In Practice

Shared Parenting

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In the May edition of this journal, at [2005] Fam Law 411, there is an account of a case heard in December 2004 in Coventry which asks: 'Are the courts now making more orders for shared parenting?'. The editor requested other examples of such orders in the country courts of England and Wales, so I offer this contribution as another account of a case, which I heard in January 2005 while sitting as a Recorder on the Western Circuit. The parents had two pre-teen children. Following their separation and divorce some 6 years previously, the father had applied for a joint residence order. However, on advice, he had been given leave to withdraw that application and consent orders for residence in favour of the mother and contact orders in favour of the father followed. Consensual variations to the contact pattern had been made over the ensuing years such that by the time of the hearing before me the children were seeing their father over one weekday night each week and over three weekends in every four, with longer periods of staying contact during each of their school holidays.

In 2003 the father reapplied for a shared residence order and sought an extension of the time the children spent with him. A Child and Family Courts Advisory and Support Service (CAFCASS) report was prepared and recommended no substantive change to the children's pattern of care save for some extension of the holiday periods with their father. The author of the report did not consider that a shared residence order would assist the parties and felt that it was possible that it might exacerbate parental dispute regarding the children. After considering that report, the father broadly accepted the CAFCASS recommendation concerning the division of the children's care with each parent, but sought orders for those arrangements to be embodied in an order for shared residence. The mother did not agree to any change in her sole residence order. At court, following negotiations, a large measure of agreement was achieved with a rota or pattern for the children's care by each of their parents being charted for the next 2 years. It was calculated on behalf of the father that this resulted in the children spending approximately one-third of their time with him in each year and the remainder with their mother. The issue over sole or joint residence, however, remained.

As I was keen to obtain an understanding of the practical issues relating to their parenting about which the parties might be likely to agree or disagree, I invited them both (before hearing any evidence) to look at and consider a 'schedule of items relating to the exercise of parental responsibility', which had been agreed by the parents in the case of *A v A (Shared Residence)* [2004] EWHC 142 (Fam), [2004] 1 FLR 1195 and which appears at the end of the law report as follows:

'Schedule of items in relation to the exercise of parental responsibility
(1) Decisions that could be taken independently and without any consultation or notification to the other parent:

- how the children are to spend their time during contact;
- personal care for the children;
- activities undertaken;
- religious and spiritual pursuits;
- continuance of medicine prescribed by GP.

(2) Decisions where one parent would always need to inform the other parent of the decision, but did not need to consult or take the other parent's views into account:

- medical treatment in an emergency;
- booking holidays or to take the children abroad in contact time;
- planned visits to the GP and the reasons for this.

(3) Decisions that you would need to both inform and consult the other parent about prior to making the decision:

- schools the children are to attend, including admissions applications. With reference to which senior school C should attend, this is to be decided taking into account C's own views and in consultation and with advice from her teachers;
- contact rotas in school holidays;
- planned medical and dental treatment;
- stopping medication prescribed for the children;
- attendance at school functions so they can be planned to avoid meetings wherever possible;
- age that children should be able to watch videos, ie videos recommended for children over the ages of 12 and 18.'

Like Wall J (as he then was), I considered it an extremely useful document, and wondered whether these parents might benefit from considering a similar agreement, whatever order I subsequently made. Fortunately, as the mother appeared in person, the CAFCASS officer who was on hand kindly agreed to assist in mediating these discussions, together with Andrew McFarlane QC (as he then was) who appeared on behalf of the father. After a further period of discussion I was delighted that the parties were able to agree an equally comprehensive schedule incorporating their own modifications and setting out matters upon which they agreed that prior mutual consultation or subsequent notification would, or would not, be required.

On the issue of shared residence I went on to hear the evidence. The CAFCASS officer noted that the father remained unhappy with the present sole residence order, feeling he was a 'second class parent' and that he felt very much that he should be on an equal footing with the mother. She considered that the children were not of an age to understand the concept of sole or joint residence and saw no difference in their parents' roles, other than in the time they spent with them. The mother when first seen had expressed a concern about differences in the parties' choice of schooling. She did not claim (as the father feared) that she had a right of sole determination on the matter if she maintained sole residence, and in the event schooling had been agreed. The mother had prepared a letter for court on the first day of hearing in which she expressed it a privilege that she had been given sole residence and had acted accordingly. In her evidence the CAFCASS officer stated that in the discussions outside court the mother had expressed herself as being 'in the driving seat' and that this was a matter which concerned the father and tended to make him feel marginalised. In evidence the CAFCASS officer did not feel able to say whether a change to joint residence would lessen or increase the areas of dispute and expressed herself very impressed at the large area of agreement that the parties had reached outside court before the hearing. She was clear that any diminution of disagreement would be to the children's advantage, while any increase in it could damage their emotional development.

Having heard the evidence of both parties it was clear that the father felt very keenly that not only the mother, but also his friends and associates regarded him as the lesser parent because the children's mother had sole residence while he only had contact. This may well have been more of a perception than a reality, but I was left in no doubt that the perception was very real to him. It was not difficult to see how that sense of resentment might affect him in communications and everyday negotiations concerning his children, which were and would continue to be necessary between himself and the children's mother. The mother made it clear that she considered this perception to be more emotional than real and that since contact had been going well she felt there was no reason to change the sole residence order, which in her view was working. The father, in contrast, felt that the pressure of the court proceedings might be an ingredient in recent better relations and feared it may not be sustained in the longer term. I asked the mother if she felt that the children would suffer a disadvantage if

the order were to be changed to a joint one. While she was not able to articulate an example at that time, she put forward her case on the basis that there was no tangible advantage that she could see in changing it.

In coming to my decision I took account of Wall J's judgment in *A v A,* which encompasses and repeats the two main decisions preceding it, namely D *v* D *(Shared Residence Order)* [2001] 1 FLR 495 (Dame Elizabeth Butler-Sloss P and Hale LD and *Re* F *(Shared Residence Order)* [2003] EWCA Civ 592, [2003] 2 FLR 397 (Thorpe LJ and Wilson D. In doing so it was apparent to me that since 1999 (when the sole residence order had been made by consent in the instant case), there had been a perceptible shift of emphasis as to the appropriateness of shared residence orders in general, as well as particular cases. In 1999 a joint residence order was the less usual species of order, made largely in cases where exceptional circumstances such as broadly equal time spent with each parents could be shown, or perhaps in those rare case devoid of substantive areas of difference between the parents. Now, however, as Wall J observed at para [119], such orders must:

'... reflect the reality of the children's lives. Where children are living with one parent and are either not seeing the other parent or the amount of time to be spent with the other parent is limited or undecided, there cannot be a shared residence order. However, where children are spending a substantial amount of time with both their parents, a shared residence order reflects the reality of the children's lives. It is not necessarily to be considered an exceptional order and should be made if it is in the best interests of the children concerned.'

Reflecting on *Re* F, he added at para [121] that the court had:

"…made a shared residence order in relation to two small children, notwithstanding the fact that the mother lived in Edinburgh, a considerable distance from the father's home in England. The Court of Appeal, upholding [the] decision, said that such a distance did not preclude the possibility that the children's year could be divided between the homes of two separated parents in such a way as to validate the making of a shared residence order. A shared residence order had to reflect the underlying reality of where the children lived their lives and was not made to deal with parental status. Any lingering idea that a shared residence order was apt only where the children alternated between the two homes evenly was erroneous. If the home offered by each parent was of equal status and importance to the children an order for shared residence would be valuable.

At para [123] he also observed that a residence order in the father's favour would not, as a matter of law, diminish the mother's status as a parent or remove her equal parental responsibility for the children but that, in his judgment, it might nonetheless be making a statement that although the children shared residence with their parents equally, that fact was nonetheless not to be recognised in the court order.

On the facts as I found them to be, it was not difficult to conclude that a shared residence order would reflect the reality on the ground of the children living not equally but one-third/two-thirds with each parent and both being involved equally in the decision making and in the exercise of parental control and responsibility that this would entail. There was no basis for believing such an order might cause confusion or stress to the children (the evidence being that it would be of little significance to them). However, insofar as it was likely to be of great significance to their father, there were grounds to believe that such an order would be likely to diminish the insecurity he had felt in his role as co-parent with the mother. By reflecting the co-operation which both parents had worked at, a joint residence order served not only to endorse reality but (as I hoped) to settle some of the insecurities which had prevented the arrangements working as smoothly as they should have for the children in the past.