Neutral Citation Number: [2006] EWCA Civ 235

IN THE SUPREME COURT OF JUDICATURE

IN THE COURT OF APPEAL (CIVIL DIVISION)

ON APPEAL FROM BRADFORD COUNTY COURT

(HHJ IBBOTSON)

Royal Courts of Justice

Strand

London, WC2

Wednesday, 18th January 2006

B E F O R E:

LORD JUSTICE THORPE

LORD JUSTICE WALL

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C (A Child)

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(Computer-Aided Transcript of the Stenograph Notes of

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MR ROGER BICKERDIKE appeared for the Appellant

The Respondent appeared in person

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J U D G M E N T

(As approved by the Court)

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Wednesday, 18th January 2006

1. LORD JUSTICE THORPE: The parties to this appeal began to live together at the beginning of 1999 as a prelude to marriage on 14th April 2000. Their only child, L, was born on 7th July 2000, so he is now five and a half years of age. Sadly, the marriage foundered and when L was about two, the mother returned with him to her home town of Bradford where she has the support of parents, aunts and sister. After her move, the father himself left the final matrimonial home quite swiftly, returning initially to his parents in Lincolnshire and then, in the autumn of 2002, commencing employment and residence in the city of York.

2. In the early stages of separation, contact between L and his father took place every weekend. Children Act proceedings were commenced, which reflects a degree of gathering antagonism. There was an order made in 2004 for contact every weekend. There was a report from the CAFCASS officer in the summer of 2004. As the proceedings moved towards conclusion there was an interim order by consent made in April 2005 for contact on alternate weekends, Friday afternoon to Sunday evening, plus Wednesdays from after school until 6.30 pm.

3. The father made a significant move in June 2005 from York where he worked, to a village close to Bradford, only about a mile and a half from L's school and equally close to the respondent's home. That significant development was extremely important to the case that he wished to advance for a shared residence order and for an increase in the nights during school term that L sleeps with him. Obviously such an arrangement is practically dependent upon proximity of homes both to each other and to the child's school.

4. The case was heard by HHJ Ibbotson for a full day on 15th July, at the end of which there was no time for judgment. Accordingly, he gave a reserved judgment, not handed down but spoken on 22nd July. He rejected the application for a shared residence order and declined to increase the time L spent with his father during the school terms. At the trial Mrs C was represented by counsel but the father appeared in person assisted by a Mackenzie friend. He filed a Notice of Appeal in this court having been refused permission to appeal by HHJ Ibbotson. His application to this court he settled himself, and he appeared on 16th November to argue the application before Wilson LJ. Wilson LJ concluded that the grounds of appeal, if significantly amended, held realistic prospect of establishing first that the Judge had misdirected himself in law in refusing the shared residence order and, second, had fallen into error in concluding on the facts that an increase in L's school nights with the father would be disadvantageous and confusing.

5. In the interim, Mr C has instructed local solicitors who, in turn, instructed Mr Bickerdike. On Friday of last week he completed a skeleton argument, a chronology and a list of relevant authorities. Mr Bickerdike's skeleton presents the argument, the grounds for which were laid by Wilson LJ at the hearing of 16th November. In this court, the advantage of legal representation reverses. The appellant has the greater advantage of Mr Bickerdike's skillful presentation. The respondent is on her own. Although she would clearly qualify for Legal Aid on a merits test, she would fail on the financial test. So she has had the formidable task of responding to a skillful skeleton prepared by experienced specialist counsel without any legal assistance.

6. Mr Bickerdike's approach to the case follows the path set by HHJ Ibbotson. The first issue, logically, is should the father's share of L's school term life be enlarged? The second issue, partially dependent on the resolution of the first, is is this an appropriate case for a shared residence order? The Judge in concluding that it was not, purported to analyse and categorise recent authority in this court in a way in which Mr Bickerdike convincingly submits is unjustified, no matter how the recent authorities are researched and understood.

7. Mrs C in her response has, naturally enough, focused more on the issues that are important to her. She know L best, she is frightened that any substantial change would upset him at a time when he is endeavouring to settle into the first year of primary education beyond the initial year of reception. She has expressed concerns about the risks

that she believes L is exposed to when in his father's care. She has safety anxieties if he is allowed to play outside in the street or to go unaccompanied into neighbouring homes on the estate. She is worried about the complete absence of family support for the father should he be accidentally prevented from picking L up from school or should he be delayed. She has explained the strength of her own position with the large extended family all within five or ten minutes and with a work life which is specifically designed to put L first. So the resolution of the appeal depends upon a scrutiny of the judgment below.

8. The Judge sets the scene in the first 27 paragraphs, which are not open to the least criticism. However, his appraisal of the evidence from L's school is expressed thus:

> "[The CAFCASS officer] told me that she had discussed it with L's teachers [the father's proposal] and their reaction when she asked how L would cope with that, she got the answer, 'Well, fine.'"

9. As Mr Bickerdike points out, the views of the head teacher and of the form teacher were much more detailed and more balanced that the Judge seems to have recollected. What in fact had been said was that L would cope well with spending part of the school week with his father and would be fine provided that the arrangements were clear and consistent. That was an important contribution, given the fact that the school had had the opportunity of getting to know L over the previous six months and were impressed by his performance in settling into school, by his adaptability and by his robust personality.

10. A more serious criticism of the Judge's reason for rejecting the father's first application is that he records the view of the CAFCASS officer only thus:

> "I bear in mind also that Mrs Middlehurst's views in her more recent report were expressed very tentatively, and that she did not actually make a firm recommendation either for more time or for a shared residence order. I think she finishes up by saying that she thinks that an arrangement where L spends more time with his father should be given serious consideration rather than making a precise recommendation."

11. That as a summary of the written report of June 2005 would be fair. But in all these cases whatever is written by the CAFCASS officer is often superceded, or put in a more substantial light, by the oral evidence. The most important part of the contribution of the CAFCASS officer is its culmination in oral evidence, when the case is complete in its preparation and when, perhaps, the CAFCASS officer has had the opportunity of hearing oral evidence from other parties.

12. As Mr Bickerdike has demonstrated in his skeleton argument, the CAFCASS officer was a good deal less tentative in her oral evidence. He draws attention to the transcript in our bundle, particularly between pages 443 and 448, in which the CAFCASS officer said that L would benefit from his father being elevated from a contact parent into a parent with a full parenting role. She said:

> "... if he could be involved with preparation for school, helping [L] with his homework, imposing guidelines, structure discipline rather than just having fun as would occur at weekends."

13. In the same vein, she said two pages later in her evidence:

> "... if [father] is to be involved in a full parenting role then I think he does need to have more involvement with L during the school week."

14. The same theme returns on the following two pages. In particular, she said:

> "The crucial question, I think, is the extent to which [father] is involved in a full parenting sense, and I think it is crucial in two ways. I think it is crucial because L could benefit from it, and I think it is also crucial because whilst he feels frustrated in that, I could envisage him having to come to court he would feel to assert, redefine things."

15. So the CAFCASS officer moved from "tentative" to "positive" when towards the end of her evidence she said:

> "I think L should spend some more time with his father to enable that to happen."

16. The Judge had an obligation to explain carefully and fully his rejection of these views if exercising his judicial discretion to depart from them. Because the Judge does not refer at all to the oral evidence of the CAFCASS officer, his rejection of the recommendation lies, quite simply, unexplained. The Judge is, in my conclusion, vulnerable insofar as he has reached a conclusion that a variation in the arrangements would cause L confusion when not only is there an absence of evidence to that effect from anyone other than L's mother, but when the available objective and expert evidence was to the contrary effect.

17. Accordingly, the Judge's discretionary conclusion cannot stand and we are faced with a choice of exercising our own discretion or ordering a retrial before a different judge. Both parties urge us to grasp the nettle and make a clear ruling today. Neither wishes to see the resumption of litigation in the County Court.

18. I move to the Judge's reason for rejecting the father's application for a shared residence order. The Judge directed himself as to the law in the following terms:

> "38. ... looking at the authorities, it seems to me that shared residence is probably appropriate in two opposing situations. One is where there is agreement between the parties that there should be shared residence, and that the child is spending significant amounts of time in both households, and that the child understands and supports the shared residence arrangement.

39. Well now, this little boy at the moment is too young, it seems to me, to be able to express any support or otherwise for a shared residence arrangement. The other type of situation where it would appear that a shared residence order is appropriate, is where the parties are simply incapable of working in harmony, and in effect are deadlocked.

> 40. Now, I accept that as the authorities currently stand, it is not necessary to demonstrate exceptional circumstances or a positive benefit to the child in order to make a shared residence order. But it seems to me that the current case does not fall into either of the categories which I have just mentioned. As I say, L is too young to understand the ramifications of a shared residence order. It seems to me also that despite their differences and despite the acrimony which

has on occasions been generated during this case, these parties are not in fact incapable of working together. ...

41. In those circumstances, having considered the matter carefully, I consider that there is no reason in this case to make a shared residence order."

19. With respect to the Judge, that summary of the effect of the authorities cannot stand. The authorities in question are, in the main, decisions of this court, particularly *D v D* [2001] 1 FLR 495; *Re A* [2003] 3 FCR 656; *Re F* [2003] FLR 397 and *Re G* [2005] 2 FLR 957. Those reported cases are supplemented by the decision of my Lord, Wall LJ, sitting at first instance in *A v A* [2004] 1 FLR 1195. My Lord in that judgment considers the circumstances in which it is appropriate to make a shared residence order in considerable detail and the views he there expressed have subsequently been approved and adopted in later decisions of this court. The categorisation identified by the Judge is simply impossible to extract from those authorities. As Mr Bickerdike has submitted in his skeleton argument, the whole tenor of recent authority has been to liberate trial judges to elect for a regime of shared residence, if the circumstances and the reality of the case support that conclusion and if that conclusion is consistent with the paramount welfare consideration. The whole tenor of authority is against the identification of restricted circumstances in which shared residence orders may be made. The Judge was plainly wrong in law in his direction and, accordingly, again his conclusion cannot stand. Again, we have to exercise an independent discretion, particularly given that both parties to this appeal resist the option of remission for retrial.

20. On the first issue, the enlargement of the father's share of the school term, the expert evidence before the court is really all one way. Whilst recognising and respecting the mother's natural and sincere anxieties at any substantial change, the reality is that L is a child who has proved himself adaptable to change and resilient in meeting change. In all the circumstances, it does not seem to me that there is really any room for tinkering. The father's proposal squarely reflects the objective which the CAFCASS officer identified and supported in her oral evidence and I am in no doubt that it should be supported and endorsed by this court.

21. Of course, that conclusion strengthens the appellant's case on the second issue. Mr Bickerdike, in his submissions, draws attention to these highly relevant circumstances:

(1) This is a child with a strong attachment to both parents who was happy and confident in both homes.

(2) There is a real proximity between the two homes.

(3) There is a real proximity of the homes and especially the father's home to L's school.

(4) L has a real familiarity with both homes and a sense of belonging in each.

(5) L has a clearly expressed perception that he has two homes.

(6) There is a relatively fluid passage for L between the two homes.

(7) There is a relatively fluid passage of L to and from school from each home.

(8) There is some post-separation history of L's care being shared between his parents.

22. Those circumstances in their cumulative effect make this, in my judgment, a classic case for a shared residence order. Indeed, if this case is not appropriate for such order, what case is? I have accordingly reached the conclusion that this court should exercise its independent discretion to make the order which the Judge rejected. I would allow the appeal and would, in the exercise of my discretion, make both the variations sought by the father. Of course, nothing in the lives of children and in the management of their care is ever written in stone and if the arrangements which I would today introduce prove less beneficial than professional opinion expects, subsequent variation will become inevitable.

23. LORD JUSTICE WALL: I entirely agree. I add a few words, only because Mrs C appears this afternoon in person, whilst Mr C is represented, and the situation was the other way about in the court below.

24. In my judgment, the errors which my Lord has identified in the Judge's judgment were so fundamental as to make it almost inevitable that this appeal would be allowed. Thus, even if Mrs C had been legally represented and her case professionally represented today, I am confident that the result would have been the same. Mrs C thus has nothing

with which to reproach herself in the outcome of this appeal. Furthermore, she must understand that an order of a shared residence is no diminution of her role in the life of L. As my Lord has pointed out from the authorities, where it is practical and where both parents are playing a full part in the life of their child, shared residence orders are, in my view, to be encouraged as reflecting the pattern of the child's life and the fact that both parents are fully engaged in it. In my judgment, as my Lord indicates, this is a paradigm case. The parents both live close to the child's school, both are fully capable of caring for the child and the father's wish to play a full parental role, as opposed to the role of a contact parent, is one which the Judge recognised he was capable of playing.

25. We would not, of course, be making this order if we did not think it was in the best interests of L. Mrs C, as I indicated earlier, should not regard it either as a diminution of her role or any form of defeat, nor should Mr C regard it as any form of victory. Both should regard it as the court's reflection of what is to happen on the ground and in relation to the reality of L's day-to-day life. Of course, it will work better if L's parents can co-operate in relation to it and similar regimes operate in each household, but the order is designed essentially to reflect the reality of Mr and Mrs C's joint and equal parental responsibility for L. His residence is thus shared between them and the order reflects that reality.

26. This case, as my Lord indicates, is one of a number in which this court has recently either made or upheld the making of shared residence orders and, in my judgment, it is important that both parties should play their full part in this child's life. I therefore, like my Lord, would allow this appeal and make the order he proposes.