

Neutral Citation Number: [2008] EWCA Civ 1468

Case No: B4/2008/0988

**IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM PRINCIPAL REGISTRY OF THE FAMILY DIVISION
(HIS HONOUR JUDGE SHAWCROSS)**

Royal Courts of Justice
Strand, London, WC2A 2LL

6th November 2008

Before:

**LORD JUSTICE WARD
and
LORD JUSTICE RIMER**

IN THE MATTER OF G (A Child)

**(DAR Transcript of
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**THE APPLICANT FATHER APPEARED IN PERSON, ASSISTED BY HIS MCKENZIE FRIEND,
DR GILL
Ms C Street (instructed by Glanvilles) appeared on behalf of the Respondent Mother.**

HTML VERSION OF JUDGMENT

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Lord Justice Ward:

1. This is an appeal brought with permission of Scott Baker LJ against orders made by HHJ Shawcross, sitting as a judge of the High Court in the District Registry in Portsmouth, when on 4 April of this year he made an order to deal with the outstanding issues between the applicant, who is the father of the child with whom we are concerned, a little girl, E, born on 5 May 2005, of whom the respondent is the mother. It is a case where we impose the usual reporting restrictions so that identities are not revealed.

2. The parties did not marry. They separated not long after E was born, and so far as the history of the litigation is concerned, it began on 6 January 2006 when father applied for contact. He is serving in the Royal Navy, and his duties have at times required him to move unexpectedly to destinations about which we know nothing, save that they are in the service of Her Majesty.
3. The magistrates who dealt with the matter made various orders. Then on 15 September 2006 father made an application for a shared residence order. That was eventually dealt with by the lay justices on 31 January 2007 when they made orders for contact: basically, alternative weekends and some holiday contact; but they dismissed the application for a shared residence order. The third actual application made by this father was to appeal that order, and in that way the matter came before HHJ Shawcross, who would necessarily have been required to sit as a judge of the High Court to deal with that appeal. At the first appointment before HHJ Shawcross the father, as I understand it, abandoned his appeal against the shared residence order, and he has not resurrected any application in that regard ever since.
4. The dispute before the judge was therefore centred on the extent of the contact the little girl should have with her father. He wanted as much as he could get. Those contact issues were resolved partly by agreement and partly by order of the judge, and that order provides generous contact to the father, on his calculation amounting to 146 nights a year, whereas under the original orders of the magistrates he tells us he enjoyed 80 days or so of contact. The scheme of the contact is generous but standard in the sense the order was that mother should make E available for contact as follows. Firstly during term time, overnight on a Wednesday each week from 4.30 until Thursday morning, the idea being father would collect from and return to the girl's nursery school. Then every other weekend from Friday at 4.00 or as soon as she finishes school until Sunday at 7.00. Then there was provision for half-term holidays and other occasions, and the order there gave father seven continuous nights over the Easter holidays. During the summer holidays he was to have two periods of ten consecutive days, those to be separated by at least five days, and arrangements for those to be agreed a month in advance. Christmas and New Year was to be shared in the sense that father would have the girl for seven nights, and in one year he would have her for Christmas, the other over New Year, and mother would alternate with him. Half-terms were to be shared, as it seems, 50/50, and there were specific provisions for that. The order dealt with the little girl's birthday, and such events as Mothering Sunday etc were all taken care of.
5. It is an order which is forward-looking and should contain the position very satisfactorily from now on, there being implied liberty to the parties to vary it as they may agree.
6. So the judge resolved that dispute. It is necessary to observe that, in the course of his judgment, in dealing with that contact dispute he said this, at page 31:

"14. May I say this, that talking in general terms about the father's requirement for 50/50 I am quite satisfied he is a very committed and caring father who really does want to involve himself and be interested in and participate in the growing up of his daughter and this is not just a question of control or anything of that nature, although there is an element of that which I will come to in a moment. So I think it is very much in E's interests that he should have that role in her life, but I regard that as sufficient. More than that I think would be disruptive for this age."
7. That is a key passage in this judgment, which both parents would do well to commit to memory, and to contemplate on the bad days when things appear to be going wrong. It is the judgment of the judge that this is "a committed and loving father" interested in the participation in the little girl's life as fully as he can and it is not just "a question of control

or anything of that nature". But he should also reflect upon the judgment of an experienced judge that there is sufficient contact: "More than that would be disruptive for the child at this stage." If the parties can grasp that firmly, then it ought to settle the pattern for the future without endless difficulties arising. Compromise is an art that every separated parent ought to master. Compromise means one side giving way to assist the other because inevitably the time will come when the tables are reversed and the one who has just given the favour will be the one seeking it. It is not an occasion to keep a tally of who is asking for favours when; it is a way of life which each of them should accept -- positions can change through illness, through prior arrangements for the benefit maybe of the mother or the father or the benefit of the child, but give and take is something that has to be learnt.

8. Contact was not, however, the only issue before the judge. On the eve of the hearing the mother's solicitors informed the father that they were minded to make an application under section 91(14) of the Children Act 1989 to restrain any further applications being made by either of them under section 8 of the Act. This was very late notice indeed, but in fairness to the mother, her solicitors had very sensibly and constructively taken the step of sending with the covering letter a copy of one of the textbooks setting out how section 91(14) operates so as to assist the father, who has at all times conducted this litigation himself.
9. The judge had adverted to section 91(14) in the course of his dealing with the parties and especially hearing from the father. This passage occurs at page 14 of the transcript:

"JUDGE SHAWCROSS: And then you don't think that [E] should have a break for all this and that you should both be prevented from making any further application, at least for a period of time?"

[FATHER]: Your Honour, it's not that I don't feel [E] should have a break. I think if we can manage reasonable contact with [E] now that I am back in the area, then there is no need to reapply back to court and I don't think it needs to be put in an order."

So that was his immediate response. Later he made the good point -- he had learnt his craft as an advocate pretty successfully -- that this was not the extreme kind of case which justified that order. But the judge made it, imposing a section 91(14) order which restrained both parties until 4pm on 4 April 2010 from making any further application pursuant to section 8 of the Act without leave of the court. He explained that this was a case where, as the father had put to him, he had come back to the court in the past because mother had breached the contact orders. The judge said, "I think he is right about that."

10. So the judge appears to have accepted that this was not the kind of case where the father had made either an excessive number of applications or had behaved unreasonably. But he came to the conclusion:

"20...that this is a very clear case for just such an order. I am troubled by the father's seemingly entrenched belief he ought to have 50% of this child's time and the difficulty as experienced in the past in accepting that that is not the way the law works, that if he has to give up a day here or a day there, that does not automatically mean he is going to have to claw one back from the mother on a subsequent occasion to compensate himself. There is the difficulty about compromise and concessions."

I have spoken about that as well.

11. In paragraph 21 he said:

"I am also very troubled about something he said in a different context altogether at the end of his submissions about telephoning".

The issue here, to summarise it, was that the father was anxious to get the landline telephone number of the mother. He wanted it because of difficulties communicating with her. It seems that there had been an order giving some directions to communicate dates of holidays and that had caused some misunderstanding. That misunderstanding having been cleared up, father said he wanted the landline number because he did not think it was a good idea for the little girl to use a mobile telephone, and he referred to certain publicity in that regard, but the judge was not as troubled as he was. What troubled the judge was, as he said:

"So I was a bit troubled that he wanted to exercise that sort of monitoring and supervision

22. When I pointed that out to him and when he got to the bottom of it and decided that he had misinterpreted the order he used the excuse for getting the landline that using a mobile phone was dangerous to a child. But I think the jury is out as they say on that particular issue, but even if it was not, children, I am afraid, these days do have mobile phones and speak for only a few minutes at a time. There is no medical evidence to suggest that it is likely to injure the child and even if there was it seems to me this is simply a device by Mr G to get the landline number and that rather worries me. So although I think his motives were good in many respects, that he is a good father and that he is a good influence for E, I am a bit concerned that his attitude to getting this landline number and his general attitude to the amount of contact he should have could result in further applications to this court which are only going to be detrimental to E. I have already made observations about the mother's record in not wholly complying with court orders and that again is a problem in this case, but she is the one who puts forward the proposal there should be a 91(14) order. I agree, I think there should be one. No applications under section 8 of any kind without leave of the court, and I think a period of two years is absolutely appropriate."

12. The father appeals eloquently, and submits that this is not the sort of case which calls for that restriction and he draws attention to the judgment of this court in the now I think well-known case on this subject Re P (Section 91(14) ...Guidelines) (Residence and Religious Heritage) [1999] 2 FLR 573 where the guidelines are set out at the foot of page 592. They were these:

"(1) Section 91(14) should be read in conjunction with s 1(1) which makes the welfare of the child a paramount consideration.

(2) The power to restrict applications to the court is discretionary and in exercising its discretion the court must weigh in the balance all the relevant circumstances.

(3) An important consideration is that to impose a restriction is a statutory intrusion into the right of a party to bring proceedings before the court and to be heard in matters affecting his/her child.

(4) The power is therefore to be used with great care and sparingly, the exception and not the rule.

(5) It is generally to be seen as a useful weapon of last resort in cases of repeated and unreasonable applications.

(6) In suitable circumstances (and on clear evidence) a court may impose the leave restrictions in cases where the welfare of the child requires it, although there is no past history of making unreasonable applications.

(7) In cases under para (6) above, the court will need to be satisfied first that the facts go beyond the commonly encountered need for a time to settle to a regime ordered by the court and the all too common situation where there is animosity between the adults in dispute or between the local authority and the family and secondly that there is a serious risk that, without the imposition of the restriction, the child or the primary carers will be subject to unacceptable strain.

(8) A court may impose the restriction on making applications in the absence of a request from any of the parties, subject, of course to the rules of natural justice such as an opportunity for the parties to be heard on the point.

(9) A restriction may be imposed with or without limitation of time.

(10) The degree of restriction should be proportionate to the harm it is intended to avoid. Therefore the court imposing a restriction should carefully consider the extent of the restriction to be imposed and specify, where appropriate, the type of application to be restrained and the duration of the order.

(11) It would be undesirable in other than the most exceptional cases to make the order *ex parte*."

13. HHJ Shawcross is a very experienced judge in dealing with family work and one has to respect the fact that this is a short extempore judgment and that it should not be over-elaborately analysed. The basis, as it seems to me, upon which he did impose this order was because he was a bit concerned about the father's attitude. He felt that could result in further applications to the court which were only going to be detrimental to E.
14. I fear that on this occasion the judge has fallen into error. The guidelines which allowed the court to make an order where the welfare of the child requires it are restricted by paragraph 7 that I have just recited, that the court needs to find facts going beyond the commonly encountered need for a time to settle to the regime which has been ordered. I fear the judge has not fully taken that fact into account nor has he sufficiently weighed the other admonitions in the guidelines that this is a remedy to be used sparingly as the exception rather than the rule, ordinarily to restrain the repeated and unreasonable applications. This was not such a case by any manner of means. This was not a father who was defiantly banging on the door of the court at every possible moment. On the contrary his applications were all well-founded and were not excessive in their demands nor in their number. And it is moreover a case where it is very difficult actually to see any evidence of detriment to the little girl, who was after all just three-and-a-half years old at the time, and is probably and fortunately blissfully unaware of this litigation going on about her. Nor is there overwhelming evidence before the court that the mother has reached such a saturation point that she is suffering and that her suffering impacts adversely upon the child. It was imposed, as it seems to me, to bring a breathing space, a good purpose undoubtedly but one which could have been achieved and in my judgment should have been achieved by giving this order, which was after all the first and final order being made by HHJ Shawcross, time to work itself out and to give the parties the opportunity to work it as it was intended to be done. I fear that the judge has too readily given in to the application and that he has not sufficiently weighed in the balance those factors which speak against it being imposed in this case. It follows that his exercise of discretion is flawed accordingly and that order should be set aside.

15. Having concluded his judgment to deal with all that was before him, there was then an unexpected turn in the proceedings. The judge was noting the order he had made when Ms Street, counsel for the mother, said to him:

"There is one other matter which I have just realised and I should have picked up before, but there isn't actually a residence order in place."

And she therefore invited the judge to make a residence order in her client's favour even though no application had been filed and even though the mother had never brought proceedings or an application for such an order. The judge's first reaction was:

"I am not going to do it -- [Mr G] has serious issues here, as I set out in my judgment. It may be he does not object at all, I do not know."

MISS STREET: This reflects the reality of the situation and the case law is quite clear on the point.

JUDGE SHAWCROSS: He may not agree with that. He is entitled to have his say on this. He has always said it should be shared residence. You rightly point out that his contact proposal virtually amounts to 50/50.

MISS STREET: Yes.

JUDGE SHAWCROSS: And I have dealt with that in my judgment."

And so the judge turned to the father and asked whether he objected:

"[THE FATHER]: Yes, your Honour, I do. I don't see any reason for making a residence order. I mean the principle of no order is fine in this situation. Just to clarify, the actual shared residence order wasn't appealed against. It was the contact that was appealed against".

And they discussed that. Mr G went on to say:

"I see no reason for a residence order to be put in place at this time".

The judge asked the father whether he wanted an adjournment and he said:

"Yes.

JUDGE SHAWCROSS: Why?

[THE FATHER]: Because I'm a [litigant in person]. I haven't investigated this line. I'd like some time."

Asked by the judge:

"Are you challenging the status of [E] as a resident with her mother?"

[THE FATHER]: Without any investigation, your Honour, then I don't really wish to comment on it because I don't actually understand the point of law with residence."

"All right" said the judge, and Ms Street had to go on to explain why she wanted the order, which was effectively to settle a potential dispute, given the father's hankering after a 50/50 arrangement.

16. The judge's judgment was this at page 38:

"This is I think rather unsatisfactory. Having given my judgment at some length and dealt with issues of contact and matters of that nature, Miss Street now says there should be a residence order. I am sure it is an oversight. Mother expected there to be a residence order and in many cases I would have said there should be, no problem at all, and in many cases the other parent would have said, "Yes, fine, I have no problem with that. That reflects the reality of the situation," but the question of residence is so deeply entrenched in [Mr G's] mind that it is a tricky one and I explored with him whether or not he would allow me to deal with the matter today. He said no, he wouldn't consent to me dealing with it today, he wants to consider the whole concept of residence. When I put him on the spot, which I believe I was entitled to do, by saying does he challenge the status of [E] residing with mother, he was not really prepared to answer that question, which confirms me in my view that he still harbours views about where [E's] real home should be and the question of equal and shared parenting, as I alluded to previously."

Then the judge continued:

"2. It is normal, since he is the one who has applied for a contact order and has got the contact order in his favour, he must recognise that it is normal, as Ms Street points out from a note in the Red Book, that a contact order is attached to a residence order. It is my experience that it is not necessarily always the case but I'm quite satisfied this is a case where it should be attached to a residence order.

3. I am sorry that Mr G has not had the opportunity to go away and think about it, but in the interests of getting this matter finalised today I am going to make a residence order. It does reflect the reality of the situation. This child effectively resides with her mother and spends a lot of time with her father. It is not a shared residence case. That has been considered and rejected and the appeal not pursued, so Mr G cannot say either that he has residence or that it is shared residence, that has been adjudicated on, and if it is not shared residence and he doesn't have residence then this child must be residing with mother. That is the reality.

4. Mr G says the no order principle should apply but there already is a contact order of considerable complexity in this case so he cannot really go down that path either. So, although it is not a very satisfactory way of dealing with it, bearing in mind I am going to make a section 91(14) order as well precluding either party from coming back and asking for residence, it seems sensible to deal with it now, otherwise the section 91(14) order really is sabotaged almost below the water line if neither party has actually got a residence order in their favour. The only person who could have seems to me to be the mother so I will make the residence order [in her favour]."

26. The judge was presented with a real dilemma. I do not for a moment doubt the genuineness of Ms Street's explanation for her application. It was that as she listened to the judgment she felt that there was a potential for the father to come back and renew his application for a residence order and that the matter had better be clarified there and then and so give effect to the reality. I am sympathetic with the judge's eventually deciding that since the reality was so obvious, why not simply endorse the little piece of paper to give effect to it? It is a little piece of paper. It is probably of no importance at all in the context of this case. Here the judge has dealt with the complicated issue of contact. This is a

- father who has parental responsibility. A residence order gives the mother no added right over and above the father. That is the lesson that has not yet been fully learned in the 19 years that the Act has been on the statute book. The residence order does no more than its definition allows: it settles the arrangements to be made as to the person with whom the child is to live; and the contact order in its turn is a convenient label for regulating the way in which the child with whom the parent lives is to permit the child to visit or stay with the other.
17. The whole purpose of the Act in getting rid of the concept of custody and access, with concomitant thoughts that they each carry different rights and power and authority and regulation and control, all of that should have been swept away, so that you have an order which conveys no right but simply regulates a factual state of affairs. The rights over the child are now conferred by parental responsibility. Each has parental responsibility and each is as fully entitled to exercise that responsibility while the child is in his or her care as the other. So when the child is with father he will determine when she goes to bed, when she is to brush her teeth and what she is to eat for breakfast, and the mother has no power of control nor does he. So it is about time that those practical lessons were learned.
 18. As I say, I have sympathy with the judge for coming to a pragmatic conclusion but I fear that his first instinct was the right one. This is an emotive matter for the father. If he has heard what I have just said he will feel less emotional about it, but as things there stood he was the litigant in person saying, "I don't understand what is involved in this; I want an adjournment, I want an opportunity to consider my position; this should not be sprung on me as it has been, it is unfair." And I regret that that is the view I have formed of this step. It was procedurally irregular; it did not give this father a fair opportunity to deal with a matter of importance to him; and the right course for the judge should have been to adjourn that matter. Technically, I suppose, in the light of section 91(14) he should have decided whether or not to give permission for the application to be made and then adjourn it but that is my being thoroughly pedantic. The important point is that it does not smack of the fairness which the father was entitled to expect and I would allow his appeal on that ground and set that residence order aside.
 19. So in the result the appeal succeeds, the residence order is discharged and so is the section 91(14) restraint.

Lord Justice Rimer:

20. I agree.

Order: Appeal allowed