



Case No: B4/2013/3769
Neutral Citation Number: [2014] EWCA Civ 852

**IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM MANCHESTER COUNTY COURT
(HER HONOUR JUDGE RODDY)**

Royal Courts of Justice
Strand, London, WC2A 2LL
Friday, 6th June 2014

B E F O R E:

**LORD JUSTICE KITCHIN
LORD JUSTICE RYDER
SIR STANLEY BURNTON**

IN THE MATTER OF P (CHILDREN)

(DAR Transcript of WordWave International Limited
A Merrill Communications Company
165 Fleet Street, London EC4A 2DY
Tel No: 020 7404 1400 Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

Mr Z Samuel appeared on behalf of the Applicant Mother
Mr K Rowley QC & Ms C Bispham appeared on behalf of the Respondent Father

J U D G M E N T
(As Approved)
Crown copyright

LORD JUSTICE RYDER

1. This is an application for permission to appeal and, if permission is granted, the appeal of a mother against an order of Her Honour Judge Roddy sitting at the Manchester County Court on 2 December 2013. The appeal is opposed by the father. We are grateful to leading and junior counsel for their attention to detail before this court.
2. The issue between the parties arises out of an application made by the mother to permanently relocate herself and the two children of the family to Germany from the north west of England. Judge Roddy refused that application.
3. The children are aged three, rising four, and two and a half years of age. They live with their mother and have done so since the relationship between the parents broke down in December 2012. It is of some significance in the context of this case that the judge was very critical of the mother for the manner in which she left the matrimonial home, and

that fed into a fundamental value judgment reached by the judge, namely that in wanting to relocate to Germany, the mother's real motivation was to interfere with the children's relationship with their father by restricting contact.

4. Mr Rowley QC, who appears on behalf of the father with Ms Bispham, has eloquently attempted to persuade the court that the judge was entitled to come to the view that she did. In any event he submits the mother's motivation was not a decisive factor. On both questions, I have come to the conclusion that I disagree and that I accept the submissions of Mr Samuel on behalf of the mother. As I shall describe, that has the effect that I will grant permission to the mother to bring this appeal, allow the appeal, set aside the order of the court below and remit the matter to be re-heard by a different judge.
5. Both parents are German nationals who were born and raised there but who have not lived there for 18 years in the case of the father, and 12 years in the case of the mother. They are not married but both have parental responsibility for the children. Father is in full time employment as a consultant orthopaedic surgeon and mother is professionally qualified as an architect but is not working, rather being engaged in full time child care. They both have relatives in Germany. As the judge held at paragraph 1 of the judgment:

"I accept that each parent loves the two children deeply and I am sure that each parent believes that he or she knows what is best for the children. I am equally sure that the children love both of their parents."

Both parents play and have played an important part in the children's upbringing.

6. The law relating to an application of this kind was admirably summarised by junior counsel for both parties, who produced an agreed note for the judge. I do not propose to repeat its contents here. It described the development of the law from *Payne v Payne* [2001] 1 FLR 1052, through *MK v CK* [2011] 3 FCR 111, to *Re F (a child)* [2012] EWCA Civ 1364, dealing in passing with the interpretation to be put on *Re Y* [2004] 2 FLR 330, i.e. is a decision on its facts that did not set up any competing principle.
7. This was a welfare case governed by section 1 of the 1989 Act and informed by a welfare analysis. The judge was loyal to the statutory principles as described in those cases. If I have any criticism, it is that the import of *Brussels II Revised* as an instrument governing the applicability, recognition and enforcement of matrimonial orders across EU member states was not given sufficient emphasis, but I would not have allowed the appeal on that ground alone.
8. The key issue in this case was whether the judge was entitled to reject mother's case on the basis of mother's motivation. That conclusion is at paragraph 16 of the judgment as follows:

"What is the mother's motivation to relocate to Germany? The mother's case is that she and the children will live in Germany where they will enjoy a better standard of living. I do not accept that that is her true or primary motivation. I am satisfied that the mother's primary objective for relocation is to limit the involvement of the father in the lives of the children. It is the mother who wishes to control the father's relationship with the children and not the father exercising control over the mother. Living in Germany with

the children I am satisfied that the mother perceives that she would be the parent with control. Maintaining the father's relationship through contact is not high on her list of priorities."

9. I regard that value judgment as being central to the judge's determination. Given its emphasis in the judgment, I cannot accept that it was either collateral or peripheral to the question to be decided, at least not in the mind of the judge. Mr Rowley rightly points out that it did not feature in the judge's welfare analysis, but that, if anything, supports me in my conclusion that, aside from this question, the evidence this court has read and the other factors that are identified in the judgment would have left the cases of the mother and father relatively evenly balanced. Both parents firmly want to retain their relationship with their children and a standard or quality of life for themselves and children that on the facts, it is apparent, is achievable.
10. Turning then to the particulars of the finding about motivation that Mr Rowley relies upon in opposing this appeal, they are as follows. It is said that the judge was right to deprecate the mother for leaving the home with the children and without notice to the father immediately prior to Christmas 2012. The relationship had broken down and the mother viewed father as emotionally and financially controlling to the extent of being abusive. The judge had the risk assessment records from a domestic violence adviser and a general practitioner, which indicated clearly that mother had never experienced or alleged domestic violence but that she had consistently reported control and emotional abuse. The judge accepted that mother genuinely perceived that to be as serious as she reported it to be, but found as a fact that it was not as mother characterised it to be. The effect of the relationship breakdown on the mother was, however, clear.
11. Secondly, the mother was criticised for a risk assessment response of the MARAC, who considered her circumstances were such that they held her to be at "high risk". That is not the mother's fault, save in one respect. Her worries had been consistently and appropriately reported and recorded until she revealed her perception that father had used words which appeared to be a threat to do something serious to himself and the children, the context being a then recent tragedy where a father had killed himself and his children. Father denied using those words. Mother was equally clear in evidence that she should not have expressed her fear in the way that she had, but nevertheless it was a fear that she genuinely held.
12. One then comes to contact itself. With respect to the judge, she elided a motivation to limit contact to the terms of agreed court orders with a motivation to limit the involvement of the father by relocating to Germany. There is a clear difference. There was some evidence to support the former, and no evidence beyond inferences derived out of the judge's criticism of the nature of the relationship breakdown to support the latter. Mother had not refused contact or breached a court order. Orders had been obtained by consent and had been complied with. They were relatively generous to father, given the need for the children to have quality time with each parent. The transcript of evidence demonstrates that mother had proposed a contact arrangement of one day a week and three out of four weekends during negotiations that were cross examined upon at the hearing. She had on occasion offered more contact, albeit it is said she would have known that father could not take up that additional contact because of his employment. The one example of contact restriction which was valid arises out of the circumstances of the relationship breakdown. Staying contact did not immediately

commence and there was a period of disruption and then visiting contact for which it may have been appropriate to criticise mother as not being sufficiently supportive of the relationship between the children and their father.

13. The other criticisms of mother and her contact proposals, while good cross examination points, are matters of comment which do not lead to decisive evidential material. Furthermore, the criticism of mother's reaction to father's contact counter proposal, namely that he would exercise one week on and one week off in Germany if there was to be a relocation, was a criticism, if valid and I stress, I express no view one way or the other against the father, not the mother; after all, he made that proposal.
14. The transcript of the evidence of the mother which has been put before this court does not support the conclusion reached by the judge. It is submitted the judge was entitled to rely on the evidence of the father. That is of course correct, but on the question of mother's motivation to relocate so as to interfere with his relationship with the children, there are no particulars in the judgment that are relevant and nowhere are particulars provided to this court, whether from a transcript of father's evidence or otherwise.
15. There are other issues between the parties, but in the context that I have come to the conclusion that the order must be set aside and the application re heard, I do not propose to express any detailed view about the same, save to say that a relatively superficial view was taken of accommodation that was available in Germany and also a superficial view of the financial needs and obligations of the parties to each other and the employment prospects of the mother in Germany. Likewise, the strength of, that is the nature and extent of the relationship of each parent and the children, was relatively superficially addressed. Those questions, alongside other welfare factors, need to be re explored without what became the dominant question of motivation which became decisive in the way that it did.
16. Mr Rowley has rightly reminded this court of our repeated strictures in relation to interference with first instance judgments and the unique position that such a judge has in relation to the witnesses she has heard. We have borne those observations very carefully in mind. The conclusion to which this judge came went beyond that broad spectrum and I regret to have to conclude she misdirected herself on a key issue.
17. For these reasons, I would give permission to appeal and allow the appeal.

SIR STANLEY BURNTON

18. I entirely agree.

LORD JUSTICE KITCHIN

19. I also agree.



Visit our free case law
libraries. Just Click