Case No: B4/2012/0794
Neutral Citation Number: [2012] EWCA Civ 721

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM CAMBRIDGE COUNTY COURT
(HIS HONOUR JUDGE YELTON)

Royal Courts of Justice
Strand, London, WC2A 2LL
Date: Friday 4th May 2012

Before:

LORD JUSTICE THORPE
LORD JUSTICE AIKENS
and
LADY JUSTICE BLACK

IN THE MATTER OF L (CHILDREN)

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Official Shorthand Writers to the Court)

Mr Nicholas Carden (instructed by Cambridge Family Law Practice) appeared on behalf of the Appellant.

Mr Liam Gribbin (instructed by CB4law Solicitors) appeared on behalf of the Respondent.

Judgment

(As Approved by the Court)

Lady Justice Black:

1. The appellant appeals against orders made by HHJ Yelton on 27 March 2012. He is the husband of the respondent. The appellant and the respondent have been married for 20

years and are the parents of twins aged eight. I will refer to the parties in this judgment simply as "the husband" and "the wife".

2. The judge made: 1) an occupation order pursuant to section 33 of the Family Law Act 1996 requiring the husband to vacate the matrimonial home forthwith and to remain away from it until 27 June 2012; and 2) a shared residence order to both parties in respect of the twins, providing that they "shall live primarily with their mother at [the matrimonial home] and spend frequent time with their father". The husband argues that the judge should not have made an occupation order at all. He has no complaint about the shared residence order itself but argues that it was wrong of the judge to specify that the children should live primarily with their mother.

3. It seems to have been common ground by the time of the hearing before the judge that the relationship between the husband and the wife had become very poor. The parties differed as to how long this had been the case. The husband said that matters got really bad since he returned from a business trip at the beginning of April 2012. The wife's case was that in the summer of 2011 she had begun to rebel against the subservient role that she perceived she had in the marriage and that things had been bad since at least that time; she told the court that she had given instructions to her solicitors to issue divorce proceedings

4. The judge was able to see and hear for himself how things were because the husband had recorded (by audio and video tape) exchanges between him and the wife, sometimes surreptitiously and sometimes overtly, with the design of showing that the wife was unreasonable or unwell. The judge listened to the tape recordings. He said of them that "undoubtedly" the wife was "shouting at him on occasion for long periods of time", saying what she said in her oral evidence and in her statement. The judge said that the wife "now sees life entirely from the point of view that the husband is a poor father ". This did not accord with the judge's view of the father, who he expressly found was not a poor father.

5. Two allegations of violence had been made in relation to events before the marriage. The judge found them to be irrelevant to the decisions he had to take. No recent violence was alleged.

6. The judge concentrated on the current position. He considered the wife's allegation that the husband had been "jolted" (as the judge put it) by her fighting back at him. He recorded that it was "a measure of the depth to which relations between the parties had fallen that she felt it necessary to call the police on 17 March. ... Nothing much happened but it shows the way in which feelings have developed." He said there was "one incident of some importance which does show the husband in a light rather different to the way he paints himself". This related to a burn mark on one of the twins which apparently arose from something that happened when she was small. The judge said that the exact circumstances were not clear and were not explored before him. The husband's account to the judge was that the wife had caused the burn but not deliberately. However, on his own account, he had recently told the child that her mother had done it without the caveat that this was accidental. The judge took this as an example of the husband "trying to manipulate the situation to his own benefit".

7. The husband said in evidence that he thought that the wife was mentally ill. The judge found that there was no evidence of that; he said that the husband "seemed to be unable to take the view that she may be perfectly well mentally, but that the marriage is over through no fault of her mental health".

8. The judge found that the children were "badly affected by the arguments and feelings between the parties".

9. It was not only the wife who thought that it would be problematic for the parties to continue to live together in the same house. The husband's position in his witness statement was that ideally he would want the family to stay together as a unit but that, if that was not possible, he wished for the wife to move out immediately for the benefit of him and the children. The judge recorded that the husband's position in evidence was that it was very difficult to see how they could continue to live under the same roof, which the judge considered to be an understatement.

10. The judge found that there was a "lack of reality as to the current difficulties on both sides". By this, he seems to have meant that there was a lack of acknowledgement of the fact that divorce was approaching and that the family home would have to be sold.

The husband's submissions on appeal

11. For the husband, Mr Carden submits that the making of an occupation order was wrong. His submission is not, I think, that a court is never able to make an occupation order without proof of violence on the part of the excluded spouse or that a necessary pre-condition is a finding of reprehensible conduct on the part of that spouse. Either of those submissions would be difficult in the light of the terms of section 33 of the Family Law Act 1996. What he submits is that this order was too draconian a response to the situation in this home. As he put it in his skeleton argument at paragraph 22:

    "Stripped to its essentials, the Judge's order rests on the notion that, in the light of the wife's witness-box declaration, there is going to be a divorce and separation. It is many years since this Court declared that the fact that the matrimonial home has become a place of tension is not of itself a permissible foundation for an order now routinely described and recognised as draconian."

    Mr Carden further complains that the judge gave no consideration to a less draconian order.

12. He is critical of the judge's approach to fact finding in the judgment. He contends that the judge expressed no views on the parties' credibility as witnesses and omitted to make findings on important issues. He submits that the few facts that were found were insufficient to justify the order made. Although not clearly articulated in the grounds of appeal, he seems also to suggest that such findings as the judge did make, or some of them, were not open to him and arose because he failed to give proper weight: (i) to what was disclosed by the recorded incidents; and (ii) to the absence of the sort of corroborative evidence from other people that would be expected if the husband had really been abusive to the wife for a long period.

13. He submits that there was no evidence that the children had suffered harm because of their parents' conduct or were at risk of doing so in future.

14. He submits also that the judge made no findings of fact that would support a stipulation that the children should live primarily with the wife and should not have ordered that. It was the wrong course to take, he says, when things were in a state of flux and it was impossible to look beyond the immediately short term. He also submits that, having determined that the welfare of the children required a shared residence order, it was wrong of the judge to exclude the husband from caring for the children by excluding him from the house.

15. As his submissions developed during the hearing, he seemed also to be complaining that there had been insufficient time for proper preparation of the hearing to take place although it was clear that no request was made to the judge for an adjournment.

The law

16. There is no need for me to rehearse the law in relation to the shared residence issue, which is an issue on the facts. I will, however, set out the basic legal position in relation to the occupation order which was made under the Family Law Act 1996 section 33(3).

17. In accordance with the authority of *Chalmers v Johns* [1999] 2 FCR 110, the judge had, first, to consider whether the evidence established that the applicant or any relevant child was likely to suffer significant harm attributable to the conduct of the respondent if an order were not made. If the answer to that had been "yes", section 33(7) would have dictated that he had to make an occupation order unless the respondent was likely to suffer significant harm if the order was made and that harm would be as great as or greater than the harm attributable to the conduct of the respondent which was likely to be suffered by the applicant if the order was not made.

18. The judge decided that this was not such a case. His reasoning was: (i) that the children were likely to suffer significant harm if the parties did not separate, harm being wide enough to include the sort of emotional harm that he thought they were suffering because the "parents had fallen out and are shouting at each other and the father is making the sort of remarks that he made to" one of the twins, but (ii) the harm was not attributable solely to the father's conduct but to that of both parents and to their presence in the house together. No-one challenges that conclusion.

19. That, therefore, took the judge to section 33(6) instead of section 33(7). Section 33(6) gave him a broader discretion which he had to exercise having regard, as he said, to all the circumstances of the case including the matters set out in paragraphs (a) to (d) of the subsection.

20. No authorities on section 33 were cited in Mr Carden's skeleton argument, the sole authority to which our attention was there invited being *Re B (Care Proceedings: Standard of Proof)* [2008] with regard to the making of findings of fact and the fact that a judge was not entitled to sit on the fence. The respondent cited *Dolan v Corby* [2011] EWCA Civ 1664 to which I will come shortly. In argument Mr Carden invited us also to consider *Chalmers v Johns*. Otherwise we were left with the words of the statute.

Discussion

21. There is nothing in section 33(6) to limit the discretion to make an occupation order to cases in which there has been physical violence. Even in section 33(7), which deals with "significant harm", physical harm is not required as we can see from the definition of harm in section 63 of the Act, which is wide. Section 33(6) requires the court to look at all the circumstances and by section 33(6)(c) it is directed to include in these "the likely effect of any order, or of any decision by the court not to exercise its powers under subsection (3), on the health, safety or well-being of the parties and any relevant child." This is broadly drafted covering not just cases in which there is violence but also all manner of other problems that can occur when a relationship has run into difficulties. This court dealt with this issue recently in Dolan v Corby, paragraph 27 of which includes the following passage.

    "No finding of violence had been made by the Recorder against Mr Corby and the Recorder had that in mind. I do not read *Chalmers v Johns* or *G v G* as saying that an exclusion order can only be made where there is violence or a threat of violence. That would be to put a gloss on the statute which would be inappropriate. *Chalmers v Johns* and *G v G* stress that it must be recognised that an order requiring a respondent to vacate the family home and overriding his property rights is a grave or draconian order and one which would only be justified in exceptional circumstances, but exceptional circumstances can take many forms and are not confined to violent behaviour on the part of the respondent or the threat of violence, and the important thing is for the judge to identify and weigh up all the relevant features of the case whatever their nature."

22. There is equally no authority establishing that a spouse can only be excluded from the home if reprehensible conduct on his or her behalf is found. It would be surprising if there were such an authority given the general terms of the relevant provisions of the Act and in particular the requirement of section 33(6) that there be consideration of all the circumstances.

23. The argument for the husband must proceed, therefore, on the basis that it was a wrong exercise of discretion to make this order on the facts of this particular case. Inevitably he relies heavily on the decision in Chalmers v Johns, that it is only in exceptional circumstances that orders such as this should be made.

24. The preliminary question is whether the judge was proceeding on the correct facts and whether he made findings that were not open to him or failed to make findings on critical matters, so leaving out of account events and behaviour which should have affected his determination. It is certainly the case that the statements of the parties included a great deal of material. Many allegations are made by each of them against the other in relation to their conduct; indeed in some ways there is a remarkable similarity in the criticisms each makes of the other. However, what comes over very clearly in the statements without making findings as to whose version of events is accurate, is that the situation between the parents is untenable and that the children have been exposed to acrimonious and unpleasant wrangles. The judge clearly found that to be the case and he made some specific findings, as I have set out earlier. I am not convinced that it was incumbent on him to work through each and every allegation that the parties made and make a finding about it. One must be practical about what is likely to be possible in a busy county court and this case had been fitted into the list because of its urgency. What the judge has to

do is to make findings on the matters that are relevant to the exercise of his discretion. Mr Carden did not pick out any particular findings that were necessary and not made because ultimately he put his case on a negative basis: that is, in the light of the findings that the judge did make, he was not entitled to go so far as he did. In the absence of a detailed identification of the findings that were needed and not made, I am not persuaded that the judge needed to go any further down the fact-finding route that he did. Nor am I persuaded that he was not entitled to make such findings as he did on the evidence that he heard.

25. I return, therefore, to the question of whether, on the facts as found, it was appropriate for the judge to make the determination that he did. He considered each of the headings in section 33(6). Under subparagraph (a) he found that both parties could find other accommodation in the short-term and no problem arose about resources under subparagraph (b). Neither of these conclusions is challenged by the husband, and we now know that he has college accommodation where he can have the children to stay, as he does under a later order made by HHJ Yelton. I think the wife might question whether it is certain that she could obtain other accommodation.

26. Turning to paragraph (c) the judge worked on the basis that the marriage was unhappy. This was beyond question. He considered what the impact would be on the children if their parents did not separate and concluded that their health and well-being would be adversely affected. He was entitled to reach this conclusion on the basis that, as he had found earlier in his judgment, the parents were shouting at each other and the father was making the sort of remarks that he had about the burn. There was a much greater flavour of how things were contained in the statements which underlay the judge's finding. It was a matter about which an experienced family judge is well equipped to take a view without any other evidence than that of the adults living in the household, here expanded by the recordings made by the father of events there. It is important to recognise that the judge's finding went beyond the sort of harm that children inevitably suffer when a marriage is breaking down and that he found that they had suffered significant harm, which is of course the threshold for local authority intervention in care and supervision cases and a serious matter, as the Children Act 1989 Part IV recognises.

27. As to subparagraph (d) it is clear, as can be seen in the judgment, that the judge considered that both parents' conduct was contributing to the situation and that their presence together in the house was a problem. Again, he was entitled to arrive at this view.

28. These considerations led the judge to the conclusion that it was not possible for the husband and wife to live together under the same roof without damage to the children. It is notable that the parties themselves seemed to be of the same view with regard to the practicalities of them living under the same roof, to a greater or lesser extent, according to what the judge said in his judgment, although the husband's case in his statement (and I think also today) was that he wanted the relationship to continue with help and did not accept the need for an order. Alternatively, if an order were to be made, he wished the court to exclude his wife not him. We are told that the parties had also tried a period following the commencement of the application when they were sharing the accommodation, albeit that that was for a very, very short time immediately before the hearing. During that period they took turns in occupying the house.

29. What was the judge to do about the practical situation and to do in the light of his finding that it was not possible for the husband and the wife to live together in the same house without damage to the children? Given his finding that the children would be adversely affected to the point of a risk of significant harm if the situation continued, it is not surprising that he determined that he had to intervene. He was right, in determining how to intervene, to consider who should have care of the children. His determination was that it should be the mother. If one parent had to be chosen as the primary carer, I do not think the judge is open to criticism for choosing the mother. It is suggested that there was no evidence to support such a conclusion but I do not see the case in that way. The wife had given up her academic career to be at home full-time whereas the husband had a senior position which, whilst giving him considerable flexibility, meant that he had to go abroad from time to time. His evidence was that this happened, as the judge put it, "more frequently at this time of the year than at others". He had a commitment to a trip in China for ten days in May. He said that, during that time, his parents could cover for him with the children. The judge rejected that proposal as "preposterous". The husband had described the wife as "a very committed parent" and she was available full time for the children. The judge's decision in these circumstances that the primary carer should be the mother is neither surprising nor outside the band of reasonable decisions. We are told that things have since moved on and that there is now an order specifically regulating the time the children spend with each parent but that does not undermine the decision taken by the judge on 27 March. It would, in my view, have been appropriate for there to be express consideration at the hearing of alternatives to the full exclusion order. Such an order is, as has been said many times before, draconian and it is incumbent on the courts not to interfere with property rights in this way without very good reason and, as *Chalmers v Johns* says, only in exceptional circumstances should that be done.

30. There were many possible alternatives because section 33(3) sets out that the court may "regulate the occupation of the dwelling house" and it would have been open to the judge with a big house such as this to provide for the occupation of the rooms to be shared between the parties in such a way as to keep them out of each other's way or to build on the husband's forthcoming absences and his potential accommodation in college to arrange a Box and Cox situation where the children lived in the house at all times but the parents alternated in the time they spent there with them. However it seems that alternative solutions were not put to the judge and it may well be that they were already seen, possibly by both parties, as impracticable suggestions. There had already been the short trial period of a Cox and Box arrangement and the judge had of course formed his own view of the harmful situation in the home, having heard the witnesses and the tapes.

31. After anxious consideration, bearing in mind particularly that the judge had seen the parties, had heard the tapes and had formed a view of the case which included that there was a risk of significant harm to the children if the parties remained in the house together and also bearing in mind that he made an order only for a relatively short period of time, I am not persuaded that he erred in the exercise of his discretion by excluding the husband from the party. I would, therefore, dismiss this appeal.

32. I stress, however, that this should not be taken as any indication as to what the correct order will be should this matter be returned to the judge for further consideration either on an application for an extension of the time period of this occupation order or on an application for a fresh order. The matter would have to be considered in the light of all

the circumstances as they then are, and I am very conscious from the little that we have heard during the course of this hearing that there have been a great deal of changes in circumstances.

Lord Justice Aikens:

33. I agree. I too have found this a very anxious case, but section 33 of the 1996 Act permits the court, in appropriate circumstances that are set out in that section, to interfere with a person's property law rights in his home. It is therefore not surprising that orders made under section 33(3) are frequently described as "draconian" and that it is well settled that such orders should only be made in exceptional circumstances. It does seem to me that, given the draconian nature of orders that can be made under section 33(3), it will often be incumbent upon a judge to consider whether a fully fledged so-called "occupation" order, which actually means precisely the reverse of that, should be made. Moreover, if section 33(7) is not applicable, then according to the terms of section 33(6), an order under section 33(3) is only to be made after a judge has had regard to all the circumstances of the case, not just those that are specifically identified in paragraphs (a) to (d) of section 33(6). However, given the judge's findings of fact in this case, particularly the finding that the children had suffered "significant" harm, I have concluded that the order made by the judge was within the permissible bounds in all the circumstances. In particular, it was, I note, only made for a three month period.

34. Therefore I agree with the conclusion that the judge was entitled to make the order he did. I also concur with what Black LJ has said, namely, that this cannot be taken as any indication or pre-judgment of what might happen at the end of the current order on 27 June 2012 or on any other applications that might be made.

35. In the event I would dismiss this appeal.

Lord Justice Thorpe:

36. I agree that this appeal should be dismissed and I also agree with all that has been said by my Lady and my Lord.

Order: Appeal dismissed