

SHARED PARENTING: THE LAW AND THE EVIDENCE (PART I)

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Introduction

Guidance on shared parenting which recently appeared on the Cafcass website attracted controversy surrounding its status and the process by which it had been produced, together with concerns about its failure to set out the law and the research evidence in a clear, accurate and balanced fashion (see Hunt *et al.* [2009]). It was subsequently withdrawn from the site and described as a 'draft', and it seems likely that more refined guidance will appear in due course. In the meantime, in the pages of this journal I wish to try to offer a balanced and accurate account of both the law and the relevant research evidence. In this, the first of two articles, I explore the law; in a forthcoming piece I shall look at the research evidence.

The concept of shared parenting in law

There are two ways in which the notion of shared parenting on the breakdown of the parents' relationship is reflected in law: in the concept of parental responsibility, which may be held and exercised by both parents and which is not lost by reason of the separation; and secondly, in orders which specify the period or periods that parents will spend together with their child. The latter may be reflected in a contact order in favour of a non-resident parent or a shared residence order. The focus here is upon the courts' approach to shared residence orders.

Section 11(4) of the Children Act 1989 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.'

Often a shared residence order will reflect an arrangement whereby the child moves back and forth between the parents' respective homes, spending several days in each. However, the time spent with each parent could be longer and more spaced out. It has been said (see *Re F (Children) (Shared Residence Order)* [2003] EWCA Civ 592, [2003] 2 FLR 397, at para [21]) that:

'The fact that the parents' homes are separated by a considerable distance does not preclude the possibility that the children's year will be divided

between the homes of the two separated parents in such a way as to validate the making of a shared residence order.’

Furthermore, reference to the concept of ‘household’ means that it is possible to make a shared residence order where persons in whose favour the order is made are living together in the same location (e.g., a house or flat), albeit not sharing households.

Deciding shared residence order cases: guidance from statute and the House of Lords

As is well known, a court deciding a shared residence application must apply relevant decision-making principles in s1 of the Children Act 1989. The court must treat the child’s welfare as its paramount consideration (i.e., the sole consideration: see *Re G (Residence: Same-sex Partner)* [2006] UKHL 43, [2006] 2 FLR 629, HL). Where the application is contested, the court must apply the checklist of factors in s1(3); and s1(5) provides that the court shall not make an order unless it is better for the child than making no order at all. As Ward LJ explained in *Re H (Shared Residence: Parental Responsibility)* [1995] 2 FLR 883, ‘each case will depend upon its own facts’, or, as Wall LJ put it in *Re T* [2009] EWCA Civ 388 (7.4.2009), ‘every case is fact sensitive’ (at para [6]).

The nature of the court’s task (as set out above) was explained recently by the House of Lords in *Holmes-Moorhouse v Richmond-Upon-Thames LBC* [2009] UKHL 7, [2009] 1 FLR 904, while examining the impact of a shared residence order upon a housing authority’s duties under the Housing Act 1996. The unusual factual and legal context of the decision meant that the case did not provide an opportunity for the House to examine the many Court of Appeal decisions on shared residence which have been decided in the more usual factual context of a dispute between parents. Indeed, a striking feature of the case was how little was known of the facts and the family’s situation (see para [33]). Nevertheless, the House made some important statements on the nature of shared residence and how shared residence order cases should be approached. The facts as disclosed were straightforward. A judge had ordered the father of four children (aged 16, 14, nine and six) to leave the (rented) family home and made a shared residence order that the children live with the father on alternate weeks and half of the school holidays. The family was known to the local social services department, having been referred by the police because of concerns about domestic violence, and the two older children were on the Child Protection Register. The court’s order rendered the father homeless and a question arose for the housing authority as to whether, as the father claimed, he was a priority housing need within s189(1) of the Housing Act 1996, being ‘a person with whom dependent children ... might reasonably be expected to reside’. The father argued that the shared residence order put him into this

category, but the relevant housing authority disagreed. The case went to the House of Lords upon the housing authority's appeal. It raised an important question of principle concerning a court's decision making on shared residence and those of a council under the 1996 Act.

Lord Hoffmann began his opinion by explaining that 'shared residence orders are not nowadays unusual' (at para [7]; and see the similar statement by Sir Mark Potter P in *Re A Joint Residence: Parental Responsibility*) [2008] EWCA Civ 867, [2008] 2 FLR 1593, CA at para [66]). This statement could be seen as an important recognition by the House of Lords of a shift in the courts' approach to shared residence. In the pre-Children Act 1989 era, the courts took a very dim view of shared residence (see *Riley v Riley* [1986] 2 FLR 429), which spilled over into the early post-Children Act cases: the Court of Appeal initially imposed a criterion of exceptional circumstances (*Re H (A Minor) (Shared Residence)*) [1994] 1 FLR 717, then apparently one of 'unusual circumstances' (*A v A*), before *D v D (Shared Residence Order)* [2001] 1 FLR 495 sought (arguably not entirely successfully as a matter of doctrine) to remove these glosses upon the statutory criteria. In a recent decision, *Re W (Shared Residence Order)* [2009] EWCA Civ 370, [2009] 2 FLR 436, Wilson LJ (albeit somewhat glossing over the doctrinal difficulties) has, however, helpfully clarified the position. Citing Hale LJ's judgment in *D v D (Shared Residence Order)* [2001] 1 FLR 495 at paras [31]–[32], his Lordship commented (at para [13]):

'for the last 8 years the better view has been that, while of course a need remains for the demonstration of circumstances which positively indicate that the child's welfare would thereby be served, there is no such gloss on the appropriateness of an order for shared residence as would be reflected by the words "unusual" or indeed "exceptional."'

Returning to Lord Hoffmann's opinion in *Holmes-Moorhouse*, his Lordship went on (at para [8]) to explain that:

'The court's decisions as to what would be in the interests of the welfare of the children must be taken in the light of circumstances as they are or may reasonably be expected to be.'

The court has no power to conjure appropriate accommodation into existence and the court 'should not make a shared residence order unless it appears reasonably likely that both parties will have accommodation in which the children can reside' (at para [8]).

By contrast, the housing authority's decision imported wider considerations: 'whether it was reasonably to be expected, in the context of the scheme for housing the homeless, that children who already had a home with their mother

should be able to reside with the father’ (at para [9]); and in practice it would only be in exceptional circumstances that it would be reasonable to expect the authority to so conclude, given that a substantial part of the property would remain empty half of the time (see para [21]).

Baroness Hale of Richmond (with whom Lord Walker of Gestingthorpe and Lord Neuberger of Abbotsbury expressly agreed) delivered a concurring opinion from a family lawyer’s perspective, which Lord Hoffmann described as ‘required reading by family judges dealing with residence orders’ (para [26]). A prominent message from her Ladyship’s opinion is that the children are the focus in shared residence applications. At para [30] she stated:

‘When any family court decides with whom the children of separated parents are to live, the welfare of those children must be its paramount consideration: Children Act 1989, s1(1). This means that it must choose from the available options the future which will be best for the children, not the future which will be best for the adults.’

Later in her opinion (at para [36]) she emphasised the importance of considering the children’s wishes and feelings, explaining that:

‘these ought to be particularly important in shared residence cases, because it is the children who will have to divide their time between two homes and it is all too easy for the parents’ wishes and feelings to predominate.’

Baroness Hale concluded that the shared residence order in this case should never have been made: there was a lack of available evidence, which meant that the court had not been in a position to adjudicate, including, importantly, no evidence of the children’s wishes and feelings. Her Ladyship also highlighted that there was a debate to be had about whether shared residence was appropriate even if accommodation were available, given the police and social services involvement (para [36]). Echoing Lord Hoffmann’s opinion, Baroness Hale underlined the fact that:

‘Family court orders are meant to provide practical solutions to the practical problems faced by separating families. They are not meant to be aspirational statements of what would be for the best in some ideal world which has little prospect of realisation. Ideally there may be many cases where it would be best for the children to have a home with each of their parents. But this is not always or even usually practicable.’ (at para [38])

Reading the speeches of Lord Hoffmann and Baroness Hale together suggests that while shared residence orders are no longer unusual orders, neither are they usually practicable. Care must be taken, therefore, not to equate the view that shared residence orders are no longer regarded as unusual with the idea that they are the usual or routine orders to be made.

Having set out the latest pronouncements in the House of Lords, an attempt will now be made to outline the guidance provided by the Court of Appeal.

Guidance in the Court of Appeal

Equal division of time not required

A shared residence order is not reserved only for circumstances in which the children will be spending their time evenly, or more or less evenly, in the two households. This was recognised in the Law Commission Report which preceded the Children Act 1989 (Law Commission, *Family Law: Review of Child Law*, Law Com No 172 [HMSO, 1988], at para 4.12) and has been stated in several decisions: see *A v A (Shared Residence)* [2004] EWC 142 (Fam), [2004] 1 FLR 1195, Wall J at para [115]; *Re F (Shared Residence Order)* [2003] EWCA Civ 592, [2003] 2 FLR 347, at paras [10] and [34]; *Re W (Shared Residence Order)* [2009] EWCA Civ 370, [2009] 2 FLR 436, CA, at para [17]. The point arose explicitly for decision in *Re K (Shared Residence Order)* [2008] 2 FLR 380, CA. In that case, the parents shared the child's time 40/60 in favour of the mother, and the father applied to increase this to 50/50 shared care, with a shared residence order to reflect that. The judge concluded that the time should not be increased and, having so found, therefore refused the SRO application. The Court of Appeal allowed the appeal with regard to the judge's refusal to reflect the arrangements in a shared residence order. Wilson LJ (at para [6]) explained:

'a ruling in favour of an equal division of time and for a shared residence order, do not stand or fall together. On the contrary, they have to be considered separately; and the convenient course is for the court to consider both issues together but to rule first upon the optimum division of the child's time in his interests and then, in the light of that ruling, to proceed to consider whether the favoured division should be expressed as terms of a shared residence order or of a contact order.'

The court's general approach

As noted earlier, the Court of Appeal in *A v A (Minors) (Shared Residence Order)* [1994] 1 FLR 669 initially took a cautious approach to shared residence, requiring 'unusual circumstances'. In that case, Butler-Sloss LJ identified a possible basis for a shared residence order where a child:

‘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.’

But it would be unlikely that a shared residence order would be made where 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’ (at p 678).

In *D v D (Shared Residence Order)* [2001] 1 FLR 495 the Court of Appeal took what has been perceived as a shift of emphasis towards ensuring that the reality of a child’s living arrangements is reflected, where possible, in the making of a shared residence order, commenting that if:

‘it is either planned or has turned out that the children are spending substantial amounts of their time with each of their parents then ... it may be an entirely appropriate order to make.’

Applying that approach in *Re A (Children) (Shared Residence)* [2002] EWCA Civ 1343, [2003] 3 FCR 656, the Court of Appeal overturned a judge’s refusal to make an SRO in favour of a mother who had a child staying with her four nights per week and half of school holidays. The court held that the judge ‘should have given the greatest weight to ensuring that the order duly reflected the realities, unless there were some counterbalancing welfare consideration that prevented that sensible outcome’ (at para [10]).

In *Re P (Children) (Shared Residence Order)* [2005] EWCA Civ 1639, [2006] 1 FCR 309, Wall LJ added that the making of a shared residence order:

‘involves the exercise of a judicial discretion and does not automatically follow because children divide their time between their parents in proportions approaching equality. However, where that does happen... it seems to me, as it seems to my Lords, firstly that a shared residence order is most apt to describe what is actually happening on the ground; and secondly that good reasons are required if a shared residence order is not to be made’ (at para [22]).

Further guidance was provided in *Re R (Residence: Shared Care: Children's Views)* [2005] EWCA Civ 542, [2006] 1 FLR 491, in which a judge had declined to make a shared residence order where there was an agreed arrangement, with which the children (aged ten and eight) were happy and wished to continue. The Court of Appeal held that the judge had dealt with the children's wishes in an excessively perfunctory manner and had misdirected himself in thinking that the making of a shared residence order required a harmonious parental relationship and dismissing the option of a shared residence order on the basis that the parents had the potential for continuing emotional conflict.

In *Re C (A Child)* [2006] EWCA Civ 235, Thorpe LJ explained that 'the whole tenor of authority is against the identification of restricted circumstances in which shared residence orders may be made' (at para [19]). In that case the father of a five-year-old boy, upon the breakdown of the parents' marriage, obtained an order for contact on alternate weekends and Wednesdays after school. The father then sought a shared residence order following his move to a home within two miles of the boy's school and equally close to the mother's home. Thorpe LJ (Wall LJ agreeing) commented that the child, L, had proved adaptable and resilient to change, and highlighted a number of highly relevant circumstances, the cumulative effect of which made this a classic case for an SRO:

1. This is a child with a strong attachment to both parents who was happy and confident in both homes.
2. There is a real proximity between the two homes.
3. There is a real proximity of the homes and especially the father's home to L's school.
4. L has a real familiarity with both homes and a sense of belonging in each.
5. L has a clearly expressed perception that he has two homes.
6. There is a relatively fluid passage for L between the two homes.
7. There is a relatively fluid passage of L to and from school from each home.
8. There is some post-separation history of L's care being shared between his parents (at para [21]).

Bases for making a shared residence order

(1) Reflecting reality, not conferring status

There appear to be two situations in which the making of a shared residence order will be justified. As can be seen for the foregoing account, one is where the order 'provides legal confirmation of the factual reality of a child's life' (per Sir Mark Potter P in *Re A Joint Residence: Parental Responsibility*) [2008] EWCA Civ 867, [2008] 2 FLR 1593, CA at para [66]).

As Ward LJ recently explained in *Re H (Children)* [2009] EWCA Civ 902 (24/4/2009) (Ward and Moore-Bicke LJJ), the Court of Appeal has repeatedly stated that a shared residence order must reflect the underlying reality of where the children live their lives and (except in the case of a shared residence order legitimately being used to confer parental responsibility, discussed below), it is not intended to confer status (see, e.g., Thorpe LJ in *Re F (Children)* [2003] EWCA Civ 592 at para [21]). Drawing on earlier authorities, Ward LJ emphasised once again (at para [11]) that: ‘the residence order reflects just that: the place of the children’s residence. It is not intended to deal with issues of parental status’ and explained:

‘... my practical test is to postulate the question, ask the children, where do you live? If the answer is “I live with my mummy but I go and stay with my daddy regularly”, then you have the answer to your problem. That answer means a residence order with mummy and contact with daddy, but if the situation truly is such that the children say, “Oh, we live with mummy for part of the time and with daddy for the other part of the time”, then you have the justification for making a shared residence order.’

It is therefore not easy to state with any precision quite where the borderline between the notions of residence and contact is drawn. It is common for those involved in shared residence cases to express the shared time in terms of a percentage, but it has been said that such statistics are ‘usually only of limited value’ (see *Re F (Shared Residence Order)* [2003] EWCA Civ 592, [2003] 2 FLR 397, at para [30], and *Re W (Shared Residence Order)* [2009] EWCA Civ 370, [2009] 2 FLR 436, CA, at para [17], per Wilson LJ). In *Re W (Shared Residence Order)* [2009] EWCA Civ 370, [2009] 2 FLR 436, CA, for example, the Court of Appeal upheld the judge’s order for a shared residence order where the child was to spend approximately 25 per cent of her time with the father. In *Re W (Children) (Residence Order)* [2003] EWCA Civ 116, the Court of Appeal allowed a mother’s appeal against a shared residence order where the father was to have contact with his children on alternate weekends during school term time and four weeks of school holidays. Thorpe LJ (with whom Chadwick LJ agreed) held that it is:

‘not open to a judge to make a shared residence order in circumstances such as this where the children sleep perhaps 320 days of the year with their mother and visit their father on a pattern of contact which, although regular and frequent, is at the lower end of what is conventionally ordered’ (at para [9]).

Ward LJ, in *Re H (Children)* [2009] EWCA Civ 902, went on to emphasise that a parent's status is recognised by his or her parental responsibility, which gives an 'equal say in how the children are to be brought up'. It is also worth noting that whether a parent's time with the child is expressed in terms of contact or residence, parental responsibility cannot be exercised in a way which would be inconsistent with an order under the Children Act 1989.

(2) Conferring parental responsibility where not otherwise possible

The second basis for the making of a shared residence order is where it is required to confer parental responsibility. In *Re A (Joint Residence: Parental Responsibility)* [2008] EWCA Civ 867, [2008] 2 FLR 1593, CA (drawing on *Re H (Shared Residence: Parental Responsibility)* [1995] 2 FLR 883) held that it is 'clear the making of a residence order is a legitimate means by which to confer parental responsibility on an individual who would otherwise not be able to apply for a free-standing parental responsibility order'. The occasions on which a shared residence order will be needed to confer parental responsibility, however, have been reduced by the increased ways in which parental responsibility can otherwise be acquired (e.g., Children Act 1989, s4ZA and s4A). In *Re A*, a child, H, had been brought up for two years on the erroneous assumption that the mother's cohabitant, A, was the child's father. Upon the breakdown of the relationship, A and H continued to enjoy good contact and A represented the only father figure in the child's life. The mother relocated, disrupting regular weekly contact. The recorder made a shared residence order on the basis that H would stay with A every alternate weekend and have generous contact during holidays. The recorder envisaged, however, that the mother would remain the primary carer, and made the order principally to confer (by s12(2) of the CA 1989) parental responsibility on A (who could not otherwise acquire it). The Court of Appeal upheld the recorder's order, which was made to reflect A's genuine love for H and his desire to continue a parental role, a finding that the relationship was in H's welfare interests, and as an appropriate reflection and recognition of A's position, in the absence of which A's relationship with H was likely to be marginalised and eroded.

Additional benefits of the order

While (as we have seen above) a shared residence order is not usually made to confer status and must reflect the reality, it may incidentally carry with it other benefits. As Wall LJ commented in *Re P (Shared Residence Order)* [2005] EWCA Civ 1639, [2006] 2 FLR 347, at para [22]:

'Such an order emphasises the fact that both parents are equal in the eyes of the law and that they have equal duties and responsibilities as parents. The

order can have the additional advantage of conveying the court's message that neither parent is in control and that the court expects parents to co-operate with each other for the benefit of their children.'

These remarks were repeated and Buxton LJ also associated himself with them in *Re K (Shared Residence Order)* [2008] 2 FLR 380, CA.

Where parents are not capable of working in harmony

The Court of Appeal has recently provided clarification of its approach to cases where the parents are not capable of working in harmony. In *A v A (Shared Residence)* [2004] EWHC 142 (Fam), [2004] 1 FLR 1195, Wall J had commented as follows:

'If these parents were capable of working in harmony, and there were no difficulties about the exercise of shared parental responsibility, I would have ... made no order as to residence ... Here, the parents are not, alas, capable of working in harmony. There must, accordingly, be an order. That order, in my judgment, requires the court not only to reflect the reality that the children are dividing their lives equally between their parents, but also to reflect the fact that the parents are equal in the eyes of the law, and have equal duties and responsibilities towards their children' (at para [124]).

Wilson LJ in *Re W (Shared Residence Order)* [2009] EWCA Civ 370, [2009] 2 FLR 436 indicated (at para [15]) that the headnote of Wall J's decision may have conduced to some misunderstanding. His judgment provides useful clarification in an important passage which bears extended citation:

'The above passage is sometimes understood to be an indication that the inability of parents to work in harmony is a reason for making an order for shared residence. Although it is now clear that inability to work in harmony is not a reason for declining to make an order for shared residence, I do not believe that Wall LJ there meant to imply that it was, by itself, a reason for making an order for shared, rather than sole, residence. I believe that he was there indicating that the inability of the parents to work in harmony meant that, rather than that he should make no order, it was better for the children that he should make some order or other in relation to residence; and that, since in that case the children were to divide their lives equally between the parents and since it was important to stress that the parents had equal responsibilities towards them, the order more greatly in the interests of the children was an order for shared residence rather than orders for sole residence and for contact.'

His Lordship added, however, that a possible consequence of the parents' inability to work in harmony, namely the deliberate and sustained marginalisation of one parent by the other, may sometimes provide a reason for making an order.

Where a parent's motivation for wanting an order is improper, that may be a reason for declining the application. In *Re K (Shared Residence Order)* [2008] 2 FLR 380, CA, Wilson LJ commented (at para [21]):

'[a shared residence order] is sometimes viewed by a parent intent upon interfering with, or disrupting, the other parent's role in the management of the child's life, as a useful vehicle by which to do so; and I have experience of cases in which parents, although allowed to have substantial contact with the child, are nevertheless rightly refused shared residence on the basis that their motivation seems to be to strike at the other parent's role in the management of the child's life. In any application for an order for shared residence, the court should, in my view, be alert to discern such malign motivation.'

Furthermore, in some cases the behaviour of a parent during an existing arrangement may make an order impossible. In *Re M (Children) (Residence Order)* [2004] EWCA Civ 1413, for example, an order was made unworkable by the father's domestic violence, rigidity and failure to cooperate over arrangements for the children, and his manipulation of the children by involving them in inappropriate discussions.

Summary

Each case is fact-sensitive and must be decided by careful application of the relevant statutory criteria in s1 of the Children Act 1989 to the facts of the case. The focus is on the child, whose welfare is the paramount consideration, to be assessed in the light of circumstances as they are or may reasonably be expected to be, and the child's wishes and feelings are of particular importance. The outcomes in reported decisions cannot (and should not) be regarded as templates for outcomes in future cases. The case law does, however, provide general guidance on the courts' approach, which provides important legal background, in the knowledge of which practitioners are able to advise the courts.

The following main principles appear to emerge from the authorities:

1. Shared residence orders are no longer regarded as unusual orders, but neither are they usually practicable and arguably should therefore not be seen as routine orders.

2. Shared residence orders may be made in cases where time is not shared equally or nearly equally, and a ruling on division of time and on shared residence do not stand or fall together.
3. Shared residence orders must reflect the reality of the child's living arrangements or intended living arrangements; they are not made to confer status, except where they are used to confer parental responsibility in cases where parental responsibility cannot otherwise be acquired.
4. Although the making of an order does not flow automatically from the fact that there is an existing arrangement, in such cases good reasons will need to be shown why an order should not be made.
5. An inability to work in harmony is not necessarily a reason for declining to make a shared residence order, but neither is that inability of itself a reason for making an order.
6. The sustained marginalisation of one parent by the other may amount to a reason for making an order.
7. Malign motivation may be a reason for declining an order.

The second part of this article will consider the research evidence on shared residence and its implications for court decision making.

Reference:

Hunt J, Masson J and Trinder L (2009) 'Shared Parenting: The Law, the Evidence and Guidance from Families Need Fathers' *Family Law* 831