Neutral Citation Number: [2009] EWCA Civ 20
Case No: B4/2008/2939

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM
HHJ WELCHMAN made on 17th November 2008
sitting in the Lambeth County Court

Royal Courts of Justice
Strand, London, WC2A 2LL
Date: 28/01/2009

Before:

LORD JUSTICE WALL
LORD JUSTICE AIKENS
and
MR JUSTICE BENNETT

- -

Between :

ETS (Appellant)

- and -

BT (Respondent)

T (A Child)

(Transcript of the Handed Down Judgment of
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David Boyd (instructed by Bindmans - Solicitors) for the Appellant

Frances Judd QC (instructed by Darbys - Solicitors) for the Respondent

Hearing date: 14th January 2009

- -

Judgment
As Approved by the Court

Lord Justice Wall :
Introduction
1. The mother of L, a girl born on 17 March 2004, and thus rising 5, seeks permission to appeal against an order made by His Honour Judge Welchman sitting in the Lambeth County Court on 17 November 2008. The only formal application before the judge (which he rejected, and from which there is no appeal) was by L's father (who is the respondent to the application in this court) that a shared residence order made by the same judge on 12 December 2007 he varied so that L's time was divided equally between her parents on a four day rotation.

2. However, the real issue between the parties was the mother's wish to relocate with L from North London, where both parents were living, to Chew Magna in Somerset, where she had obtained employment. The judge refused the mother permission to relocate. He did so, not by imposing conditions under section 11(7) of the Children Act 1989 (the 1989 Act), but by varying the shared residence order; (1) to extend the periods L spent with her father at weekends "from after school on Fridays until the beginning to the school day on Tuesdays on alternate weeks"; and (2) "from after school on Tuesdays until the beginning of the next school day being the Tuesdays in the weeks following the Tuesdays in (1)".

3. L began at primary school in North London in September 2008. We were told at the bar that pending the hearing of this application, the mother has been commuting daily to Somerset from North London, and that when L is not at school or with her father, she is being looked after in the day time by the mother's husband, whom she married in November 2007.

4. I saw the case on paper at the end of the Michaelmas term, and listed the application on notice to the father with the appeal to follow if permission was granted. This is, so far as I am aware, the first case to reach this court in which the question of what I propose to call "internal relocation" (that is, relocation within England and Wales) arises where there is already in existence a shared residence order. For that reason, amongst others, I would grant permission to appeal.

The facts
5. The mother is 37, and is British, although she also has an Israeli passport. Her mother is Scottish and her grandfather Israeli. The father is 39. He is Serbian, but is settled in England. The mother and the father began a relationship in 1999, which finally ended in December 2005, when the mother left the father, taking L with her. They did not marry, and L is their only child.

6. After the separation, both parties lived in South London, and although the detail may be in dispute, the father plainly played a substantial role in L's life. Unfortunately, in April 2007, the mother was made redundant, and in September 2007 she applied to the court to relocate with L and her then fiancé (now her husband) to Israel. That application came before His Honour Judge Welchman in September 2007, and he refused it. For some reason, the order of the court is dated 12 December 2007, although the judge's written judgment is dated 5 September 2007.

7. The reasons given by the judge for refusing the mother's application to relocate with L to Israel are important, and I will return to them. Suffice it for the moment to record that on refusing the application, the judge made a shared residence order and divided L's time between her parents. The mother sought permission from this court to appeal against the

order, but permission was refused by Wilson LJ on paper, and the application was not renewed. The mother then moved to North London, and the father followed. Both now live in N21, and, as I have already stated, L has started her primary education at a local state school.

8. The mother's case before the judge was that she had made numerous job applications in London and elsewhere, and that the only offer of suitable employment was that which she wished to take up in Chew Magna. A place was available for L at the local primary school: the mother would be able to rent suitable accommodation, and the setting was both rural and ideal for L. Neither in the court below nor in this court did the mother seek to disturb the shared residence order, although she accepted that mid-week contact with the father would not be a practicable proposition. She proposed, as compensation, longer periods in school holidays, combined with staying contact at alternate weekends as under the present order.

9. In her written statement dated 14 October 2008, the mother asserted her willingness to foster a good relationship between L and the father, but also argued that L's home had always been with her. She concluded her first statement dated 1 October 2008 with these words:-

> If I cannot move to take up employment in Bristol, I am in despair as to what the future will hold for us. L would miss out on the opportunity to live in the countryside, with outdoor space and a healthy environment to grow up in. I hope the court will accept the more and my proposals for contact. I truly believe the more will be in L's best overall and long-term interest.

10. The father's case was that the move to Chew Magna would seriously disrupt his relationship with L. Moreover, he asserted that the move to Chew Magna was, in effect, contrived. It was part of a pattern of moves and proposed moves designed to minimise (and possibly to extinguish) his role in L's like. He pointed to the proposal to go to Israel, and the unannounced move to North London.

The Law

11. As I indicated in paragraph 4 of this judgment, this is, so far as I am aware, the first case to reach this court in which the question of a parent's proposed relocation with a child within England and Wales has arisen where there is already in existence a shared residence order in favour of the parents in relation to the same child. Several questions therefore arise. In particular; (1) what effect, if any, does such an order have? And; (2) what weight should a judge give to the existence of such an order?

12. Both Miss Frances Judd QC for the father and Mr. David Boyd, for the mother submitted that it would be a powerful disincentive to parties entering into shared residence orders if either felt that the consequence of so doing was to place a fetter on any subsequent application to relocate. I agree. However, this provides only a partial answer to the questions posed in the previous paragraph, and it is therefore necessary to look at the authorities on internal relocation. They are, I think, the following (I list them in chronological order):-

(1) *Re E (Residence: Imposition of Conditions)* [1997] 2 FLR 638 (Re E)
(2) *Re H* [2001] EWCA Civ 1338, [2001] 2 FLR 77 (Re H)
(3) *Re S (A Child)* [2001] EWCA Civ 847, [2001] 3 FCR 154 and [2002] EWCA Civ 1795, [2003] 1 FCR 138 (*Re S* (No 1) and *Re S* (No 2))
(4) *B v B (Residence: Condition Limiting Geographic Area)* [2004] 2 FLR 979 (B v B)
(5) *Re H (Agreed Joint Residence: Mediation*)[2004] EWHC 2064 (Fam), [2005] 1 FLR

8 (which, for present purposes I propose to call Re H (No 2))
(6) *Re G (Contact)* [2006] EWCA Civ 1507, [2007] 1 FLR 1663
(7) *Re B (A Child)* [2007] EWCA Civ 1055, reported as re B (Prohibited Steps Order [2008] 1 FLR 613 (Re B).

13. The 1989 Act, by section 8, defines a residence order as "an order settling the arrangements to be made as to the person with whom a child is to live". The shared residence order in the present case gives the father parental responsibility for L, although we were told at the bar that he may well have already had it before the shared residence order was made.

14. *B v B* and *Re H (no 2)* are decisions at first instance. The remainder are decisions of this court. *Re E*, it seems to me, remains the leading case, and sets the tone for much of what followed. I propose, accordingly, to cite extensively from the leading judgment in the case, given by Butler-Sloss LJ (as she then was).

15. In *Re E* the judge at first instance had treated as separate issues the two questions; (1) with whom and; (2) where the children in question should live. He thus made a residence order in favour of the mother, but imposed a requirement under section 11(7) of the 1989 Act that the children should continue to reside at a named address unless otherwise ordered or agreed by the children's father. The mother wished to take the children to live with her in Blackpool: the father wanted the children to remain in London. On the mother's appeal, this court reversed that part of the judge's decision which imposed the section 11(7) requirement on the mother.

16. Although not directly relevant to this appeal, it will, I think, make this judgment easier to follow if I set out section 11(7) of the 1989 Act, which reads as follows:-

> A (residence order) order may—
>
> (a) contain directions about how it is to be carried into effect;
> (b) impose conditions which must be complied with by any person –
>
> (i) in which favour the order is made;
> (ii) who is a parent of the child concerned;
> (iii) who is not a parent of his but who has parental responsibility for him; or
> (iv) with whom the child is living, and to whom the conditions are expressed to apply;
>
> (c) be made to have effect for a specific period, or contain provisions which are to have effect for a specified period;
> (d) make such incidental, supplemental or consequential provision as the court thinks fit.

17. Giving the leading judgment in *Re E*, Butler-Sloss LJ said:-

Section 11(7) applies to all four section 8 orders, including prohibited steps orders and specific issue orders. The wording of the subsection is wide enough to give the court the power to make an order restricting the right of residence to a specified place within the UK. But in my view a restriction upon the right of the carer of the child to choose where to live sits uneasily with the general understanding of what is meant by a residence order. In *Re D*

(Minors) (Residence: Imposition of Conditions) [1996] 2 FLR 281, this court considered a similar condition placed on a residence order. In that case the mother had originally agreed that she would not bring the children into contact with the man with whom she had been living. On her subsequent application to discharge that condition this court held that a section 11(7) condition could not exclude another person from the mother's home, thereby interfering with her right to live with whom she liked. Ward LJ said:

> The court was not in a position to overrule her decision to live her life as she chose. What was before the court was the issue of whether she should have the children living with her.'
>
> That decision in my judgment applies with equal force to the issue in the present appeal.
>
> A general imposition of conditions on residence orders was clearly not contemplated by Parliament and where the parent is entirely suitable and the court intends to make a residence order in favour of that parent, a condition of residence is in my view an unwarranted imposition upon the right of the parent to choose where he/she will live within the UK or with whom. There may be exceptional cases, for instance, where the court, in the private law context, has concerns about the ability of the parent to be granted a residence order to be a satisfactory carer but there is no better solution than to place the child with that parent. The court might consider it necessary to keep some control over the parent by way of conditions which include a condition of residence. Again, in public law cases involving local authorities, where a residence order may be made by the court in preference to a care order, section 11(7) conditions might be applied in somewhat different circumstances.
>
> The correct approach is to look at the issue of where the children will live as one of the relevant factors in the context of the cross-applications for residence and not as a separate issue divorced from the question of residence. If the case is finely balanced between the respective advantages and disadvantages of the parents, the proposals put forward by each parent will assume considerable importance. If one parent's plan is to remove the children against their wishes to a part of the country less suitable for them, it is an important factor to be taken into account by the court and might persuade the court in some cases to make a residence order in favour of the other parent. But, on the facts of the present appeal, it is clear that the welfare of the children points firmly to their living with their mother, and the advantage of remaining in London is outweighed by the other factors leading to granting a residence order to the mother.

18. In *Re H*, a father, in whose favour the judge had made a residence order, .wished to relocate with the children concerned to Northern Ireland. The mother, who otherwise was the more suitable parent to care for the children, was disqualified from doing so by alcoholism. The judge made an order preventing the relocation, and the father's appeal to this court was dismissed. Applying section 1 of the 1989 Act to the facts of the case, this court took the view that the children's loss of contact with their mother would be akin to a bereavement; the effect on the mother would be devastating, as would the knock-on effect of her devastation on the children. Leading counsel for the father sought to rely on *Re E* as demonstrating that a condition against relocation was only to be imposed in exceptional circumstances which, it

was argued, did not apply on the facts of the case. Giving the leading judgment, Thorpe LJ (at paragraph 19) said
The relocation within the United Kingdom may be highly problematic, as this case illustrates. The primary carer will invariably give notice, directly or indirectly, of an intended move. The court has power under section 8 to make a prohibited steps order or to impose a condition under section 11(7) to the residence order. Whilst the primary carer may not have an obligation to apply under section 13(1)(b), he will still have to defeat the challenge of an application for a prohibited steps order or for the imposition of a condition to the residence order. Perhaps the only certain constant is that, where there is a dispute between the parents, incapable of resolution by negotiations or mediation, it must be decided by the court. In making its decision the court must always apply the welfare test as paramount, whether the relocation is internal or external. The test, in the case of external relocation, is clearly laid down in *Payne v Payne* [2001] EWCA Civ 166, [2001] Fam. 473.

19. This judgment must, however, be read with Thorpe LJ's later commentary on it in *Re B*, as to which see paragraph 33 below.

20. In *Re S (Nos 1 and 2)* the critical feature of the case was that the child in question was down syndrome, and thus not capable of understanding fully major changes in her life, including a reduction in her contact with her father. Her mother wished to relocate with her to Cornwall. The judge refused to allow her to do so, taking the view that he had a discretion to impose such a condition in an exceptional case. This court allowed the mother's appeal and remitted the matter to the judge for reconsideration.

21. Giving the leading judgment in *Re S (No 1)* Thorpe LJ said:-

> [16] The jurisprudence in those cases that are now caught by s 13(1)(b) had been established over the course of more than 30 years by decisions of this court which recognise the great importance of not imposing on primary carers' restrictions on their freedom to choose their preferred way of family life and their preferred place of residence for two good reasons. The first is that often the notion of such restrictions are simply contrary to good sense and, secondly, because the imposition of restrictions is likely to have an adverse effect on the welfare of the children indirectly through the emotional and psychological disturbance caused to the primary carer by denial of the freedom to exercise reasonable choice.
>
> [17] This line of authority has recently been reconsidered by this court in the light of the arrival of the Human Rights Act 1998 in the case of Payne v Payne . It seems to me that it is necessary to have some consistency between that line of authority applying to s 13(1)(b) cases, and those in which a judge has to consider whether it is open to him to apply a condition under s 11(7) to a residence order that restricts the primary carer's place of residence. It is true that in the case of Re E (minors) (residence: conditions) Butler-Sloss LJ said:
>
> In my view, the principles set out in a long line of authorities relating to leave to remove permanently from the jurisdiction have no application to conditions proposed under s.11(7).'
>
> [18] With that I am in complete agreement in the sense that it is not ordinarily necessary for primary carers who seek to make a local move to have to clear the

various hurdles that confront an applicant for permission to move out of the United Kingdom. In such cases the applicant has to demonstrate that he or she has made a thorough research and exploration of the circumstances and conditions in the country to which he or she aspires to relocate and that the proposals are practical and reasonable. Such an applicant also has to meet whatever opposition there may be from the secondary carer on the front of reduction of contact or other suggested adverse consequences of relocation. Whatever tests are applied to the applicant under s 13(1)(b), they must inevitably be more stringent than the tests applied to the primary carer seeking a purely local relocation.

22. Thorpe LJ then turned to an examination of the judgment of Butler-Sloss LJ in *Re E* and concluded in this respect:

> [24] I am in no doubt that, in defining the possibility of exception, Butler-Sloss LJ was guarding against the danger of never saying never in family law litigation. The whole tenor of her judgment is plain to me, in that she was giving the clearest guide to courts of trial that, whereas it was not safe to say never in cases in which the imposition of such a condition would be justified, it would be highly exceptional and probably restricted to a case, as yet unforeseen and may be difficult to foresee, in which the ability of the primary carer to perform to a satisfactory level required the buttress of a s 11(7) order.
>
> [25] Certainly, in my opinion, her judgment is not to be interpreted as giving trial judges a general latitude to strive for some sort of ideal over and above the rival proposals of the available primary carers. As is well argued in the appellant's skeleton, that approach could lead to quite unsustainable restrictions on ordinary adult liberties, extending even to the secondary carer's chosen way of life.

23. Clarke LJ (as he then was) whilst agreeing that the appeal should be allowed, took a somewhat different view of Butler-Sloss LJ's judgment in *Re E.* He said:-

> [34] I do not read Butler-Sloss LJ as specifying precisely what cases would amount to exceptional cases and what would not. She simply gave some particular examples. I do not read her judgment as limiting the exceptional cases to the cases where the court was concerned about the capabilities of the primary carer. To my mind, it could scarcely do so given the words of the statute. However, I entirely accept the proposition that the court should not ordinarily dictate to the primary carer where he or she should live. Thus Butler-Sloss LJ made it clear, for example, that the court must not impose conditions simply because the proposals for the particular child are not ideal.
>
> [35] I entirely agree with Thorpe LJ that the subsection should not be interpreted as giving trial judges a general discretion to strive for some ideal situation. A condition should only be imposed in genuinely exceptional cases.

24. *Re S* returned to this court after the circuit judge had reheard the case, and reached the same conclusion. Once again, the mother's appeal was dismissed. On this occasion the constitution comprised Dame Elizabeth Butler-Sloss P (as she had become) Waller and Laws LJJ. The former gave the leading judgment. She identified two conflicting principles:-

i) The appellate court, in accordance with the decision of the House of Lords in *G v G (Minors: Custody Appeal)* [1985] FLR 894; [1985] 1 WLR 647 ought not readily to interfere with the decision of a competent and conscientious judge who has taken into account the relevant factors and has exercised his discretion to arrive at his conclusion in favour of the child remaining in the London area.
ii) The principle enunciated in *Re: E* that the court ought not in other than exceptional circumstances to impose a condition on a Residence Order to a primary carer who is providing entirely appropriate care for the child.

25. The President then conducted an examination of the previous authorities, and stated: -

17. In accordance with the decisions which I set out above, the general principle is clear that a suitable parent entrusted with the primary care of a child by way of a residence order should be able to choose where he/she will live and with whom. It will be most unusual for a court to interfere with that general right of the primary carer. There will however be exceptional circumstances in which conditions will have, in order to protect the best interests of the child, to be imposed albeit those conditions will interfere with the general right to choose where to live within the United Kingdom. I did not intend in my judgment in Re E to exclude the possibility that an exceptional case might arise in which a parent against whom there is no complaint might nonetheless have to face some restriction of movement. Section 11(7) provides a safety net to allow for the exercise of discretion under the provisions of section 1 where the paramountcy of the welfare of the child exceptionally requires the court to impose restrictions upon the primary carer which otherwise would be unacceptable. I could not, as Clarke LJ pointed out in paragraph 34, in accordance with the wording of section 11(7) shut the door on the exceptional case. I respectfully agree with the interpretation given by Clarke LJ to that passage in my judgment.

26. The President then conducted a full and careful review of the facts, at the end of which she concluded:

37. I am satisfied that the judge was entitled to treat this as an exceptional case. He was faced with an impossible task which he carried out carefully and conscientiously and with understanding of the conflicting emotions and issues which faced him. He considered and applied the principles set out in *Re E* and had regard to the rights of the parents under Article 8. He carried out the unusually difficult balancing exercise and came to a conclusion which in my view cannot be faulted. His exercise of discretion on the facts and on his view of the witnesses is not to be set aside by an appellate court without very good grounds to do so. It is not for the Court of Appeal to substitute its own view of the outcome where the judge has heard all the relevant witnesses and has the inestimable advantage of getting the feel of the case unless the judge has failed to direct himself correctly or has otherwise come to an obviously wrong conclusion. There is no obviously correct decision in this exceptionally difficult case which turns on the assessment of future risk to the emotional wellbeing of a delightful but seriously disadvantaged child. This is pre-eminently a case in which *G v G* should apply and the exercise of discretion by the judge should not be set aside by the appellate court. For these reasons, in my judgment, this court was right to uphold the decision of the trial judge.

27. I note, in passing, that Laws LJ added: -

> 39. The jurisprudence shows that the imposition, under Section 11(7), of conditions upon a residence order is something to be contemplated only in exceptional circumstances. However, to borrow a phrase from another area of the law, the categories of what is exceptional are not closed; nor was my Lady suggesting in *E* that they were. Indeed they could not be: to formulate a definition of exceptional circumstances, whether inclusive or exclusive, would be to transform a broad principle into a hard-edged rule. But hard-edged rules are made if at all by the statute, not by the courts.
>
> 40. Here, applying the general principle, the Judge was in my view wholly entitled to treat the case as exceptional. The combination of this little girl's disability and medical problems, the limits of her understanding, her foreshortened life expectancy, and the practicalities of travel between south London and Cornwall amply suffice to produce that result.

28. In *B v B*, Mrs Sally Bradley QC, sitting as a deputy High Court Judge imposed a condition preventing a mother who had the custody of her child from relocating from the South of England to Newcastle. She did so because, as she put it: "I am firmly of the view that it is in (the child's) interest to do so". Whilst the case turns largely on its facts, the deputy judge undoubtedly directed herself correctly as to the law - see paragraph 26 of her judgment, which I will not set out. I think it sufficient for present purposes simply to identify the following points from the headnote of the case as reported:-

> Held – discharging the wardship and adjourning the father's specific issue order – making a residence order in the mother's favour with a condition that she and the child should reside within an area bounded by the A4 to the north, the M25 to the west and the A3 to the south and east until further order – amending the previous contact order and directing that the parents should agree the child's school from September 2004 –
>
> (1) The real question was whether the proposed move was in the child's best interests. A move in this case was a move to a geographically distant location where all contact arrangements would depend on the mother ensuring that the child would board an aeroplane for London. The mother was so hostile to contact and to the father that she could not be relied upon to promote contact. She had misled the court and the father on a number of very serious issues
>
> (2) A move to a school out of the geographical area where she currently lived would not be in the child's best interests. It would be in her best interests to remain in an area where appropriate schooling was available and, importantly, where there was a greater prospect of contact continuing .
>
> (3) The court had the power under section 11(7) of the Children Act 1989 to impose conditions upon any residence order made. The geographical condition proposed was not a permanent prohibition on relocation. It was what was needed now. Section 11(7) conditions were only to be attached in exceptional circumstances. This was a highly exceptional case. The mother had made two

applications to go to Australia, with the prime motive being to get away from the father.

29. *Re H (No 2)* is a decision of Baron J. It is the only reported case in which there was a joint residence order. The father wished to relocate to Devon in order to ensure his earning capacity and employment security. The parties were agreed that they would like a joint residence order and had agreed a schedule of contact for the parent with whom the child did not have his main home, but were unable to reach agreement as to which parent that should be.

30. Once again, I think it sufficient to cite the relevant part of the headnote of the case as reported:-

> Applying the welfare principle and checklist, it was in the child's best interests to move to Devon with his father. The child's primary attachment was to his father. The special bond created in the period immediately following the separation had never been broken despite the fact that the mother had increased her role since that time. The child had never expressed any opposition to the move. The child would face disruption whichever parent he was with.

31. .I have included *Re G* for completeness, but I do not think it takes the matter any further. This court refused to implement an Australian order when there had been a number of changes of circumstances.

32. Finally, *Re B* was another Northern Irish case in which, in this instance, the judge had refused to allow the mother to relocate with the child, notwithstanding that she was plainly the "primary carer". This court allowed the mother's appeal and ordered a re-hearing.

33. Thorpe LJ, giving the leading judgment, reviewed his previous decision in *Re H*:

> [7] The judgment that I gave in the case of *Re H* does not, on reconsideration, sufficiently reflect the fact that the imposition of a condition to a residence order restricting the primary carer's right to choose his or her place of residence is a truly exceptional order. The case of *Re H* included an endeavour on my part to rationalise the interface between the true relocation cases governed by the decision of this court in *Payne v Payne* and the internal relocation cases governed by the decision of this court in *Re E*. At the conclusion of the passage, I questioned the rationalisation for a different test to be applied to an application to relocate to Belfast as opposed to, say, an application to relocate to Dublin, and having posed the question I continued:
>
> All that the court can do is to remember that in each and every case the decision must rest on the paramount principle of child welfare.
>
> [8] I see that the Recorder, reading that passage, did not have his attention sufficiently directed to the earlier case of *Re E*. In my reasoning for upholding the imposition of a condition preventing the relocation in the case of *Re H*, I did not perhaps sufficiently clearly state that the circumstances (particularly the impact upon the mother of a refusal of the condition, fully established by mental health

evidence) clearly took the case into the exceptional category identified Butler-Sloss LJ in *Re E*.

[9] By way of conclusion I would only endorse the treatment of this topic by Professor Lowe and his co-authors in International Movement of Children (Jordan Publishing Ltd, 2004). He, at page 90, considers movement of children within the UK, and reviewing the cases, concludes that a primary carer faced with an application for a prohibited steps order or the imposition of conditions on a residence order, will not, save in an exceptional case, be restrained by the court, because for the court so to do would be an unsustainable restriction on adult liberties and would be likely to have an adverse effect on the welfare of the child by denying the primary carer reasonable freedom of choice. Professor Lowe takes that proposition from the decision in *Re E* and in para 6.4 he states:

'The correct approach, therefore, is to look at the issue of where the children will live as one of the relevant factors in the context of the cross-applications for residence, and not as a separate issue divorced from the question of residence. If the case is finely balanced between the respective advantages and disadvantages of the parents, the proposals put forward by each parent will assume considerable importance. If one parent's plan is to remove the children against their wishes to a part of the country less suitable for them, it is an important factor to be taken into account by the court and might persuade the court in some cases to make a residence order in favour of the other parent.'

He then considers what might constitute an exceptional case and in particular refers to the decision of this court in *Re S (No 2).*

What principles can be gathered from the authorities, and should there be a different approach in cases where there is a shared residence order?

34. In my judgment, the propositions which emerge from the authorities are well summarised in the citations from the judgment of Butler-Sloss LJ in *Re E* and from Thorpe LJ's judgment in *Re B* which I have set out in paragraphs 17 and 33 above. Should there be any difference in approach where there is a shared residence order?

35. In my judgment, a shared residence order is, self-evidently, a species of residence order under section 8 of the 1989 Act. It settles the arrangements to be made as to the persons with whom a child is to live. In some, albeit rare cases, such a *A v A (Shared Residence)* [2004] EWHC (Fam) 142, [2004] 1 FLR 1195 an equal division of the children's time between their parents is appropriate, but there is no doubt that a shared residence order can properly be made where there is a substantial geographical distance between the parties: - see, for example, the decision of this court *Re F (Shared Residence Order)* [2003] EWCA Civ 592, [2003] 2 FLR 397, in which the mother was planning to relocate to Edinburgh, a considerable distance from where the father lived.

36. In my judgment, therefore it is wrong in principle to apply different criteria to the question of internal relocation simply because there is a shared residence order. Plainly, the fact of such an order is an important factor in the welfare equation, but I respectfully agree with counsel that it is not, in effect, a trump card preventing relocation. In each case what the court has to do is to examine the underlying factual matrix, and to decide in all the

circumstances of the case whether or not it is in the child's interest to relocate with the parent who wishes to move.

The judge's first judgment

37. Against this background, I turn to examine the two judgments given by the judge and to explain my conclusion in relation to the second. It will be recalled that in the first judgment, the judge refused the mother's application to relocate with L to Israel. He appears to have directed himself appropriately in accordance with the decision of this court in *Payne v Payne*, but in the process of doing so made a number of important findings adverse to the mother.

38. Firstly, the judge found that the mother had not told the truth about the amount of work her then fiancé had done in Israel. She had not acknowledged the untruth until she was cross-examined and had then suggested that her untruthful assertion had been "a typographical error", which it plainly was not. The judge, rightly, said he would have expected the error to have been corrected "at the earliest opportunity", and concluded:

> It was not and the conclusion I draw is that it was only in the witness box that (the mother) was prepared to admit this was a *mistake* and I regret to say that it was not an honest one.
> (emphasis in the original)

39. The judge also made other adverse findings against the mother. For present purposes, four are of particular importance. Firstly, she had delayed for a long as possible before telling the father about her intention to relocate; secondly, she had demonstrated a "lack of frankness" about an extended trip to Australia during which she and her fiancé were to marry; thirdly she had made a number of unilateral changes in L's care, something which the judge described as "a deeply worrying feature of the case"; fourthly, and perhaps most significantly, he took the view that:

> part of (the mother's) motivation for the proposed move is to diminish greatly (the father's) relationship with their daughter and that it can be categorised properly as selfish. She did not see the need nor have any wish to discuss or involve (the father). I found the mother's evidence that if she could not go to Israel she would go to Edinburgh a further indication of this.

40. The judge took the view that L was "flourishing" under the present arrangements, and in the final paragraph of his judgment said:-

> If L relocates I consider her relationship with her father would be in peril whatever the safeguards were built into the order. The mother's plans do not have secure enough foundations and her words and actions evidence in my judgment a clear desire on her part (to) undermine the relationship between L and her father.

The judgment under appeal

41. The judge begins by reminding himself of the previous proceedings. He then identifies the relocation issue in the following way:-

> Such a move would mean inevitably that the residence order would need to be varied and the proposal is that the lion's share of the holidays should be spent with her father plus possibly three out of four weekends (Friday afternoon to Sunday

afternoon). The journey time between father's home and Chew Magna is in the order of three and a half hours and if public transport is used, it would involve a taxi to Bristol Airport, a bus and train journey from Bristol Temple Meads to Paddington and a tube journey thereafter. Adult fares are put between £49 and £137. Mother says that she would cooperate fully with these travel arrangements and share cost and journeys.

42. The judge then sets out the parents' respective cases and deals with the position of the CAFCASS Officer, who had written to the judge but who did not give oral evidence. He records that both parties and the mother's husband had given oral evidence. He summarises the mutual accusations made by each parent against the other. However, he comments:-

> The real charge against the mother is that her "application" is a means to an end (loosening considerably the bond between daughter and father with the objective of leaving the UK) and for having ill-considered and not properly costed proposals.

43. Under the heading The Welfare Test the judge correctly reminds himself that L's welfare is his paramount consideration, and refers to the fact that counsel had cited *Re B, Re S (No 2)* and *Re H*. He then recited a submission made by junior counsel for the father – which he appears subsequently to accept that:-

> the present case is distinguishable from *Re B* and *Re S* on the ground that the court here is dealing with a shared residence and not a sole residence order and because the mother's motive is a desire to weaken the link with the father – the objective rather than an unfortunate consequence – and that her proposals do not stand up to examination so it is not in L's interests for her to be moved to Somerset.

44. Under the heading Feasibility the judge records a dispute about the mother's budget and the fact that there is, as yet, no tenancy or property acquired in Chew Magna. The judge comments:-

> I have serious concerns about taking the availability of suitable and affordable accommodation on trust in the light of the mother's evidence in the earlier proceedings about (her then fiancé) having paid work in Israel that was untrue.

45. Under the heading Employment the judge acknowledges that he had expressed "some incredulity" during the hearing about the lack of work for the mother in London, but acknowledges that he has no basis so saying that the mother had misled the court about her job interviews and offers. Moreover, he adds:-

> It is not my task to assess earning capacity or to tell the mother where she should or should not work. There is a job on offer, and the question is whether the court will sanction her acceptance by making a necessary, consequential variation in the shared residence order. Whether or not the decisions of the Court of Appeal in *Re B* or *Re S* or indeed *Re H* have a direct application to this case, it is obvious that save for extraordinary circumstances it is not for a court to tell a parent where he or she should live.

46. Under the heading How would it work in practice? the judge says:-

> (The CAFCASS Officer) expresses concerns about how the arrangements between the parents would work if the mother moves to Chew Magna. There are obvious difficulties and while the holiday arrangements would be adjusted in father's favour the weekends in between would be problematic. L would have a lot of travelling and a much-reduced period of time in her father's company. It would require a very positive input from mother for it to be viable and it is not difficult to foresee an application in short order for the discharge of the shared residence order and a suggestion the father should have holiday contact with an occasional weekend in between. A far cry from the present arrangement and an even farther cry from the day to day care provided by the father prior to January 2007, which Wilson LJ described as "most unusual and highly significant".

47. Under the heading Motive the judge in paragraph 18 of his judgment makes the following findings:-

> The mother's search for work out of London intensified after the father's move to (N21). The juxtaposition of this is in my judgment no coincidence and in my judgment the mother is driven by an objective of undermining (the) shared residence order, possibly with the intention of renewing an application to relocate abroad. Part of that motivation may stem from the fact that the mother finds the father a difficult man to deal with and I am sure that from her perspective he is. I consider it likely that he has at time been inflexible and unreasonable. In part it may stem from his temperament although I note that he is a respected longstanding employee of (a named company) but also from acute anxiety and concern as (sic) what he perceives as an attempt to take L from him.

48. The judge then goes on to reject the four day on four day off shared residence proposal advanced by the father as "unnecessarily disruptive and not in L's best interests". Having held that L is well cared for and loved by both parents, and that in turn she loves them both and is happy with either, the judge goes on:-

> 21. I consider that a change in her current circumstances as proposed by the mother would be detrimental to L's welfare in that it threatens to undermine the close and loving relationship she has with her father, and is likely to be harmful to her emotional well-being. It could ultimately rebound on the mother and damage L's relationship with her.
>
> 22. Quite apart from my finding that the mother's motive is to weaken L's emotional and physical bond with her father there is in my judgment a distinction to be made between a case where the parent with a residence order in his or her favour wishes to relocate and a case where there is a shared residence order. The intention here was that there should be no principal carer. The order made on 12 December 2007 reflected the realities of mother living in north London and father in south but for that provision would have been made for L to spend more time with her father during the working week. The ideal would have been to return to the pre-January 2007 position, but that was impossible in view of the location of the mother's then residence. Even so I recognise that in cases of a shared residence order there is a delicate balancing exercise to be performed. It was not submitted by (counsel for the mother) that the mother was the de facto the principal carer but it was nevertheless submitted that the decisions of the Court of Appeal in *Re B* and *Re S*

> *(No 2)* should be applied and no order made that would in effect prevent the mother from taking up the offered employment and moving to Chew Magna. In my judgment this case is distinguishable on the basis that there is a subsisting shared residence order. However, if it were not for the conclusions I have reached as to the mother's motivation it is obviously desirable that even a move to an inconvenient (emphasis in the original) location should not if at all possible undermine a shared care arrangement. It might be workable with some lateral thinking and ingenuity but my conclusion is that it would not work in this case for reasons already given.

49. The judge, accordingly, did not sanction the move, and whilst refusing to make the order sought by the father for an equal division of L's time between her parents, made the order set out in paragraph 2 of this judgment.

Discussion

50. I have set out the judge's decision in some detail because I have to say that, in a number of respects. I do not agree with his approach. I will endeavour to set out each of these in turn.

51. In the first place, I think the judge was wrong to distinguish this case from the authorities cited to him on the basis that they dealt with sole residence orders, whereas he was dealing with a shared residence order. This is not, in my judgment, a narrow legalistic point. For the reasons which I have given in paragraph 36 above, the correct approach, in my view, is not to distinguish the case but to look at the underlying factual substratum in welfare terms, bearing in mind the tension which may well exist between the freedom to relocate which any parent must enjoy against the welfare of the child which may militate against relocation. In my judgment it is this balance which is critical, and the danger of distinguishing the case as a matter of law is that the court will either lose sight of, or give insufficient weight to the former consideration.

52. In particular, a shared residence order must not, in my judgment, be seen as an automatic bar to relocation, or, as Mr. Boyd put it, a trump card against relocation. There may be cases in which it is determinative of welfare, but there will be others where it will plainly be in the best interests of the child to relocate, notwithstanding the existence of a shared residence order. Simply to distinguish the case of the basis of a shared residence order is, in my judgment, to run the risk of making it determinative in all cases and of distorting the welfare balancing exercise.

53. Secondly, I also have to say that I do not follow parts of the judge's reasoning as cited in the extracts at paragraphs 41 and 48 above. The judge was in charge of the case. He could have made it abundantly clear to the mother that any internal relocation was not to be perceived as a prelude to an application to move abroad with L. He could, for example, have insisted on a review if it transpired that the time he allocated to the father had not been honoured, and ultimately on the facts, if the mother's lack of good faith was established, he had the possibility of ordering that L make her principal base with her father.

54. Equally, the judge does not appear to have fully considered alternative contact arrangements. He appears to take the complexities for granted. Why, for example, did he not consider an arrangement whereby the mother brought the child either to Temple Meads or to London on a Friday evening? Why did he assume, in the extract set out at paragraph 41 that contact would involve the father in extensive travel arrangements? If the mother's good faith was to be tested, what better way of doing it than requiring her to bring L to London on a

regular basis? And why was there not more investigation of the costs of travel, including the acquisition of a Family and Friends Railcard?

55. In my judgment, Miss Judd was wise to accept, as she did, that it would have been better if the judge had addressed these issues.

56. I also thought that Mr Boyd had a good point when he submitted that the judge does not appear anywhere in his judgment to consider the likely effect on the mother of a refusal to allow her to relocate, notably the fact that she would be likely to remain on benefit and living in unsuitable accommodation.

57. Equally, whilst the case was not put on the basis that the mother was the principal carer, the fact of the matter was that L was spending 10 days out of every 14 with her mother, and the judge expressly declined to order an equal division of L's time between her parents.

58. Finally, I am uneasy about the fact that the CAFCASS Officer reported to the judge by letter (in response to a letter from the judge which we have not seen) and did not give oral evidence. Furthermore, she had not interviewed the parties, and her report is very largely opinion / argument. As the judge properly observes, she does indeed stray outside her role. However, as no point was taken on her report, and as neither party called for her attendance for cross-examination, I propose to put any concerns I have about this aspect of the case out of my mind.

Disposal

59. Accordingly, were the factors which I have identified the only or indeed the principal issues in the case, the likelihood is that I would have been in favour of allowing the appeal and, at the very least, directing a re-hearing. However, they are not the only factors, and for the reasons which follow I am satisfied that, despite my criticisms of the judge's approach, this appeal should be dismissed.

60. The first point, of course, is that this is a discretionary decision to which *G v G* and, more recently, the decision of the House of Lords in *Re J (Child Returned Abroad: Convention Rights)* [2005] UKHL 40, [2006] 1 AC 80 apply: - see in particular the extract from the judgment of Butler-Sloss LJ in *Re E* cited at paragraph 24 above, and the speech of Baroness Hale of Richmond in the latter case. I remind myself that the judge had the opportunity, denied to this court, of seeking and hearing the witnesses. I also remain myself of the wise words of Cumming-Bruce LJ in *Clarke-Hunt v Newcombe* (1983) 4 FLR 482 at 486F-G.

61. Secondly, and in my judgment crucially, Miss Judd was able to rely on the judge's findings of fact, which were plainly open to him to make. In particular, he knew the case well, and found as a fact that the mother's motivation in seeking an internal relocation was "driven by an objective of undermining shared residence". Given his findings in the previous proceedings and his findings about the mother in the current proceedings, this was plainly a conclusion which he was entitled to reach: furthermore, it was plainly a factor which militated strongly against L's best interests and thus against relocation.

62. I am very conscious of the facts, as Miss Judd properly reminded us. that; (1) we do not have a full transcript of the proceedings before the judge; and (2) that he was obviously working at some speed in order to assist the parties by resolving the issue swiftly. Insofar as I have been critical of his reasoning, both these factors need to be borne in mind. Above all,

however, I have reached that the judge was entitled to make the findings of fact that he did, and that his decision cannot be said to be outwith the ambit of reasonable disagreement, or plainly wrong.

63. Thus whether one regards the facts as exceptional, or whether one takes the view that the judge was entitled in all the circumstances of the case to reach the conclusion on L's welfare which he did reach, the result, in my judgment is the same.

64. In summary, therefore, it seems to me that it was properly open on the facts of the case for the judge to reach the conclusion that internal relocation to Chew Magna was not in L's best interests. That was a discretionary decision within *G v G* and one with which this court should not interfere.

65. For these reasons, I would dismiss this appeal.

Postscript

66. I cannot part with this appeal without addressing a few words directly to L's parents. The judge was plainly right to find that both parents love L, and that, in turn, she loves them and is "happy with either". However, the judge was also right, in my view, to find that there is a risk to L if her parents "continue to be at loggerheads". Indeed, I would put the matter more strongly. If the parents retain their current hostility to each other, they will undoubted cause L serious emotional harm.

67. L is a child of mixed heritage, and in my judgment it is essential that she benefits from both parts of it. What matters, in my view, is that L should have love and respect for each of her parents and should be able to move easily between them. To achieve this, the parents must have respect for each other.

68. Each parent represents 50% of L's gene pool. Children, moreover, learn about relationships between adults from their parents. In twenty years time it will not matter a row of beans whether or not L spent x or y hours more with one parent rather than the other: what will matter is the relationship which L has with her parents, and her capacity to understand and engage in mutually satisfying adult relationships. If she is given a distorted view of adult relationships by her parents, her own view of them will be distorted, and her own relationships with others – particularly with members of the opposite sex – will be damaged.

69. L must therefore be able to appreciate that even though her parents are separated, they have respect for each other. Most disputes about children following parental separation have nothing to do with the children concerned: they are about the parents fighting all over again the battles of the past, and seeking retribution for the supposed ills and injustices inflicted on them during the relationship. This case shows every sign of going that way.

70. The father and the mother share equal responsibility for this state of affairs, and the father in particular should not regard the outcome of this appeal as a victory: it is, in reality, a defeat for both parties, who have been unable to resolve their differences by sensible agreement. They are fortunate in having a daughter whom they both love and who loves them. Each must fully appreciate the role the other has to play in L's life, and the current hostility between them must cease. Otherwise, in my judgment, the emotional damage to L will be serious and lasting.

Lord Justice Aikens
71. I agree. I would like to associate myself particularly with the remarks of Wall LJ in the Postscript to his judgment.

Mr Justice Bennett
72. I also agree. I would also like to associate myself particularly with the remarks of Wall LJ in the Postscript of his judgment.