Re A (Children) [2009] EWCA Civ 1141

Case No: B4/2009/2108

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL (CIVIL DIVISION)

ON APPEAL FROM DEWSBURY COUNTY COURT

(MRS RECORDER ARMITAGE)

Royal Courts of Justice

Strand, London, WC2A 2LL

7th October 2009

B e f o r e :

LORD JUSTICE THORPE

LORD JUSTICE THOMAS

and

MR JUSTICE COLERIDGE

IN THE MATTER OF A (CHILDREN)

(DAR Transcript of

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Tel No: 020 7404 1400 Fax No: 020 7831 8838

Official Shorthand Writers to the Court)

Mr C Heaton QC and Miss J Pye (instructed by Lee and Priestley LLP) appeared on behalf of the Appellant Mother.

Mr M Rudd (instructed by Nadat Solicitors) appeared on behalf of the First Respondent, the Father.

Mr R Bickerdike (instructed by Michael George & Co) appeared on behalf of the Second, Third, and Fourth Respondents, the Children.

HTML VERSION OF JUDGMENT

Lord Justice Thorpe:

On 30 September this court heard an application for permission to appeal and a stay of execution from the order of Mrs Recorder Armitage in the Dewsbury County Court sitting in Leeds on 25 September 2009.

The application was granted, and both my Lords, Wall LJ and Sedley LJ, gave short reasons for granting permission and staying the execution of the judge's order. Those short reasons reveal their shared disquiet at the boldness of the order below, which transferred the residence of three children from their primary carer, the mother, to their father, whose contact to the children had sadly been non-existent for some 17 months.

The parties married in 1997, and the children with whom the court is concerned are Kameel, aged 8, Sameer, aged 7, and Sara, aged 3. The application for a defined contact order was issued by the father on 27 February 2008, and in June 2008 there was a hearing, from which a very significant order emerged.

The mother had developed really quite florid allegations of domestic violence, including an incident when she asserted that Kameel had been struck by her father with a crutch. The order of June 2008 recorded very significant concessions by the mother: firstly, that she was no longer relying on the asserted history of domestic violence as a bar to contact and, second, that she was prepared to co-operate in the initiation of a contact regime.

That concession was shortlived and within a week it was withdrawn, with the consequence that arrangements had to be made for a fact-finding hearing, which took place in front of the Recorder in January 2009. She heard a lot of oral evidence and it enabled her to come to some firm conclusions, which are set out in a careful judgment of 29 January extending to some 32 pages. It is quite unnecessary to analyse the detail of her findings. Enough to say that she rejected both parents as being reliable or truthful in all detail.

She found some of the allegations proved. Importantly, she dismissed completely the allegation that the father had assaulted Kameel with a crutch. That, I think, she even held to have been an invention, a deliberate invention of the mother's. Essentially she found that this was a case of a very volatile marriage and that apportionment of blame was six of one and half a dozen of the other. She concluded her judgment, which was clearly very carefully considered, reduced to writing and then read, with the essential finding that the volatility had been detrimental to the wellbeing of the children and that each parent must share responsibility for that.

At the conclusion of the reading of that judgment, the judge made some additional observations which fell upon the ears of the mother, her solicitor, the father (then in person), the children's guardian and the children's solicitor. The words of the judge are not recorded, but it is accepted by all parties that they are accurately recorded in paragraph 1.2 of the report of the children's guardian filed on 14 September this year. The judge's words were these:

"This mother needs to understand the Court is anxious to see contact resumed. These findings made by the Court do not represent a bar to contact. I will be looking to the mother to give the children permission to enjoy the benefit from that and I do not wish to see further damage to these children."

Given the history, the judge might have asked herself whether exhortation to the mother was likely to prove effective. The point was put to her squarely at directions hearings that took place on 10 and 26 February some two and three weeks later. The guardian, in her position statement for the directions hearing, said that:

"…the position of the [guardian] is as that of the Learned Judge, that the findings are not a bar to contact. It is accepted the re-introduction of contact will need to be carefully managed but that this can be achieved and that direct contact should commence immediately. Further delay in facilitating contact would only serve to cause further entrenchment. Furthermore, Mr Parr [the] Psychologist, in his assessment will be required to observe contact."

The father (then in person), said something similar in his position statement, namely that contact needed to commence immediately.

However, Mr Clive Heaton QC, who has represented the mother at various points when his other commitments have permitted, filed a position statement on 17 February in which, in paragraph 13, he took the firm litigation point that the judge's observations on 29 January and 10 February were unprincipled, in that the court was expressing a clear view on the ultimate issue without having had evidence from the mother or the expert evidence already commissioned. That fair submission no doubt persuaded the judge to take no step on 26 February and to make no order on that date.

So the aridity of the position continued unchanged as the psychologist conducted his examination and investigation. He saw the mother last on 16 July, and she made it plain that her position remained unchanged and that no contact could be contemplated for a minimum period of six months after the conclusion of the trial, fixed to commence on, I think, 21 September. There was no contact between mother and guardian since, following the fact-finding hearing, the mother had asserted that the guardian was biased or unfair to her and had sought her replacement. The guardian had, by letter of

14 August, invited the mother to a meeting, but the mother's response set conditions unacceptable to the guardian and no meeting took place.

There was, however, an extraordinary development on, I think, 7 September, when the mother filed her final statement in preparation for the trial. In that statement she professed to have seen the light, to have understood the error of her past ways and now to accept that the court should make a generous contact order in favour of the father if confirming the children's continued residence in her home. The father had issued, in March 2009, a competitive application for a residence order, and it is an obvious speculation that the mother's dramatic shift in position was inspired in part by a fear that if she did not give ground she would lose the children.

The case proceeded through that week to conclusion on 25 September and during its course the parents gave oral evidence, as did other members of the family. The psychologist gave evidence at length and the guardian gave her evidence on the 23rd and 24th.

On the 25th, after she had concluded her evidence, the guardian submitted a contact regime, which she would suggest if the judge decided to leave the residence order where it was and an alternative contact regime if residence were transferred to the father. The two regimes are more or less matching. Whichever parent had the residence, the other parent would have comparable generous contact. I draw attention to the fact that if the residence order were to remain with the mother, the guardian proposed one or perhaps two almost immediate two-hour supervised contact introductions, with a swift move to unmonitored contact with some frequency, moving on swiftly to an overnight stay, moving on swiftly to alternate weekends and by Christmas to an equal share of the holidays.

The judgment delivered has now been transcribed and it is full and careful. No criticism could possibly be made of the judge's careful record of history, nor could any criticism be made of her record of the trial and her essential findings. She approaches a conclusion at paragraph 75 when she directs herself thus:

"This then is the full background against which I have to determine father's application for a residence order. It turns on whether I can, on the balance of probabilities, safely place reliance on mother's change of position and on her promises to ensure in the future that the children's needs for a full and loving relationship with father and his family are met such as will repair some of the harm done and prevent any further emotional harm in the future."

In the following paragraphs, 76 to 79 inclusive, the judge explains why she cannot place reliance on the mother's change of position, first by reference to the history and second by rejecting evidence given by the mother at trial on a number of points.

Mr Heaton, who leads Miss Pye in presenting this appeal, says quite shortly that the judge has simply identified the wrong crucial issue. Of course it was essential for the judge to assess the sincerity of the mother's late shift in her litigation position, to assess whether it was genuine or whether it was simply a manipulative litigation gambit. But all that was in preparation for what Mr Heaton suggests was the essential task, namely to assess the risk of shifting the children from mother to father and to balance that against other risks that would undoubtedly arise if endorsing the mother's proposals.

For the father and for the guardian, both Mr Rudd and Mr Bickerdike have made forceful submissions demonstrating how careful was the judge's analysis of the issue that she had defined as crucial and sound were the foundations upon which she built

her rejection. Mr Bickerdike in particular emphasises that this was a very experienced tribunal; the judge had a choice between three alternatives in exercising her discretionary choice; she had explained herself fully and carefully; and that it was not open to this court to interfere.

Whilst respecting the respondent's submissions, I am in no doubt at all that Mr Heaton is right. The judge I think was misled into regarding an assessment of the mother's true position as crucial. It was important but not crucial. What is so significant about this history is that no attempt was made to introduce any contact regime, either in January or February 2009. All that the mother had against her was the concession contained in the June 2008 order and her subsequent renege. This was not a case in which there had been a clear contact order which the judge subsequently had to revisit with feelings of frustration or despair at the continuing obduracy of the primary carer. Posit that the mother had not filed her final statement and maintained her objection right to judgment. The judge would then have had to focus on what Mr Heaton has correctly defined as the true issue, namely the risk of moving the children against the risk of confirming them, but subject to a very clear contact order.

The transfer of residence from the obdurate primary carer to the parent frustrated in pursuit of contact is a judicial weapon of last resort. There was hardly a need for a psychologist to establish the risks of moving these girls from mother to father, not only after her long years of care but also in the light of the negative picture that they had been given of a father who they had not effectively seen for 17 months. The risks of gamesmanship from the mother in the future, confirmed in residence but nailed down with a clear detailed contact order, were plainly less, and from that essential risk balance the judge was diverted. In a sense it could be said that the order she made was premature and in its draconian content too risky for these children.

So for all those reasons I would allow the appeal. I would dismiss the residence order the judge granted, but I would propose that a contact order in line with the guardian's proposals to the judge (to be found at page A69 in the bundle) should be immediately introduced, only making a small shift in the timetable to reflect the fact that we are now some two or more weeks on from the date of trial.

Lord Justice Thomas:

I agree.

Mr Justice Coleridge:

In this case the Recorder is to be applauded for taking a robust approach to yet another case involving a parent determined to exclude a perfectly adequate non-resident parent from having a proper relationship with S or her child. These cases are the scourge of the whole family justice system and are always extremely difficult to resolve. They do indeed demand a robust response from all of us involved in the system. The remedy of transferring residence from one parent to the non-resident parent is an essential weapon or tool in these cases as a weapon or tool of last resort. It may indeed be a case of putting a gun to a parent's head to force her or him to rethink, as counsel described it, but that, it seems to me, is a legitimate approach and remedy. However, where as here there has been an apparent volte-face by a mother and a concession that now contact should happen, combined with an acceptance by all that the mother's care was in all other respects adequate, the remedy of last resort needs to be deployed with great care and any apparent change of heart, it seems to me, fully tested. In this case the mother has not been in breach of any defined contact order and so her future response to court orders is quite unknown. She is adamant that she has changed her mind. She is an

intelligent professional lady and it seems to me she now understands the position which she is now undoubtedly in.

The Recorder's judgment is in almost all respects careful and detailed. In my judgment she merely went too far too soon and I am afraid, in so doing, was wrong. The mother's volte-face needs to be tested, and she needs to be warned in the strongest terms that this is indeed her last chance to comply fully with the requirements of a court order. For that reason I too would allow the appeal, as my Lord as indicated, and replace the residence order with a defined contact order in terms of A69, commencing as soon as practical, probably next week.

Finally May I deliver the warning which the learned judge herself might have delivered? This mother must embrace not only the letter but the spirit of this order. She must begin now to allow the children to have a proper and full relationship with their father. If she fails to do that, it will be detected extremely quickly and the contact order will simply not operate properly. If that is the case, the consequences are all too obvious. The children will indeed move to make their primary home with their father. She should be under no illusion that that is the course that the court will take on the next occasion if these contact orders are not rigorously obeyed by her.

Order: Appeal allowed