

JERSEY / JUDGMENT

CAH v SRM DHand AH

[2003] JRC 084 (19 May 2003)

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judgment

the bailiff: 1. This is a summons issued by DH and AH, to whom we shall refer individually as "the grandfather" and "the grandmother" respectively and collectively as "the grandparents", who are the grandparents of a child 'BM' seeking orders vesting the custody of BM jointly in them and BM's father, to whom we refer as "the father", and the care and control of BM in themselves alone. The application is resisted by the father, who seeks custody, care and control for himself. 2. There is a sad history to this application. BM was born in October 1997 and is now aged five. His mother, "the mother", was the daughter of the grandparents. The mother and the father were married in October 1993 but the marriage failed and they separated in April 2001. Divorce proceedings ensued and a decree absolute was granted on 5 th September 2002. The Court had earlier ratified an agreement between the parties whereby custody of BM was vested jointly in the mother and the father and care and control was given to the mother with generous access to the father. The former matrimonial home in Bellozane Road, St. Helier, "the property", was at the time of the agreement already vested in the mother, the father having surrendered his interest. 3. After the divorce, the father met a young woman, to whom we refer as "Eva", whom he married in October 2002. In the meantime BM continued to live with the mother in the property. Regular access was, by common agreement, exercised by the father and BM was also regularly cared for by the grandparents while the mother was at work or otherwise occupied. 4. Tragically, on 2 nd February 2003, the mother suffered a cerebral aneurism and was declared dead two days later on 4 th February. The mother died intestate and made no written requests so far as the care of BM was concerned, although, on the evidence of the grandparents, there was an oral request that they should look after him in the event of anything happening to the mother. The property has been inherited by BM and remains unoccupied. 5. Since his mother's death BM has been living with the grandparents, although the father has been exercising access on three weekday evenings and at the weekends. These interim arrangements were ordered by the Family Registrar on 20 th February 2003. The Registrar has also made a number of sensible ancillary orders, directing proofs of evidence to be filed and served by the grandparents, the father and any other witness to be called on his behalf. The Registrar also directed that a report be prepared by the Children's Service. These proofs of evidence have been verified on oath and we have taken them into account. We have also heard evidence viva voce from the grandparents and from the Court

Welfare Officer, Miss Caroline Dwyer. 6. The material evidence may be summarised succinctly as follows. The grandparents have a poor opinion of the father. They claim that they have witnessed childish outbursts of temper by the father in the past and that the father has a tendency to avoid facing problems. As an example, they cite his behaviour in leaving the Island for Manchester in 1998 after his restaurant business had failed and he had been declared en désastre . They have suggested that the father is prone to physical violence and they claim to have witnessed the father force-feeding BM on one occasion, to the extent that BM was physically sick. The allegations of physical violence and force-feeding are strenuously denied by the father, although he has conceded that he was wrong to leave his family and to return to Manchester after the failure of his business. Both grandparents consider that the father is not fit to have care and control of BM. The grandfather suggested that the father was not really interested in BM, never played with him and wanted BM as some form of trophy. He alleged that he wanted BM for what he could get, in particular the property and money. The grandfather suggested that BM was frightened of his father and had said that he shouted all the time. 7. We have given careful consideration to this evidence of the alleged inadequacies and ulterior motives of the father but we do not accept it. In so saying, we do not find the father to be faultless. He acknowledges that he has convictions for minor public order offences in July 1998 and November 2000. He accepts that his actions in leaving his wife and BM in 1998 after the collapse of his business were wrong. We have no doubt that the period leading up to the separation of BM's parents in April, 2001, was a stressful and unhappy period and we well understand how the grandparents can have formed an unfavourable view of their then son-in-law and how those views persist today. 8. At the same time it was clear to us that both the grandfather and the grandmother are, very understandably, still in a state of deep grief and possibly shock, following the tragic death of their daughter. Their feelings of antipathy towards the father have been exacerbated by their loss and they blame the father for their daughter's aneurism which they consider to have been caused by stress. These feelings of grief and antipathy have combined to produce a fiercely protective attitude towards BM which verges on the obsessional. The grandmother admitted having twice gone to BM's school when he was due to be collected by the father, or Eva, just to make sure that he was all right. She said that she had not intended to be observed but she was on both occasions seen by BM. She did not think that this behaviour might have been disturbing to BM. On one occasion she followed them into the car park and wrote down the registration number of Eva's car. 9. The written statements of the father and Eva, confirmed on oath to be accurate, suggest that, after the divorce, the relationship between the father and the mother improved. According to the father, they had determined in the interests of BM to put their differences behind them. According to Eva, the mother had asked to meet her on learning of her relationship with the father, realising that Eva would be having some contact with BM. Eva had received a number of small kindnesses from the mother and she believed that they would eventually have become friends. 10. The evidence of Miss Dwyer, the Court Welfare Officer, was based on a number of meetings with all the parties. She reported that BM appeared to be a mild mannered, sensitive, loving, little boy who has benefited from having a close bond with all his family members. He is doing well at school and staff there are keeping a close watch on him, following the death of his mother. He appears to be coping with life at present. 11. According to Miss Dwyer, BM appeared comfortable

with the father and Eva and to interact with them in a positive way. They were settled and at ease with each other. She had witnessed BM and his father being affectionate towards each other and this had appeared to be completely natural. She had also seen BM on a number of occasions with the grandparents and he appeared comfortable and happy in their company. Miss Dwyer had spoken to BM to seek his views. BM had said that he enjoyed seeing his father and Eva and talked about the physical activities they had shared together. So far as sleeping arrangements were concerned, he was happy to stay over at his father's home. He did however state that he wished to keep on sleeping at his grandparents' home. 12. The conclusion and recommendation of Miss Dwyer is that the father should be permitted to take up his responsibility as BM's main carer and that custody, care and control should be vested in him. Miss Dwyer adds however that the rôle of the grandparents cannot be underestimated and that, for a number of reasons, they should always have an important part to play in BM's life. 13. We now turn to the Law. There is no doubt that the Court has a discretion to do what it thinks is right for BM. A basic rule and indeed the only overriding indicator is that the Court should treat the welfare of the child as the first and paramount consideration. Mr Clark, for the grandparents, drew our attention to *Le Verdier -v- Davey* (1938-1939) 240 Ex 291, where the Court awarded the care and control of a five year old girl to her grandparents, following the death of her mother. The facts are very similar to the present case in that the dispute lay between the maternal grandparents and the father and his new wife, except in one important respect. That factor is that in *Le Verdier -v- Davey* the application came before the Court four years after the death of the mother. The grandparents had in that case been looking after the child from a very early age. What is important, however, is that the Court made its decision on the basis of what was "dans l'intérêt de ladite enfant"

- in the interests of the said child. 14. It seems that in England there is a statutory presumption that, in cases such as this, care and control should be awarded to the surviving parent. That seems to be reflected in Article 1 of the *Loi (1862) sur les Tuteurs* which provides: "Lorsque le père ne sera pas tuteur de ses enfants, il en aura néanmoins la garde et le soin, à moins que la Cour ne juge que par sa conduite il en doit être privé." (Translation: when the father is not the 'tuteur' of his children he shall, nevertheless, have the custody, care and control of them unless the Court judges that by reason of his conduct he should be deprived of such custody, care and control.) 15. Even without a statutory presumption, however, we think that, by the natural order of things, strong reasons would be necessary to reach the conclusion that the best interests of the child were not served by vesting care and control in the surviving parent. We have no doubt that in this case the best interests of BM are served by ordering that custody, care and control be vested in his father. 16. We reach that conclusion on the basis of all the evidence that we have received and the recommendation of the Court Welfare Officer. However loving and generous and kind towards BM the grandparents may be, they have a different relationship with the child from that of his father. The grandmother is aged fifty seven and the grandfather sixty three. Both are fit and well, but, nonetheless, if BM is brought up by them he will be an only child in an ageing household. As BM reaches his teenage years it would be surprising if the grandparents did not find it increasingly stressful to cope with the demands of adolescent

youth. By contrast, if life follows its normal course the father and Eva may have children of their own and BM will, in time, have the benefit of other youthful relationships. 17. The grandparents expressed forceful and critical views about the character of the father. The Court decided that it did not need to hear oral evidence from the father or Eva, although we had the opportunity of observing them while the evidence of the grandparents was being given. Counsel for the grandparents agreed, on instructions, that he did not need to cross examine on the sworn proofs of evidence. We did not hear oral evidence from the father or Eva because it was clear to us that, in the future, the interests of BM will not be served if the grandparents remain at loggerheads with the father and we did not wish these proceedings to cause further damage to this relationship. 18. Justice demands, however, that we record our view that the grandparents were unduly negative and unfair in their expressed criticisms of the father. This is a very difficult time for them but we hope that as the months go by they will find it possible, in the interests of BM, to forgive past failures of the father as indeed it seems that their daughter was able to do. 19. We are going to order that BM has generous access to his grandparents. We reiterate, however, that the paramount consideration is the interests of BM. If the grandparents allow their current feelings of antipathy towards the father to undermine his relationship with BM that right of access may have to be revisited. We accordingly order, subject to what appears below, that the custody, care and control of BM be vested in the father. We also order that BM should have generous access to his grandparents. We define 'generous access' below. But we wish first of all to emphasise that BM will have only one home. That home will be with his father. It must be expected that in time BM's needs will change and that these access provisions will have to adapt. We express the hope that in the future the father and the grandparents will be able to agree sensible arrangements which may be different from what we define now as generous access. 20. For the present, however, generous access means, following the recommendation of the Court Welfare Officer, fortnightly overnight contact from Friday after school until the following Sunday at 6p.m. There will be liberty to apply to all parties. 21. We also accept the advice of the Court Welfare Officer in relation to the process of transferring the day to day care of BM from the grandparents to the father. This should be done gradually, over the period of one month. By the expiration of one month from today BM should be living with his father and Eva. As to how this gradual transition is achieved, we leave the practical arrangements to the good sense of the parties but we delegate to the Court Welfare Officer the duty to supervise the arrangements and, in the event of disagreement, the power to direct what will happen. 22. There remains the question of the property, which, as we understand it, belongs to BM. We request and authorise the guardian ad litem of BM to make the necessary application to the Court to constitute a tutelle. We think it would be desirable if Miss Martin were to act as tutrice but we authorise her to seek out another officer of the Court if that is not possible. The tutelle should include a representative of the Children's Service but should not include either the father or the grandparents. 23. We think that it would be sensible for BM, with his father and Eva to move into the property which was the former matrimonial home and is familiar to BM. That must, however, be a matter in the first instance for the tutelle and, subsequently of course for the

agreement of appropriate terms with the father if that is his wish. We say no more about that. 24. Finally we record the conclusion of the Court Welfare Officer that all parties concerned genuinely feel tremendous love and responsibility for BM. From our own observations that conclusion is absolutely right. It follows that with goodwill on all sides, BM's future, notwithstanding the unhappy bereavement that he too has suffered, is reasonably bright. We express the hope that all the parties will now put their disagreements behind them and look to that future. Authorities *Le Verdier -v- Davey* (1938-1939) 240 Ex 291. *Richomme -v- Le Gros* (27 th June 1994) Jersey Unreported; [1994/128] *Loi (1862) sur les Tuteurs*. Human Rights (Jersey) Law 2000: Schedule 2: Article 8. *Re A* (Section 8 Order: Grandparent Application) [1995] 2 FLR 153. *Re D* (Care: Natural Parent Presumption) [1999] 1 FLR 134 CA, *Re F* (a minor) (wardship: appeal)

[1976] 1 All ER 417 CA. *Re W* (Contact: Application by Grandparent) [1997] 1 FLR 793. *Re KD* (a minor) (Access: Principles)

[1988] 2 FLR 139 HL. *AG -v- Prior* (9 th February 2001) Jersey Unreported [2001/35]. Page Last Updated: 27 Mar 2017 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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