Refusing a child to give evidence: Freedom of Speech and cultural clichés.

May 11th, 2011

The law is a slow-moving, rather bovine type of beast and as the author of this blog herself has bovine tendencies (so her star sign alleges) she can empathise with the limbering, laid back vehicle that is the family justice system. But when is the beast going to charge? (And no, we don't mean more fees. Enough with the fees).

The recent case of Re H, [2011] All ER (D) 84 (May), which was heard today (11th May) and doesn't appear to be available on BAILII or other public sources (and which we were lucky enough to discover thanks to the über efficient legal stylings of Lexis PSL), centers around the thorny issue of children giving evidence in court and when that might be considered appropriate. Indeed, what makes this case so fascinating to us, is that the judge in the first instance not only refused to allow the child to give evidence (and it would appear from the synopsis which is all we have access to) that the child, who was 14 at the time, did want to give evidence, but that on appeal this was again denied.

The fascination for us also lies in the fact that despite the new guidelines in Re W, [2010] UKSC 12, which state clearly that exclusion of children giving live evidence should no longer be the starting point of any proceeding but merely an end point once all the necessary checks and balances have been carried out, some of our judges are still reticent to reconsider their own personal bias and implement the law as it stands. And despite the fact that the judiciary in some quarters are beginning to raise the importance of the voice of the child in family proceedings, we still seem to have a rather squeamish approach to children who actively want to give evidence and even more bizarrely, still have judges routinely coming to the conclusion that a child's live evidence is not only un-necessary but unlikely to add anything of value in determining a just outcome for that child. It rather begs the question then: why have witnesses at all? Why have a stand? Why not just take the word of an expert who's seen the family on perhaps one or two occasions and be done with everyone else? Oh…..

This rather troubled approach raises several key concerns about how children are viewed and about the dangerous subliminal perceptions held by young people in relation to the system itself. It also forces us to think about the cultural predilections prevalent amongst the judging classes and whether or not they are helping or harming the evolution of our understanding about the human condition.

Co-incidentally, this time last year, almost to the day, the Family Justice Council published a set of guidelines for judges talking to children in family proceedings and although different to the above case in that the child wanted to give live evidence in court and the guidelines merely highlighted the need for judges to engage with children, both the case and the guidelines share something in common – they both fail to understand the psychological implications of refusing to allow *children to engage with the process*, so focused are we adults on whether or not the system should be allowed to engage with them. Of particular worry in the Council's recommendations was the distinct lack of focus on understanding children and the elements of self-esteem and feeling valued which needs to be delicately balanced with avoiding a child from feeling responsible in any way for the outcome of a case.

The Council are halfway there; by considering the need to make sure that children don't feel taking part in the case will be burdensome for them, they have touched on something important, but the motivation to continue that thought process through to its logical conclusion is missing. Not only do we want children to feel 'safe' when contributing to legal proceedings but we should also want them to feel valued. More importantly, children implicitly wish for us to value their opinion. This does not mean devalue it.

The sheer importance then, of allowing children who want to take part in these proceedings and who are mature enough to understand the very basic legal tests relating to truth and verbal reasoning, cannot be underestimated and in our opinion, should be the starting point in this context. If we want our children to grow into healthy adults at home, we nurture their self-esteem and make sure their thoughts are heard and incorporated into family life. Why then, should our court system be any different and as a bastion of truth, justice and noble values, surely there is an incumbent duty upon it to behave not as a chastising and judgemental parent, but as a compassionate and listening ear?

Re H poses some peculiar problems. The judgment tells us that the judge, in refusing the child to give evidence, had struck a measured balance and that there was "*no force in the suggestion that she would have reached a different conclusion if the guidance in Re W (children) (abuse: oral evidence[2010] 2 All ER 418 had been available to her*". What exactly does 'no force' mean and how can a judge be so sure that the evidence before them is ever enough? If Researching Reform were a judge for a day on such matters (God help us all), and we had the opportunity to hear from the little person in question (and they actively wanted to have their say), we certainly wouldn't turn it down unless it transpired that the child did not, in actual fact, want to speak.

Another odd fact about the judgment is that in coming to her decision to deny the child their right to speak (which arguably falls squarely within the Human Rights Act) the judge's reasoning included the observation that "the case was not so unusual or extraordinary that S should give evidence". But should this really be a deciding factor when considering whether or not to allow a child to give evidence? After all, there is no similar threshold in family cases for parents who wish to give live evidence. Indeed, even in the most basic of family cases where hearings occur, parents are routinely sent to the stand. So, are these double standards useful in today's world or are they just causing a world of confusion, in a system which clearly needs to hear as many sides of a story as are available at any one time (and with the willing involvement of every family member).

A final oddity about the judgment was the view that "The guidance that the Supreme Court gave in Re W did not turn the world on its head. A measured balance between the demands of justice and the needs of the child's welfare was still required". But this sentiment neglects one thing: Re W tells us "The court [cannot] ignore relevant evidence just because other evidence might have been better". The ultimate question surely must then be "Is not all live evidence from children who are willing to speak, relevant?"