Case No: B4/2008/2371

Neutral Citation Number: [2009] EWCA Civ 370
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM BROMLEY COUNTY COURT
(MISS RECORDER VENTERS QC)
(LOWER COURT No: BR07PO1464)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Tuesday, 10th February 2009

Before:

THE PRESIDENT OF THE FAMILY DIVISION
(SIR MARK POTTER)
LADY JUSTICE SMITH
and
LORD JUSTICE WILSON

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IN THE MATTER OF W (A Child)

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Mr Colin Yeo (instructed by Messrs Morrison Spowart) appeared on behalf of the **Appellant Mother**.
Mr Michael Bailey (instructed by Messrs Judge & Priestley) appeared on behalf of the **Respondent Father**.

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Judgment

Lord Justice Wilson:

1. With permission given by the recorder herself, a mother appeals against an order for shared residence made in favour of herself and the father by Miss Recorder Venters QC in the Bromley County Court on 17 September 2008. The subject of the application was their child, a girl, K, who was born on 21 October 2000 and so is now aged eight.

2. The parents were never married. They began a relationship as long ago as 1993, when the father was aged 29 and the mother was aged 23. K was born as a result of it, but, by the time of her birth, the parents had not begun to cohabit. Their cohabitation began in 2002 and ended in May 2006. Thereafter K lived primarily with the mother but, albeit with interruptions, she had substantial contact with the father.

3. It was one such interruption which precipitated the applications on behalf of the father which ultimately came before the recorder. For in June 2007 the mother ceased to allow the father to have contact with K on the basis that his time-keeping in relation to the arrangements for it had been unreliable. This complaint was rejected by the father, who accused the mother of stopping the contact because he had begun another relationship. At all events in September 2007 he issued applications under the Children Act 1989 ("the Act") for orders for parental responsibility, for contact and for what he called "joint" residence and should have called "shared" residence.

4. At an initial hearing of the applications by a deputy district judge in October 2007 the mother agreed that the father's contact should begin again, indeed on the basis of staying contact on alternate weekends. Analogous arrangements were made in a further interim order made by consent in April 2008.

5. In July 2008, however, the mother, by solicitors, indicated that she was again ceasing to make K available for the contact. She put forward two reasons, first that the father had taken K swimming in Dorset in dangerous circumstances and second that he had on occasions played too roughly with K, in particular by pinching her.

6. Three weeks after that second cessation of contact a CAFCASS officer interviewed K in the course of his enquiries referable to the father's three outstanding applications. In his report dated 29 August 2008 the officer stated that K had a good relationship with the mother but had told him that she missed her contact with the father and wanted it to be reinstated. The officer

also noted the mother's allegations of the father's exposure of K to swimming in dangerous circumstances and to the father's allegedly robust horseplay with her; and he noted the father's rejection of those complaints. He reported K as saying that she had indeed felt somewhat frightened when swimming with the father out to some rocks but that he had remained close to her at all times and in retrospect she was pleased that she and the father had achieved their objective. He did not report that she had made any complaint about pinching or other rough treatment at the hands of the father.

7. At a pre-trial review on 3 September 2008 the mother agreed that K's contact with the father should resume.

8. At the outset of the hearing before the recorder on 17 September 2008, counsel for the parents, being then (as now) Mr Bailey for the father and Mr Yeo for the mother, told her that there was a substantial measure of agreement between them. They told her that the mother agreed that a parental responsibility order should be made in favour of the father. They also told her that the parties had agreed a timetable to reflect the amount of time which K should spend with the father: namely that she should stay with him on alternate weekends, for one week during each Christmas and each Easter holiday, for two weeks during each summer holiday, for one extra night during each half-term holiday and on Christmas Eve and New Year's Eve in alternate years.

9. Counsel told the recorder that the only issue which remained outstanding was the father's application for a shared residence order. Mr Yeo thereupon made clear that, although his client did not withdraw any of the complaints which she had made about the father referable to his contact with K nor indeed other allegations which she had made to the effect that the father had mistreated her (the mother) while they lived together, she had instructed him not to ask the court to hear evidence, nor thus to make findings, in respect of any of them.

10. The recorder thereupon heard oral evidence from the father, the mother and the CAFCASS officer. In their written statements the parents had not addressed the issue of whether K should be the subject of a shared residence order or whether instead the order for residence should be made in favour of the mother alone together with a contact order in favour of the father. In his report the CAFCASS officer, while noting that he had been directed to address an issue of residence, had merely written, as part of his conclusion, that residence should remain with the mother; he had not specifically addressed the merits or otherwise of a shared residence order. We lack a transcript of the oral evidence given to the recorder but in her

judgment she noted that the officer told her that he had no concerns about the motives of the father in applying for a shared residence order but considered that the mother might react adversely to it. Today Mr Yeo tells us that in his oral evidence the officer indicated that he had little to say in relation to the issue of shared residence, which he regarded as an issue more for the lawyers than for himself and indeed not as one of great significance. Mr Bailey adds that in his oral evidence the officer accepted that he was unaware of recent developments in the law in relation to the circumstances in which a shared order might be appropriate.

11. The principles which now govern the making of a shared residence order have best been summarised by my Lord, the President, in a recent decision of this court in Re: A (a child) (joint residence: parental responsibility) [2008] EWCA Civ 867, [2008] 3 FCR 107, at [66], as follows:

"The making of a shared residence order is no longer the unusual order which once it was. Following the implementation of the [Children Act 1989] and in the light of s.11(4) of that Act which provides that the court may make residence orders in favour of more than one person, whether living in the same household or not, the making of such an order has become increasingly common. It is now recognised by the court that a shared residence order may be regarded as appropriate where it provides legal confirmation of the factual reality of a child's life or where, in a case where one party has the primary care of a child, it may be psychologically beneficial to the parents in emphasising the equality of their position and responsibilities."

12. The President's judgment had not been reported at the time of the hearing before the recorder. In my view, however, she applied in effect the same principles. She correctly said that she had to decide what order for residence would be in the best interests of K. She then cited from the judgment of Wall LJ in Re: K (Shared Residence Order) [2008] EWCA Civ 526, [2008] 2 FLR 380, in which, at [25], he quoted the words of his earlier judgment in Re P (Shared residence Order) [2005] EWCA 1639, [2006] 2 FLR 347, at [22], as follows:

"…Such an order emphasises the fact that both parents are equal in the eyes of the law and that they have equal duties and responsibilities as parents. The order can have the additional advantage of conveying the court's message that neither parent is in control and that the court expects parents to co-operate with each other for the benefit of their children."

13. With respect to Mr Yeo, I see no subsisting foundation for his submission to us today that, unless the time to be spent by a child in the two households is close to being equal, unusual

circumstances are required before a shared residence order should be made. Fifteen years ago his submission would have been valid: see A v A (Minors) (Shared Residence Order) [1994] 1 FLR 669, per Butler-Sloss LJ at 677. But at any rate for the last eight years the better view has been that, while of course a need remains for the demonstration of circumstances which positively indicate that the child's welfare would thereby be served, there is no such gloss on the appropriateness of an order for shared residence as would be reflected by the words "unusual" or indeed "exceptional": see D v D (Shared Residence Order) [2001] 1 FLR 495, per Hale LJ, at [31]-[32].

14. It might, however, be worthwhile for me to comment briefly upon a passage in another judgment of Wall J, as he then was, because the recorder herself adverted to it. The passage is in his judgment in A v A (Shared Residence) [2004] EWHC 142, [2004] 1 FLR 1195, at [124], as follows:

> "If these parents were capable of working in harmony, and there were no difficulties about the exercise of shared parental responsibility, I would have … made no order as to residence ... Here, the parents are not, alas, capable of working in harmony. There must, accordingly, be an order. That order, in my judgment, requires the court not only to reflect the reality that the children are dividing their lives equally between their parents, but also to reflect the fact that the parents are equal in the eyes of the law, and have equal duties and responsibilities towards their children."

15. The above passage is sometimes understood to be an indication that the inability of parents to work in harmony is a reason for making an order for shared residence. Although it is now clear that inability to work in harmony is not a reason for *declining to make* an order for shared residence, I do not believe that Wall LJ there meant to imply that it was, by itself, a reason for *making* an order for shared, rather than sole, residence. I believe that he was there indicating that the inability of the parents to work in harmony meant that, rather than that he should make no order, it was better for the children that he should make some order or other in relation to residence; and that, since in that case the children were to divide their lives equally between the parents and since it was important to stress that the parents had equal responsibilities towards them, the order more greatly in the interests of the children was an order for shared residence rather than orders for sole residence and for contact. In my view the headnote of that decision in the Family Law Reports may to some extent have conduced to the misunderstanding to which I have referred. I should make clear, however, that, although therefore an inability of parents to work in harmony does not, by itself, amount to a reason for

making a shared residence order, a possible consequence of their inability to do so, namely the deliberate and sustained marginalisation of one parent by the other, may sometimes do so.

16. It is true, although Mr Yeo has not presented his argument in quite this way this morning, that the recorder did note - and did appear to rely upon the fact -that these parents had proved unable to work in harmony in relation to the arrangements for K during the previous two years. But, although of course she did not use the President's words, the nub of her decision was that a shared order would be psychologically beneficial to the parents in emphasising the equality of their responsibilities towards K and thus that it would indirectly benefit her, being a child who clearly not only needed but also wanted a full relationship with both of them.

17. In his attractively economical submissions to us this morning, Mr Yeo began by presenting to us statistics which he had compiled and which, according to him (and no doubt he has done his arithmetic perfectly), indicate that, under the arrangements made by consent between the parties, K is to spend with the father only 25% of her time, indeed only 22% of her nights during term time and only 24% of her nights during holiday time. His submission reminded me of comments which, as a temporary member of this court, I made in Re: F (Shared Residence Order) [2003] EWCA Civ 592, [2003] 2 FLR 397, at [30], to the effect that statistics of that character were usually only of limited value. Mr Yeo ultimately described as the main plank of his appeal the fact that a shared residence order did not reflect the situation on the ground. Thus there was a correlation between Mr Yeo's summation of his main point and the statistics which he had presented to us at the outset of his submissions. But it was in that same short judgment of mine, at [34], that I attempted to explode the *canard* that a shared residence order was appropriate only in circumstances in which the children would be spending their time evenly, or more or less evenly, in the two homes.

18. I am unable to discern any flaw in the manner in which the recorder exercised her discretion to make an order for shared residence; and indeed it is a tribute to Mr Yeo's powers of advocacy that she so readily acceded to the mother's application for permission to appeal. At all events, subject to the minor point which I am about to make, I would dismiss the appeal.

19. The minor point relates to the fact that, as drawn, the recorder's order not only included the shared residence order but then encompassed the agreed periods which K was to spend with the father within a contact order.

20. In section 8(1) of the Act a contact order is defined as:

"…an order requiring the person with whom the child lives, or is to live, to allow the child to visit or stay with the person named in the order, or for that person and the child to have contact with each other;"

Section 11(4) of the Act provides:

"Where a residence order is made in favour of two or more persons who do not themselves all live together, the order may specify the periods during which the child is to live in the different households concerned."

21. In my view the effect of these two provisions is clear. A contact order is an order requiring a person with whom a child lives or is to live, i.e. including a person who has sole residence of a child or who shares his residence, to allow the child to have contact with another person. In circumstances in which a shared order for residence is made, the order may specify the periods during which the child is to *live* in the different households: in such circumstances *contact,* by contrast, does not arise. It is a contradiction in terms to grant a contact order to a person who has a shared residence order. I have no doubt that, had the proper description of the agreed periods which K was to spend with the father been raised before her, the recorder would have been the first to point out that, in the light of her decision, they were not properly to be described as periods of "contact". My proposal that the appeal should be dismissed is, therefore, subject to a rider that the form of the recorder's order be altered accordingly.

Lady Justice Smith:

22. I agree.

Sir Mark Potter, President:

23. I also agree. The appeal will therefore be dismissed save that the order of the recorder will be redrawn to reflect the final observations of Wilson LJ.

Order: Appeal dismissed