

Case No: B4/2010/2070
Neutral Citation Number: [2010] EWCA Civ 1428
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM MIDDLESBROUGH COUNTY COURT
(MR RECORDER BULLOCK)
(Lower Court No:MB10P00569)
Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Wednesday, 27th October 2010

Before:

LORD JUSTICE WILSON
LORD JUSTICE RIMER
and
LADY JUSTICE BLACK

Between:

IN THE MATTER OF F (CHILDREN)

(DAR Transcript of
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Official Shorthand Writers to the Court)

Mr John Myers (instructed by Ward Hadaway, Newcastle) appeared on behalf of the Appellant Mother.

Miss Elizabeth Lugg (instructed by Goodswens, Redcar) appeared on behalf of the Respondent Father.

Judgment

(As Approved by the Court)

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Lord Justice Wilson:

1. A mother appeals against the refusal of Mr Recorder Bullock, sitting as if in the Middlesbrough County Court on 30 July 2010, to grant her application for a specific issue order. The order which she sought was that, as the primary carer of four children, she should be permitted to move their home within the UK, namely from their present home with her in a town in Cleveland to the island of Stronsay, which is one of the Orkney Islands. The father of the children, who also lives in the town in Cleveland, opposed her application. In that, however, the mother has at all times made clear that, were her application to be refused, she would continue to provide the home for the children in Cleveland, there was no question of any move by the children to the home of the father.
2. The four children are a boy, A, who is aged 14; a boy whom it will be convenient to describe by the initial of his middle name, namely G, who is aged 12; a girl, R, who is aged 11; and a boy, T, who was is aged nine.
3. Each of the parents practises, or until recently has practised, as a medical practitioner in the area of Cleveland. The father practises in the town where they all live. The mother has until very recently practised in a nearby conurbation. They were married in 1995, separated in 2003 and became divorced in 2005. Each has now remarried. The mother has married yet another general practitioner, also in practice, until recently, in a nearby town; his children are adult. The father has married a woman who, by her former marriage, has a child, namely a boy, E, who is now aged seven. E lives with her and the father.
4. The mother and the father both appear to be excellent parents. Ever since their separation they have sought to co-operate in relation to arrangements for the children and, in particular, for the father's contact with them. The only major issue occurred in 2009 when, in court proceedings, the mother successfully objected to a holiday abroad which the father proposed to take with the children. For several years the pattern has been for the children to stay with the father on Wednesday evenings, at all alternate weekends and for longer periods during school holidays. Sadly, however, for reasons which the parents have not explained and perhaps cannot entirely explain, R, the only daughter, has in recent years chosen to go only rarely to the father on contact periods. The three boys in no way share her reluctance to go.
5. A and G attend the town's secondary school. G moved there only a year ago. R and T attend one of the town's primary schools; and the plan had always been for them to move to the secondary school in due course. That school does not however cater for children beyond the level of GCSE. A Level students need to move to a college.
6. Although A, R and T are all sensitive children, in need not only of the excellent parenting afforded to them in both homes but also of perspicacious attention on the part of their teachers, the child with the greatest needs, physical, educational and probably emotional, is G. He is bright and able, particularly in the verbal sphere, but he is dyspraxic and has a mild autistic disorder which gives rise to social and communication difficulties and makes him easily upset. He also has certain physical conditions, in particular a skin condition and curvature of the spine.
7. In March 2010 the mother and her husband were offered employment in the form of a job-share and they accepted it. The offer was that, jointly, they should act as the GP on

the island of Stronsay, which is one of the northern Orkney Islands and has a population of 350, and that they should also act in this capacity on the neighbouring island of Eday, which has a population of 150. The main island of the Orkneys is called "Mainland" and its capital is Kirkwall. Travel from Stronsay to Kirkwall is achieved by ferry, which takes 80 minutes, or by air, which takes 15 minutes.

8. The wish of the mother and her husband to move to Stronsay is deeply held and is the product not only of their very substantial connections with Scotland, including the Orkneys, but also of their conviction that life for the four children would be in every sense healthier and more fulfilled than the life which they are leading, and would be likely to continue to lead, in Cleveland.
9. Although the mother happens not to have been born in Scotland, she is very Scottish. Her parents were Scottish; she was brought up there; she and the father were both medical students in Dundee; they met later when working in a hospital in Scotland; and, at the time of the marriage, they both gave thought to practising medicine on the Isle of Skye. For 15 years her husband's parents lived in the Orkney Islands themselves. Indeed the husband's father practised first as a psychiatrist and then as a GP on various Scottish islands. Once they moved to the Orkneys, the mother's husband frequently stayed with his parents there.
10. The mother always realised that she would not be able to move the children to Stronsay without either the father's consent or the approval of the court but, in my view reasonably, she considered that there was no point in raising the possibility of a move until the position was definitely available to her and her husband. Thus it was that in March 2010 she and her husband accepted the offer; and we understand that, in that their employment was fixed to begin in August 2010, the mother's husband was constrained, in the light of the Recorder's decision, to move alone to Stronsay in order to fulfil their commitment. Of course their profound hope is that, following today, the mother and the children will be able to join him. Were the appeal to be dismissed, the mother and her husband would give notice of termination of their employment and, following the working out of the notice, her husband would rejoin her and the children in Cleveland. It appears however that both she and her husband have severed their connections with their practices in Cleveland; so they would presumably have to seek to re-forge those connections or to join other local practices.
11. As one would expect, the mother made intensive inquiries about education for the children in the Orkneys. The result of her research may be said in one sense to accord with the general perception of the strength of the Scottish educational system. The school on Stronsay, namely the Junior High School, takes children from primary level up to the age, about 16, when pupils are expected to sit the Scottish Standard Grades, which are equivalent to GCSEs. As one would expect, classes in the school are much smaller than those in the schools in Cleveland. When, in March 2010, the mother took all four children to Stronsay for a long weekend in order to show them the island, the school's headteacher showed them around the school and went out of her way to stress how welcome they would be and what opportunities they would have. But, when children on Stronsay wish to proceed from Scottish Standard Grades to Scottish Higher Grades, ie to proceed to what we would call A Levels, they have to attend the grammar school in Kirkwall, which has a good academic record. For children resident on islands other than "Mainland" a hostel is provided for their stay in Kirkwall mid-week. The mother has

suggested in the alternative that, if, as one would expect, these children were indeed to proceed to the grammar school, she or her husband might make a temporary home for them in Kirkwall, from which they could conveniently attend it each day. But that would, of course, leave the other spouse, and such of the younger children as were still at school on Stronsay, alone on the island. The degree of attention which the school on Stronsay might be able to give to the particular needs of each of the four children is well demonstrated by the fact that, in June 2010, the school sent a learning support teacher down to Cleveland in order to meet the children there and in particular to talk to their teachers.

12. The mother also devised elaborate proposals for the children to have contact with the father in the event of the move. The father responded that, in the event of a move, the contact needed to be greater than she had proposed. In the event the two parents provided a model for how parents should present to the court an issue upon which they profoundly disagree: for, at court, they agreed a schedule of contact which was to operate in the event that the recorder were to grant the mother's application. Apart from indirect contact by Skype and webcam, the contact was to take place for three weeks of the summer school holiday; for one or two weeks of the full school holiday in Scotland in October; for one week of the Christmas school holiday; for one week of the Easter school holiday; for a long weekend in Scotland in November, January and March; and for a long weekend in Cleveland in September, February and May. Thus the arrangement would require the children to travel from Stronsay to Cleveland and back on seven occasions each year.
13. In her statement the mother explained the different options for the making of such journeys. The first option was to travel by ferry to Kirkwall, by ferry to Aberdeen and by car to Cleveland. That option involved departure from Stronsay at 7:00pm on Friday, departure from Kirkwall at midnight, arrival at Aberdeen at 7:00 am and arrival in Cleveland at 2:00pm: a journey of 19 hours. The second option was to travel by air from Stronsay to Kirkwall, by air from Kirkwall to Aberdeen, by air from Aberdeen to Leeds and then by car to Cleveland: if all went well, the children would arrive in the father's home at about 9:00pm, after a journey of 12 hours. On the return journey, however, the children would have to stay overnight on Sunday in Kirkwall. The third option was to travel by air from Stronsay to Kirkwall, by air from Kirkwall to Aberdeen and by air from Aberdeen to Teesside: that journey might take only nine hours but, on the return leg, the flight times would require the children to stay overnight in Aberdeen. The fourth option was to travel by air from Stronsay to Kirkwall, to stay overnight in Kirkwall and to fly on to Edinburgh, where the father would meet them and, over about four hours, drive them to Cleveland.
14. It was the mother's case that the daughter, R, was highly enthusiastic about the proposed move. In the light of R's reluctance to have contact with him and his effective inability to talk to her about such matters, the father was prepared to assume that she was indeed keen to move. In relation to the boys, however, the mother's case was that they spoke inconsistently about whether they wished to move; the father's case, by contrast, was that they told him that they did not wish to do so. The parents agreed that, while the court would be unlikely to be assisted by a Cafcass report, it would be appropriate for an independent professional person to collect the wishes of the children and to convey them to the court. Thus it was that Ms Bailey, an independent social worker well known in the family courts in the north east, was instructed to interview and report.

15. Ms Bailey conducted her interviews with the children, in the event at the home of the mother, on 3 June 2010.

16. A said to Ms Bailey:

- (a) "I can see [Stronsay] is a nice place and everyone there looks happy, it's kind of calm."
- (b) "It would make Mum and [R] happy if we all went."
- (c) "This is where I have grown up for most of my life."
- (d) "I have friends here and I don't make friends easily."
- (e) "I would miss my Dad."
- (f) "I would miss my friends."
- (g) "I would miss the places I know."
- (h) "I am doing GCSE astronomy; they don't do it...at GCSE level as far as I know."
- (i) "[G] doesn't want to go and I wouldn't be happy there unless everyone came."
- (j) "The solution would be for everyone to stay here in [Cleveland]. That would make some of us happy but...not Mum and [R]. They have always wanted to live there. It's really sad."

17. G said to Ms Bailey:

- (a) "I'm not going. If they go, I will stay with my Dad. The only one that wants to go with Mum is [R]."
- (b) "I have been there to see and I didn't like it."
- (c) "Last time they went to court, I wasn't allowed to go on holiday and that was the opposite of what I said. Will it be the same judge and will he listen to what I want this time?"
- (d) "I am in my first year at [secondary school] and I want to stay there."

18. R said to Ms Bailey:

- (a) "I really want to go. I have always wanted to live in Scotland."
- (b) "The boys might say they don't want to go but once they are there they will get used to it and learn to like it."
- (c) "I will miss Dad...he could come to us one time and the next week we could come to him."
- (d) "There are planes. It's not like we are going to live in America and it will be like a holiday every time we see him."
- (e) "People there are nicer than here. Here people at school might not like you if you aren't cool enough. One of my friends has another friend as well and she keeps saying "two's company, three's a crowd"."
- (f) "There is a more of a community...on Stronsay. If there is a birthday party, the whole island is invited."
- (g) "Why can't Dad look on the positive side of it? It's what Mum and [my stepfather] want."

19. T spoke to Ms Bailey while he was playing loudly on the piano. He made clear to her that he proposed to play the piano in order that R should not hear what he said. He said to Ms Bailey:

- (a) "I think it's a bad idea to move there."
- (b) "I like it here."
- (c) "I don't want to be all the way up in Scotland and Dad to be down here in England."
- (d) "I've got all of my friends down here."
- (e) "I have been to visit and I didn't like it."
- (f) "I do fun stuff after school like cubs but I don't want to start again in a new pack."
- (g) "If we leave now...I will never get to go to War Hammer Club in Year 7 or go to Games Workshop in Middlesbrough."
- (h) "[E] won't want us to go. We play together."
- (i) "Mum and Dad have already been to court once. This is just getting boring. Are you writing all of this down? I hope the judge is going to read...this... but not out loud."

20. Such, then, was the main evidence before the recorder. He received brief oral evidence from the mother and the father but, notwithstanding their presence in court, it was agreed to be unnecessary for the mother's husband and the father's wife to give oral evidence. The hearing was completed in less than three hours on the first day of the hearing and the judge delivered an oral judgment on the second.

21. The recorder was referred to the main authorities of this court in relation to internal relocation (i.e. relocation within the United Kingdom). Mr Myers, who appears for the mother today as he did below, accepts that the recorder properly articulated the relevant principles; his challenge is to the way in which he applied them.

22. I confess that I have not previously had occasion to study these authorities myself. For the purposes of today's appeal however I have studied them carefully and, in that regard, I have been greatly assisted by the full survey of them recently conducted by Wall LJ (as he then was) in *Re L (a child) (internal relocation: shared residence order)* [2009] EWCA Civ 20, [2009] 2 All ER 700, at [11] to [33] (also referred to as *Re T*). But I remain puzzled by three features of the authorities.

23. The first feature does not arise in the present case and therefore I offer only a passing view about it. In the present case it was the parent who aspired to relocate ("the aspiring parent") who wisely took the initiative by issue of legal proceedings. It is plain that she issued the correct form of application, namely an application for a specific issue order which would determine whether she might take the children to reside with her in the Orkneys. It is in circumstances in which the initiative to place the matter before the court is to be taken by the parent who objects to the relocation ("the objecting parent") that the authorities seem to me to give rise to confusion. To be specific, is the proper course for the objecting parent to apply, in a case where the aspiring parent already has a residence order, for the imposition upon it of a condition against the relocation pursuant to s.11(7)(b) of the Children Act 1989 ("the Act") or even to apply, in a case where the aspiring parent does not already have a residence order, for a residence order somehow to be foisted upon that parent and then for the imposition upon it of the same condition? Or should the objecting parent apply for a prohibited steps order which would in terms prohibit the relocation? Were the necessary result to be achieved by making a residence order, including in my view a residence order subject to a condition, it would not be open to the objecting parent to apply for a prohibited steps order: see section 9(5) of the Act. My provisional view is, however, that the necessary result cannot properly be achieved by the imposition upon a residence order of a condition. What the objecting parent seeks

to secure is an express, enforceable prohibition, not merely a situation in which, if the aspiring parent breaches the condition, the only effect is that no residence order subsists in relation to the child. Thus I am of the view, which accords with an observation of Thorpe LJ in *Re B (Prohibited Steps Order)* [2007] EWCA Civ 1055, [2008] 1 FLR 613, at [4], that the relief appropriately to be sought by the objecting parent is a prohibited steps order.

24. The second feature relates to the interface between the respective principles which govern applications in respect of external relocation, on the one hand, and those in respect of internal relocation on the other. In the first reported decision of this court in relation to internal relocation, namely *Re E (Residence: Imposition of Conditions)* [1997] 2 FLR 638, Butler Sloss LJ said, at 643A:

"In my view the principles set out in a long line of authorities relating to leave to remove permanently from the jurisdiction have no application to conditions proposed under section 11(7)."

Is it so obvious, however, that there should be a complete dichotomy between the principles apt to each of the two types of determination? In the first of the decisions of this court in relation to the child, S, namely *Re S (A Child) (Residence Order: Condition)* [2001] EWCA Civ 847, [2001] 3 FCR 154, Thorpe LJ, at [17], and Clarke LJ, at [36], both observed that it was desirable to have some consistency between the two sets of principles. Two months later, in *Re H (Children) (Residence Order: Condition)* [2001] EWCA Civ 1338, [2001] 2 FLR 1277, Thorpe LJ said at [20]:

"What is the rationalisation for a different test to be applied to an application to relocate to Belfast, as opposed to, say, an application to relocate from Gloucester to Dublin? All that the court can do is to remember that in each and every case the decision must rest on the paramount principle of child welfare."

The answer given by Thorpe LJ shows in my view that he found his question difficult. I do not mean to suggest, particularly in the light of the current controversy surrounding the aptness of the principles which have been developed in this court in relation to the determination of applications in respect of external relocation, that, as they stand, they should -- or can -- be applied to cases of internal relocation. Nevertheless, even if, for example, the effect upon the aspiring parent, and thus indirectly upon the child, of a refusal of permission to remove was one day to be considered to have been afforded too great an emphasis in our principles governing external relocation, I would expect our principles governing internal relocation to allow at any rate for some weight to be attributed to that factor. Indeed in that regard I note that in *Re L* above Wall LJ, at [56], expressly accepted that the effect on the aspiring parent of the refusal of permission to effect an internal relocation would be likely to be relevant. In the present case I am sure that the effect of the recorder's decision, if upheld, would be extremely negative for the mother and that, at any rate in that specific regard, the children might suffer, indirectly, to some extent. But such was not a point pressed upon the recorder on the mother's behalf in the written opening of Mr Myers; scarcely referred to by Mr Myers at the hearing before the recorder; not referred to in the judgment; and not included in the grounds of appeal. In the event, for reasons which I will explain, the point, whatever its precise degree of force, would in my view never have secured, or have helped to secure, the outcome for which the mother has contended.

25. The third feature relates to the early insinuation into the principles governing internal relocation of a test of exceptionality. The development of the case law in this regard offers an interesting insight into the way in which law is made, perhaps not always satisfactorily. No one could quarrel with a proposition that it would rarely be in the interests of a child for the residential parent to be prevented from moving home with the child within the UK. The way in which, in *Re E* above, Butler-Sloss LJ chose to express that proposition was to turn it round and to say, at 642D, that "there may be exceptional cases" which justified refusal. Thus were the seeds of a new test sown. In the first of the decisions in *Re S* above, Thorpe LJ, at [24], described the cases in which refusal would be legitimate as "highly exceptional" and Clarke LJ, at [35], described them as "genuinely exceptional". By the time of this court's second decision in relation to *S*, namely *Re S (a child) (residence order: condition) (No 2)* [2002] EWCA Civ 1795, [2003] 1 FCR 138, exceptionality had become part of "the principle". For Butler-Sloss LJ, at [9][ii], referred to:

"...the principle enunciated in *Re E*...that the court ought not in other than exceptional circumstances to impose a condition on a residence order to a primary carer who is providing entirely appropriate care for the child".

26. In two entirely different contexts I have previously had occasion to refer to the danger that a decision-maker's attempt to explain his decision in terms which include reference to exceptionality gives rise to the subsequent elevation of a concept of exceptionality as the governing criterion: see *Currey v Currey (No 2)* [2006] EWCA Civ 1338, [2007] 1 FLR 946, at [19], and *Haringey Independent Appeal Panel v R (M)* [2010] EWCA Civ 1103, at [29]. It is too late for it to be permissible for this court to rule that, in internal relocation cases, the analysis of the child's welfare, informed by consideration of the matters specified in section 1(3) of the Act, should not be conducted through the prism of whether the circumstances are exceptional. The recorder thus rightly asked himself whether the circumstances were exceptional; his answer was that they were; and the main thrust of the appeal is that he was plainly wrong so to have concluded. But, for the reasons given, I believe that, had I not felt bound by authority, I might have wished to suggest that a test of exceptionality was an impermissible gloss on the enquiry mandated by section 1(1) and (3) of the Act.

27. Only half way through his short judgment the recorder said:

"What the mother is proposing can be properly described as 'truly exceptional'. It is as close ... to a case of removal from the jurisdiction as one could possibly get. Stronsay must be one of the most remote inhabited places in the United Kingdom."

28. Mr Myers submits that the proper reading of the recorder's judgment is that he found 'true exceptionality' in one feature which did not, of itself, justify the finding, namely that the move would be to Stronsay. In my view, however, although of course the recorder was exercised by the fact that the proposed move was to be to Stronsay and was thus exercised by its effects, for example on the father's contact, the recorder was finding exceptionality in the combination of circumstances to which he had already referred or was about to refer. For example in the immediately preceding sentence he had referred to "a huge change in the lifestyle of the family": that feature must have contributed to his conclusion and I cannot agree with Mr Myers that the recorder's choice of words in that respect was of doubtful validity.

29. The recorder proceeded to refer, albeit briefly, to the mother's proposals for contact. He said that they involved "ferries, overnight ferries, flights, further flights, train journeys and ... car travel [of] up to seven hours." The recorder did not offer a view whether, in the light of the length and complexity of the journeys, it was realistic to consider that contact could be maintained at the level set out in the schedule without undue exhaustion, dislocation and frustration for the children.
30. Nor did the recorder in terms address the depth of the likely upheaval for all four children in leaving their home, their schools, their friends and their out of school activities, and, in particular for T, the damage to the close ties with the father's stepson, E.
31. The recorder did however make a relatively full reference to Ms Bailey's report.
32. Then the recorder expressed his conclusion. He said that the move would create "huge emotional strain" for the children; that the mother was "sailing into entirely untested waters"; and that, although obviously no physical harm would come to the children, there would be "emotional harm".
33. Such were the circumstances in which the recorder announced the refusal of the mother's application.
34. In an attractively economical yet powerful presentation Mr Myers submits to us today that there is nothing exceptional about the circumstances of this case; that it was irrelevant for the recorder to draw a parallel with applications in respect of external relocation; that, as the mother stressed in oral evidence, the boys' comments, at any rate to her, about the move varied to some extent from day to day; that R's consistent and profound wish to move had not been afforded proper weight; and that, in the absence of expert evidence, it was improper for the recorder to have concluded that the move would generate emotional harm for the children.
35. In my view, even prior to service of Ms Bailey's report, the mother's application was fraught with difficulty. All four children had been born and brought up throughout their lives in the town in Cleveland and could not have been more firmly rooted there. Their contact, or at any rate that of the boys, with the father on a frequent basis, was patently important for them; and the tortuous nature of their proposed journeys to Cleveland and back to Stronsay placed an obvious question-mark against the very sustainability of the arrangements for contact which both parents had ultimately agreed to be in principle in the interests of the children. Even as it stood prior to service of the report, the evidence in my view clearly militated against a conclusion that it would be in the interests of the children to make the move. Once, however, Ms Bailey's report came to hand, the application in my view became almost unarguable. Of course when mature, intelligent children have conflicting views, it is as impossible for the court as it is for parents to accommodate all of them. But regard had to be paid to the strength of views articulated not only by R in favour of the move but also by T against it; it had to be paid to the mature ambivalence rather movingly articulated by A; and it had to be paid, in my view in particular, to the views of G. In the light of his particular needs for support, stability, routine and paternal contact, his views, expressed with such vehemence to Ms Bailey, were in my view even more in need of consideration than those of the others.

36. In the light of the gross upheaval which the move would precipitate for the children and of the fact that, in the case of G and T and to a lesser extent of A, the mother would be imposing upon the children, even at their relatively advanced ages, permanent living arrangements entirely contrary to their own wishes, the recorder was in my view entitled to forecast emotional strain and indeed harm for them.
37. In that the recorder was vested with a discretion, it would be usual for this court, if minded to dismiss the appeal, to say simply that there was no error in the way in which he had exercised it. But such words, however legally appropriate, would fail to reflect my view of the matter, which is that the welfare of these children required the dismissal of the mother's application. Since that conclusion has to be expressed as a conclusion that the case was exceptional, so be it.
38. This appeal arrives before us because the recorder gave the mother permission to bring it. Curiously, on the requisite form, he declined to summarise his reasons for having given permission and suggested only that we should consult the transcript; but the transcript of his judgment stops short of the exchanges which followed judgment. Counsel tell us that the transcript would not have assisted us in any event because the application of Mr Myers for permission was advanced before the recorder without argument and was granted without argument. Had the recorder not granted it, I am in no doubt that, well prior to today, this court would have refused the mother permission to appeal. I am clear that it was wrong for the recorder to have granted the mother permission to appeal, especially on an unreasoned basis: it has caused both parties substantial extra expense, will have inappropriately raised the mother's hopes and will have condemned all nine members of the two families to a continued state of high uncertainty for longer than was necessary.
39. I would dismiss the appeal.

Lord Justice Rimer:

40. I agree.

Lady Justice Black:

41. I also agree.

Order: Appeal dismissed