assist the Court in arriving at a conclusion, a number of expert witnesses, who had previously prepared written reports, were called. The first one was Miss Claire De Brito, a Child Care Officer. Her original report had been made on 2nd May, 1996, and she reached the conclusion that the mother's concerns regarding possible sexual abuse were inconclusive and unsubstantiated. Not surprisingly, in the last paragraph of her report, she recommended no further action be taken by the Children's Service, in this case, unless further concerns regarding the children were forthcoming. In her evidence before this Court, Miss de Brito said that in the clarification sessions, (which included a video of what the children were saying and doing) there was nothing to suggest anything that would substantiate what the mother says the children told her the father did or said.

The Court is also in possession of the evidence of Mr. M.J. Cutland, a Court Welfare Officer, who prepared two reports. The first report was prepared on 3rd December, 1996, and the second, with which we are more concerned, on 20th February, 1997. In paragraph 9 of the second report, Mr. Cutland refers to information received from Mrs. J. Andrews, a Child Care Officer who herself, at that time, had had clarification sessions with 'C'.

What is interesting is that Mr. Cutland referred to Mrs. Davey, the lady supervising access, and said that she had informed him that the children seemed to be enjoying the access with their father and that she was impressed by the quality of their relationships. I should pause here for a moment to say that the Court is quite satisfied that each of these parents has, as the Court sees it, the best interests of the children at heart and neither, we are sure, is actuated by malice or a mere wish to get back at the other. This is important because, in cases of this nature, parents of children should endeavour to keep up relations between them so that, at least, the children do not suffer as much as might be the case if relations continued to be acrimonious to the point of court actions following one upon another.

Furthermore, a letter from Mrs. J. Andrews to Mr. Cutland dated 23rd October, 1996, is in the following terms:

> *"Dear Mike,*
>
> *I have recently had three clarification sessions with 'C'. As you will appreciate, owing to her age, it is very difficult to elicit specific information. As the number of the sessions were limited I did quite a lot of directed play, but nothing came out about Dad that was at all suspicious. Not an easy one - over to you, Mike".*

We have also heard from Mrs. Tina Baker, a Child Psychologist and a Principal Clinical Psychologist, who had been consulted by the mother mainly concerning the mother's own sexual experiences as a child. It is not necessary for us to go into the detail of the evidence given to us,

which was mainly contained in a written report, but I do wish to read a portion of that report which is to be found in the last page as follows:

> *"In this respect, I would argue that Ms P is responding very appropriately to the signals and behaviours expressed by her children. I would further argue that there are four possibilities regarding Ms P's account of her daughter's acting out behaviour, i.e., simulated masturbation: Firstly, that she is exaggerating an event which could be construed as harmless in an attempt to communicate her distress, or indeed to discredit her partner; Secondly, that she is lying in the hope that she will prevent her partner from having access to his children; Thirdly, that due to her own experience of sexual abuse she is over-interpreting the situation and acting with undue anxiety; Fourthly, that because of her own experience and the fact that she has managed to emotionally deal with this, she is able to show, precisely the necessary and appropriate concern, in terms of supervision and attention to her children's needs which could prevent the possibility of further incidents.*
>
> *On balancing all the information before me, both clinical as well as theoretical, the details of which have been discussed above, it is my opinion that Ms P fits in with the last formulation. I acknowledge the difficulty in making conclusive remarks regarding such complicated cases particularly when they could have a significant impact on all persons involved. I consider that it is my professional duty, however, to draw up a balance of probability based on available knowledge which could safeguard the well-being of my clients, and I therefore trust that all necessary recommendations will be observed to ensure the most positive outcome for Ms P and, in particular, her children".*

That is a very fair assessment of the position as we see it. We have no doubt that the mother is not suffering from hallucinations, nor is she making these matters up. We find it difficult to reach a conclusion other than that. Having said that, the Court has to decide whether that alone is sufficient evidence, for us to determine - applying the test of probability - whether the abusive behaviour - there were other less important matters - took place.

The Court was aided by the reports and evidence of Mr. Richard Jones, a Registered Chartered Psychologist, who has been employed in working with children and families since 1978. He may therefore be taken to be an experienced Psychologist in this difficult field. In his evidence before us he, very fairly, referred to the specific allegation that the father had masturbated in front of 'C' and that there had been clarification sought from 'C', and from the father, who denied it.

Mr. Jones was quite satisfied that the mother had, in fact, given a clear description of her fears and was doing what she thought best for her children. A view which, as I have said, the Court shares. On the other hand, in view of the denial by the father - although he admitted that the children had seen him with an erection on another occasion - it was difficult for Mr. Jones to make firm recommendations. In the end he had to say that one or the other's recollection of what had taken place,

(that is to say what the mother said the children told her and the denial of the father) could be untrue.

Happily, we do not think it necessary for us to go into those allegations in any greater depth. For this reason: Mr. Jones said that, even if the allegations were true, unsupervised access could still be given - although that was somewhat speculative - provided there was some safeguard. In fact, he went further; he actually said it would be inappropriate for unsupervised access to be given without safeguards. He did not go into details as to what the safeguards should be and I shall come to that in a moment.

Mr. Jones made a number of interesting observations about childrens' recollection of their memories. He said that he thought that children could recall events from their very early years and use - when doing so - the language of a three year old. They had an early set of images and would put a text to those images commensurate with their age. He said that if the mother's account of what 'C' told her was accurate, then it was obvious that it was more likely that the explanation of the father was incorrect.

If the events had taken place as suggested and if they were as distressing as they might have been at that time, then he would have expected the children, particularly child 'C', to retain a fear. This was not apparent from the clarification sessions. In reply to cross-examination by Mr. Pirie, Mr. Jones said that it was very difficult to establish what had happened. This Court concurs with that observation.

Looking at the evidence as a whole, and having regard to the law as set out in the quotation, already mentioned, by Millett LJ in Re H and R from the judgment in Re W (Minors), - that is to say ***"The more serious the allegation, the more convincing is the evidence needed to tip the balance in respect of it"*** - we are unable, on the balance of probabilities, to say that the evidence, in this case, has been sufficiently convincing to tip the balance, given the seriousness of the allegation.

That being so, it must follow - having found that the alleged behaviour did not take place - that we would have to be certain that there was a real possibility of abuse occurring in the future and not a ***"mere fanciful or insubstantial possibility or one based on no evidence"***. For that statement I refer to the headnote in Re H (a Minor); Re K (Minors) (Child Abuse: Evidence) [1989] 2 FLR 313 CA.

In Re P (Sexual Abuse: Standard of Proof) [1996] 2 FLR 333 CA at p.342, Wall J said this:

> ***"Amongst the matters which the judge had to consider under s 1(3) of the Act was, under s 1(3)(e) any harm which the children had suffered or were at risk of suffering. 'Risk' in this context, clearly applies to the future, not to the past. Past harm suffered by the children was clearly an issue of fact to be decided on the balance of probabilities. The judge had decided that he could not be satisfied on the balance of probabilities that the father had sexually abused the children. That was plainly correct. In my judgment, it was simply not***

open to him to qualify that finding by a conclusion that there was a substantial risk of past harm having occurred.

In my judgment, the judge has plainly confused an analysis of past harm by way of sexual abuse, which has to be established on the balance of probabilities, with the need to make an assessment of the risk of future harm. Such a confusion is fatal to the exercise of his discretion in this case".

It is not open to this Court, having found there to be insufficient evidence by applying the proper tests, then to find that there was abuse. Notwithstanding that we can justifiably say there would be a real risk of abuse in the future. Accordingly, we are going to allow unsupervised access but on two conditions. There will be a review which takes place once a month. Mr. Jones has agreed to undertake that review, but as he is leaving shortly for Australia, he has agreed that he will nominate somebody who will continue the review in his place.

I should say here we have every sympathy with Mr. Pirie, for the Defendant, who, having heard the evidence of Mr. Jones, was quite properly unable to advance the argument that, notwithstanding the question of past abuse, we should not allow unsupervised access.

In spite of that difficulty, Mr. Pirie put cogent arguments to us, and expressed very clearly, to us, the mother's fears. We understand those fears, and sympathise with them, but in applying the law we think that the order we have made is the correct one. As I have said there will be the safeguard of the monthly report, but, as Mr. Pirie has said, that is not sufficient protection as something could happen between monthly reports. Therefore, we are going to order that if any allegations similar to the ones which have been concerning this Court today are made by the children, to the mother, she will immediately report them to the Child Protection Unit and that unit will have the power to stop unsupervised access forthwith. I want to stress that.

We trust, however, that nothing will happen because we think that the father has learned his lesson in this respect and has been co-operative - he has certainly shown proper affection and care for the children in the supervised access - and we trust that he understands the risk he would run if there is any suggestion that it might happen again. I must emphasise, however, that this is not an invitation to come back to this Court in every instance, should there be - which we hope there will not - any further complaints of this nature.

Authorities

Re P (Sexual Abuse: Standard of Proof) [1996] 2 FLR 333 CA.

Re H and R (Child Sexual Abuse: Standard of Proof) [1995] 1 FLR 643 CA.

Re H (A Minor); Re K (Minors) (Child Abuse: Evidence) [1989] 2 FLR 313 CA.