

IN THE SUPREME COURT OF JUDICATURE FC3 96/7543/F
IN THE COURT OF APPEAL (CIVIL DIVISION)

ON APPEAL FROM THE BOW COUNTY COURT
(HIS HONOUR JUDGE RIDDELL)

Royal Courts of Justice
Strand
London WC2

Wednesday, 30 April 1997

B e f o r e :

LORD JUSTICE BUTLER-SLOSS
LORD JUSTICE SAVILLE
LORD JUSTICE THORPE

E (Residence:Imposition of Conditions)

(Computer Aided Transcript of the Palantype Notes of
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MISS S ALLEN (Instructed by Mahmood Southcombe, Ilford, Essex, IG1 2LA)
appeared on behalf of the Appellant

MR Z NABI (Instructed by Wallace Bogan Co, London, E3 3AB)
appeared on behalf of the Respondent

J U D G M E N T
(As approved by the Court)

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LADY JUSTICE BUTLER-SLOSS:

This is an appeal by a mother from the order of His Honour Judge Riddell made on the 13th September 1996 in the Bow County Court. On the 11th November 1996 the judge granted leave and this Court has extended time. The issue relates to a condition placed by the judge on a residence order granted to the mother in respect of the two children of the family, a boy, E. known as Eh. born on the 3rd August 1985 and so now aged 11 and a girl A., known as Ai, born on the 26th July 1990, now 6.

The relevant part of the order of the 13th September 1996 reads:-

"1) There be a residence order to the Respondent (Mother) in respect of the two children subject to the condition that the said children continue to reside at [and the address is given] unless otherwise ordered by the court or agreed by the Applicant (Father) in writing."

The mother appeals against the imposition of the condition.

We allowed the appeal; set aside the condition in the order and reserved our reasons for that decision.

The background to this appeal is that the father is Nigerian and the mother is English born in Blackpool where her family still live. They married on the 9th June 1984. Eh. was born in London. During 1989 and 1990 the mother returned with Eh. to live with her parents and Ai. was born in Blackpool.

At that time the father was studying and abroad for a time. During 1990 the mother and two children returned to London and went back to live with the father. Since 1990 she and the children have visited her family in Blackpool about 4 times a year. During 1992 the marriage was breaking down although the parents and children remained in the matrimonial home. The family moved to 4 Hope Close in January 1995. On the 17th August 1995 the father informed the mother that the marriage was over. She told him she was going for a holiday with the children to Blackpool and intended eventually to settle there with them. The father made applications for a prohibited steps order and a specific issue order, designed to prevent the mother removing the children permanently from London. By the time of the hearing on the 23rd August the mother and children were on holiday in Blackpool. The court in her absence ordered that the children should live with the father in the matrimonial home until the return date. On the 20th September 1995 the father undertook to leave the matrimonial home forthwith and did so. The mother undertook not to remove the children from that address without leave of the court or the agreement of the father. Both those undertakings were in force at the time of the hearing on the 13th September.

At the hearing there were cross applications for a residence order. The father sought in the alternative defined contact and an order preventing the mother from removing the children from London to live in Blackpool. The father's family of five sisters, three of whom have children, all live in north London whereas the mother's family all live in the Blackpool area. The father was principally concerned to keep the children in London in order that they might continue to be in close contact with his side of the family. He told the court welfare officer that his application for a residence order was motivated by his desire to keep the children in London. The mother sought to be released from her undertaking to remain in the former matrimonial home or to be given leave to remove the children to Blackpool.

The court welfare officer said that the mother was very child-focused; their best interests were her highest priority and he was very impressed with her parenting skills. The mother impressed the judge very favourably and he was completely satisfied that her care of the children was excellent. She had not worked since the birth of Ai. She hoped however to obtain a job in Blackpool and rely upon her family to help with the child care. She had arranged to rent a house from her sister, relying initially upon state benefits. The judge found that the proposed arrangements made by the mother were satisfactory.

The father is a commodity broker. He rented a house from a cousin in Dagenham. He asserted that he would be able to care for the children with the help of a sister. The judge found that he had through his business other pressures on his time. He said to the welfare officer that he was married to his business. The judge had no difficulty in coming to the firm conclusion that, although the father and children were devoted to each other and he would be a good enough carer of the children, it would be profoundly disturbing for the girl to be moved from her mother who was obviously the parent to care for both children.

I have dwelt a little on the factors relating to the issue of residence since the judge decided with whom the children should live separately from the question of where the children should live. He was faced with an unusually difficult problem that the mother was clearly the better parent to care for the children, and the father has not cross-appealed against that decision of the judge, but there were strong pointers in favour of the children remaining in London. The court welfare officer felt strongly that the children should not move from London. He reported that Eh. did not want to go to Blackpool. The children, being of mixed race, fitted more easily into the multi-racial and multi-cultural life style of London. Blackpool by contrast has a largely white population. The children were very fond of their father and had close contacts with his black family. Further the father was unreliable about contact and the distance from London combined with his unreliability might deprive the children of adequate future contact with him. The judge felt, somewhat surprisingly since they are 11 and 6, that the children required frequent contact rather than extended periods of contact with their father. All these factors led the judge to the conclusion that, despite making a residence order in favour of the mother, he should impose a condition under section 11(7) of the Children Act 1989 that the children should reside in London in the former matrimonial home. He felt able to do so since the mother had not been released from her undertaking of the previous September not to remove the children from the matrimonial home. He applied by analogy the principles relevant to an application for leave to remove children permanently from the jurisdiction, now enacted in section 13 of the Children Act and refused to release the mother from her undertaking.

Prior to the Children Act, to my knowledge, residence restrictions were not attached to custody orders and only rarely to an order in wardship which did not involve a public law element. An order granting custody to a parent who was to live within the jurisdiction gave the custodial parent the right to decide where to live and with whom. If the plans were unsuitable it might be a reason not to make the custody order in favour of that parent.

The concept of parental rights and duties was introduced in the Family Law Reform Act 1987 and renamed parental responsibilities in the Children Act. Both parents formerly married to each other now retain parental responsibility for their child after the making of a residence order. A parental responsibility order is defined in section 3 as:-

"(1) In this Act 'parental responsibility' means all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property."

A custody order has been replaced by a residence order, defined in section 8 of the Children Act as:-

"a residence order' means an order settling the arrangements to be made as to the person with whom a child is to live;"

A residence order is not identical with a custody order and in particular the parent with whom the child does not live retains greater rights and responsibilities by virtue of his/her continuing parental responsibility for the child than under a custody order. Nonetheless the decision to place the child with one parent in preference to the other inevitably gives that parent the greater say in the day to day arrangements for the child. He/she generally provides the home for the child. His/her new relationship dictates the person or people with whom the child will live. The school which the child attends will in the case of most children be chosen in the area in which the parent chooses to live.

Section 11(7) is relied upon to impose the condition of residence upon the mother in this appeal. It states:-

"A section 8 order may-

(a) contain directions about how it is to be carried into effect:

(b) impose conditions which must be complied with by any person-

(i) in whose favour the order is made;

(ii) who is a parent of the child concerned;

(iii) who is not a parent of his but who has parental responsibility for him; or

(iv) with whom the child is living,

and to whom the conditions are expressed to apply;

(c) be made to have effect for a specified period, or contain provisions which are to have effect for a specified period;

(d) make such incidental, supplemental or consequential provision as the court thinks fit."

There is a specific requirement to seek the leave of the court in order to change a child's name or remove a child permanently from the jurisdiction contained in section 13:-

"(1) where a residence order is in force with respect to a child, no person may-

(a) cause the child to be known by a new surname; or

(b) remove him from the United Kingdom;

without either the written consent of every person who has parental responsibility for the child or the leave of the court."

There is no statutory requirement of consent or leave of the court in respect of moving the child anywhere within the United Kingdom.

Section 11(7) applies to all four section 8 orders, including prohibited steps orders and specific issue orders. The wording of the subsection is wide enough to give the court the power to make an order restricting the right of residence to a specified place within the United Kingdom. But in my view a restriction upon the right of the carer of the child to choose where to live sits uneasily with the general understanding of what is meant by a residence order. In *Re D (Minors)(Residence: Imposition of Conditions)* [1996] 2 FLR 281, this Court considered a similar condition placed on a residence order. In that case the mother had originally agreed that she would not bring the children into contact with the man with whom she had been living. On her subsequent application to discharge that condition this Court held that a section 11(7) condition could not exclude another person from the mother's home, thereby interfering with her right to live with whom she liked. Ward LJ said:-

"The court was not in a position to overrule her decision to live her life as she chose. What was before the court was the issue of whether she should have the children living with her."

That decision in my judgment applies with equal force to the issue in the present appeal.

A general imposition of conditions on residence orders was clearly not contemplated by Parliament and where the parent is entirely suitable and the court intends to make a residence order in favour of that parent, a condition of residence is in my view an unwarranted imposition upon the right of the parent to choose where he/she will live within the United Kingdom or with whom. There may be exceptional cases, for instance, where the court, in the private law context, has concerns about the ability of the parent to be granted a residence order to be a satisfactory carer but there is no better solution than to place the child with that parent. The court might consider it necessary to keep some control over the parent by way of conditions which include a condition of residence. Again, in public law cases involving local authorities, where a residence order may be made by the court in preference to a care order, section 11(7) conditions might be applied in somewhat different circumstances.

The correct approach is to look at the issue of where the children will live as one of the relevant factors in the context of the cross-applications for residence and not as a separate issue divorced from the question of residence. If the case is finely balanced between the respective advantages and disadvantages of the parents, the proposals put forward by each parent will assume considerable importance. If one parent's plan is to remove the children against their wishes to a part of the country less suitable for them, it is an important factor to be taken into account by the court and might persuade the court in some cases to make a residence order in favour of the other parent. But, on the facts of the present appeal, it is clear that the welfare of the children points firmly to their living with their mother, and the advantage of remaining in London is outweighed by the other factors leading to granting a residence order to the mother.

The judge attempted to identify the present circumstances as exceptional, but even if he were justified in imposing the condition, which in my view he was not, it would give rise to the temptation to impose conditions in many cases where the proposals for the children were not,

as they often are not, ideal. It is not unusual for the suggested arrangements to have the effect of depriving the children of frequent contact with the other parent and his relatives, of their present home, of their schools and their friends. There are increasing numbers of mixed marriages and the areas of concentration of mixed communities are not evenly distributed. The situation facing the judge in this case was not unique and may well become more frequent.

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). Miss Allen for the mother was also justified in criticising the judge for requiring the mother to live with the children in London because the father was unreliable over contact. As Miss Allen said, the mother was being penalised for the inadequacies of the father. Bearing in mind that Eh. is 11 and Ai. although only 6 has a close relationship with her father, the requirement for frequent rather than extended contact appears to me to be unnecessary and was not suggested to be necessary by the court welfare officer. The importance of maintaining close links with the father and with his family in London must not be underestimated by the mother. Suitable contact arrangements can however be made for a major part of the school holidays, part of half terms and rely less upon weekend contact which would involve the children in a 600 mile journey over two days. This extended contact can be made not only with the father, who may continue to put his business first but also, with the agreement of the paternal aunts, with them and the cousins in London or holidays abroad as before.

The judge refused to release the mother from the undertaking she gave to the court in September 1995. In the circumstances of this case, he was wrong not to do so. Both parents gave undertakings, the father to leave if the mother and children continued to live in the former matrimonial home, pending a long term decision over the children's future. In my view at that substantive hearing those cross-undertakings were spent and it was unjust to the mother to hold her thereafter to her undertaking. In my judgment, for the reasons I have set out, the judge erred in principle in imposing the residence condition upon the mother. He recognised that her plans for the children were suitable and she was entitled to make her own decision where she and the children would live in the future.

LORD JUSTICE SAVILLE: I agree.

LORD JUSTICE THORPE: I also agree.

Order: Leave to appeal granted; appeal allowed; set aside the conditions in the order; set aside contact order and substitute therefor an order for reasonable contact; legal aid taxation of both parties' costs.