

Judgment 8/2012

B V B
- Magistrate's Court
- 24th February, 2012

Issue of disputed residence – whether the Court should grant a sole or shared residence order in relation to two parents who have to date lacked the ability to reasonably communicate with each other.

IN THE MAGISTRATE'S COURT OF THE ISLAND OF GUERNSEY

Between

B

Applicant

-v-

B

Respondent

Dates of hearing: 8th & 9th February 2012
10th February 2012 (am)
15th February 2012 (written submissions)

Judgment handed down: 24th February 2012

Before: Cherry Amanda McMillen, Judge (Magistrate's Court)

Applicant: In person

Respondent: In person

Statutes and Cases referred to:-

- 1) The Children (Guernsey and Alderney) Law, 2008
- 2) Practice Direction No. 6 of 2008
- 3) Re. P (Shared Residence Order) [2005], 2 FLR 347,

Head Note: Issue of disputed residence – whether the Court should grant a sole or shared residence order in relation to two parents who have to date lacked the ability to reasonably communicate with each other.

The Judge of the Magistrate’s Court summarised the Applicable Legal principles as follows in paragraphs 134-162 of her judgment:-

Shared or sole residence (and overnight contact).

1. Taking into account the findings that I have made and my consideration of the child welfare principles and the child welfare checklist, I am satisfied that there is no evidence before me as to why A should not spend time with her father overnight. The main barrier to that contact is the anxiety that it causes in the mother.
2. I am satisfied that currently (and indeed for the foreseeable future) it is in A’s best interests if these parents do not come into contact with each other at all and hopefully, by that lack of physical contact, the mother may also be able to access some therapy and counselling to assist her in dealing with coming to an understanding that the father will remain in his daughter’s life throughout her childhood and into adulthood. Indeed, the father has a role in this regard and I stress to him that, whilst I may not have found his behaviour to have been abusive, in his own words it has on occasions been “*incorrect and inappropriate*” and he must, in the future, deal with the mother in such a manner so as to never to allow A to believe that it is appropriate for one parent to act discourteously or rudely to another.
3. The mother seeks a sole residence order and an order for defined contact with no overnight contact. The father seeks a shared residence order and by implication this would mean the A would likely spend time with him on an overnight basis.
4. In settling the arrangements for the child, the Court may order that the child should live with two or more persons, who do not themselves live together. The Court may (although it is not mandatory) specify the periods during which the child is to live in the different households concerned. In *Re. P (Shared Residence Order) [2005], 2 FLR 347*, Wall L J explained the value of a shared residence order: “*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*”.
5. It has been held that a shared residence order may be appropriate where the parents are incapable of working in harmony because it avoids the risk that a sole residence order is misinterpreted as enabling control by one parent when co-operation is required.
6. It is also a contradiction in terms to grant a contact order to a person who has a shared residence order; specified time under a shared resident order defines that time during which the child is to live with the person and is not “*contact*”.
7. The case of *Re. C (a child) [2006] EWCA Civ 235* highlighted relevant circumstances which could lead the Court to conclude that a shared residence order was appropriate.
8. In that case it was highlighted that:-
9. (i) “*This is a child with a strong attachment to both parents and is happy and confident in both homes*”.

In general terms I accept that as a statement of fact relating to the child before this Court.

(ii) *“There is real proximity between the two homes”.*

I find that that is the situation in A’s case

(iii) *“There is real proximity of the homes and especially the father’s home to the child’s school”.*

I find that in Guernsey this is likely to be the case when A reaches school age.

(iv) *“The child has a real familiarity with both homes and a sense of belonging in each”.*

I am satisfied that A does have a sense of real familiarity with both homes, that of her mother and of her father, and has a sense of emotional and psychological belonging in each because of the nature of her strong attachment with both of her respective parents

(v) *“The child has a clearly expressed perception that she has two homes”.*

I am not satisfied that the evidence that I have received could lead me to reach this conclusion, although I am satisfied that as time passes it is more likely than not that A will grow up to have a clearly expressed perception that she has two homes.

(vi) *“There is a relatively fluid passage for the child between the two homes”.*

I do not find in this case currently that that is the position. Currently the arrangements for A to see her father are through the mechanism of defined contact arrangements and because of the lack of interaction between the parents there is no real fluidity for the child in the current arrangements. However, I am satisfied that by establishing clear routine of where the child is to reside and when that as she grows older, A will have a clear perception of her place in both of her parent’s homes.

(vii) *“There is a relatively fluid passage to and from school from each home”.*

Whilst this may not be the current case, I am satisfied that in the future provision can be made for it to become the situation for A.

(viii) *“there is some post separation history of the child’s care being shared between his parents”.*

There has indeed been regular contact between A and her father but I do not conclude that it has been shared care. However, I am satisfied that if the mother had not opposed the increase in A’s overnight contact with her father there would, before the final hearing, have been an increase in the amount of overnight contact or time that A was spending with her father.

10. I have considered the father’s application for a shared residence order and the mother’s opposition for it. I have to view that application in the context of the findings that I have made in relation to both of the parents and the concern that I have

expressed that the mother cannot acknowledge the role of the father in her daughter's life and also the fact that she places an over-emphasis on her own role, as important as she is in A's life. A has two parents. Both parents are equally important to her, even though the mother has been the primary carer, but she has two equal psychological parents and unfortunately, in a period of nearly three years, at no time can I identify that this mother has been able to demonstrate an insight into the importance of the father in the child's life. Instead she had undermined the father's role in A's life by convincing both herself and her family of the incorrect theory that he presents a risk to her.

11. I factor in the principle that A's welfare is the paramount consideration and I am satisfied that recognition of the importance of A's father in her life is crucial in this regard and as I have found that the mother is not able to demonstrate that she can acknowledge and act in such a manner so as to maintain the importance of the link between A and her father, then I consider that it is in the interests of A's welfare to grant a shared residence order to these parents, despite their many difficulties in being unable to co-operate with each other.
12. By granting a shared residence order the Court acknowledges the importance of A's father in her life. In addition it will be a message to the mother and her family of the importance of the father in A's life and also to others, for example the nursery, so that they understand that the father is someone who is in entitled to information and, on relevant dates, be one of two people to whom they would turn if A was ill. Further, it also acknowledges the importance of A's father in her life if anything were to prevent the mother in continuing to be the primary carer for A. I stress, making a shared residence order does not negate the role of the mother in A's life – indeed I hope this judgment has done sufficient to confirm that I acknowledge the role of the mother in A's life but what I want to achieve is an equal acknowledgement of both parents and their respective roles to date and in the future in A's life.
13. In granting shared residence it is no longer appropriate to make a contact order. However, there is nothing to prevent me from considering what and how much time A should spend with her respective parents, or more correctly what periods of residence she should have with both parents.
14. I am satisfied that, because of the nature of the parents relationship, the less they have contact with each other at this current time the better it is for A. I have therefore determined that the amount of time that A has residence with her father will be influenced by :
 - (i) Her age
 - (ii) An order that will allow the father to collect her from the nursery and return her to the nursery as much as possible.
 - (iii) And of course, the relevant legal principle I have outlined above
15. In such a way the mother will not have to come into contact with the father and the father will be protected from any further allegations about his conduct.
16. I have noted with care the view of the professionals that state that a child up to age of five in general terms should not be "*separated*" from their primary carer for a period of no more than seventy-two hours.

17. I have concluded that there is no risk to A in regularly residing with her father on an overnight basis.
18. I have determined that the appropriate order in this regard will be as follows. There will be a two week cycle.
19. In the first week of the cycle A will reside with her mother overnight on Monday and Tuesday nights and will reside overnight with her father on Wednesday nights, with her father collecting her from the nursery on Wednesday afternoon (at the conclusion of the nursery) and returning her there on Thursday morning. A will reside with her mother on Friday, Saturday, Sunday and Monday night (commencing the second week of the cycle) and she will reside overnight on Wednesday evening with her father – her father collecting her on Wednesday from the nursery and returning her to the nursery on Thursday morning. She will reside with her mother on Thursday evening and then she will reside with her father on a long weekend, from Friday (collecting from nursery) until Monday morning (returning to nursery). This means that A will reside with her father five nights out of fourteen and will reside with her mother nine nights out of fourteen.
20. If A becomes ill at nursery, then the person who has responsibility for her will be the parent with whom she will be residing on that evening. So, for example, in the first week if A becomes ill on a Monday then it will be the mother's responsibility to make arrangements for A, but if she becomes unwell on a Wednesday it will be the father's responsibility to make arrangements for her. In this regard the responsibility for the child will be handed over to the parent on the morning of the day with whom the child is to reside that evening.
21. Unfortunately, because of the difficulties that these parents have experienced in not being able to negotiate or co-operate with each other, I am satisfied that these arrangements cannot be altered, even by agreement. I am dismayed at the manner in which e-mails have been exchanged – both in terms of their volume and their content. These orders cannot be altered.
22. I am not satisfied that provision has to be made for special days, for example, the parents' respective birthdays or A's birthday. I have decided that no matter what day the special celebration falls on, that whoever A is spending the night with according to the two week cycle schedule, then that person has the advantage in that year of A spending the night with them – and I accept that this may well mean that A will on occasion miss her mother's birthday celebrations and indeed her father's birthday celebrations, but in order to prevent any further unhelpful discussions about which days the child should spend with each other, I have determined that as far as possible this residence schedule should be "*written in stone*". – Such an approach is not normally appropriate in children cases where flexibility and co-operation is to be encouraged, but this case has been before the Court for a considerable number of months and I have seen no possibility, at least at this time, of the parents being able to appropriately discuss flexibility in residence arrangements and for the time being I have determined that these arrangements are not to be changed.
23. If there is to be a bank holiday on any one of the relevant days and the nursery is not open, then the residence will remain as directed in this residence schedule and the

mother will make A available to the father on the relevant day but the father collecting A, for example- if A's period of residence with him commences on Good Friday and returning A to the mother's home on the morning of Easter Monday. In this manner the amount of contact between the parents will be cut down considerably, although not completely.

24. I now turn to the issue of holidays and the time A will reside with both of her respective parents on holidays. I am satisfied that the appropriate amount of time is that A will reside with her mother for an exclusive holiday(s) with her mother for a period of four weeks in total in any one calendar year– of no more than two separate holidays in or out of the Island (i.e. one period of four weeks, or one period of three weeks and another of one week, or two periods of two weeks). The mother is to notify the father by 9th March, 2012, which period or periods of holiday A will spend with her in 2012. The relevant period of time can include Christmas period 2012, but not Christmas 2013 or each alternate Christmas thereafter. I define the “Christmas period” to include the dates 23rd December – 29th December inclusive. During the four weeks holiday that A has with her mother away from or in Guernsey, the father will not have a period of residence with his daughter and there will be no “*making up*” of the relevant dates. The schedule will recommence where it left off prior to the child going on holiday with her mother.
25. I have considered the issue of A spending a period of holiday with her father. I am satisfied that for 2012 there should be no period of holiday between A and her father pending A's becoming familiar with the increased residence time that she spends with her father. However, I am satisfied that in 2013, when A becomes four, she should have one week residential holiday with her father (either on-island or off-island) increasing to two weeks in 2014, and to three weeks in 2015 and each calendar year thereafter and in those years the mother must notify the father by 14th February of the relevant calendar year of the dates that she intends to spend with A on holiday and the father must, on or by 28th of February of the relevant calendar year, notify the mother of the dates that he intends to spend time with A in each calendar year, avoiding the dates the mother has already confirmed to him in this regard neither parent will have to wait upon the other's dates in relation to the issue of the holidays.
26. Turning to the balance of the parents' applications. I have determined as follows:-
27. I have granted the father's application for a shared residence order and directed the quantum of the division of residence between the two parents' households.
28. I have refused the mother's application for a sole residence order and refused her application to cease overnight contact between A and her father.

Dated this 24th February 2012

Cherry A McMillen (Judge of the Magistrate's court)