

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND  
FAMILY DIVISION

Re R (SHARED RESIDENCE APPLICATION: CONTACT)

GILLEN J

[1] The judgment in this case is being distributed on the strict understanding that in any report no person other than the advocates or the solicitors instructing them (and other persons identified by name in the judgment itself) may be identified by name or location and that in particular the anonymity of the child and the adult members of the family must be strictly preserved.

**Introduction**

[2] The applicant in this case is A who is the father of R (DOB 22 January 1998). G is the mother of this child. A seeks to obtain a shared residence order in respect of R pursuant to Article 8 of the Children Order (Northern Ireland) 1995.

**The Background**

[3] A and G married on 14 September 1990. Understandably the couple were keen to have a family but unfortunately as the years passed it became clear that there were difficulties with conception. Eventually after exhaustive IVF treatment their ambition was realised through an ovum donation scheme and R was born on 22 January 1998. Despite their delight at the birth of R, the relationship between the couple sadly deteriorated. On 15 October 1999 G obtained a Mareva injunction against A followed by a Non-Molestation Exclusion Order against him on 24 February 2000. The effect of this order was that A was excluded from the former matrimonial home at an address in Belfast which I do not propose to name. Thereafter A lived initially with his sister for about 8 months before moving to an address in Lisburn. In October 2001, he moved home to a property which G claims is now only four doors away from her home and which he asserts is approximately 100 yards away.

In any event, he has moved to a residence which is very close to where his wife and child live.

[4] Since the obtaining of the Mareva Injunction in 1999, there have been a series of applications to the court. The child resides for the most part with his mother and a great number of court hearings have ensued dealing with the question of contact. Eventually on 5 October 2000 the present application for a Residence Order was made by the husband although he has made it clear from 10 April 2001 through his solicitor that it is a shared residence order that he seeks.

[5] A number of extremely lengthy affidavits have been filed by both parties throughout the several court hearings which have formed the unhappy background to this case. These lengthy documents include details of allegation and counter-allegation made against each other by the parties. Contact with R has been one of the prominent features of the escalating conflict between A and G. A stresses that his application for a shared residence order now is merely to set in place long-term arrangements for the upbringing of their son and he emphasises it is not merely a preliminary or short-term move designed to deny his wife contact with his son or to secure a residence order exclusively in his favour. His wife alleges that historically A has been a very controlling, domineering and determined individual who has initiated a series of Contact Order applications culminating in the residence order application as part of his overall attempt to control her and the child.

### **Preliminary Comments**

[6] Both adults in this case would do well to reflect that they are, and will continue to be, bound together by this child. Other couples have been through as difficult a period as they have and emerged determined to put the interests of their child first and resolutely seek to make a fresh start. This should be the resolution of both A and G in this case. Each must look forward rather than perpetually raking over the past. I get the clear impression that they both remain mired in unfinished historical business and frankly at the moment the future offers little prospect of closure if they continue in this vein.

[7] The privilege of being a parent is immeasurable. If they continue to allow their unhappy differences to escalate the current climate of conflict between them, this privilege will be abused. There is a real danger that this child has been or will be in the future exposed to the hostility between these parents which is liable to occasion him irreparable damage. It is quite clear from reading the papers that this positively delightful little boy is both intelligent and perceptive and it will not be long before he quickly captures the atmosphere of the surrounding parental hostilities. The effect on him of this will be momentous if something is not done very urgently to arrest it.

These parties are all too often reverting to court proceedings in order to resolve issues which could be quite easily determined by themselves in a mature and child responsible manner. I trust these proceedings are going to be a watershed in that regard and that neither parent will consider that the result that I have come to represents a victory or defeat for one or other party. The paramount interest here is the welfare of R. I have not the slightest doubt that both parents love this child deeply. It is crucial for his future well-being that he enjoys the untrammelled company of both. Perhaps unwittingly, my fear is that both A and G may have lost sight of the priorities of R in the midst of their own unhappy differences. In an attempt to turn the page and refocus these parents on the future, I have attempted in this judgment to reduce to a minimum a rehearsal of the various charges and counter charges that have punctuated their relationship in recent years. I trust they will do the same.

### **Factual Conclusions**

[8] I have no doubt that neither party in this instance is without fault or flaw. Neither A nor G gave evidence before me and it was agreed, I believe wisely, by counsel that with the exception of Dr Weir to whom I shall turn shortly, the case was conducted on the basis of the various lengthy statements which had been filed by the parties.

[9] Dr Weir is a Chartered Clinical Psychologist. I found her an extremely impressive witness who gave her evidence in a measured and considered fashion. She had assessed G over a period of 2 hours and considered her psychological status in the context of the present application. The conclusion that Dr Weir drew was that G is frightened and intimidated by her husband and that was to some extent underlined by the fact that she is attending Women's Aid on a fortnightly basis for counselling as well as attending staff from a domestic violence unit. I must also in this context bear in mind that she did obtain a Non Molestation and Exclusion Order against him. Dr Weir's evidence served to underline the clear impression that I had formed from the papers that G genuinely feels that this man is attempting to control her life. Her insecurity is borne of the history during the marriage and has been fed by many of the actions of her husband. I believe 3 instances will suffice to illustrate my reasoning:

(a) Despite the anguished history of disharmony and the frequent clashes between them, A chose to take up a residence very close indeed to where his wife was living. He explains this by indicating that it was for the child's benefit since R could therefore easily avail of both homes. I believe this explanation in light of the history is disingenuous. I consider he knew full well the anxious affect this would have upon his wife. Needless to say he did it without discussing the matter with her or the effect it might have on her. I consider it was calculated to assert his control over the situation that then obtained. I have no doubt that there would have been a wealth of houses that

he could have chosen to reside in that would have been similarly convenient for the boy but less intrusive for the mother.

(b) In March 2002, during a contact weekend, R had suffered from one of his periodic bouts of asthma. The mother had been largely responsible for organising his treatment. During the course of that weekend when the child was staying with the father and without consulting the mother, the father arranged for the child to be brought to another doctor on Sunday. Thereafter he summarised the advice that he had been given and presented this to the mother. I can understand perfectly well the mother's concern that all this had been done without her having been told about it or invited to attend at the doctor with them. A completely fails to recognise her concerns and in the course of a statement before this court has stated "in the circumstances I invite the court to consider to what extent this incident illustrates my wife's preoccupation with her own perceived rights rather than R's welfare and her propensity to find fault and attach sinister significance to innocent matters". On the contrary, I consider it is one of several illustrations of A's determination to take control of the family situation without catering at all for the sensitivities or appropriate concerns of his wife. A preparatory telephone call to her could have assuaged her concerns and included her in the process. Even now he completely fails to understand why his unilateral action should have upset her.

(c) On 26 January 2002 an incident occurred at the former matrimonial home. A was required to carry out some tasks urgently on behalf of a customer's mother. In his haste, he locked his car keys and house keys inside his own residence. He proceeded to the former matrimonial home in order to obtain a hammer and chisel from the garage to regain entry. G's version is that he rang incessantly on the doorbell, shouting to her to open the door and saying that he was locked out of his own house. When G refused to open the door because she said she felt intimidated by his aggressive behaviour, G then alleges that he proceeded to break into the garage and remove the hammer and paintbrush without her permission. A's version is that he simply went to the garage door, opened it, collected a hammer and chisel and returned to his home. I consider this to be yet another example of where A simply proceeds to adopt his own course irrespective of the sensitivities of his wife. He must learn to appreciate that irrespective of the nature of a client emergency, his wife does not have to accede to his unilateral demands no matter how justifiable they may appear to him. He must afford to her the same dignity and equality that doubtless he does to others in his business life. He cannot steamroller her views simply because he does not agree with them. I am certain he would not have behaved in this manner towards anyone else irrespective of where his toolbox was and he must not do it in relation to his wife particularly in the presence of the child.

[10] I reiterate that having read the papers in this case I have concluded that there is more than a measure of justification in his wife's disquiet about his behaviour and attitude towards her. These actions smack of an attempt on A's part to dominate and control her irrespective of the upset he occasions her.

[11] It was Dr Weir's view that the acrimony thus engendered between the parents will feed into this child's insecurity and he will mirror the mood of his mother with whom he spends most time. She said "children are like a sponge and will soak up the atmosphere." Sadly this may even remain unspoken but nonetheless is liable to be damaging. Unhappily I have come to the conclusion that the behaviour of A is contributing significantly to the sense of despair which I detect in the course of G's statements and which was obvious to Dr Weir. It cannot be in the interests of this child that this is allowed to continue. In saying this I am not unmindful of the fact that G is in some instances all too ready to think the worst of A and has on occasions in my opinion overreacted. Nonetheless the gravamen of her complaint has some substance and that has provided the cornerstone of my concern in this case.

[12] Before turning to the legal principles, I pause to make one further observation on the evidence of Dr Weir. Mr Malcolm who appeared on behalf of A criticised her evidence on a number of grounds. First, that this examination was not from a general practitioner but upon a referral from lawyers. Secondly that she did not have the opportunity to consider in detail the husband's statements in the case and thirdly that she misconceived the nature of the relief sought. In particular he submitted that her concern that G felt that the order would result in a loss of control was misplaced. I reject these criticisms. I consider that Dr Weir faithfully confined herself to the brief which she was given and that her comments on the mental status of this woman, the effects of the order if it was made on her and on the child were all highly relevant matters. The contents of her report and her evidence before me served to confirm clear impressions that I already had formed having read the various statements in the case.

### **Legal Principles Governing this Application**

[13] The leading authority on the question of joint residence is D v D (Shared Residence Order) [2001] 1 FLR 495. In this case the Court of Appeal provided valuable guidance to first instance judges in dealing with such cases. In particular it emphasised that contrary to earlier case law it is no longer necessary to show that exceptional circumstances exist before a shared residence order may be granted. Indeed Dame Elizabeth Butler-Sloss P said that it is probably no longer necessary to show a positive benefit to the child. What is required is to demonstrate that the order is in the interests of the child in accordance with the requirements of the 1995 Order. It is right to say that

in D v D the order for shared residence was upheld despite a high level of animosity between the parents. However a close perusal of this case makes it clear that this was probably done because arrangements had been settled for some considerable time and the children were spending substantial amounts of time with both parents. Between paragraphs 21-32, Hale LJ provided an interesting historical review. In the context of the background to the Children Act 1989 and the Law Commission's Working Paper No 96 published in 1986 on Custody and the Law Commission's report LAW Com No 172 on Guardianship and Custody she said:

"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 wherever possible."

[14] At paragraph 32 Hale LJ said:

"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, ... 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."

[15] I have come to the conclusion that to make a Shared Residence Order in this case would not be best for this child. I fear that the impact of such an order on the mother could be such as to occasion her grave concern and anxiety, a position which I believe has been fuelled by the intemperate behaviour of her husband. The order would I believe feed into her a sense of insecurity and lack of trust and in turn her anguish and concern could affect her care for this child which is of course my paramount concern. I have no doubt that the situation between the two of them is too raw to permit of a further intervention of this kind. Whilst in effect a shared residence order in law provides no detriment or disrespect to either party and serves simply to reflect the reality of a child's life, in this case my fear is that A would avail of

it to exercise more control over this woman and the child. Any order which is likely to excite further acrimony between the parties cannot be in the interests of this child and indeed could be detrimental to his future care. At the moment they cannot even agree on the degree of contact which each is prepared to afford to the other. A is only 4 years of age but the disharmony between these parties carries the risk of grave emotional damage to him and I have concluded from the evidence before me that far from ameliorating this danger, an order of the kind sought could lead to a deterioration of the situation. It would I believe provide but one more excuse for this father to interfere with the mother in matters taking place whilst he did not have care of the child. Both these parties must realise that in law they already share parental responsibility for the child. No other label is required to underline this.

[16] My final reason for rejecting this application is because although I intend to fix the contact at this time, contact is not a fixed notion. Contact arrangements can change as parents and children's circumstances change and they enter different stages of life. More importantly whilst it is the intention of the court at this stage to ensure that the child does spend substantial amounts of time with each parent, if this contact is abused by either parent and used as a means of disquieting the other, then this court will not hesitate to act to alter or curtail that contact to ensure this child is adequately protected. Accordingly it is too soon to say if the arrangements for contact that I intend to make will work satisfactorily in the interests of the child and hence a shared residence order is inappropriate.

[17] The general principles relevant to Article 8 of the Children Order (Northern Ireland) 1995 apply to contact orders. Accordingly I have had regard to the paramountcy of the child's welfare, I have recognised that delay in determining the question is likely to prejudice the welfare of the child, I have applied and considered the welfare checklist set out at Article 3(3) of the 1995 Order, and I have recognised the presumption against making an order unless to do so would be better for the child than making no order at all. The principles on which a court must act when deciding an issue relating to contact have been summarised by the Court of Appeal in Re P (Contact: Supervision) [1996] 2 FLR 314. In particular I have recognised that overriding all else the welfare of the child is a paramount consideration and the court must consider the interests of the mother and the father only in so far as they bear on the welfare of the child. This approach I find to be consistent with a proper appraisal of the right to family life to which each parent is entitled under Article 8 of the European Convention on Human Rights. I have recognised that it is almost always in the interests of a child whose parents are separated that he or she should have contact with the parent with whom the child is not living. These parties must realise that contact is the right of the child and not the right of the parent. Both these parents must recognise the fundamental emotional need of this child to have an enduring relationship

with both his parents. Unfortunately I have been told that these parents cannot agree the degree of contact despite the numerous efforts in the past. I afforded them one final opportunity over the summer period to come to a reasonable agreement but yet again no agreement was forthcoming. The sad consequence of this is that I must now impose arrangements on them which are to some extent random and blunt. This is yet another consequence of their failure to agree.

[18] The contact arrangements shall be as follows:

- (1) The child shall reside with his mother save for;
  - (a) Alternate weekends between 6.30pm on Friday evening and 7.30pm on Sunday evening when he shall remain with his father.
  - (b) Each Wednesday between 12.30pm (or the end of school whichever is the later) and 7.30pm when he shall remain with his father.
  - (c) On the last Tuesday of every month between 12.30pm (or the end of school whichever is the later) and Wednesday evening at 7.30pm when he shall remain with his father.

On each occasion the father shall collect the child from his home or from school and shall return him promptly to his mother at her home.

- (2) Save for the holiday arrangements which I will outline below, the child shall reside with the mother at all other times. These arrangements can only be varied by way of an agreement between the parties, which must be in writing and must be signed by both parties. These arrangements hereinbefore set out are hereinafter termed "the normal arrangements".

### Summer Holidays

[19] During the summer holidays whilst the child is off school, he will spend three full weeks on holiday with each parent. During the remainder of the holiday period, the normal arrangements shall operate. In the absence of agreement (which must be in writing and signed by both parties), the mother will have the child for a holiday of two weeks in July of each year and the father will have the child for a holiday of one week in July of each year. Commencing in the year 2003 and thereafter in alternate years, the mother shall have the first choice of holiday periods during July.

[20] The mother will have the child for a holiday of one week during August of each year and the father shall have the child for holiday of two weeks in August of each year (save that the child must reside with the mother



during the week immediately before the recommencement of school term at the end of the summer). Commencing 2003, and thereafter in alternate years, the father shall have the first choice of holiday during the August period.

[21] Where one parent has the first choice of holiday under the terms of this agreement, the other parent shall have the choice in the following year.

[22] Each party shall confirm in writing to the other the holiday dates sought during the summer period no later than 1 June of each year and no earlier than 1 May of each year.

#### Easter Holidays

[23] The child's Easter holidays will be spent equally with the mother and father. If the child is with the mother during the first weekend of the school holiday period following the normal contact arrangements, then the child will remain with the mother during the first half of the holiday. If the child is with the father during the first weekend of the school holiday period as per the normal arrangements, then the child will stay with the father during the first half of the holiday. In any event the child must always be returned to the mother a full day prior to the commencement of the school term.

[24] Any variation of the Easter holiday arrangements must be in writing and signed by both parties.

#### Christmas and New Year

[25] In the absence of agreement between the parties, which must be in writing and signed by both parents, the normal arrangements for contact shall operate save that the child will stay with the mother for the entirety of every Christmas Eve until Christmas Day at 6.00pm. The child will stay with the father from Christmas Day at 6.00pm until 2.30pm on 27 December of each year. Commencing in 2002 and on alternate years thereafter, the child shall stay with the father from 2.30pm on New Year's Eve to 2.30pm on New Year's Day.

[26] The normal arrangements shall operate during all other holidays and birthdays save that on Mothers Day if the child is with the father over the course of a weekend as per the normal arrangements, the father shall return the child to the mother at 11.00am on Mothers Day. On Fathers Day, if the child is with the mother, as per the normal arrangements, the father shall collect the child at 11.00am and return him to the mother by 7.00pm.

[27] I wish to remind both parties that the court has powers under Article 179(14) of the Children Order (Northern Ireland) Order 1995 to order that neither party shall issue further proceedings in respect of the child

without prior leave of the court. I do not intend to invoke that Article at this stage, but this court will not hesitate to do so in the event of any unreasonable applications being made to this court. I make no order for costs. Each party shall bear their own costs of these proceedings. Any further proceedings touching upon this child should be referred to me for hearing.