B1/2002/2441

Neutral Citation Number: [2003] EWCA Civ 592

IN THE SUPREME COURT OF JUDICATURE

IN THE COURT OF APPEAL (CIVIL DIVISION)

ON APPEAL FROM THE

ALDERSHOT & FARNHAM COUNTY COURT

(HER HONOUR JUDGE BONVIN)

Royal Courts of Justice

Strand

London, WC2

Tuesday, 18 March 2003

B E F O R E:

LORD JUSTICE THORPE

MR JUSTICE WILSON

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F (CHILDREN)

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(Computer-Aided Transcript of the Stenograph Notes of Smith Bernal Wordwave Limited
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DR PAUL MCCORMICK (instructed by Clerey's, Hants GU11 1HT) appeared on behalf of the Appellant Father

MR LEO CURRAN (instructed by Foster Wells, Hants GU11 1JX) appeared on behalf of the Respondent Mother

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J U D G M E N T

(Approved by the Court)

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1. LORD JUSTICE THORPE: On 23 October 2002 Her Honour Judge Bonvin, sitting in the Aldershot and Farnham County Court, gave judgment on cross-applications for residence orders in respect of the two children of the F family: N, who is five years of age, having been born on 7 October 1997; and L, who is just four, having been born on 12 March 1999. The parties to the dispute were the father, a lieutenant commander in the Navy, 44 years of age; and the mother, who has had part-time employment but who has principally been concerned with the daily care of the children. She is 38 years of age. The parties had married on 10 September 1994 and separated on 16 June 2001. The separation between the parties was particularly traumatic. The mother raised the assertion that N had had some inappropriate sexual experience with her father, and she applied without notice to the court for an injunction which led to the father's expulsion from the home. In subsequent investigations, conducted both judicially and by the appropriate child protection services, it emerged that there was not a scintilla of evidence to support the mother's anxiety, and the injunction that she had obtained without notice was appropriately discharged.

2. However, the separation created by the application was never resolved and the sharing of the children thereafter was managed collaboratively between the parents. The father had always had a great commitment to the upbringing and development of these two girls and despite his equal commitment to his naval career, he had made himself available to the children whenever his commitments to his career did not conflict. So prior to the determination of these cross-applications it was entirely appropriate that there should have been a substantial sharing of the children's lives between these two parents.

3. The cross-applications were undoubtedly hard to determine. The judge had the task of sifting evidence from a considerable number of witnesses, some of whom were close friends of one or other of the parties; and there can be no doubt at all that there had been a certain alignment of the extended family and close friends, some supporting the mother's cause and some supporting the father's cause.

4. The mother's proposal for the future was that she should return with the two children to Edinburgh, which is her home town and where her extended family and old friends are still based.

5. The father, perhaps surprisingly, given the extent to which the future fell to be determined by the judgment, had resigned from his commission in advance of the hearing. His plans were therefore fluid. He had his naval pension to depend upon and he intended to develop a new career in civilian employment. But he acknowledged the possibility that if the judge sanctioned the mother's plan to relocate to Edinburgh, he might establish himself in reasonable proximity so as to continue the easy sharing arrangements which were on foot prior to the trial.

6. The judge also had the advantage of evidence from a very experienced children and family reporter, Mrs Chidgey, who filed a written report in which she concluded that the best outcome for the children would be a residence order to the mother with generous contact to the father. The judge's ultimate conclusion was that there should be a shared residence order, acknowledging the mother's freedom to move with the children to Edinburgh if she so determined. The mother's plan was posited on a move during summer 2003. The judge speculated that the father might withdraw his resignation and continue his service career and she noted that he might alternatively himself move to Scotland. She laid down a flexible pattern of contact which provided for a number of alternative future developments. The order is expressed in this way. There be a shared residence order in favour of the mother and father under which the children are to live with each party for the following periods: during school term time with the mother on all weekdays and for one in four weekends, subject to the applicant father on three out of four weekends and with the father on the Thursday of each week immediately preceding the weekend during which the children are to stay with their mother; with the father for the whole of each half-term holiday. The order proceeds that during the main school holidays the children should spend an equal number of days with each parent. The order then provides for the possibility of both parents relocating to Scotland, in which event, the order continues, the children's time should be shared between the parents in similar fashion. Finally, the order provides for the eventuality of the mother moving to Scotland and the father remaining in England. Then the arrangements shall be subject to the following modifications: any day not taken up by the father during term time weekend because he is unable to travel to Scotland, shall be replaced by an extra day during the main school holidays, subject to the mother's share of the Christmas school holidays not reducing below a minimum of five days and her share of the summer school holidays not reducing below a minimum of seven days.

7. The order of the court is fully explained in a careful and lucid judgment. The judge records in the earlier paragraphs the extent of the written evidence and the oral evidence that she had heard. She then recorded the background history with appropriate care. In paragraph 16 she recorded the recommendation of Mrs Chidgey which had been substantiated in her oral evidence. Part of the reasoning of Mrs Chidgey was that a sharing of the children's residence would be unworkable in the event of the mother's proposed move to Scotland. It was on the basis of that premise that Mrs Chidgey recommended an order to mother alone.

8. The judge then turned to the father's case and to her findings in relation to him. The judge could hardly have been more complimentary in her description of the father, both as a witness, a career officer and as a personality. She described him at a very impressive witness. She described him as a man of complete integrity. She made it plain that wherever there was conflict between the evidence of the parents she unhesitatingly preferred the evidence of the father. She recorded the extent to which he had been involved in the lives of the children, giving them of his best outside the 37 hours a week that belonged to the Royal Navy. She recorded that his posting was essentially a shore posting and that he had been absent for work travel for only relatively brief periods ranging from the odd night up to a maximum of one or two periods when he had been away for a month. The judge recorded the excellence of the relationship between the father and the children, and made only small reservations in relation to the vehemence of some of his criticisms of the mother which figured in his written evidence but not at all in his oral evidence.

9. At paragraph 29 the judge turned to consider the mother's evidence and personality. She contrasted the parents by a finding against the mother that she had many flaws. The judge found that she had not been entirely honest in a number of instances in her dealings with the father during the periods of conflict following the breakdown of the marriage. She found than the mother had a violent temper which she had displayed not only in the course of her quarrels with the father but also on occasions in her handling of the children. The judge also found against the mother that she had a dangerous tendency to prefer one child over the other and that these defects in her personality or in her conduct had not been hidden from the children, but had been revealed to them: they had been exposed to these weaknesses and defects.

10. On the other hand the judge recorded the extent to which the children's worlds had been centred on the mother. The mother, besides working part-time, was the parent who had spent the majority of the daytime hours with the children. She had breast-fed each of the girls from birth and had dealt with the daily routine. The judge said:

> "There is no doubt that she has carried out such duties very well".

11. That fact was acknowledged by the father more than once in his oral evidence. It is also borne out by a number of the mother's supporting witnesses and by the children's teachers. In addition it is clear that for most of the time the mother's relationship with the children was warm, loving and supportive. The judge continued that that had been confirmed and emphasised by Mrs Chidgey.

12. The judge turned (at paragraph 42) to consider the law that she had to apply to those facts. She had regard to the statutory check-list in section 1(3) of the Children Act 1989. Having applied the subparagraphs of that subsection to the facts as she had found them she had regard to the range of powers available to the court. First, she said that it was a clear case for the making of an order. Then she noted the options available to her - a sole residence order to the mother, a sole residence order to the father, or a shared residence order. She noted the last had been pointed as the appropriate outcome by Mrs Chidgey had the parties both been intending to remain in the Aldershot area. She disagreed with Mrs Chidgey's conclusion that for the parties to relocate, the 400-odd miles between the two locations would rule out such an order or render it unworkable. She noted the mother's opposition to a shared residence order. That was in contrast to the father who had advanced the alternative of a shared residence order should his own application for a sole order fail.

13. She expressed her ultimate conclusion with commendable clarity. She found that a sole residence order to the mother, Mrs Chidgey's ultimate preference, might be interpreted and used by the mother gradually to exclude the father from the children's lives. She noted that the fulfilment of the mother's plans would put distance and other logistical difficulties in the father's path. She concluded that the mother would not be sorry to see the amount of contact between father and children reduced. The judge continued that exclusion would be likely to spread to other important aspects of the children's lives such as their schooling. She noted that there was an ominous precedent in the mother's

enrolment of N at school in the summer 2002 without proper consultation. She then concluded that a shared residence order would most readily promote the interests of the children. She said (at paragraph 48 of the judgment):

> "In that way, the children can continue to spend weekdays with their mother, who has been their main carer during the week hitherto, thus reducing the impact of the imminent change in their lives. However, in my judgment, it is particularly important in this case for the father's role in their upbringing to be marked by equal status, partly because of the comparatively high degree of his involvement in their care and their lives hitherto, but also in order to make sure that he remains sufficiently closely involved in their lives to provide a suitable example of good behaviour, appropriate guidance on moral issues, as well as to counteract any tendency of the part of the mother to be overly critical of N."

14. The judge went on to say that in making the order she did not intend to prevent the mother from moving to Scotland in due course should she continue to wish to do so. If the father elected to follow her then the same pattern of shared care might be replicated north of the border. However, if he chose not to move, then lost weekends would have to be made up by additional contact.

15. Finally, the judge explained very fully why she was departing from the recommendation of Mrs Chidgey. She said that the recommendation had been formulated before much of the supporting evidence in the case had been filed, and that of course the recommendation preceded the judge's findings in relation to the credibility and the personality of the parents. She noted that thereof Mrs Chidgey had not had the opportunity of reflecting some of the shortcomings on the mother's part which the judge had recognised. Finally, she made the point that her departure from the recommendation was not as great as first appeared because Mrs Chidgey would have proposed a shared residence order had the parties been intending to remain in the same area. Thus the only respect in which she was differing from Mrs Chidgey was in holding that the proposed move to Scotland would not render a shared residence order unworkable.

16. Dr McCormick, who appeared in the court below, then made a number of applications to the judge which have been largely recorded in a transcript of the exchanges after judgment. In relation to his application for permission to appeal he emphasised two principal points. First, he said that the judge's findings in relation to the parents conflicted with the form of order for which the judge had opted; and secondly, he challenged whether a shared residence order was open to consideration where the parents were proposing to life in separate jurisdictions.

17. Miss Hudson, who represented the mother in the court below, did not seek permission to appeal other than as a shield should permission be granted to the father. In the end the judge granted permission to both parties, although she said characteristically:

> "... the grant of permission does not mean that an appeal has to be lodged, and I do urge the parties to go away and sleep on it, and reflect not only on the disturbance that might arise and the continued uncertainty that might arise as a result of any appeal because there is considerable delay before anything could be dealt with in a higher court, but also to reflect on the expenses."

That was a wise exhortation but unfortunately it did not bear fruit, a notice of appeal being lodged on behalf of the father on 19 November. A respondent's notice was received on 4 December and in explanation for the delay it was said that the mother had not intended independently to exercise her permission but had only put in the respondent's notice in reaction to the father's appeal.

18. At the outset we extended time and thereby constituted the mother's cross-appeal. In preparation for the hearing in this court a great deal of the oral evidence below has been transcribed, and given the clarity of the judge's findings and the extent to which they favoured the father's cause, I questioned at the outset with Dr McCormick the relevance of the transcript. Dr McCormick pointed to some exchanges with the judge in the aftermath of judgment. He had said to the judge that there were one or two points where the court had not drawn any specific conclusions and he said that there were one or two quite significant matters in which the judge had not made findings. However he concluded his observation by saying: "They probably do not add very much". To that the judge responded as follows:

> "Exactly. I took the view that in the light of the finding that I had made about the allegations in the injunction in support of the more recent application, that there was no need to find one way or the other what had happened ten years ago in relation to that."

Dr McCormick then said:

> "That is right. So that is very much a subsidiary point, but the two main points are the ones I have given to you."

19. Dr McCormick this morning sensibly conceded that his appeal stood or fell on the two principal points, and he did not pursue an endeavour to persuade this court that the judge had made additional implicit findings as a consequence of her having labelled a number of the lay witnesses to be witnesses of truth. That seems to me to be a sensible concession since in my opinion it would be extremely difficult to set up implicit findings of any significance founded on the judge's approbation of corroborative witnesses. One of the functions of the judge is of course to make express findings. Another function of the judge is to be selective and to make findings that are relevant and necessary for the disposal of the issue. It is not incumbent on the judge to elaborate or extend judgments by making findings on every area or every issue, and it is open to a judge to confine him or herself to those matters which he or she selects as significant and necessary.

20. So I come to Dr McCormick's two principal submissions. First, he says that on the findings of fact made by the judge the natural and probable order was a sole residence order to the father. He says the cap does not fit the head. By the cap he means the order, and by the head he means the judgment. I find that submission completely unpersuasive. I do not accept that implicitly the judge would have preferred a sole residence order to the father had she dismissed a shared residence order to the parents. Of course the judge made adverse findings against the mother. But they were properly balanced against the very important consideration that the mother had been uppermost in the daytime lives of the children throughout, and that she had, through that role, established a close and warm bond with the girls. After all, how can it be said that the implicit second choice was a sole residence order to the father, given the strength of Mrs Chidgey's approbation of the mother and her regime? Secondly, Dr McCormick

suggests that the judge had inadvertently contradicted herself by moving from the shared residence order to the endorsement of the mother's plans to move to Edinburgh. He suggests that unconsciously she slipped back into a mode of thinking that this was a mother who had earned a sole residence order, and thus the freedom to elect where she would discharge her responsibilities to the children.

21. Again I do not find that a persuasive submission. The judge fully explained why she differed from Mrs Chidgey on the fundamental question: is a shared residence order a practical order if the parents are to be separated by a distance of several hundred miles? The judge explained why she regarded the arrangements as a workable arrangement and rejected Mrs Chidgey's view that it was unworkable. The judge's approach is in my opinion founded on sound principle. As this court has said recently, a shared residence order must reflect the underlying reality of where the children live their lives. The fact that the parents' homes are separated by a considerable distance does not preclude the possibility that the children's year will be divided between the homes of the two separated parents in such a way as to validate the making of a shared residence order. This case is a good example of how, in reality, the order expressed by the judge, in providing for the contingency that the mother moves to Scotland and the father remains in England, results in a routine that sees the girls established in an Edinburgh home during the school term times, and in a Hampshire home during the school holidays. My Lord has worked out the extent to which the mother's half share of the main school holidays will be eroded if the father foregoes much of his term time weekend contact. In reality the mother will be paired down to her irreducible minimum 12 days. That ensures that the children will have their father's home as their home during school half terms and almost all the school holidays. That is a sufficient reality to justify the order made by the judge. Of course the residence order reflects just that - the place of the children's residence. It is not intended to deal with issues of parental status. But although the judge could be said to be open to criticism, having laid emphasis on marking by equal status the father's role in the upbringing of the children, that would, in my opinion, be a pedantic criticism since the judge's meaning is crystal clear. The risk of harm to the children through the areas of the mother's fallibility is properly protected by ensuring that a substantial part of their year is spent in the home and in the company of their father.

22. In my judgment this outcome properly reflects the difficult and sophisticated balance that had to be drawn at the conclusion of the evidence and the submissions. The terms in which the judge expressed herself are in my opinion above criticism. I only regret that the judge was persuaded to grant permission. In the end I do not consider this case brings to the Court of Appeal any point of principle. This was an impeccable exercise of the judicial discretion in a case which the judge rightly described as very finely balanced. For all those reasons both the assaults on judgment, by way of appeal and by way of cross-appeal, fail.

23. Finally, I should only record that after the short adjournment Mr Curran for the mother withdrew his assault on the judgment and accepted that his essential role was to ensure that that the appeal did not succeed.

24. MR JUSTICE WILSON: I agree.

25. My analysis is that essentially the judge reached four conclusions.

26. Her first conclusion was that each parent should continue to play a very substantial role in the life of the girls. In this regard she rejected the claim of each parent that the girls should reside solely with that parent and that the other parent should have contact with them to an extent not clearly spelt out (at least in this court) but apparently of a substantial yet conventional character, perhaps about half the holidays and every alternate weekends during term-time. The judge's rejection of the father's claim in that regard forms the main basis of his appeal.

27. The father relies on numerous positive findings about him set out in the judgment. It is clear that he is a deeply impressive, likeable man and, even more relevantly, a devoted, sensitive father. It seems also that the mother's character, expressed at times in her conduct towards or in front of the girls, is to some extent flawed. Of the judge's findings in relation to various regrettable incidents relating to the mother, two feature prominently in my mind. First, a disgraceful loss of temper on her part in the presence of N when a woman politely remonstrated that the mother's car was blocking her drive; and second, her comment, made more than once in the presence of both girls, that she would prefer to have had ten children like L rather than to have had one child like N. Even if the context was light-hearted, it should not need to be pointed out to a mother how damaging such comments would be likely to be.

28. But the judge was not engaged in reaching a conclusion in a vacuum about the quality of each parent. She was not, for example, choosing between rival adopters for a child not yet placed. The mother had been the main carer of the girls throughout their lives. On a practical level she had looked after them very well. The judge found that her relationship with them was very close and for most of the time was warm, loving and supportive. She described her as "generally a good mother". Furthermore, in that the father was proposing that the mother should have substantial contact with the girls, some exposure on their part to her lapses was inevitable.

29. Therefore I cannot begin to subscribe to the father's argument that, in rejecting his application that the girls should reside with him, the judge exceeded the ambit of her discretion. The father's case for sole residence of the girls did not even enjoy the support of the Children and Family Reporter.

30. As a subsidiary point in this area of the case, the father complains that the effect of the judge's order, even in relation to the period prior to the mother's anticipated move to Edinburgh, was not such as to give him equal time with them. He has produced a schedule which suggests that, omitting school holidays which were to be equally divided, the judge's allocation of the girls' time afforded 58 per cent of it to the mother and only 42 per cent to himself. Such schedules, often relied upon by aggrieved parents, are, in my view, usually only of limited value. In the present case, for example, the father's calculations ascribe to the period spent with him between 2.00 pm and 4.00 pm on each of the first three Saturdays of the four-weekly cycle a value equal to the period spent with the mother between 7.00 am and 9.00 am on the Monday, Tuesday and Wednesday of the first week. Yet on any realistic analysis those six hours spent with him are vastly more significant than those spent with her.

31. The judge's second conclusion was that her choice of arrangements for the girls in the short term, prior to any move to Edinburgh, should be reflected by an order for shared residence. I would first observe that the judge was correct to use the phrase a "shared residence order" rather than a "joint residence order" or indeed a "split residence order." In my view reference to a "joint residence order" is apt when the persons in favour of whom it is made are living together; and the word "shared" is preferable to the word "split" because it connotes parental combination rather than division.

32. Speaking for myself, I make no bones about it: to make a shared residence order to reflect the arrangements here chosen by the judge is to choose one label rather than another. Her chosen arrangements for the division of the girls' time could also have been reflected in orders for sole residence to the mother and for generous defined contact with the father. But labels can be very important. The most obvious label to be chosen in respect of any child is surely the name which she or he should bear; and in our courts there is no longer any room for doubting the importance of that.

33. It has recently been held in this court, namely in Re A (Children) (Shared Residence) [2002] 1 FCR 177, that a shared residence order in favour of both parents is inappropriate in circumstances in which a child is unlikely even to visit one of the parents. But in D v D (Shared Residence Order) [2001] 1 FLR 495, now the leading authority in this court on orders for shared residence, Hale LJ said at paragraph 32:

> "If ... it is either planned or has turned out that the children are spending substantial amounts of their time with each of their parents then ... it may be an entirely appropriate order to make."

34. What is particularly noteworthy about that case is that a shared residence order was held to be appropriate in circumstances in which the children were to spend only 140 days (or 38 per cent) of each year with the father. Any lingering idea that a shared residence order is apt only where, for example, the children will be alternating between the two homes evenly, say week by week or fortnight by fortnight, is erroneous.

35. Thus in this case the judge was entitled to consider whether to enshrine her chosen arrangements for the division of the girls' time in a shared residence order. Indeed she was bound to do so in that section 1(3)(g) of the Children Act 1989 required her to have regard to the range of powers available to her. In any consideration as to whether to make such an order the welfare of the children will be paramount. Will it cause confusion for them if the court defines each of two homes as their place of residence? Or, on the contrary, will an order for shared residence be valuable to them as a setting of the court's seal upon an assessment that the home offered by each parent to them is of equal status and importance for them? The judge's conclusion that this was a case for a shared residence order was well within her discretion.

36. The judge's third conclusion was that it was reasonable for the mother to wish to return to Edinburgh; that, if the girls accompanied her to Edinburgh, satisfactory alternative arrangements for their life with the father could be devised; and that accordingly it was reasonable for the girls to reside partly with the mother even after her move there. Although Scotland is outside the jurisdiction of this court, no formal permission of the court is necessary to remove a child to live wholly or partly in Scotland. It is removal only from the United Kingdom without the consent of the other parent or the leave of the court which is prohibited by section 13(1)(b) of the Act of 1989. In the light of the mother's upbringing in Edinburgh and of the presence there of her parents and other friends and relations, the father has not challenged the conclusion that it is reasonable for her to wish, for herself, to return there. He has challenged - and does challenge - the conclusion that the girls' life with him could properly be maintained if their life with the mother was to be in Edinburgh and if, notwithstanding that he has canvassed the possibility that he would also then move to Scotland, he were nevertheless to remain living in Hampshire.

37. In my view, however, the judge's direction that, following any move to Edinburgh, such weekend contact as the father thereby had to forego should be added to his half of the school holidays, subject to the irreducible seven days to be spent with the mother in the summer and five days to be spent with her at Christmas, did create a programme under which it could fairly be said that the necessarily substantial life of the girls with the father would be maintained.

38. The judge's fourth conclusion, which was essentially the subject of the mother's cross-appeal (now withdrawn), was that, even after the move to Edinburgh, it would be appropriate to set the revised arrangements within the continued framework of a shared residence order. It was in reaching this conclusion that the judge departed from the recommendation of the Children and Family Reporter who had suggested that in that situation such an order would be unworkable.

39. I consider that it was well within the judge's discretion to disagree with the Reporter on that point. Of course, if at the back of one's mind was to linger some misconception that a shared residence order necessarily involved regular alternation between the two homes, then such a distance would preclude such an order. But, like my Lord, I consider it perfectly apt to say, without stretching language, that, were the girls to spend

term-time with the mother in Edinburgh and all half-terms and almost all school holidays with the father in Hampshire, they would have the benefit of residence with each parent in each of the homes.

40. I have made my comments about the judgment in terms of the ambit of the judge's discretion because that is the criterion which in this court falls to be applied to it. In fact, however, like my Lord, I have been greatly impressed with the care, the clarity, and, I would add, the insight and wisdom displayed in the judgment. As it happens, I consider positively that the judge was entirely correct in all her conclusions.

(Appeal dismissed; no order for costs save detailed assessment on behalf of the respondent mother; application for permission to appeal to the House of Lords refused).