3 March 2010

PRESS SUMMARY

Re W (Children) [2010] UKSC 12 *[On appeal from [2010] EWCA Civ 57]*

JUSTICES: Lord Walker, Lady Hale, Lord Brown, Lord Mance and Lord Kerr

BACKGROUND TO THE APPEAL

In this judgment the Supreme Court reformulates the approach a family court should take when exercising its discretion to decide whether to order a child to give live evidence in family proceedings. In so doing it removes the presumption or starting point of the current test, which is rarely if ever rebutted, that it is only in the exceptional case that a child should be so called.

At issue in this case is the care of five children. The mother and father at the relevant time were in a relationship and the father is the biological parent of the four youngest children. A sixth child is due to be born to the couple this month. The proceedings began in June 2009 when the eldest child, a 14 year old girl, alleged that her de facto stepfather had seriously sexually abused her. All the children were taken into foster care and the four younger children are having supervised contact with both parents. The father has since been charged with 13 criminal offences and is currently on bail awaiting trial.

In the family proceedings the parties originally agreed that there would be a fact finding hearing in which the 14 year old girl would give evidence via a video link. The judge however asked for further argument on whether she should do so. The Local Authority, having had time to consider the material received from the police, decided that they no longer wished to call the girl as a witness. In November 2009 the judge decided to refuse the father's application for her to be called. Instead, she would rely on the other evidence, including a video-recorded interview with the child.

The Court of Appeal dismissed the father's appeal. They did, however, express some concern about the test laid down in previous decisions of that court and suggested that the matter might be considered by the Family Justice Council. The father appealed to the Supreme Court.

JUDGMENT

The Supreme Court unanimously allows the appeal and remits the question of whether the child should give evidence, and if so in what way, to Her Honour Judge Marshall to be determined at the fact finding hearing scheduled for 8 March 2010 in light of the principles set down in this judgment. Lady Hale gave the judgment of the court.

REASONS FOR THE JUDGMENT

- The court agreed with counsel for the Local Authority that there were very real risks to the welfare of children which the court must take into account in any reformulation of the approach. **[17 to 21]** However the current law, which erects a presumption against a child giving live evidence in family proceedings, cannot be reconciled with the approach of the European Court of Human Rights, which aims to strike a fair balance between competing Convention rights. In care proceedings there must be a balance struck between the article 6 requirement of fairness, which

normally entails the opportunity to challenge evidence, and the article 8 right to respect for private and family life of all the people directly and indirectly involved. No one right should have precedence over the other. Striking the balance may well mean that a child should not be called to give evidence in a great majority of cases, but this is a result and not a presumption nor even a starting point. **[22, 23]**

- Accordingly, when considering whether a particular child should be called as a witness in family proceedings, the court must weigh two considerations: the advantages that that will bring to the determination of the truth and the damage it may do to the welfare of this or any other child. **[24]** The court sets out a number of factors that a family court should consider when conducting this balancing exercise. An unwilling child should rarely, if ever, be obliged to give evidence. The risk of harm to the child if he or she is called to give evidence remains an ever-present factor to which the court must give great weight. The risk, and therefore the weight, will vary from case to case, but it must always be taken into account. **[25, 26]** At both stages of the test the court must also factor in any steps which can be taken to improve the quality of the child's evidence, and at the same time decrease the risk of harm to the child. **[27, 28]**

- The essential test is whether justice can be done to all the parties without further questioning of the child. The relevant factors are simply an amplification of the existing approach. What the court has done however is remove the presumption or starting point; that a child is rarely called to give evidence will now be a consequence of conducting a balancing exercise and not the threshold test. **[30]**

- In this case the trial judge had approached her decision from that starting point. The Supreme Court could not be confident that the judge would have reached the same result had she approached the issue without this starting point, although she might well have done so. Nor did the court consider it appropriate to exercise its own discretion, given that all of the relevant material was not before the court. The question is remitted to the trial judge to decide at the fact finding hearing scheduled for next week. Taking account of the detriment which delay would undoubtedly cause to all of the children concerned, including the unborn baby, there should be no question of adjourning that hearing. **[31 to 35]**