All England Official Transcripts (1997-2008)*

Re S (a child) (financial provision)

[2006] EWCA Civ 479

(DAR Transcript: Smith Bernal Wordwave)

COURT OF APPEAL (CIVIL DIVISION)

THORPE, LAWS, HALLETT LJJ

15 MARCH 2006

Child – Financial provision – Settlement of property – Application by mother – Whether judge in error in focusing on needs of mother rather than needs of child – Children Act 1989, s 15

15 MARCH 2006

S Thrower for the Appellant

J Posnansky QC for the Respondent

Care & Desai; Levison Meltzer Pigott

THORPE LJ:

[1] On 13 August 2004 Bennett J delivered a judgment which was not handed down, but it was briefly reserved, and Mr Posnansky who appeared below tells us that it was effectively a spoken judgment delivered from written notes. He was deciding a claim brought under s 15 of the Children Act 1989 by the mother for full financial relief for her daughter. The daughter had her ninth birthday last Sunday. It follows from that brief introduction that the parents were never married. They enjoyed a relatively brief relationship between 1995 and 1999. The case before the judge had been very hard fought. Mr Posnansky QC had appeared for the father and Mr Tager QC for the mother. One of Mr Tager's principal tasks and objectives was to destroy the truth and comprehensive accuracy of the father's financial disclosure; and in that task he fully succeeded, the judge holding that the father had consistently and over an extensive period given deliberately false evidence as to his financial circumstances.

[2] The judge made some assessment of the father's true worth at a figure of about £4 million net. With respect to the judge, that does not seem to me to be much more than the best assessment he could make on the information available to him. What seems to me unusual is the complete absence of professional valuation of most of the plusses on the

balance sheet compiled to demonstrate net worth. There seems to be even more uncertainty surrounding the extent of the income that the husband had enjoyed in past years, and perhaps as to the income he was likely to enjoy in future years. For me, what is perhaps the most secure foundation on that aspect of the court's responsibility to investigate and determine is an exchange between Mr Tager and the father in the course of his cross-examination when, at the conclusion of a string of questions from Mr Tager, the father gave this answer:

> "Question: Would it be fair to say that you would have no difficulty in finding [£2 million in all as a package] with that sort of security?
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> Answer: Yes, so long as my employment is stable I think that is right."

[3] It was not necessary for the judge to make a critical assessment of the mother's past conduct, because that had been accomplished by other judges in a number of prior hearings related to contact and relocation applications brought by one or other of the parties. The judge cited and adopted highly critical assessments that had been made by Hogg J, who had in the main been the judge of the division before whom disputes had been listed. The essential critical finding was that the mother was highly egocentric and manipulative; reluctant to accept fault or blame; rejecting criticism and blaming others (often the father) in order to justify her actions. That, I think, gives a fair flavour of no less than five separate citations from past judgments.

[4] The only area of Bennett J's discretionary conclusion that we review is the housing fund. It was common ground that in order to satisfy the daughter's future needs her father would create a settlement of a substantial capital sum which would enable the trustees to purchase either a freehold or a long lease (of at least 100 years' duration) for the remainder of the daughter's minority; the fund to revert to the settlor after what then would have been a period of about 11 years. The key question for the judge was the determination of the capital sum to fund the settlement. He explained himself comparatively succinctly in paras 58 to 64 of his judgment. He had to decide between a case presented for the mother which was essentially focussed on Knightsbridge, where she and the daughter were then living and where the school that the daughter attends is also situated. Mr Tager selected four properties from a wider bunch. They were on the market at figures ranging between £1.6 million and £2 million.

[5] For the father, it was asserted by Mr Posnansky that there was no reason why mother and daughter should not relocate to Parsons Green or Fulham and particulars were produced to illustrate that relatively modest houses could be bought in that area for £500,000 to £550,000. The judge almost inevitably reached a decision somewhere between these two highly polarised presentations. He said, in his concluding sentences in this **section** of the judgment:

> "In my judgment it would be fair and just for the father to provide a maximum sum of £800,000 to cover:
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> (a) survey fees;
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> (b) purchase price;
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> (c) Stamp Duty; and

(d) conveyancing and trust fees.

In my judgment the mother's claim for accommodation in the range of £1.6 million to £2 million is grossly excessive."

It was subsequently established that the comprehensive figure of £800,000 would enable the mother to offer a contract at £760,000, the remaining £40,000 being required to cover survey, stamp duty, conveyancing and trust fees.

[6] An application for permission to appeal that decision was put before me on paper and I provisionally refused, drawing attention to the judge's highly critical findings of the mother. I posed the question: where is the point of law or principle on which a prospective appeal might focus? On that basis I provisionally refused. That resulted in a request for oral hearing which took place on 19 April 2005, the mother's case being attractively presented by Mr Simeon Thrower. The decision of the court recognised the force of Mr Thrower's submission that the judge might have fallen into error of principle in affectingly treating the investment fund in the reported case of ***Re*** *P (Child) (Financial Provision)* [2003] **EWCA Civ** 837, [2003] 2 FCR 481, [2003] 2 FLR 865 as being comparable, and moving to a relatively small reduction from £1 million to £800,000 on the grounds of the disparity between the fortune of the father in ***Re*** *P* and the fortune of the father in this case.

[7] Accordingly, we granted permission for an appeal limited to the challenge to the quantum of the investment fund. Mr Thrower has presented his appeal this morning with comparable moderation and attraction, and in addition to the point that succeeded for him on 19 April he has advanced a number of additional points under what he has neatly labelled the four S's. The four S's are security, stress, schooling and stability. As to security, he says that the child deserves to be close to her school and her friends. She has always lived in the Knightsbridge area and to move her from familiar sights and sounds, substituting the unknown for the familiar, would be an unnecessary risk of harm to her wellbeing. As to stress, Mr Thrower emphasises that the mother has had a great many trials and tribulations with her health over the last few years. Stress to the mother is likely to impact on the child indirectly, and to consign the family to Parsons Green would involve stressful school journeys at each end of the day for mother and daughter.

[8] As to schooling, Mr Thrower sought to criticise the judge for making an unqualified finding that in Michaelmas 2008, the daughter would be moving to one of the prestigious girls' schools in West London, in which event a Fulham or Parsons Green home would be no disadvantage. He suggested that there was not sufficient evidential basis for that finding. Stability is the last S, perhaps only another way of putting security. He says it is very important, given the extent to which the daughter's early life has been unsettled by the disputes between her parents; that she should now have a period of release from wandering. She is at an age where she simply would not understand the need for change and she would be puzzled by the difference in living standards between the home of her father and the home of her mother. That led Mr Thrower to add in a criticism of the judge for having ignored the disparity between the two homes that would result from the implementation of his order, given that he had assessed the father's settled home in Kensington Park Gardens as having a conservative value of £3.5 million.

[9] On the principal point of Mr Thrower's criticism, he has emphasised that to treat the investment award in ***Re*** *P* as a benchmark, from which judges are entitled to scale up or down in individual cases, would be an extremely dangerous exercise. Each case has to be decided within its own four walls.

[10] The Respondent's case has been equally attractively argued by Mr Posnansky. He rightly reminds this court of the

strictures, in the speech of Lord Hoffman in the well known case of *Piglowska v Piglowski* [1999] 3 All ER 632, [1999] 1 WLR 1360, [1999] 2 FCR 481, against too textual an analysis of trial judgments. The Court of Appeal effectively would be substituting its own discretion for that of the trial judge without having any legitimate foundation for the exercise of a fresh discretion. Secondly, he urges Bennett J's careful direction as to the statutory provision and the authorities, and thirdly – and perhaps most importantly – he deals with the specifics.

[11] Having heard Mr Posnansky, and Mr Thrower briefly in reply, I am quite satisfied that the criticisms in relation to the judge's finding as to the daughter's secondary education is without any foundation. I am equally satisfied that there is no foundation in Mr Thrower's complaint that the judge ignored the danger of creating an excessive disparity between the two homes. That factor is specifically considered in judgment at various points (p 46, p 55 and onward).

[12] There are two points, however, that profoundly trouble me. The first is the primary submission as to the judge's possible misinterpretation of the effect of the decision in ***Re*** *P*, and the second is as to the extent of the judge's focus on the daughter's needs as opposed to the needs of her mother, which the judge was perfectly entitled to characterise and dismiss as he did. So, in order to consider these two points, it is I am afraid necessary to read into this judgment paras 55, 57 and 59 of the judgment below:

> "55. I believe that the judgments of the Court of Appeal in ***Re*** *P* are important, not only for the principles which are reaffirmed, and in some respects developed, but also for the very broad guidance given as to the level of financial relief appropriate in such a case. This is not to say that the Court of Appeal applied or was in any way suggesting the ceiling of financial provision beyond which it was not appropriate to go. However, I do not see why I should not have regard in the instant case to what orders the Court of Appeal made in ***Re*** *P* in which a dominant feature was the exceptional wealth of the father. I suspect that on a scale of one to ten, the father in ***Re*** *P* would have clocked in, conservatively speaking, at 9.5, and more probably at 9.75. In other words, he was almost at the top end of the range of wealthy fathers that it is likely the courts may have in front of them.
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> 57. Mr Tager made a further submission. The father accepted in cross-examination he could, in fact, meet all the mother's demands as to housing in London, the country, and periodical payments, and he would still be able to live comfortably. Thus it mattered not how rich a father was in a case such as this if he was at the top end of the spectrum of wealth, as was the father in ***Re*** *P*. What mattered, it was submitted, was that there had to be a proper balancing of the environments in which the mother should live with Tatiana and in which the father lived and into which Tatiana went when with the father. I do not accept the entirety of that submission, particularly if, as I believe, it is an invitation in the instant case to go beyond, indeed well beyond, that which the Court of Appeal decided was fair and just in ***Re*** *P*. The scale of the father's wealth and his chosen way of life in ***Re*** *P* was, in my judgment, in a different league to that of the father in the instant case. The dominant feature in ***Re*** *P* was the scale of the father's wealth. Given that the award in ***Re*** *P* was proportionate to the father's wealth, it must follow that the award to the mother in relation to Tatiana must be proportionate to the father's wealth.
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> 59. So the father's case was based on three properties in the Parson Green/Fulham area, which he said were suitable, at a cost of £500,000 to £550,000. He proposed a ceiling of expenditure at £550,000 to include the purchase price, Stamp Duty, survey costs and fees for conveyancing and setting up of the trust. He saw no need for Tatania to continue living in Knightsbridge. Although some of her school friends live in central London, Tatania is likely to move on to Godolphin & Latimer or St Paul's Girls School, both of which are situated in Hammersmith and draw their pupils from not just central but west and perhaps other parts of London. Further, comparing ***Re*** *P* to this case, the award was of £1 million for

> the housing of L in central London in respect of a father in a different league of riches from Tatania's father. £1 million was less than 10% of the value of L's father's home."

[13] In para 55 the judge quite rightly recognises that the decision of this court in P did not create a ceiling beyond which this court could not or would not go in deciding future cases which might come before it, Bennett J realistically noted that the father in ***Re*** *P* was, on a scale of worldly riches from 1 to 10, probably at about 9.75. In other words, there are few men in this society richer than that. He recognised – and I think correctly recognised – that this court had not intended the inference that because it was there dealing with a father at the top end of the possible range of riches, a ceiling had thereby been created. However the difficulty for me comes in para 57 when the judge, in answering Mr Tager's submission that there should not be undue disparity, said this:

> "I do not accept the entirety of that submission, particularly if, as I believe, it is an invitation in the instant case to go beyond, indeed well beyond, that which the Court of Appeal decided was fair and just in ***Re*** *P*. . . . Given that the award in ***Re*** *P* was proportionate to the father's wealth, it must follow that the award to the mother in relation to her daughter must be proportionate to the father's wealth."

[14] Furthermore, the sentences in para 59 that I emphasise are these:

> "Further, comparing ***Re*** *P* to this case, the award was of £1 million for housing of L in central London in respect of a father in a different league of riches from [this child's] father. £1 million was less than 10% of the value of L's father's home."

Those passages in combination have persuaded me that the judge had regarded the quantum of the trust fund in ***Re*** *P* as being a benchmark: given that undoubtedly the father before him did not enjoy the same magnitude of wealth as the father in ***Re*** *P*, it behoved him to award something less for the investment fund here. He took the £1 million figure awarded in ***Re*** *P* and scaled down proportionately to reflect the disparity in wealth between the two men. That, in my judgment, was an erroneous approach and one which seems to have made a significant contribution to the ultimate discretionary decision.

[15] The second point is perhaps not quite so easy to express. However, the heart of the judge's reasoning is within this passage and I take it from para 64 of the judgment:

> "In my judgment the mother has again shown herself to be malicious towards the father by refusing on two separate occasions to accept the very generous offer from Cadogen Estates in relation to Clabon Mews. In my judgment the emphasis placed by the mother on her perceived social standing and thus her need to live in Knightsbridge is another example of her egocentricity. What motivates her to want to live in Knightsbridge or Chelsea is her own selfish need. She dresses that up as being in [the child's] best interests. . . . I see no reason why mother and [daughter] could not live in Parsons Green or Fulham, but I would not confine it to the specific area or areas in which the father identified his three properties."

Now for me, the difficulty in that passage is that the judge has not focussed on the needs of the child as separate and distinct from the needs of the mother, which he was perfectly entitled to hold were selfish and a further example of her egocentricity. The mother may well have forfeited the sympathy of the judge, as she had forfeited the sympathy of other

judges before, by her manipulative and egocentric presentation, but the real focus of the judge's appraisal had to be upon the daughter's needs and interests. They were distinct from the mother's and they were not tainted simply because the mother's presentation was tainted. The judge surely had to ask himself, what would be the consequence for the daughter were she to lose the security of the familiar; the home in Knightsbridge, the school in Knightsbridge, the friends in Knightsbridge? Perhaps, given the extent of the father's fortune, the judge needed to ask the question: was it necessary for the daughter to move from the familiar, as well as asking, would a move from the familiar risk harm to the daughter's welfare?

[16] Those questions are neither asked nor answered in this judgment; a factor acknowledged by Mr Posnansky, although he fairly says that, inferentially, the judge concluded that it would be no harm to the child given that he had in the earlier passages already cited both referred to the child's best interests and expressly held that there was no reason why they could not live in Parsons Green or Fulham. I am perhaps exposing myself to the criticism that I am analysing the words of the judgment too minutely, but the question was not whether the mother and daughter could live in Parsons Green or Fulham, but whether that development would be consistent with the daughter's welfare.

[17] The authorities show that it has not been the practice in these cases for children to be separately represented, but the present case is in my opinion a neat illustration of the advantages of ensuring separate representation for the child when a claim is brought under s 15 of the statute. Here there was an intense and bitter battle between two adults; the mother striving to harm the father by extracting the maximum investment fund, the father striving to worst the mother by concealing the extent of his fortune. It is easy to see how, in such circumstances, the real crux of the case can be lost to view unless there is some advocate there to constantly urge the needs and interests of the child. For that, in the end, is what the award is largely designed to satisfy.

[18] There seems to me to have been a polarisation in the fight between the parents, as Mr Posnansky has well illustrated. The mother's demand for only Knightsbridge did not lie comfortably with statements made in earlier affidavits or proposals advanced at earlier stages of the litigation. Equally, the father's focus on Parsons Green was probably because it is necessary to move that far from Knightsbridge in order to produce estate agent's particulars at £500,000. In my view that polarisation is both unfortunate and unnecessary. There are, after all, a huge number of possible property purchases lying between those two poles.

[19] Having reached the conclusion that Bennett J's judgment cannot withstand the attacks that Mr Thrower has levelled, I come to what for me is the most difficult part of this judgment. The case has been extremely well advocated on both sides and I have found the resolution of the rival submissions unusually difficult. Plainly, once it is demonstrated that Bennett J's discretionary conclusion is flawed, either this court must exercise an independent discretion or the case must be remitted. I have already emphasised that the fresh exercise of discretion must particularly concentrate on the child's needs and interests. It must also have regard to the hinterland between the two poles presented to the judge below.

[20] As we sit this afternoon, we simply do not have sufficient information, and certainly not sufficient up-to-date information, in order to exercise an independent discretion. Accordingly, what I would propose is that the appeal should be allowed and that we should in due course hear submissions from counsel as to how that further evidence should be prepared, and whether the relatively simple remaining task should be carried out by this court or by a judge of the Division.

LAWS LJ:

[21] I agree with everything my Lord has said. This has been a difficult case. The disentanglement of the child's interests and the mother's personal aspirations presented the judge with a task that was perhaps not entirely straightforward. He was quite right to be astute to ensure that he was not, in truth, acceding to a claim based on the mother's rather than the child's interests. Like my Lord, I have been troubled by the polarisation of the debate here relating to accommodation between Knightsbridge and Chelsea in the centre of London on the one hand and West London that is Fulham and Parsons Green on the other; though the polarisation seems to have been due to the way the case was put below. In my judgment it is inherently artificial to suppose that the child's interests must have lain in one or the other of these two locations. Against that background, I wish to express my specific agreement with what my Lord has said of the failure by the judge, in para 64, to focus on the needs of the child. I agree also that there is material to suggest that the judge has taken the quantum of the award in ***Re*** *P* [2003] 2 FLW 865 as a benchmark to be scaled down, to reflect the fact that the father here was not in the same league of wealth as the father in ***Re*** *P*.

[22] Accordingly, I am in agreement with my Lord that the judgment below cannot stand. The welfare of the child here required particular findings and a relatively broad approach. I concur in the course which my Lord has proposed, that we should hear further submissions as the resolution of matters on which at present we lack definitive evidence.

HALLETT LJ:

[23] For the reasons given by my Lords, I too agree that the appeal should be allowed and that the course should be adopted as proposed.

Appeal allowed.