RE O (RESIDENCE)
[2012] EWCA Civ 1955

Court of Appeal

Thorpe, Rimer and Patten LJJ

5 December 2012

Residence – Permission to relocate granted – Appeal – Fresh evidence of mother's early retirement – Whether the judge would have reached a different conclusion

After her parents' separation, the girl, now aged 10, remained living with the mother and had contact, although not overnight, with the father. The parents were on bitter terms and only communicated through the child. The mother worked long hours for an Irish bank and sought permission to relocate to southern Ireland in order to work closer to home and spend more time with the child. The mother proposed substantial periods of staying contact with the father. The judge found it to be a finely balanced case but decided in favour of permitting relocation. A prominent factor in the reasoning was the financial security the mother would experience in moving to Ireland. He also found that the mother's contact proposals were practical and reasonable. Prior to the hearing the father had withheld periodical payments from the mother as a reaction to her application and before the order was perfected, he offered to discharge the arrears, secure future periodical payments and make a substantial payment on account of costs. In view of that offer he sought a reconsideration of the issues but at the later limited hearing, the judge came to the same conclusion. The father appealed. In the mother's updated statement she stated that she had taken the decision to take early retirement from the bank in return for a lump sum of £100,000 plus £15,000 per annum. Coupled with the £60,000 equity in her current home she would have a good capital sum with which to fund the child's university education and whatever she earned from part-time employment would equate to the father's periodical payments. The father asserted this information should have been made available to the judge and had it been, it might have led to a different decision.

Held – dismissing the appeal –

(1) The answer to the key matter for consideration of whether, had the judge had the information about the mother's retirement, it might have led him to a different conclusion, was that it would not. In many ways it could be said that it would have fortified his conclusion that relocation was the right course for the child as it had the same advantages of relieving the mother of any financial anxiety and it had the advantage of leaving the mother even freer to be available to the child on a daily basis than she would have been under the repatriation scheme (see para [25]).

(2) The suggestion that the order below should be quashed on the basis of the fresh evidence was bold but without any solid foundation. At the most it could be said to demonstrate a need for remission, but remission was always an order of last resort and the idea of setting up a third trial between the two parents and inevitably to embroil the child in the midst of that was, as a matter of common sense and welfare evaluation, unthinkable, absent some necessity of a fundamental nature in order to establish due process or in order to do justice. There would also be continuing financial cost to the family, neither party being legally aided (see para [26]).

Statutory provisions considered
Children Act 1989

Teertha Gupta QC and *Poonam Bhari* for the appellant
Tosin Oguntayo for the respondent

THORPE LJ:

[1] His Honour Judge Cryan was the judge responsible for deciding a relocation application which was brought for trial in the Gee Street Court. The applicant for permission to relocate was B OS, the respondent was M O and the child in question is H OS, who was born in February 2003 and is accordingly now approaching her tenth birthday.

[2] The parties were married comparatively briefly, although they had cohabited since 1997 and separated in 2006.

[3] The applicant has always provided the home for H and although she sees her father frequently, it is rare that she stays a night under his roof. The parents are sadly on bitter terms and any communication as to the arrangements for contact are carried through by H herself. So one of the good things about a picture which is in many respects sad is that H seems to be able to cope with fixing her own relationship with her father and the detail of the time that she spends with him.

[4] This is a well-to-do family and the level of periodical payments for H was set at some stage in the sum of £440 a month. The parents are both in their mid or early fifties and they both come from Ireland and it is to the south of Ireland that the applicant sought to relocate.

[5] She has for a long time been a valued employee of the Allied Irish Bank and at the time of the trial below in receipt of a substantial salary. But the job was stressful and involved some 2 ½ hours' travel a day, so that the time she had to spend with her daughter during the working week was curtailed. So her proposal to the court in this jurisdiction was that the quality of life for herself and for H and the quality of their relationship would be considerably improved were she to repatriate to take employment with the bank in the homeland, where there would be very little travelling time lost during the course of the day and where she would be able to acquire equivalent accommodation to her home in Ruislip for a much reduced capital sum.

[6] Of course, the cost of those gains would be a considerable reduction in the frequency of the contact between H and her father. The mother in recognition proposed that there should be substantial periods of staying contact during school holidays, but that of course in itself was a questionable compensation. It was not the pattern that H herself had unilaterally developed.

[7] So it was clearly a finely balanced case that required considerable judicial expertise, and that it received from His Honour Judge Cryan, who in his initial judgment of 22 May explained with sensitivity and insight why he came down in favour of relocation. A factor that was prominent in his reasoning was the financial considerations, the considerable improvement in the security of the mother's economy if she removed to a suburb on the outskirts of Cork. He essentially explained himself at paras [48] and [49] of his first judgment when he referred to the Children Act checklist, weighing all material facts relevant to H's welfare. He said:

> 'Both the mother and the father have plans for [H] which have considerable advantages and disadvantages, but on balance I have concluded that [H]'s best interests will be served by her going to live with her mother in Cork as is planned, but on the basis that there are very full arrangements for contact between [H] and her father. The

> mother's plans are practicable and reasonable. They are likely to best provide for [H] and the mother's economic and domestic security. They provide adequately for [H]'s education and physical care. The mother's proposals for contact are genuine and achievable and will result in [H] spending longer times with her father than she does now. The regularity of contact, though lost in some important sense, can be compensated for by the additional lengths of contact which the mother proposes. [H] loves her father and she will not lose that, but for [H]'s good he will have to adapt.'

[8] In the following paragraph he acknowledged that H's wishes and feelings were clearly stated by the Cafcass officer and were in favour of the retention of all that was familiar to her. So the judge said in this crucial paragraph:

> 'In reaching this conclusion I have taken into account [H]'s wishes and feelings and the fact that as a nine year old girl they are no doubt strongly and genuinely articulately held. However, she is relatively young. She cannot appreciate the complexities with which her mother must wrestle to achieve security for both of them. Moreover, it is highly unlikely that she appreciates that her present life is not in fact sustainable. I acknowledge that she does not want things to change but change they must inevitably and I am satisfied that what the mother is proposing is reasonable in those circumstances. Obviously I take into account [H]'s views, but they cannot be determinative. The adults in her life have to provide for her and the proposals advanced by her mother do that sensibly and lovingly.'

[9] Before the order to give effect to judgment had been perfected, there was a dramatic development. The father had for a considerable time withheld the periodical payments due for H in a vengeful spirit, he having been upset by the mother and he being, as the judge found, a man prone to strong emotional reactions. So through his counsel he came forward to say: Well, the judge has found as he did having considerable regard to financial considerations. I therefore will discharge the arrears of periodical payments, I will secure future periodical payments and I will make a substantial payment on account of the applicant's costs. So on his behalf his counsel said the landscape has changed, the order has not been perfected and accordingly we request the reconsideration of your conclusion.

[10] The judge dealing with the application in para [27] said:

> 'I accept that financially the father's financial offer if put into effect would make the mother's position in relation to her home and mortgage viable.'

The judge then addressed the consequences and concluded:

> 'It seems to me, having looked at this anxiously, that if arrangements could be made which would effectively secure the mother in her present home, the balance of reasonableness and the welfare of [H] in the

> circumstances might, and I stress might, be different. Whether the scheme proposed by the father is unacceptable or insecure and insufficient needs to be considered properly by this court in order to discharge its duties under the Children Act to [H].'

[11] The judge then directed that he would reopen the issue at a further hearing, but a further hearing of a limited character. It was to be confined to 4 hours. There was to be no examination in chief, cross-examination was to be limited to half an hour each side and anything that the parties wished to say further was to be set out in statements to be filed relatively swiftly.

[12] The judge was clearly hoping that the issue would be before him without much delay after that truncated preparation, but in the event it was not until the middle of August that the short hearing resumed. The judge, having heard the further evidence, made an important finding in para [29] when he said:

> 'If the mother chooses to remain in Ruislip I am satisfied that she can, but I accept that there are other considerations at work and the balancing exercise needs to deal with those and consider where [H]'s welfare lies.'

[13] He then referred at some length to his earlier judgment and the basis upon which he had found for the mother, and then concluded this second judgment by saying:

> 'After the most anxious consideration, I have concluded that [H]'s welfare is founded in the love of both her parents, but primarily in the mother's home and with the mother as her primary carer. [H] wishes to stay in her mother's home cared for by her and I am mindful of the fact that only four nights in 2011 did she spend with her father. The mother provides her day-to-day care and would best do that if she was secure both emotionally and financially. If she was content and supported and with more time available, I am satisfied that the plans for the mother's move to Ireland would achieve that. If she were not to move I think that she would be anxious, would feel insecure about employment and home, her rehabilitation package and relations with the father. It seems to me that she would have a greater opportunity to assist [H] in the regime in Ireland that she proposes. There would be less risk of what the mother described as [H] being at home alone at the end of the school day and difficulties over the school holidays. There would be loss to [H] and sadness and there would be change, but I form the view that those elements can and should be managed and given the amount of contact on offer and the father's substantial apparent financial means to facilitate it, those factors should be reduced to acceptable levels.'

[14] And then in para [36]:

> 'I am satisfied that the benefits to [H] as a result of the mother's plan would be greater than the disadvantages. I have reached that conclusion without being entirely certain, but thinking it likely. I have reached that

> conclusion knowing what [H] has said and understanding of the situation, but I am satisfied that she was likely to have a fuller and more supportive life if her mother is more available to her on a day-to-day basis. I appreciate that the father will be disappointed but I hope he appreciates it is an extremely difficult situation for everybody and his duty now is to do the best he can to support [H].'

[15] The application to this court came with the father's appellant's notice of 18 September. I am told that the application was referred to me and I directed an oral hearing. On 18 October at that oral hearing McFarlane LJ granted permission. On 6 November at a directions hearing he refused separate representation for H which was urged upon him by Mr Teertha Gupta QC, leading for the father, but he did request a wishes and feelings statement from one of the specialist Cafcass team serving the High Court.

[16] McFarlane LJ also directed the parties to file updated statements, which were to deal with contact. They would be limited to a single page. They are in the bundle. They have taken no place in the argument today. What has been central to the argument today is a statement dated 16 November signed by the mother in which she records that she made a substantial decision in September to abandon the plan for continuing employment by the bank but in the homeland in favour of an opportunity offered to all employees to take early retirement. Under the deal that was offered her she took a lump sum of £100,000 and an annual pension in the sum of just over £15,000. She explained that she was also entitled to a small retraining grant and that it was her intention to seek probably part-time employment in the caring industry, having done the pre-training.

[17] So the picture presented in this statement is one of considerable financial strength, a return home with the benefit of the pension entitlement and with the benefit of the proceeds of sale of the Ruislip home, which after discharge of mortgage and other debts left her with a net sum of £60,000. So with a £100,000 lump sum and £60,000 for the house she could rehouse herself in Ireland and she could have capital on top available to fund H's future university education. On the income front she would have the pension, she would have whatever she earned from part-time employment and she would have the periodical payments for H.

[18] This attracted a supplemental submission from Mr Gupta in which he asserted that there had been a lack of frankness on the part of the mother. This was very crucial information, it should have been made available to the judge (the option to take early retirement) and had it been it might well have produced a different result. That assertion emerged in a supplemental skeleton filed on Monday.

[19] On Tuesday (yesterday), the mother was asked to produce documents relating to her negotiations with the bank. Those documents were brought into court this morning by counsel who represents her. What do they reveal? First, that on 21 May the Chief Executive of the bank published to all employees the bad news that the bank was having to reduce its staff levels significantly and that one way by which that was to be achieved would be by the offer of an early retirement scheme. On 15 July came a letter from the bank saying that the deadline for, as it were, signing into the possible scheme had been

extended to 6 July. We were told that the mother's entry into the scheme was by letter, probably of 5 July. An offer tailored to her situation was dispatched by the bank on 16 August and that offer was returned to the bank on 29 August, leading to an agreement between herself and the bank on 10 September.

[20] Mr Oguntayo on instructions says that there was no want of candour. When the bank's offer tailored to her was dispatched she was on holiday. She returned on 17 August but she did not deal with accumulated correspondence over the course of her 3-week holiday until after the hearing in front of His Honour Judge Cryan. She did not at that stage have any intention of entering the retirement scheme. However, when her application for costs failed in front of His Honour Judge Cryan at the end of his judgment, she decided that the only way she could cope with her resulting debt to her solicitors was by taking the cash benefits that flowed from early retirement. That presentation was only offered by counsel on instructions. Mr Gupta was critical. He said that it should not be accepted on its face and that the matter should be remitted to a judge for investigation.

[21] Mr Gupta helpfully headlined his two submissions to this court. First, that the judge was plainly wrong to refuse applications for an updated Cafcass report and to refuse a suggestion for separate representation for H below. He makes the valid point that the Cafcass officer had seen H in November 2011 when she was only 8. The Cafcass officer's report was January 2012 and by August there was nothing that was current to cover that most important factor, namely H's wishes and feelings.

[22] On the face of it that may seem a plausible submission, but it is I think without any foundation given that the application for H to be separately represented and for an update to the Cafcass report surfaced for the first time in a position statement settled by the father's junior counsel on 17 August. It is said that it was reiterated but only in closing oral submissions and there was some criticism from Mr Gupta of the absence of any reference to either application in the judgment. That simply does not impress me. It completely overlooks the limited nature of the second hearing in August. It was not to be a reinvestigation de novo. It was simply to re-evaluate one strand of earlier process of trial, namely the important strand relating to money. The limited nature of the hearing was defined by the judge on 25 May when he said 4 hours, limited to financial issues and with checks on cross-examination. If there was to be an application that demanded a reasoned refusal from the judge, it had to be made then in May when the judge was making directions and planning the litigation future. So I see nothing in that criticism.

[23] Mr Gupta's submissions in relation to money, the money aspect: he says that if you put either a '£' sign or a 'W' (a '£' for money, a 'W' for welfare) against each paragraph of the judgment, the judge focused too much on finance and too little on welfare. I think that that is a criticism of the judge without foundation. He was absolutely right to focus on the practicalities and the importance of financial security as well as emotional security for the primary carer.

[24] So in the end for me the only question that need be addressed in conclusion to Mr Gupta's submissions and the submissions from Mr Oguntayo in response is: what is the effect of the fresh evidence? I can shortly deal with the effect of the wishes and feelings evaluation. It was

obviously a very skilful bit of work by the Cafcass officer, but it really added nothing to the evaluation of the child's wishes and feelings reached by the judge in May on the basis of the first Cafcass officer's report. In short, nothing had changed.

[25] More concerning is the fresh evidence in relation to the applicant's retirement from the bank. It is, as Mr Gupta has submitted, impossible for this court to reach any findings absent evidence and having only the words of counsel given on instructions, but even assuming Mr Gupta would succeed in some other court in his forceful cross-examination of the mother sufficient to satisfy the judge that she had been less than frank in informing him of the possibility of early retirement, the key question that then results is: had the judge had that information, could it have, would it have, led him to a different conclusion? In my mind, I am quite clear that it would not. In many ways it could be said that it would have fortified his conclusion that relocation was the right course for H. It has the same advantages of relieving the mother of any financial anxiety and it has the advantage of leaving the mother even freer to be available to H on a daily basis than she would have been under the repatriation scheme.

[26] The suggestion that we should quash the order below on the basis of this fresh evidence is to me bold but without any solid foundation. At the most it could be said to demonstrate a need for remission, but remission is always an order of last resort and the idea of setting up a third trial between these two parents and inevitably to embroil H in the midst of that is as a matter of common sense and welfare evaluation unthinkable absent some necessity of a fundamental nature in order to establish due process or in order to do justice. There will also be continuing financial cost to the family, neither party being legally aided.

[27] So I have no doubt in my mind that despite all Mr Gupta's eloquence, this is an appeal which should be dismissed.

RIMER LJ:

[28] I agree.

PATTEN LJ:

[29] I also agree.

Appeal dismissed.

Solicitors: *Bottrill & Co* for the appellant
J M Charles & Co for the respondent

SAMANTHA BANGHAM
Law Reporter