Neutral Citation Number: [2002] EWCA Civ 1343

B1/2002/0602

IN THE SUPREME COURT OF JUDICATURE
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE IPSWICH COUNTY COURT
(His Honour Judge Thompson)

The Royal Courts of Justice
Strand
London WC2
Friday 26th July, 2002

B e f o r e :

LORD JUSTICE THORPE
MR JUSTICE FERRIS

A (CHILDREN)

(Computer-aided transcript of the Palantype Notes
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MR B JUBB (instructed by Messrs Harter and Loveless) appeared on behalf of the Appellant
THE RESPONDENT appeared on his own behalf

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1. LORD JUSTICE THORPE: This an appeal from the order of His Honour Judge Thompson, sitting in the Ipswich County Court on 7th March 2002. He had to determine what were the sensible orders to make in respect of two children, C, who is 14, and S, who is 12. Their parents were the only parties before the court, H, their mother, and D, their father.

2. The parties with the aid of the court welfare officer had agreed an extremely sensible regime, whereby C would stay with his mother on Monday and Tuesday nights and half of all school holidays, whereas S would stay with his mother Monday, Tuesday, Wednesday and Thursday nights and half of all school holidays. That sensible regime was made possible as a consequence of the mother's move from London to Sudbury,

the town in which the two boys were well established in the care of their father and half-brother. It was agreed between the parties that the order in respect of C should be a residence order to his father, with a contact order to his mother defining the two nights a week in the school term and the equal division of school holidays. The only issue was whether there should be a similar format for S, or whether the sharing between the two homes should be reflected in a joint residence order.

3. The judge explained in his judgment why he rejected the mother's application for a joint residence order and preferred instead to make a sole residence order to the father. At the same time he, at the invitation perhaps of both the parties, but certainly of the father, said that neither should make any application under the statute without leave. That, of course, was a hurdle that he was empowered to put in place by virtue of section 91(14) of the statute. He refused permission to appeal.

4. The application for permission was accordingly redirected to this court and came before Hale LJ, who granted permission, saying:

> "In principle, Children Act orders should reflect practical reality rather than theoretical `rights' or authority. If a child is to spend a substantial amount of his time living in each household then a shared residence order (settling the arrangements with whom a child is to live) will often best reflect that reality: see *D v D (Shared Residence Order)* [2001] 1 FLR 495, CA. A degree of co-operation is needed for such arrangements to work whatever the court's order. If the main reason for not making a shared residence order was that the mother had only recently moved to Sudbury and needed time to settle down, it was illogical to impose a section 91(14) requirement which might suggest that the parties should not seek to reflect that reality in a shared residence order as soon as it had become firmly established."

5. She also, in an exhortation to the parties, suggested that they should renew their efforts to sort out issues in dispute through the aid of others, whether lawyers, the Children and Family Reporter, a family mediator, or other family members and friends.

6. In consequence of that exhortation, solicitors for the mother embarked upon the sensible process of finding a qualified mediator in the Suffolk area. After a degree of journeying between service providers, they arrived at the door of a solicitor who was clearly well qualified to assist the parties. She carried out sensible input sessions and fixed a date for mediation earlier this month. Unfortunately, perhaps as a result of rising tension between the parents, that session never took place and accordingly the issue of mediation remains embryonic.

7. This court attaches great importance to the resolution of continuing disputes by alternative dispute resolution. Accordingly, the court operates an alternative dispute resolution scheme of its own which provides mediation to parties to proceedings within this court free of charge. It would be open to us today to invite the parties to engage in the Court of Appeal scheme. But I do not think that that would be sensible, given the arrangements that have already been pursued to an advanced stage in the locality. I am in no doubt at all that the parties would be best served by renewing the

arrangements recently broken off with the local mediator. At this stage I would like to record that Mr C, the father, despite his misgivings, has unambiguously confirmed his ability to re-enter the local mediation process.

8. The other development since permission was granted is that a statement has been prepared on behalf of the mother, a long statement with an even longer exhibit (as father points out 80 pages of A4), which was delivered to the court and to the father yesterday afternoon. It is very much a lawyer's statement and inevitably it reads to the father, and even to this court, as a contentious document. So it would do nothing to reduce the climate of dissension and mistrust were it to be admitted. Its admission would also be unfair to the father, who has had no opportunity to digest it and even less opportunity to put his own side of the story.

9. So I would unhesitatingly refuse the admission of that statement. It is enough for this court to know that the mother continues to live in Sudbury and continues to pursue her application for rehousing. It is enough for us to know that the children are, broadly speaking, dividing their time between the two homes in the manner that the judge directed. So it is necessary for us only to consider what remains to be done this morning to dispose of this appeal.

10. As I have indicated from the outset, I am very doubtful as to whether the judge in the County Court has sufficiently reflected in his approach the shift of emphasis signalled by the decision of this court in D v D. There is no doubt at all that there is a need for courts of trial to recognise that there may well be cases that are better suited by a joint residence order than by residence orders to one parent alone. Where there is a proximity of homes and a relatively fluid passage of the children between those two homes, the judicial convention that the welfare of the children demanded a choice between one parent or the other as a guardian of the residence order in order to promote the welfare of the children no longer runs as it used to run. I am in no doubt at all that orders made in the courts of trial should above all reflect the realities.

11. Mr Jubb has conceded that the essential differences that would be achieved by his client were she the holder of a joint residence order are not necessarily easy to define. Of course her parental responsibility is plain, whichever form of order is adopted. But Mr Jubb points out that the making of a joint residence order would confirm in her equal authority vis-à-vis the world. That might have practical implications, particularly, for instance, in relation to the Child Benefit Agency and to the drawing of child benefit which heretofore has inevitably been drawn by the father alone.

12. He also points to the fact that the conferring of a joint residence order is an acknowledgement of the equal competence of the parents, and thus buttresses the mother's sense of well-being and her sense of self-esteem as a parent.

13. More legalistically, the court in D v D, in the judgment of the President at page 503, defined that a shared order:

> "Brings with it certain other benefits (including the right to remove the child from accommodation provided by a local authority under section 20) and removes any impression that one parent is good and responsible whereas the other parent is not."

14. So what was it that led the judge to make the order which he did? At page 13 of his judgment he recorded the words of the children and family reporter thus:

> "The practicality of what the parents had now agreed, was really shared residence, whatever the Order of the Court."

15. That, in my opinion, should have given the judge the clearest guide to the resolution of the issue before him. He reasoned himself quite fully between pages 23 and 26 of his judgment. He pointed to the fact that the mother's arrival in Sudbury was very recent and might never take firm root. He pointed to the fact that there was an absence of harmonious history between the parents, and finally he said:

> "I am concerned that if I were to make a Shared Residence Order it might, psychologically, give some sort of unbalance to the relationship between the children and the parents."

16. I view the case in a very different light. I think that here the judge should have given the greatest weight to ensuring that the order duly reflected the realities, unless there were some counterbalancing welfare consideration that prevented that sensible outcome. Here I do not think that there was. In so far as he had anxiety about the recent arrival of the mother on the scene, the passage of the intervening three or four months allows us to view that factor more robustly.

17. I would like, finally, to pay tribute to the manner in which the father has conducted his case in this court. He can no longer afford legal representation. He has prepared for us a statement in which he has quite rightly concentrated on the unacceptable endeavour of the appellant to introduce contentious evidence at a late stage. He has made the valid point that neither of them can really afford continuing litigation, and that section 91(14) only operates to ensure that neither goes to the court without good reason.

18. In relation to the sharing of the residence order, in relation of course only to S, he has in the end, with good grace and to his great credit, said that he could live with that conclusion. I think it is the proper conclusion. It has the advantage of disposing of these proceedings in this court. Hopefully there will be no need of further litigation between these two parents. Hopefully they will find that the resolution of any continuing or future areas of dispute between them can be more successfully and more cheaply managed by the process of mediation, than by reopening the adversarial proceedings in the County Court.

19. I would, in conclusion for those reasons, propose to allow the appeal only to the extent of varying the order in the court below to provide that in respect of S alone his residence should be shared between the parents, on the basis that he will divide his time between the two homes in accordance with the pattern that is recorded in the current contact order.

20. MR JUSTICE FERRIS: I agree.

21. Having regard to the considerable measure of agreement which existed at the time of the hearing before the judge and the principles stated in D v D, I think the right order

for him to make in respect of S would have been a shared residence order. Such hesitation as I have felt on the hearing of this appeal arises only because there appear to be continuing difficulties in working out the very sensible arrangements which the parties then agreed, and I wondered at one stage whether it would be better to leave the order which the judge did make in place pending the outcome of the mediation which it seems to be agreed should now take place. In the end, however, I think that the right order to make is the one proposed by my Lord, namely to allow the appeal to the extent of making a shared residence order now.

22. As to the future, the best hope lies in mediation and, like my Lord, I am very glad to hear that the father is prepared to go along with mediation. I am sure that one of the matters which the mediator will address is the father's misgivings that whatever may come out of the mediation may be ignored by the mother. But I have no doubt that if agreement can be reached, a mediator has a better chance of bringing it about than confrontational hearings in court.

23. For that reason, it seems to be desirable to leave in place the order under section 91(14). I would therefore make the order proposed by my Lord.

ORDER: Appeal allowed to the extent of making a shared residence order; detailed assessment of the Appellant's Community Legal Services Funding certificate.
(Order not part of approved judgment)