IN THE SUPREME COURT OF JUDICATURE
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE WATFORD COUNTY COURT
(HHJ CONNOR)

No. B1/2000/2430

Royal Courts of Justice
Strand
London WC2

Monday 20th November, 2000

B e f o r e:

THE PRESIDENT
LADY ELIZABETH BUTLER−SLOSS
−AND−
LADY JUSTICE HALE

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Official Shorthand Writers to the Court)

Mr McCourt (instructed by Messrs PW Moody Solicitors, Barnet, London) appeared on behalf of the Appellant.
Mr A Thorpe (instructed by Messrs SJ Vickers & Co Solicitors, Palmers Green, London) appeared on behalf of the Respondent.

J U D G M E N T

(As Approved by the Court)

1. THE PRESIDENT: I will ask Lady Justice Hale to give the first judgment.

2. LADY JUSTICE HALE: There are two matters before the court today. The first is a mother's appeal against a shared residence order made by His Honour Judge Connor in the Watford County Court on 1st June 2000. The judge himself gave permission to appeal on 26th June 2000. Technically an extension of time is required but no doubt he would have granted that if asked and no prejudice has been caused. For my part I would readily grant that extension.

3. The second matter is the mother's application for permission to appeal against a order of His Honour Judge Connor in the Watford County Court on 11th October 2000 dismissing her application that contact with the father be supervised or suspended and ordering her to pay the father's costs of that day.

4. The case concerns three girls, S, who was born 2nd November 1987, and is now just 13; T, who was born on 15th June 1989, and is now 11; and A, who was born on 9th June 1991, and is now 9. The parents are both ethnically Gujerati and of the Hindu religion. The father comes from Kenya, where he still has family. The mother comes from Mumbai in India, where she still has family. An arranged marriage took place in Mumbai on 5th September 1986. The mother was living in India then, but the father had been living in this country for some time and the couple came to make their home here.

5. The marriage broke down in the summer of 1995. There were divorce proceedings. The pattern was established quite quickly, of the children living with their mother but having very substantial contact with their father. Even from August 1995 this was weekly. As from February 1996 it was one weekday evening and three weekends in five, half the school holidays, birthdays and religious festivals, including a three−week holiday in Kenya. As from June 1996 the pattern was established, in an order made by His Honour Judge Ansell, that it was three weekends out of four with the father and the rest of the time shared as before. Later, the father agreed that there should be one shared weekend, so that it became two weekends with him, one with the mother and one shared and that basic pattern seems to have continued. But there were frequent returns to court to settle the precise schedules each year, to ensure the release of passports so that they could go to Kenya, to secure that the mother told the father of the children's appointments at the eye hospital and to resolve a dispute about the children's education.

6. The current proceedings began with the father's application on 16th February of this year to determine the contact schedule for 2000/20001, and for what was called a "joint" residence order and a prohibited steps order prohibiting the mother from causing anyone to withhold information about the children from him.

7. The hearing before His Honour Judge Connor began on 15th March 2000. It was part heard to 17th April when there was no time for him to give judgment and so that was delivered on 1st June.

8. There were three basic matters for him to determine. The first was the summer holiday this year. The father wanted to take the children to Kenya and had booked flights; the mother wanted to take them to India to see their maternal grandfather, who was in very poor health, and had also booked flights.

9. The judge found that the trip to India was in the children's interests. It was the mother's turn to have the first choice of dates and the father had not responded to an overture to agree dates with the mother's solicitors, and so he held in favour of the trip to India. There has been no appeal against that, of course, but it has led to a difficulty which prompted the second application before us and so I must return to the events of the summer.

10. The second issue was the general pattern of contact. The mother now wanted the weekend time equally shared, that is in each four weeks there should be one full weekend with each parent, and in the intervening weekends one full day with each parent. The judge found that there was no justification to change the arrangements. These conformed to the basic pattern which had been laid down by His Honour Judge Ansell in June 1996. He was entitled to assume that there had been good reasons for such a high level of contact, and given the animosity between the parties, those arrangements had worked surprisingly well.

11. The third matter was the question of a shared residence order and/or a prohibited steps order. The children spent some 140 days each year with their father, which he calculated was 38 percent of their time. The father claimed to have experienced difficulties with schools and the hospital in obtaining information and to have felt like a second class parent. The judge found that there was an exceptionally high level of animosity between the parents, despite the time that had elapsed since they separated.

> That animosity is most obvious in the evidence of [the mother]...She is a person who very readily becomes excited. In many respects, she was a terrible witness."

12. The father in his view presented "as a calm, thoughtful person, with his emotions very much more under control". Nevertheless, the judge held that the father was at least as responsible as the mother "for the state of animosity that subsists between them." And because the father was more in control of his emotions he should do more "to lessen the tension between them", whereas, in fact, he stirred up the mother unnecessarily.

> The sad fact is that it appears that neither parent can put behind them their own personal feelings or swallow their pride for the benefit of the children."

13. There was no evidence that the children were yet seriously affected, but there was no guarantee that that would continue. There was, incidently, no welfare report in the case because His Honour Judge Ansell at an earlier hearing had decided that it was not necessary.

14. The judge considered the evidence of the difficulties faced by the father in gaining information. He found that that evidence was unsatisfactory because it came in the form of letters

from the school and the hospital rather than witness statements. Nevertheless, he concluded that there had been difficulties and that part of the problem arose from the fact that one parent had a residence order and the other did not.

15. He considered the cases of Re H (A Minor) (Shared Residence) [1994] 1 FLR 717 and A v A (Minors) (Shared Residence Order) [1994] 1 FLR 669 and, in particular, the observations of my Lady, Lady Justice Butler−Sloss (as she then was) and to which I will return. He was somewhat anxious as to whether he had to follow her words to the letter, but considered that it was a matter for his discretion in the individual case. He pointed out that the general pattern of contact had been settled now for some time; there was no evidence that the children were having difficulty moving between their parents; there was a substantial risk that the children would be harmed by the continuing conflict. He was convinced that the mother was using the sole residence order as a weapon in the war with her ex−husband

> ...and that the making of a joint residence order underlying the status of the parents as equally significant in the lives of the children would be likely to diminish rather than increase that conflict."

16. Hence, he made the shared residence order, that is an order that the children should live with both of their parents defining the time to be spent with the father and providing that the rest was to be spent with the mother. All of these arrangements, of course, were subject to a contrary agreement between the parents for a court order.

17. That order was made on 1st June 2000. Sadly, further conflict arose over the summer. The evidence in relation to that is limited. The children did, after all, go to Kenya with their father. There were problems over the hand over. The mother says that she took them to the car park to be collected, as agreed, on 19th July but the father did not arrive. The father's case, set out in a letter from his solicitors, was that someone, without his authority, had changed the flights to the following day, so that their departure was delayed. Nevertheless, he did collect the children and they flew on 20th July.

18. There were then problems over the return. The order was that the children had to be returned by 7pm on the Saturday 12th August and they were due to fly to India on the morning of Monday 14th August. When they did not arrive at 7 o'clock the mother contacted the police. In fact, the children had flown back a day later and so they did not arrive in this country until 7 o'clock on the Sunday morning. Nevertheless, the father did not contact the mother to explain the situation but took them to his home so that they could get some rest. They were not returned until the Sunday evening, the mother, by that stage, being in a state of very considerable anxiety.

19. She, therefore, applied in September to supervise or suspend the father's contact. That application was dismissed by His Honour Judge Connor on 11th October 2000 and he took the unusual step of ordering the mother to pay the costs of that hearing.

20. I turn first to the issue on the appeal. Mr McCourt, who appears for the mother, has argued that the authorities indicate that shared residence orders should only be made either in exceptional circumstances or, at the very least, where it can be demonstrated that they would show a positive benefit for the children. In this particular case there were no exceptional circumstances, no evidence of positive benefit and thus, no reason to change the legal arrangements which had been in place for some time. He also argues that access to information was irrelevant or given too much weight because the father already had parental responsibility and was entitled to that information. Thus that, by itself, could not be regarded as an exceptional circumstance or of positive benefit.

21. In considering these arguments it may be helpful to go back to basics. Before the Children Act 1989 there was a Court of Appeal authority in Riley v Riley [1986] 2 FLR 429, to the effect that a shared residence order, which had been made and worked comparatively well in that case for five years, should never have been made at all. It is clear, as the court appreciated in the later cases, that the intent of the Children Act 1989 was to change that decision.

22. The background to the Children Act provision lies in the Law Commission's Working Paper No. 96, published in 1986, on Custody and the Law Commission's Report, Law Com. No. 172, published in 1988, on Guardianship and Custody. If I may summarise the basic principles proposed, the first was that each parent with parental responsibility should retain their equal and independent right, and their responsibility, to have information and make appropriate decisions about their children. If, of course, the parents were not living together it might be necessary for the court to make orders about their future, but those orders should deal with the practical arrangements for where and how the children should be living rather than assigning rights as between the parents.

23. A cardinal feature was that when children are being looked after by either parent that parent needs to be in a position to take the decisions that have to be taken while the parent is having their care; that is part of care and part of responsibility. Parents should not be seeking to interfere with one another in matters which are taking place while they do not have the care of the children. They cannot, of course, take decisions which are incompatible with a court order about the children. But the object of the exercise should be to maintain flexible and practical arrangements whereever possible.

24. Then dealing with residence orders the Commission said this at paragraph 4.12 of the Law Com No. 172:

> Apart from the effect on the other parent, which has already been mentioned, the main difference between a residence order and a custody order is that the new order should be flexible enough to accommodate a much wider range of situations. In some cases, the child may live with both parents even though they do not share the same household. It was never our intention to suggest that children should share their time more or less equally between their parents. Such arrangements will rarely be practicable, let alone for the children's benefit. However, the evidence from the United States is that where they are practicable they can work well and we see no reason why they should be actively discouraged. None of our respondents shared the

> view expressed in a recent case [Riley v Riley] that such an arrangement, which had been working well for some years, should never have been made. More commonly, however, the child will live with both parents but spend more time with one than the other. Examples might be where he spends term time with one and holidays with the other, or two out of three holidays from boarding school with one and the third with the other. It is a far more realistic description of the responsibilities involved in that sort of arrangement to make a residence order covering both parents rather than a residence order for one and a contact order for the other. Hence we recommend that where the child is to live with two (or more) people who do not live together, the order may specify the periods during which the child is to live in each household. The specification may be general rather than detailed and in some cases may not be necessary at all."

25. It is for those reasons that section 8(1) of the Children Act 1989 defines "a residence order" as:

> An order settling the arrangements to be made as to the person with whom a child is to live..."

26. "Person" of course includes "persons" on ordinary principles of statutory construction. It is, therefore, an order about where the children are to live. Section 11(4) of the Act specifically 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."

27. Not long after the Children Act came into force in October 1991 the matter came before the Court of Appeal, on 1st December 1992, in Re H (A Minor) (Shared Residence) [1994] 1 FLR 717, Purchas LJ said at page 728:

> That such an order [which he referred to as a joint residence order] is open to the court, as has been said in the judgment of Cazalet J, is clear from the provisions of s 11(4) of the Children Act 1989, as was indicated during the debate on the Bill by the Lord Chancellor. But, at the same time, it must be an order which would rarely be made and would depend upon exceptional circumstances."

28. He went on to refer to the case of Riley v Riley.

29. The matter next came before the Court of Appeal on 3rd February 1994, in A v A (Minors) (Shared Residence Order) [1994] 1 FLR 669; Lady Justice Butler−Sloss (as she then was) at page 677 said this:

> Miss Moulder, representing the father, accepts that the conventional order still is that there would be residence to one parent with contact to the other parent. It must be demonstrated that there is positive benefit to the child concerned for a s 11(4) order to be made, and such positive benefit must be demonstrated in the light of the s 1 checklist... The usual order that would be made in any case where it is necessary to make an order is that there will be residence to one parent and a contact order to the other parent. Consequently, it will be unusual to make a shared residence order. But

> the decision whether to make such a shared residence order is always in the discretion of the judge on the special facts of the individual case. [I suspect that when My Lady used the word "special" she meant "particular"]. It is for him alone to make that decision. However, a shared residence order would, in my view, be unlikely to be made if there were concrete issues still arising between the parties which had not been resolved, such as the amount of contact, whether it should be staying or visiting contact or another issue such as education, which were muddying the waters and which were creating difficulties between the parties which reflected the way in which the children were moving from one parent to the other in the contact period."

30. She went on to say:

> If a child, on the other hand, has a settled home with one parent and substantial staying contact with the other parent, which has been settled, long−standing and working well, or if there are future plans for sharing the time of the children between two parents where all the parties agree and where there is no possibility of confusion in the mind of the child as to where the child will be and the circumstances of the child at any time, this may be, bearing in mind all the other circumstances, a possible basis for a shared residence order, if it can be demonstrated that there is a positive benefit to the child."

31. It is quite clear that in those words my Lady was moving matters on from any suggestion, which is not in the legislation, that these orders require exceptional circumstances. She was also recognising that it stands to reason that if it has not yet been determined where the children are to live, how much contact there is to be, or whether or not there is to be staying contact with the parent with whom they are not spending most of their time, then there could not be a shared residence order, because that would be an order that the children were to live with both parents.

32. If, on the other hand, it is either planned or has turned out that the children are spending substantial amounts of their time with each of their parents then, as both the Law Commission and my Lady indicated in the passages that I have quoted it may be an entirely appropriate order to make. For my part, I would not add any gloss on the legislative provisions, which are always subject to the paramount consideration of what is best for the children concerned.

33. This case is one in which, as the judge said, the arrangements have been settled for some considerable time. The children are, in effect, living with both of their parents. They have homes with each of them. They appear to be coping extremely well with that. I accept entirely what we have been told by the mother today, that she would never seek to turn the children against their father, because she herself so loves her own father that she could not possibly do that. It is greatly to her credit that her children have been able to maintain such a very strong and good relationship with both of their parents. Of course, it is to the father's credit as well that he has remained as dedicated to their interests as he has.

34. In those circumstances it seems to me that there is indeed a positive benefit to these children in those facts being recognised in the order that the court makes. There is no detriment or disrespect to either parent in that order. It simply reflects the reality of these children's lives. It was entirely

appropriate for the judge to make it in this case and neither party should feel that they have won or lost as a result. I would, therefore, dismiss the appeal.

35. As far as the application for permission to appeal is concerned, we are hampered by the lack of clear evidence and clear findings of fact in relation to the events of the summer. On any view, to bring the children back into this country later than the time indicated in the court order and then not to take positive steps to inform the mother that the children were safely back and arrange for them to come home to her ready for their trip to India the following day, was irresponsible and unkind on the part of the father. It amply bears out His Honour Judge Connor's observation that the father is capable of behaving in a way that winds the mother up. The mother, as the father perfectly well knew, was liable to overreact in that situation and it may be that the judge was right to characterise her reaction in going to the police as an overreaction. That, it seems to me, is not a matter upon which one can form a concluded view. One can form a concluded view that those events came nowhere near constituting a good ground for suspending or supervising contact.

36. The father must understand that it is his responsibility to adhere to the timetables set, then if he does not do so he must make sure that the mother knows what the position is, and he must make appropriate arrangements to put things right. If that can take place then, perhaps, the mother would have no cause to overreact, in the way that she did in response to the events of the summer, by making the application that she did.

37. Fortunately, the father now realises that it is very rare indeed for the courts to make costs orders in cases about children. The courts realise that parents love their children and care about their children's welfare and when they bring cases to court they generally are trying to secure their children's best interests. For that reason the court is reluctant to make a costs order unless one of the parents has behaved totally unreasonable in bringing the proceedings. The father, recognising that, has undertaken not to enforce the costs order made on 11th October. The mother accepts that, in those circumstances, the appropriate thing to do is to make no order on her application, so that that matter is now at an end.

38. THE PRESIDENT: I agree with the judgment of Lady Justice Hale and I only add a few words of my own because the judge trying the case was potentially, though fortunately not in the event, inhibited by some observations of mine which led him to believe that he had to be particularly cautious in making a shared residence order.

39. The approach of the Court of Appeal in the decision of Re H [1994] 1 FLR 717 was made, as my Lady has already said, shortly after the implementation of the new Children Act. It looked back at an earlier decision of the Court of Appeal in Riley [1986] 2 FLR 429 and, of course, a decision made under the old legislation. With hindsight that decision of the Court of Appeal was unduly restrictive. In A v A (minors) (Shared Residence Order) [1994] 1 FLR 669 decided 18 months later, this court had a more relaxed approach to the concepts of shared residence. Now nine years later with far greater experience of the workings of the Children Act it is necessary to

underline the importance of the flexibility of the Children Act in section 8 orders and, consequentially, that the Court of Appeal should not impose restrictions upon the wording of the statute not actually found within the words of the section.

40. Any application to change an existing order must be supported by good reasons. A shared residence order is not the standard order and it is helpful to look at the guidance of the Children Act 1989 Guidance and Regulations, Volume 1, Court Orders paragraph 2.2(8) at page 10 and I am taking it for convenience from A v A page 174 in the judgment of Connell J. He set out there a passage from the Guidance, a very helpful passage and it says at E:

> It is not expected that it will become a common form of order partly because most children will still need the stability of a single home, and partly because in the cases where shared care is appropriate there is less likely to be a need for the court to make any order at all. However, a shared care order has the advantage of being more realistic in those cases where the child is to spend considerable amount of time with those parents 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."

41. I stand by what I said on page 677 and 678, save to say, as my lady quite correctly said, the word is not "special" facts, I meant on the "particular" facts of the individual case. I am not certain that one does have to demonstrate a positive benefit to make a shared residence order. One does have to demonstrate that a shared residence order is in the interest of a child in the accordance with the requirements of section 1 of the Children Act.

42. The importance for a judge of first instance is that the guidance that comes from the Court of Appeal, setting out the principles to be followed, is, I hope, valuable for first instance judges but, at the end of the day, it should not inhibit the first instance judge from making the right decision. The right decision is dependant upon the individual facts of each case where the judge exercises his discretion and decides what is best for the children in that particular case.

43. In my judgment this judge was clearly entitled to exercise his discretion in the way he did. He took the view that it was beneficial for the children and I see no reason to disagree with him and, therefore, I too would dismiss this appeal. I would only add this: I would like both these parents to realise that neither of them has won today; that this is a case in which the father must go away and make contact work, in the sense that he has to obey court orders as to timings and if, as my Lady says, in the words of wisdom that she expressed today, he cannot obey it, he must use his telephone first to apologise and second to explain. Now the mother must respond to that and be more flexible in understanding that the strict times cannot always be kept to.

44. Communication is the art here and both of them are demonstrating a woeful lack of use of communication. I would not like the father to think that his returning the children on the Sunday, when the order said the Saturday, and not letting the mother know, was in any way reasonable, and

I share the view of Lady Justice Hale that it was both irresponsible and unkind. But I am grateful to the father for having recognised that in a children case it is very unusual to make a costs order and, perhaps, also to recognise with the help of his counsel, that to get rid of such an order will get rid of a feeling of injustice by the mother and may just make the future contact better.

45. What these two should do is to leave this court and say we have an order that has run since 1996, let us make it work. Why are we wasting time and money and a great deal of emotional stress in going back to court? You have a framework for your children; they love you both. Go away and do not bother us any more. It is time you got on with your lives and your children's lives without using the courts.

46. The appeal, therefore, is dismissed with no order as to costs, save legal aid assessment. The application for permission to appeal: there will be no order on the written undertaking of the father not to pursue the order for costs of 11th October 2000. Any other point?

47. MR THORPE: My Lady, you made an order, I believe, in relation to the costs of the appeal. In the light of the success of the appeal I was proposing to make an application for costs against the Legal Services Commission, in the light of the facts that the−−

48. THE PRESIDENT: Mr McCourt, your client, I take it, is legally aided, is she not?

49. MR MCCOURT: Yes, she is, my Lady.

50. THE PRESIDENT: Yes. You have no point to make as to whether the Legal Services Commission should pay this? It is not an unusual order nowadays for us to make against the Legal Services Commission. Your client clearly does not have the funds to meet it.

51. MR MCCOURT: No, she has not. I make two points about that. One is what your ladyship said in respect of the making of costs orders.

52. THE PRESIDENT: Well, we do −− that does not apply in the Court of Appeal, I am afraid. If, in fact, an appeal is pursued, of course leave was given. Is your client paying his own costs?

53. MR THORPE: He is, my Lady.

54. THE PRESIDENT: Yes, Mr Thorpe, we think you have a point here that there will be legal aid assessment of the mother's costs. We do not think, really, that leave should have been given in this case for appeal to the Court of Appeal, although maybe it has turned out to be helpful, and, therefore, we think it appropriate that there should be an order for costs to follow the event. It is clear that the mother, who is legally aided, does not have the finance to meet any order and, therefore, we will make the order against the Legal Services Commission and suspend it for the usual period to give the Legal Services Commission the opportunity to be heard, if they wish to be heard, on the order for costs. Thank you. The usual period is ten weeks.