



Neutral Citation Number: [2008] EWCA Civ 867

Case No: B4/2008/0799/CCFMM

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM RECORDER ADAM
LOWER COURT NO: BA04P00442

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/07/2008

Before:

SIR MARK POTTER
THE PRESIDENT OF THE FAMILY DIVISION
LORD JUSTICE SCOTT BAKER

and

SIR ROBIN AULD

In the matter of:

Re A (A Child: Joint Residence/Parental Responsibility)

Kate Branigan QC and Barbara Mills (instructed by Griffith Smith) for the Appellant
Jane Probyn (instructed by Withy King) for the Respondent

Hearing dates: 25th and 26th June 2008

Approved Judgment

Sir Mark Potter:

Introduction

1. This is the appeal of a mother from an order made by District Judge Adam, sitting as a Recorder, on 11 January 2008 pursuant to a final judgment delivered on 14 August 2007 in proceedings concerning the mother's only child H, born on 17 August 2002 and now almost 6 years old. By that order, the Recorder granted to the mother's former partner, Mr A, a joint residence and parental responsibility order in respect of H as well as making provision for contact and certain other matters. H was born at a time when the mother was cohabiting with Mr A, having been conceived close to the time when they first met. For the first two years of H's life, and until the parties relationship broke down in July 2004 he was brought up by them together on the assumption that Mr A was his biological father.
2. Following the breakdown of the relationship, Mr A brought proceedings for parental responsibility residence and contact. He immediately applied for, and obtained, a parental responsibility order. In the course of the proceedings it emerged that Mr A was not the father of H. The biological father was in fact Mr C, with whom the mother was ending a previous relationship at the time she first met Mr A and with whom she last had unprotected intercourse in the same menstrual cycle as with Mr A.
3. Once it was established that Mr A was not in fact the father or parent of H, nor was he H's stepparent or guardian (see Sections 2-5 of the *Children Act 1989*), that meant that the only route by which he could acquire parental responsibility for H was via the provisions of s.12(2) of the Act which provides:

“Where the Court makes a residence order in favour of any person who is not the parent or guardian of the child concerned that person shall have parental responsibility for the child while the residence order remains in force.”
4. In consequence, what were already difficult proceedings between two determined people became more complicated and protracted and the issues raised between the parties more difficult to resolve. A further complicating factor was that, in the course of the proceedings, the mother, who was the primary carer of H, decided she wished to leave the area in which both parties lived close by and to move to a town on the South Coast. This meant that Mr A's regular weekly contact with H would be disturbed and, as Mr A saw it, his role in H's life would be marginalised. During the course of protracted interim proceedings the mother was restrained from moving from the area in which the parties lived, first by means of a Prohibited Steps Order and then on her own undertaking. However pursuant to the final decision of the Recorder, she has since made the move and is living with H under new contact arrangements the subject of the final order made by the Recorder.
5. Despite the parties having been at loggerheads throughout the proceedings, (the Recorder referred to them as chalk and cheese) it has never been an issue between them that H loves and is loved by each of them, that the mother should be the primary carer, in which role she is assiduous and child-centred, or that contact between H and Mr A is of good quality and beneficial to H, in whose life Mr A has, to date, represented the only father figure. However, since the revelation as to H's true

parenthood, the mother has been unable and unwilling to recognise Mr A as having either parental rights or responsibility in respect of H. It is her case, as indeed the Recorder found, that Mr A is a dominating and controlling personality, used to and persistent in obtaining his own way and by whom the mother feels overwhelmed. It was and is the mother's case that, as H's biological mother and primary carer, it is she who should make the decisions in respect of the incidents of H's daily life and that H's needs for and benefit from contact with Mr A can be properly catered for by an appropriate contact order. She, too, the Recorder found to be determined and controlling in her desire to marginalise Mr A's role in H's life. It is her position that a joint residence order conferring parental responsibility on Mr A is inappropriate, unnecessary, and will be used by Mr A to interfere in an officious and controlling manner, productive of strife rather than harmony. It is Mr A's position on the other hand (which was the position accepted by the Recorder), that he has exercised and should continue to exercise the role of H's father and, to that end, he should be the beneficiary of a joint residence order as the only means by which, not being the biological father of H or married to the mother, he can avoid being marginalised and acquire the parental responsibility which he seeks.

The Order under appeal

6. In the event, the Recorder's order of 11 January 2008 provided that there should be a joint residence order in respect of H and, for the avoidance of doubt, the order granted parental responsibility to Mr A. (Indeed that was the very purpose of the joint residence order). It also provided that the mother be permitted to relocate with H to the coastal town from late August 2007 and she should make H available for contact with Mr A every alternate weekend, Mr A also having generous and detailed holiday contact as further set out in the order and a lengthy schedule attached. In broad terms the holiday periods were equally divided. It was also provided that, if H was unavailable for contact due to illness on one weekend, a replacement would be arranged for the following weekend without affecting the ongoing pattern of regular weekend contact.
7. The order also provided that the mother was prohibited from introducing H to Mr C, his biological father for a period of two years, save by order of the court or with the agreement of the parties; the mother in any event to provide the father with eight weeks' notice of any intended introduction.
8. Finally, the order provided that there be an order under S.91(14) of the Children Act 1989 prohibiting either party from bringing any further applications to court without permission until after January 2010, and that any future applications in respect of H were to be reserved to the Recorder if available. It is agreed between the parties that this provision of the order cannot stand.
9. In the light of the arguments raised on the appeal, the history of the proceedings, including features of Mr A's conduct relied upon by the mother as illustrative of his controlling personality, requires to be set out in some detail.

The background history

10. Mr A is a successful local businessman who owns a nightclub, has an interest in a public house, has other business interests and is locally well known and influential.

He is now aged 56. The mother is aged 47 and prior to the birth of H was employed as an English and drama teacher. Their relationship began soon after meeting in October 2001. The mother informed Mr A of her pregnancy in January 2002. They decided they would live together and raise their child as a family. A few months later the mother moved in with Mr A and they set up home together in a large house owned by Mr A. Mr A was present at H's birth and cut the umbilical chord. He was involved as a father from the start but, according to him, the mother was reluctant to share H with him. He felt undermined by her criticism of him as a parent and excluded by her determination to continue breast feeding and remaining with H throughout the night, a situation which still prevailed in December 2005 at the time of the first judgment when H was almost 3½. Nonetheless Mr A was able to establish a strong relationship with H and to care for him on his own without difficulty. According to the mother Mr A was initially enthusiastic but his interest soon waned and he wished to resume an active social life which she considered to be a detriment to herself and H.

11. The parties' relationship broke down in the summer of 2004 when H was just two. For a while they both remained living in the same house, which was large enough for them to live separately. Mr A immediately issued an application for parental responsibility, residence and a prohibited steps order, the last of which he obtained ex parte at a hearing without notice to the mother. Under that order she was restricted from removing H from Mr A's care until further order. At a return date on 19 July 2004, Mr A was awarded parental responsibility of H and the prohibitive steps order was discharged. The order made provision for the mother and H to remain living in the same property, albeit separately from Mr A, with generous contact provisions for three evenings per week and one day on either Saturday or Sunday of each weekend. A directions appointment was listed for 25 October 2004. However on 30 September 2004 the mother left the home and moved into rented accommodation. She had had a violent argument with Mr A at a party and shortly afterwards discovered a pile of video tapes in the basement, the product of CCTV surveillance by cameras covertly installed by Mr A in the rooms occupied by the mother and H, each video tape being clearly marked with a label in his writing showing the day the recording was made.
12. At an interim residence and contact hearing on 14 October 2004, the mother gave an undertaking to remain in the area provided her rent and utility bills were paid by Mr A. Directions were given for the preparation of a CAFCASS report and the filing of statements. A comprehensive and extensive visiting and contact schedule was drawn up to cover the period until 1 January 2005. Mr A was to have contact for a full day at the weekend plus two days per week for five hours, increasing to overnight staying contact every weekend after 1 January 2005.
13. On 17 December 2004 Mrs R, the CAFCASS officer, reported. She recommended joint residence with staying contact between H and Mr A on alternate weekends and visiting contact every Tuesday and Thursday from 10am – 6.30 pm.
14. On the next day, the mother told Mr A that he might not be H's father and asked him to postpone the staying contact part of the order until DNA tests had been obtained.
15. On 13 January 2005 the mother applied for DNA tests and a review of contact. On 20 January the Recorder ordered a hearing to determine whether DNA tests should be ordered. He made an order for such tests on 11 February 2005, ordering also that the

report with results be sent only to him for the purpose of further directions and for the parties to be informed of the DNA results by the Court.

16. Despite this order, during teeth brushing of H on 15 February 2005, Mr A obtained a swab from his mouth and arranged the carrying out of his own DNA tests. On the required form he stated that he had parental responsibility and falsely stated that H's mother was abroad and could not be found. In the same month he also contacted H's dentist and GP, changing H's address from that of the mother where H was living to his own address.
17. At about this time, Mr A also agreed with another woman, who lived in Chicago and with whom he had formed a relationship during the early stages of his relationship with the mother that he would take DNA tests in respect of a male child born in June 2002, some two months before H's birth. Neither the existence of the child nor his disputed paternity, which Mr A acknowledged following the DNA test, were known to the mother or to the Court until a hearing in September 2005.
18. On 6 May 2005, the Recorder made an order by consent that the case should be listed for hearing to consider the question of staying contact; which school, if any, H should attend from September 2003 and whether the videos made by Mr A of the mother without her knowledge or consent should be destroyed. He also ordered that a child psychologist be appointed to assist the Court and the parties with the issue of H's paternity and its effect (if any) on the issues. He also granted leave for the putative father Mr C to apply to become a party to the proceedings. Those matters were dealt with on 26 May 2005. At the same time, the Recorder ordered Mr A's parental responsibility to continue. (This order was in fact outside the power of the Court: see paragraph 3 above). He also advised that interim contact continue as previously; that Ms D, a psychologist, produce a report by 25 August 2005, and that a final hearing be fixed with a time estimate of three days, the case was subsequently listed for hearing on 20-22 September 2005.
19. In the report produced by Ms D, she expressed her opinion upon the benefits of a shared residence order and provided helpful advice about the manner in which H should be informed of his paternity once Mr C's intentions about his future role were established. She also commented at length on the dynamics between the mother and Mr A, who were virtually not on speaking terms, and whom she advised needed to address their difficulties as a matter of urgency in the interests of H.
20. On 22 September 2005, the evidence was heard and completed followed by written submissions on behalf of the parties. At that hearing the existence of Mr A's child in Chicago was revealed to the Court. However, Mr A stated that he had no intention of becoming involved in his life. So far as Mr C (H's biological father) was concerned, he took no part in the proceedings despite having been invited to do so and having been informed of the situation by the mother. He had no apparent interest in seeing or having contact with H. According to Mr A, Mr C was in a relationship with another woman and did not wish to get married, although he would like to have reports from time to time. The Recorder's judgment was eventually handed down on 19 December 2005.

The Judgment of 19 December 2005

21. The position before the Recorder was that Mr A sought a joint residence order, not only to provide him with parental responsibility but also to reflect his position in H's life both in the past and in future. By the time of the hearing he was enjoying 24 hour contact but was seeking also to have overnight contact for two or three days at the weekend coupled with contact midweek. The mother on the other hand was opposed to shared residence because she felt the conduct of Mr A towards her had been oppressive, controlling and intimidating and that this adversely affected H and her relationship with him, which could not be in his best interests. Her position (at least until the very end of her evidence) was that she wished to leave the area and go to live with her family, either with her brother on the South Coast or the remainder of her family in the Midlands. However, at the end of her evidence she conceded that really she would like to remain where she was, provided she could be free of the control and harassment that she saw herself as experiencing from Mr A. Mr A denied that he was behaving in such a fashion and stated that he would give an undertaking not to persist in any such behaviour and thus to make life easier for the mother if she remained where she was. In reaching his decision, the Recorder enumerated what he called a number of worrying and unusual features.
22. So far as the mother was concerned, he identified her continuing practice of sleeping with H (who was now almost 3½) and breast feeding him and her belief that she should go on doing so on demand for so long as he wanted it, although he was on solids as well. This made it difficult to develop overnight contact between H and Mr A.
23. Second, and of greater concern, the Recorder referred to the paternity issue. He observed that the mother's expressed worries about paternity had only emerged at the stage when the CAFCASS officer had advocated a joint residence order in her report, to which the mother was rigidly opposed. The Recorder found that the mother had in fact been dishonest with Mr A and the Court in that she must, as he found she did, have realised that Mr C was the potential father of H from the outset; yet she had deliberately led H to believe that Mr A was his father and vice versa. Her actions and inactions in respect of the paternity of H had exacerbated the animosity which now existed between her and Mr A; it had involved dishonesty to H, Mr A and Mr C as well as to the Court. Whilst she was a good mother and parent on a day-to-day basis, her actions in relation to the paternity issues had been bad parenting on her part.
24. On the other hand, the Recorder had criticisms of Mr A. His actions in setting up a CCTV monitoring 24 hours a day in Miss A's private quarters while she remained in the home was wrong, as he now acknowledged. It had sown the seeds of the mother's view that he was controlling and observing in a way which infringed her privacy.
25. The Recorder also criticised Mr A's conduct over the private DNA test and his conduct in relation to H's doctor and dentist.
26. He then turned to the expert evidence before him. He first referred to the evidence of a health visitor who had given the parties advice on the weaning of H a few months after their parting. She stated that the parties were now agreed that, as H was having one overnight stay a week with A, he needed to be gradually weaned in a way which would prevent any undue distress to him. She also expressed the view that it was clear

from her work with the family that both the mother and Mr A loved H and that their difficulties in agreeing over his care might be preventing them from making his interests their priority.

27. The Recorder also referred at length to the report of Mrs R, the CAFCASS officer, who had found H to be a very contented child who related well to each of the parties in their homes. Mrs R emphasised the fears of the mother; and that “she feels that she has been preparing all her life to bring up H”; the mother’s belief that Mr A needed H to represent his family and to be the reason for having the home which he had built; the mother’s dread of staying contact based on her belief that, even if H were distressed, Mr A would not bring him back; and that, but for these considerations, the mother’s first desire would be to stay living where she was with Mr A having less staying contact until H was older.
28. Mrs R reported favourably on H’s progress despite these difficulties; that he was achieving all his development milestones, talking well, and seemed able to separate from Miss A to go to the child minder or Mr A without difficulty; he had not suffered but had rather thrived. Mrs R expressed the view that she was in favour of a joint residence order and that, although at present the parties were not communicating, it would be helpful for the Court to give a strong message as to H’s right to have both his parents seen as equally committed to him.
29. The Recorder then referred to Mrs R’s oral evidence before him, she only having learned of the paternity issue after making her original report. She nonetheless recommended increased contact from H’s single overnight stays and remained in favour of a joint residence order.
30. The Recorder then referred at length to the evidence of Miss D, the child psychologist, who expressed criticism of both parties’ inability to communicate sensibly or civilly over the question of contact. Miss D commented, and the Recorder expressly found, that H appeared to be picking up his mother’s anxieties about contact, while apparently being happy and content during the contact sessions. As recorded by Miss D, H had told her that it was fun at Mr A’s house during the day but indicated that he was less happy at night. Nonetheless when Miss D had visited him in the morning after an overnight stay she had found a contented little boy who did not appear tired. She found H to be a perceptive little boy who picked up many tensions in the situation he was in, and intelligently sought to keep his worlds apart by calling Mr A ‘Daddy’ at his house, but by his Christian name in his mother’s presence.
31. So far as shared residence was concerned the Recorder referred to the fact that Miss D had mixed views in that respect. On the one hand she considered that a shared residence order would have the advantage of ensuring that H’s contact with Mr A continued and was recognised as the important relationship which it was for H. On the other hand, however, she observed that that it could also “serve to perpetuate a deception and have consequences for H’s relationship with his extended family and any future relationship with his biological father”. The Recorder agreed with the first position but disagreed that the second was a weighty objection in this case in the light of Miss D’s oral evidence, which the Recorder accepted that H had a real and emotionally significant relationship with Mr A who had lived with him as a father figure until he was two and with whom he had continued to have regular and happy contact. Miss D moved to the position in her evidence where she felt that there were

“advantages to H in ensuring that the relationship with Mr A continued via a shared residence arrangement [although] this may be premature given some of the other uncertainties in the situation”. In this respect Miss D said as the Recorder plainly accepted, that “H is already asking questions about Daddy and who he addressed in this way... explanation of mummies and daddies making children and Mr C’s role in this at a level that H can understand would seem appropriate. This should be presented as an additional person in H’s life rather than a replacement to Mr A”.

32. Later in his judgment the Recorder observed:

“I have made my views clear about what I think about perpetuating a deception in the context of the legal view about a shared residence. Lots of people with no biological connection with children have shared residence orders without perpetuating a deception, particularly if what might be termed a deception is explained sensibly and properly to a child, in this case H.”

33. Having considered at length the tension between the desirability for full and proper recognition of A’s role as a psychological, albeit not a biological, parent in a situation where the biological father appeared to be displaying no interest, against the mother’s concerns that a shared residence order would encourage future conflict in a situation in which Mr A would continue to seek to exercise an unduly controlling influence, the Recorder found that:

“In one respect Mr A and [the mother] are as like as chalk and chalk, that in respect of determination. Just as Mr A has been determined to get his way, [the mother] has been determined to carry on with her way, as Mr A would see it, marginalising his position with H. Otherwise she is not the same obviously forceful character as Mr A and one can see that [she] could find herself dominated by his strong and forceful personality. Perhaps she might feel – I am not suggesting that Mr A willingly attempts to control her – but she might see herself as being controlled by him.”

34. The Recorder went on to say, however, that he was concerned about the mother’s attitude to the knowledge that Mr A was not the biological father of H and that she had to change for H’s sake. The Recorder then proceeded in an orderly fashion through the welfare checklist recording under paragraph (b) that both parents were aware of H’s physical emotional and educational needs but needed to learn to communicate civilly so as to shield H from the arguments between the parties.

“They have to learn to communicate in a meaningful way about their son. It is essential that H needs a good relationship with his mother and his father, for which Miss A may want to read ‘father figure’. He needs a rounded future. A rounded future is achievable only with a father figure as well as a mother figure. The mother figure will be the dominant figure but the father figure will be a significant person in his life; it must be. That is what he needs.”

35. Under paragraph (c) of the checklist he made clear that he was going to make an order in relation to contact which would set a time scale for H and Miss A to adjust to weaning and for the mother to prepare to adjust her behaviour and attitude so as to reconcile herself to the making of a joint residence order, which he was inclined to make but for her present fears and attitude of mind. He said this:

“Shared residence; there are great advantages in a shared residence order which I shall come to in a moment. It sends out the strong message that Mrs R suggested and Miss D agreed with about Mr A’s position in H’s life. On the other hand, Miss D did suggest it would impinge (these are my words, not hers) on mother’s security. It would affect mother, as would parental responsibility which goes with it; and that is something to put in the balance.”

36. He then turned to deal with the order which he proposed. I propose to set out the relevant passage at length because, in the course of doing so, the Recorder made reference to relevant authorities and the applicability to the parties circumstances in a passage with which, in the course of argument, Miss Branigan QC for the mother accepted that she was unable to find fault.

“Dealing with shared residence first of all, Mr A’s application; mother objects strongly. She experiences Mr A’s exercise of his rights in relation to H as oppressive. Greatly in H’s interest that the current war of attrition be ended and submitted make a shared residence order would serve to extend it. Miss Probyn [presented] what I thought was a skilful argument, relying on the authorities towards a shared residence order or a joint residence order. She says that a joint residence order will not only provide Mr A with parental responsibility by virtue of Section 12(2) of the Children Act: [it would] also reflect his position in H’s life both in the past and future. I am entirely with her on that. There is clear authority for the grant of shared residence in circumstances where the law does not permit an order under Section 4 of the Act because (as in this case) H is not, as it now appears, the biological son of Mr A. At the time that the order was made by the Court purportedly under Section 4 of the Act it was thought that he was, but it transpires he is not. In *Re:H (Shared Residence: Parental Responsibility)* [1995] 2 FLR P. 883, the Court of Appeal clearly stated that a shared residence order was an appropriate means of conferring parental responsibility upon a step father. [In] the much more recent case of *R: G (Children)* [2005] EWCA Civ P. 462, the Court of Appeal turned to the use of shared residence as a tool to ensure that the non-biological parent shared parental responsibility for the child concerned. The courts have emphasised in numerous cases the desirability of shared parental responsibility. It is not the case, as has been suggested by Mrs R, for example, that conflict and parental acrimony are grounds to refuse to make an order for shared residence. In *A &*

A (Shared Residence) [2004] 1 FLR 1195, Wall J (as he then was) made a shared residence order against a background of tremendous conflict between the parents that resulted in frequent applications to the Court.

Miss Probyn sets out an analysis of the grounds for a shared residence order set out at paragraph 12 of *Re: G*. There is, as she says, a clear analogy between that case and this case. Certain headings identified by the CAFCASS officer in *Re: G* as set out in the judgment of Thorpe LJ, are considered in the context of this case. Firstly, excluding Mr A would not be helpful to H when he is trying to understand his history and early life ... (2) A shared residence order will help H have a clear picture of where he fits in when he grows older. (3) A joint residence order would work to specify in detail what arrangements there should be ... (4) It will help H to know that both parties are involved in his education. (5) A joint residence order will require the mother to share information with Mr A. (6) A joint residence order will help H to understand where Mr A fits in and to understand this better in years to come if an order give him a legal importance in his life. (7) A joint residence order would encourage the parties to recognise the reality of H's early life. So all these criteria apply. However, in this particular case, there is one further different factor that is the effect on Miss A of making a joint residence order. It would have on this mother a disproportionately adverse affect which may rebound on H and that is my concern."

37. In the light of the last observation, and despite the fact that this was on the face of it a final hearing, the Recorder indicated that he was not prepared to make the joint residence order sought by the husband at that stage; but would defer his decision in that respect to a review in 6 months time in the light of the mother's attitude. He stated:

"29. I am very much in favour of a joint residence order for the reasons already mentioned just now in the criteria, but I do not propose to make an order now because I am concerned about the effect it would have on the mother. I am not going to make an order at this stage for that reason but I want to keep the option open and we will look at it again in the case of a review. I am expecting, when the review comes round, ... to examine closely the mother's behaviour and attitude towards this judgment. If I find there has been a failure to heed my remarks in her attitude towards Mr A and indeed to H, that may well strengthen my resolve at the next hearing to make a joint residence order. So I am putting it on ice for the moment, concerned as I am for the mother's reaction to it; but she has warning that it may well be coming if she does not co-operate for H's benefit with Mr A. I reject, as I have already said, that a

joint residence order would perpetuate a deception; but that is not a factor in my mind.

30. Let me just say this in relation to joint residence. I am making the order that I do on the basis that the mother's staying in [the area] and I find that for her to do so is in H's best interest in maintaining a relationship with Mr A."

38. The Recorder invited the mother to give an undertaking not to move out of the area, observing that if she wished to do so later on for good reason she would have to come back to court and seek to be released from the undertaking.

He said:

"If it is a *quid pro quo* for my not making at this stage a joint residence order ... she may well find that would mean to secure protection from Mr A from marginalisation in relation to H, then there will be a joint residence order."

39. The Recorder went on:

"Parental responsibility; the existing order was made in error, an error due to Miss A. It is an academic thing. I am going to revoke the existing order [with] the possibility that for the same reason as the joint residence order, it may be revived. When I look at the situation, it may be needed to protect Mr A against any unilateral intention to marginalise him from H made in the mind of Miss A."

40. The Recorder then went on to make generous provisions for contact at the weekends. He reduced the 24 hour contact midweek to day time contact in accordance with the recommendation of Miss D in order to set a target for the end of H's weaning with a promise of increased staying contact at the weekend after three months.

41. As already indicated, the order pursuant to the judgment of 19 December 2005 was not finally drawn until 11 January 2006 following a hearing for yet further directions. Under the order, the parental responsibility of Mr A was discharged on the basis that, absent the making of a shared residence order, there was no power in the Court to make an order. Pursuant to the proposed review after 6 months, Mr A's application for joint residence and contact was adjourned to July 2006. Mr P of CAF/CASS was appointed to take over from Mrs R and was directed to discuss the case with the psychologist and to report on the issues of joint residence and contact thereafter. A schedule of visiting and increased staying contact was ordered and Miss D was instructed to assist the parties with how to tell H about his paternity and other related issues. The parties were also referred to mediation.

42. The reference to mediation proved unsuccessful and it was not long before the mother made an application for the court's permission for release from her undertaking to stay in the area and to relocate to the South Coast. The CAF/CASS officer and psychologist were thereafter directed to consider the proposed move and its effect on H. There was a flurry of further applications and directions with the result that the

final hearing of the mother's application to relocate and Mr A's applications for joint residence and contact did not take place until 21-25 May and 17 July 2007. It involved a 5-day hearing and judgment was eventually given on 14 August 2007.

The Judgment of 14 August 2007

43. In his judgment of 14 August 2007 the Recorder referred back to his judgment of December 2005 for his consideration of the history of the relationship between the mother and Mr A and the findings which he had made. He stated:

“This judgment should be read or heard in conjunction with that earlier judgment, from which it follows on. There are a number of issues now before me.”

44. He set out the main issues in this way:

“5. The first issue... is the mother's application to relocate with H from [her home locally] to [the South Coast]. The reason she applies to the Court is that I made it clear in my earlier judgment that it was in H's best interests that she should remain [in the locality] because of what I found was a real fear of Mr A [that] moving out of the area to a distant location within England would make contact more difficult and might be seen by Mr A at least, as his marginalisation by the mother. So she has to apply to the Court as indeed she has done, for permission to relocate to [the South Coast]. This is also the review hearing originally contemplated to be taking place in July 2006 in the original order.

6. Then there is the issue of shared residence, which is strongly put forward by Mr A, because he wishes not in fact to have a significant share of H's time living with him in terms of equal or more or less equal division, but he wishes to have parental responsibility restored to him – again, as he would put it, so as to prevent the mother from marginalising him in his relationship with H.

7. There is the third issue of contact, which depends, of course, on whether the mother and H remain in (their present location) or whether they remove to [the coast].

8. There are issues about H's surname, which are put forward by Mr A. Should he be known [by the father's or mother's surname]. There is also an issue raised by Miss Probyn in her skeleton argument, concerning the introduction of Mr C, who is in fact H's biological father, to H. H knows of him, but he has not met him – how does that impact, I must decide, upon H's welfare at the moment.”

45. At paragraphs 9-11 of his judgment, the Recorder referred to the fact that the mother was ill at ease within Mr A's sphere of influence in Bath; also to the belief of Mr A

that the mother was anxious to marginalise his position as the “father” of H. The Recorder observed that they were broadly right in their respective perceptions. Mr A was anxious and determined as always to have what he believed his rightful position recognised by the Court while the mother could not accept that position and was understandably concerned at Mr A’s controlling behaviour by reason of the history of the DNA application, the CCTV videoing and other matters. He stated that the continuing position of antagonism and mistrust between the parents was not in the best interests of H.

46. The Recorder stated his view (paragraph 12) that in fact both parties were controllers, Mr A wanting to control the way the litigation went, making applications that he believes are his right and requesting penal notices on orders; the mother controlling the release of information to the Court and in particular the release of the information about paternity. He expressed as a finding of fact that the mother wanted to go off to Brighton because that meant that she would be in control.
47. The Recorder then went on to say that he did not wish to rehearse the factual issue between the parties, as to who had done what in the past but to look in the future, building on the very good features which both parties exhibited as parents and for which they deserved full commendation. He stated that critical evidence in the case came from the experts in the form of Miss D the psychologist and Mr P, the family adviser now involved, whose report was dated 25 July 2006, at which time he had unfortunately not seen the report of Miss D who in May 2007 had seen H and obtained his views.
48. At paragraphs 15-19 the Recorder reviewed the report of Mr P under the various heads of welfare checklists. He accepted that Mr P’s then view that H was too young to give his considered views and observed that for those he must turn to Miss D. In relation to H’s physical emotional and educational needs, the Recorder accepted that his physical needs were exceptionally well catered for in the settings of two homes in which he was entirely happy and content and appeared to be emotionally secure.
49. However, the Recorder expressed himself in agreement with the concern that H had been in sight and sound of conflicting episodes over contact and said that any step which could be taken to reduce the possibility of conflict should be taken if a detrimental effect on H’s overall emotional development were to be avoided (paragraph 17). As to the question of any future risk of harm, such conflict was the only possible source of such harm although it appeared at present that H was coping exceptionally well within the current care arrangements. The Recorder then quoted the view of Mr P that:

“The Court has the option of ordering a continuation of the existing orders, in that H lives with his mother and has contact with his father. A further option would be to grant a residence order to Mr A and a contact to the mother. *Had Mr A been H’s biological father, it would have been reasonable for the Court to order shared residence, as a reflection of the equal status and the responsibilities of the mother and Mr A. I would have no hesitation in recommending that that is the most appropriate outcome, but as Mr A is not the biological father, I am not sure*

if this is possible. There may by a precedent, however, to the Court that confirms this is still feasible.” (paragraph 19)

[I have myself added the emphasis to this passage].

50. So far as the mother’s move to the South Coast was concerned, Mr P had stated his view that it would be contrary to H’s interests because of what he regarded as H’s close bond with Mr A on the basis that:

“Such a move would inevitably fracture H’s ability to continue to develop a primary relationship with both his parents, even if a generous contact regime was ordered or indeed agreed. To subject the young child to extensive travel to facilitate contact, would not be regarded as being desirable or appropriate. He has the opportunity to continue to move between parents in a much closer proximity by staying in [the area of his present home].”

51. Miss D, the psychologist, on the other hand emphatically stated in evidence. (see paragraphs 28-29 of the judgment) that it was in H’s best interests that there be a move from his present home to the South Coast because of the impact on the mother of living in the same area as Mr A and, through her, as the primary carer for H, upon H as well. When asked whether a shared residence order would perpetuate conflict between the parents, Miss D thought that it would or could, but stated that the issue that she was concerned with was H maintaining regular and positive contact with Mr A. She stated that given that there were difficulties over handovers which impinged very much on the mother’s behaviour, a move would ease that position and that was a good reason for such a move.

52. Having reviewed the possibilities of making regular contact as easy as possible, despite the distance between H’s then home and the South Coast the Recorder then turned to an orderly consideration of each paragraph of the welfare checklist. As to paragraph (a) he recorded H as having told Miss D that his best times were when he was with Mr A, yet he was anxious about staying overnight away from his mother. The Recorder observed:

“It is very important that he maintains what he likes and loves, his best times, so there can be no question of him losing his relationship with his father. Miss D supports continuation [as does] Mr P.” (paragraph 34)

53. As to paragraph (b) the Recorder stated that H’s physical and emotional and educational needs were met with the possible exception of his emotional needs not being met as a result of strife. He said:

“He needs security, he needs to know that life does not involve Mr A and [the mother] in an antagonistic background. He needs to feel secure emotionally with both of them.” (paragraph 35)

54. As to paragraph (c) the Recorder recorded that the change of circumstances in moving to Brighton could mean difficulties in seeing Mr A, but that those difficulties could be overcome if Mr A made a commitment to having a base in the Brighton area. The

likely effect of the move would at any rate be to meet the aspiration of the mother to be away from the area in which Mr A lived. The Recorder observed:

“That should reflect in her happiness, her demeanour, and in turn, benefit H, because it is H’s welfare which is my paramount concern – Section 1 of the Children Act – not to the parties’ best interests or welfare.” (paragraph 36)

55. As to paragraph (d) and the question of H’s possible future relationship with his biological father, the Recorder stated:

“So far as the introduction of Mr C is concerned, that may well confuse H in a time of change, which needs to be fraught with as little danger as possible, as little change as possible, with little concerns as possible, which going to new schools, going to a new area, as proposed. There will come a time when he needs to be introduced to Mr C, but it is after his position with Mr A is entirely secure, it seems to me. That is what I find to be in H’s best interest.” (paragraph 37)

56. As to paragraph (e), the Recorder stated that H:

“is at risk from suffering emotional damage as a result of the antagonism between the parties, and I stress once more, they must stop this antagonism, and the best way of doing that in all the circumstances, I have found, is a move [by] H and his mother provided the level of contact and the enjoyable contact which H has with Mr A is maintained.”

57. Under paragraph (f) the Recorder observed that both parents were capable and intelligent and could meet the needs of H.

58. Finally, under (g) the Recorder considered the range of powers available to the Court and stated:

“41... that brings into question the possibility of making a shared residence order. It is the only way of giving Mr A parental responsibility. He thought he was the biological father of H. [The mother] led him to believe, and led the Court to believe, that he was. If he had been and we had not had the DNA tests, there would have been no difficulty about Mr A having parental responsibility. A shared joint residence order would grant him parental responsibility, and ... although in fact it [is] intended that, of course, [the mother] will remain H’s primary carer, that route has been approved of in *Re H (Shared Residence – Parental Responsibility)* [1995] 2 FLR 883 and *Re G (Children)* [2005] EWCA Civ 462.

42. [The mother] objects to the order, on the grounds that this will lead to further disputes and potentially further litigation. As Miss Probyn submitted in *A v A (Shared Residence)* [2004]

1 FLR 1195 CA, [the Court of Appeal] said that parental conflict is precisely a reason for granting the order.

43. Mr Grime, counsel for the mother says that there should be exceptional circumstances for using a joint residence order as a device to grant parental responsibility. There are exceptional circumstances in this case. What could be more exceptional than Mr A being led to believe he was the natural father and being present at the birth, cutting the umbilical chord, treating H as his son, and then to be told in fact that there was another candidate for paternity, and discovering that the other candidate was indeed the biological father. A further exceptional feature is the commitment shown by Mr A to his parental responsibility – and I stress his “responsibility”, not parental rights. Parental commitment is always a factor if the Court considers granting parental responsibility. And of course, there is the parental conflict, which I have already mentioned.

44. When I gave my judgment at the end of 2005, I made it quite clear in taking away Mr A’s parental responsibility then, that if I sanctioned a move away from Bath it would very likely be on the basis of restoring parental responsibility to Mr A.

45. [The Mother] has changed her mind. I do not criticise her for doing that. She changed her mind about what she says about parental responsibility. In the end she still cannot, as I understand it, bring herself to accept the position of Mr A as a “father” to, “daddy” to H. She considers that she is under the control of Mr A in [her present home]. I accept that this is how she feels, I accept that is having an adverse effect on her, and I accept that thereby it is having an adverse effect on relations with Mr A and in turn difficulties in that relationship are impinging upon H, with possible adverse consequence on his emotional development.

46. All those reasons militate in favour of sanctioning the move to [the South Coast], in return for granting a joint residence order and parental responsibility to Mr A. I find that doing so is in H’s best interest. That is the best scenario envisaged by Mr P, so I am not contradicting his ultimate recommendation. It is meeting the concerns of Miss D. It is really up to the parties to make sure that any antagonism is minimised for the benefit of H.”

59. The Recorder went on to make it clear that he was making the order he did on the basis that there would not be excessive travelling involved for H. he expected the father to make appropriate arrangements in this respect if, as the Recorder considered, contact needed to be gradually increased.
60. In this respect he adopted the cautious approach which had been put to Mr P by Mr Grime for the mother and continued:

“50. What I would like to know, going further than the mother offers, is the current pattern to continue during this coming school term. There ought to be a period of adjustment in Brighton. I would like Mr A to firm up his arrangements, whatever they are. Once he has firmed up those arrangements, he can have, it seems to me, the fortnightly contact, provided it takes place in Brighton or nearby. Not returning H to school in the autumn term, but once the spring term starts, he should be able to return H to school on the Monday morning. Again not take him back to [Mr A’s home]. However, half terms and school holidays, he can go back to [Mr A’s home] as it is the extended contact.”

61. In paragraph 52 of his judgment, the Recorder addressed the parties as to how they should conduct themselves. He stated:

“52... [the mother], of course, was very anxious that Mr A does not impose himself and his will upon every slightest detail. Parental responsibility means just that for Mr A. he has responsibilities, not rights. [The mother] is to remain the primary carer of H. That means that day to day matters, she may decide without reference to Mr A. Some criticism is made of a lack of hair cut by Mr P in his report ... but I do not expect, now Mr A has parental responsibility, that he will be laying down the law to [the mother] about having hair cuts and minor detail. And [the mother] can make preliminary arrangements on important matters such as change of school or an important operation, if one is necessary, which one hopes it is not, but generally speaking the day to day care arrangements for H shall continue to be made by [the mother] – where H is to live, if there is to be a move, and matters of significant importance are to be discussed with Mr A, and the parties are going to have to do their best to reach amicable agreement, if there are such matters, which will occasionally arise ... Conflict is bad for H. Almost all the main functions of daily routine and decisions will be taken by [the mother] as before. Major issues will be discussed with Mr A. If when H is with Mr A, he needs to go to hospital or he needs to see a doctor ... his home address is to be given, his home doctor’s references to be given; nothing is to be done in that respect unilaterally by Mr A, but he can, of course, with responsibility, take his child to the doctor’s or to Casualty if something dreadful were to necessitate that.”

62. The parties were left to agree the terms of the order in the light of the Recorder’s judgment. In the event agreement was not possible upon the detailed terms and, following written submissions from the parties, the Recorder delivered in writing a “Clarification of Final Order” dated 10 December 2007. It is not necessary to refer to that document save to record that, in respect of the objection by the mother to Mr A being referred to in the order as the “Applicant Father”, the Recorder stated:

“5. I do not wish to have to repeat to [the mother] that for all purposes Mr A is to be regarded as H’s father. Relying on expert evidence at an earlier hearing, I found this to be in H’s best interests. In the absence of an appeal, the mother must accept this finding, whether she likes it or not. In the court order, Mr A should be referred to as “the Applicant/Respondent (as the case may be) Father.”

The grounds of appeal

63. The grounds of appeal contend that the Recorder erred in principle and as a matter of law in his overall approach to the applications before the Court with the result that he made a series of orders which are fundamentally flawed both in principle and in law. Specifically it is complained that the Recorder failed to give any proper weight to the position of the mother as the child’s natural and legal parent as against the Respondent who is not. It is said that such failure has resulted in the Court:

- i) Approaching the question of the relocation of the mother and H to Brighton on a flawed and incorrect basis.
- ii) Inappropriately linking the question of the mother and H’s relocation to the acquisition by Mr A of parental responsibility.
- iii) Having inappropriately linked the question of location to the acquisition of parental responsibility, making a shared residence order where such order was wrong in principle and inappropriate in the circumstances of the case.
- iv) Making orders in respect of ongoing contact based on flawed principles and thereby disproportionately extensive and disruptive.
- v) Approaching the whole case from a perspective which unduly favoured Mr A and, failing to give any appropriate scrutiny to his behaviour towards the mother and in respect of H.
- vi) Approaching the whole case from a perspective unduly critical of the mother and the choices she has made or wishes to make for herself in respect of H.
- vii) Giving disproportionate weight to the wishes and ambitions of Mr A to the detriment and undermining of the position of the mother as biological parent.

64. The second main ground of appeal is that the Recorder failed to give any or proper consideration or weight to the fact of H’s biological parentage and its impact and role in H’s overall welfare. It is said that such failure has resulted in the Court:

- (viii) Making a series of provisions in its order which individually and in combination wrongly strengthen and promote the role of Mr A as the “father” of the child both directly (by means of the shared residence and parental responsibility order, coupled with extensive contact) and indirectly (by the exclusion of H’s biological father from H’s life)
- (ix) Making a series of provisions in its order which individually and in combination perpetuate a “lie” that Mr A is H’s father “for all purposes”.

- (x)-(xi) Forcing the mother to treat Mr A “for all purposes” as the father of H “whether she likes it or not”.
- (xii) Making orders which fail to recognise the need for the child to be given a clear, consistent and honest message about his paternity.
- (xiii) Making orders which take no account of the wish of the biological father of H to have some involvement in H’s life.
- (xiv) Making an order which is based on and perpetuates a false premise as to H’s paternity, contrary to his best interests, both short and long term.

Discussion

65. It is plain from the terms of the judgments of the Recorder to which I have at length referred that, read together (or rather as a continuum), as he intended they should be, his reason for making a joint residence order was not for the purpose of recognising the reality of equal, or near equal, sharing of residential time between the parties; he both intended and emphasised that the mother was, and should, remain the primary carer, albeit with generous contact to Mr A. Rather, he made the joint residence order for the purpose of conferring upon A the parental responsibility which went with it and which the Recorder considered was merited by Mr A, whose role he did not wish to see marginalised or diminished. That purpose was in turn founded upon (i) Mr A’s position since H’s birth as the only father figure known to H, (ii) Mr A’s genuine love for H and desire that his role should continue; (iii) the Recorder’s finding (supported by the experts) that it was in H’s welfare interests that such relationship, parental in nature, should continue; and (iv) the Recorder’s concern that, in the context of the mother’s proposed move and continuing unwillingness to recognise Mr A’s role as a father figure, the order was an appropriate reflection and recognition of Mr A’s position, in the absence of which Mr A’s relationship with H was likely to be marginalised and eroded.

Shared Residence Orders

66. The making of a shared residence order is no longer the unusual order which once it was. Following the implementation of the Children Act 1989 and in the light of S.11(4) of that Act which provides that the Court may make residence orders in favour of more than one person, whether living in the same household or not, the making of such an order has become increasingly common. It is now recognised by the Court that a shared residence order may be regarded as appropriate where it provides legal confirmation of the factual reality of a child’s life or where, in a case where one party has the primary care of a child, it may be psychologically beneficial to the parents in emphasising the equality of their position and responsibilities. As long ago as 1995, in *Re H (Shared Residence: Parental Responsibility)* [1995] 2 FLR 883, Ward LJ observed at p.883 that, while orders for shared residence were still unusual:

“They may gradually win more grudging approval from the Courts if the Judges begin to acknowledge that such orders can reflect practical arrangements made by parents and their children which work well in putting into satisfactory practice

that purpose promoted by the Act which emphasises that parenting is a continuing and shared responsibility even after a separation.”

In that case, albeit in circumstances very different from the instant case, the Court of Appeal rejected the argument that it was inappropriate to use a shared residence order for the purpose of conferring parental responsibility on a stepfather who would otherwise lack it. It was appropriate to make such an order for the purpose of alleviating the confusion which might otherwise arise in the mind of a child if he did not have the comfort and security of knowing not only that the father figure wished to treat the child as if he was his father, but that the law would give its stamp of approval to the *de facto* position. Ward LJ stated at p.889 that:

“Residence orders are, as their words indicate, practical orders which settle the arrangements to be made as to the person with whom the child is to live. Here it was important that the boys retained the perception that they lived with their father when they did not live with their mother. Shared residence has a different psychological impact from residence with one, contact with another, because, as contact is defined, it requires that the parent with whom the child lives, must allow the child to visit or stay with the other parent. Here it was necessary for the boys to know that they lived with the Respondent and that they did not just visit him.”

67. At that time and for several years afterwards, shared residence orders were still broadly restricted to a position where parents lived close together and there was no element of likelihood that such an order would foment disputes which were likely to ill-serve the welfare interests of the children concerned. However, in *D v D (Shared Residence Order)* [2001] 1 FLR 495, the judge at first instance had made a shared residence order where there was a degree of animosity between the parents and frequent legal proceedings to sort out the time to be spent with each. In affirming the order the Court of Appeal made clear that, contrary to earlier case law, it was not necessary to show that exceptional circumstances existed before a shared residence order should be granted. Nor was it probably necessary to show a positive benefit to the child. What was required was to demonstrate that the order was in the interest of the child in accordance with requirements of s.1 of the 1989 Act.
68. In *Re F (Shared Residence Order)* [2003] EWCA Civ 592 [2003] 2 FLR 397, this Court made clear at paras [21], [34] and [35] that the fact that the parents’ homes were separated by a considerable distance did not preclude the possibility that a child’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. That order had to reflect the underlying reality of where the children lived their lives, but 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 a child, an order for shared residence could be valuable.
69. Considerable impetus was given to the Court’s willingness to make shared residence orders by the decision of Wall J in *A v A* [2004] 1 FLR 1195. Wall J held that the circumstances before him were a prime case for a shared residence order, not only

because it reflected the reality of the children's lives, but to mark the fact that the parents were equal in the eyes of the law and had equal duties and responsibilities towards their children. Such an order also made the point that, in a case where the parties' dispute was essentially about control, what was needed was co-operation: see paras. [124]- [126].

70. Finally, and of principal relevance to the case, it is also 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, as in the case of someone who is not the natural parent, but a step-parent (see *Re H* above) or same sex partner: see *Re G (Residence: Same Sex Partner)* [2005] EWCA Civ 462, [2005] 2 FLR 957. In that case, upon the break-up of a lesbian couple and in the face of the threat of the biological mother to relocate with her children (whom she had conceived by artificial insemination) to another part of the country, the appellant partner applied for a joint residence order as the only means by which herself to acquire parental responsibility for the children. The judge at first instance refused that order in favour of a number of specific issue orders designed to ensure that the appellant retained a significant role in the lives of the children. In reversing that decision and granting the partner a joint residence order, the Court of Appeal approved and applied the remarks of Wall J in *A v A* to the situation of the appellant. It also quoted and applied the words of Baroness Hale of Richmond in *Ghaidan v Godin Mendoza* [2004] UKHL 30, [2004] 2 FLR 600 to the effect that:

“... The presence of children is a relevant factor in deciding whether a relationship is marriage-like but if the couple are bringing up children together, it is unlikely to matter whether or not they are the biological children of both parties. Both married and unmarried couples, both homosexual and heterosexual, may bring up children together. One or both may have children from another relationship: thus it is not at all uncommon in lesbian relationships that a Court may grant them a shared residence order so that they may share parental responsibility ...

[143] It follows that a homosexual couple whose relationship is marriage-like in the same way that an unmarried homosexual couple's relationship is marriage-like are indeed in an analogous situation. Any difference in treatment is based upon their sexual orientation.”

71. Furthermore, the Court emphasised the importance of the finding of the Judge that the respondent had been developing plans to marginalise the appellant. Thorpe LJ stated at para. [27]:

“The CAFCASS officer had expressed a clear fear that, unless a parental responsibility order was made, there was a real danger that [the appellant] would be marginalised in the childrens' future. I am in no doubt at all that, on the Judge's finding, the logical consequence was the conclusion that the children required firm measures to safeguard them from

diminution in, or loss of, a vital side of family life – not only their relationship with [the appellant], but also with her son. The parental responsibility order was correctly identified by the CAF/CASS officer as the appropriate safeguard. The judge's finding required a clear and strong message to the mother that she could not achieve the elimination of [the appellant], or even the reduction of [the appellant] from the other parent into some undefined family connection. It may be that the mother's own needs and emotions drove her in that direction but that road had to be sealed off for, if not sealed off, it would be taken at a real cost to the children. I do not think that that factor was sufficiently identified by the judge."

72. The saga on *Re G* continued and, in an appeal to the House of Lords in respect of a later order of the Court of Appeal, the views of Thorpe LJ as I have quoted them were cited without any suggestion of criticism by Baroness Hale of Richmond.
73. However, the main significance of the decision in *Re G* in the House of Lords [2006] 2 FLR 62A, for the purposes of this appeal, is the mother's reliance upon it in argument for the emphasis which it placed on the importance, when deciding what is in the best interests of the child, to accord due weight to the relationship with the child of the natural or "biological" parent as against the claims of a partner whose relationship with the child is that of a "social and psychological" parent only.
74. In relation to that argument in the context of this case it is important to note that the House of Lords were there concerned with a situation where the mother of children who was their biological mother and primary carer, was appealing against the decision of the Court of Appeal for upholding the decision of the trial Judge to *remove* the children from her primary care to that of her former partner (the "social and psychological" parent). It was not, as this case is, one where the former partner is doing no more than claiming *joint* residence and parental responsibility whilst recognising that primary care is and should remain with the biological mother. The matter was succinctly expressed by Lord Nicholls of Birkenhead as follows:
- "In this case, as in all the cases concerning the upbringing of children, the Court seeks to identify the course which is in the best interests of the children. Their welfare is the Court's paramount consideration. In reaching its decision the Court should always have in mind that in the ordinary way the rearing of a child by his or her biological parent can be expected to be in the child's best interests both in the short term and also, and importantly, in the longer term. I decry any tendency to diminish the significance of this factor. A child should not be removed from the primary care of his or her biological parents without compelling reason."
75. In her leading judgment, with which their Lordships agreed, following a review of the position prior to the passing of the Children Act 1989, Baroness Hale stated at paragraph [30]:

“The statutory position is plain: the welfare of the child is the paramount consideration. As Lord MacDermott explained, this means that it ‘rules upon or determines the course to be followed’. There is no question of a parental right. As the Law Commission explained, ‘the welfare test itself is well able to encompass any special contribution which natural parents can make of the emotional needs of their child’ or, as Lord MacDermott put it, the claims and wishes of parents ‘can be capable of ministering to the total welfare of the child in a special way’”.

76. At paragraph [31] she referred with approval to Australian authority in *Hodak, Newman and Hodak* (1993) FLC 92-421 per Lindenmayer J that:

“I am of the opinion that the fact of parenthood is to be regarded as an important and significant factor in considering which proposals better advance the welfare of the child. Such fact does not, however, establish a presumption in favour of the natural parent, nor generate a preferential position in favour of the natural parent from which the Court commences its decision-making process ... Each case should be determined upon the examination of its own merits and of the individuals there involved.”

She subsequently observed at paragraph [32]:

“To be the legal parent of a child gives a person legal standing to bring and defend proceedings about the child and makes the child a member of that person’s family, but it does not necessarily tell us much about the importance of that person to the child’s welfare.”

77. Baroness Hale then stated:

“[33] There are at least three ways in which a person may be or become a natural parent of a child each of which may be a very significant fact in the child’s welfare, depending on the circumstances of the particular case. The first is genetic parenthood: the provision of the gametes which produce the child. This can be of deep significance on many levels. The parent, perhaps particularly for a father, the knowledge that this is “his” child can bring a very special sense of love for and commitment for that child which will be of great benefit to the child ... For the child, he reaps the benefit not only of that love and commitment, but also of knowing his own origins and lineage, which is an important component in finding an individual sense of self as one grows up ...

[34] The second is gestational parenthood: the conceiving and bearing of the child. The mother who bears the child is legally the child’s mother, whereas the mother who provided the egg is

not: 1990 Act, s.27. While this may be partly for reasons of certainty and convenience, it also recognises a deeper truth: that the process of carrying a child and giving him birth (which may well be followed by breast-feeding for some months) brings with it, in the vast majority of cases, a very special relationship between mother and child, a relationship which is different from any other.

[35] The third is social and psychological parenthood: the relationship which develops through the child demanding and the parent providing for the child's needs, initially at the most level of feeding, nurturing, comforting and loving, and later at the more sophisticated level of guiding, socialising, educating and protecting. The phrase "psychological parent" gained most currency from the influential work of Goldstein, Freud and Solnit, *Beyond the Best Interests of the Child* (Freepress, 1973), who defined it thus:

'A psychological parent is one who, on a continuous, day-to-day basis, through interaction, companionship, interplay, and mutuality, fulfils the child's psychological need for a parent, as well as the child's physical needs. The psychological parent may be a biological, adoptive, foster or common law parent.'

78. Having categorised the parents thus, Baroness Hale went on to say:

"[37] ... Parents who are neither genetic nor gestational, but who have become the psychological parents of the child ... have an important contribution to make to their welfare. Adoptive parents are the most obvious example, but there are many others. This is the position of CW in this case whatever may have been the mother's stance in the past."

79. I now turn to the individual grounds of appeal.

Relocation of the mother – grounds (i) (ii) and (iii).

80. I do not consider that the Recorder inappropriately linked the question of relocation with the acquisition of parental responsibility in this case. Whilst legally they were separate issues, they were in fact linked in the sense that the mother's desire to relocate to the South Coast was, as the Judge found, not simply a wish to move out of the same area as Mr A, but a move intended to consolidate her control over H in a manner which, combined with the distance involved in the move, raised real and justified fear of marginalisation on the part of Mr A.

81. It seems to me that the issues were clearly and appropriately set out at paragraphs 5 and 6 of the Recorder's judgment (as quoted at paragraph 44 above) and were thereafter dealt with upon that basis.

82. In the course of his judgment, when considering the matter under the various headings in the welfare checklist, the Recorder first and separately considered the question of

the beneficial effect of the move to the South Coast (see paras. 50-54 above). Once having decided that the future was best catered for by means of approving such a move whilst providing for a generous contact regime for Mr A, the Recorder turned to the question whether or not a shared residence order was appropriate (see para. 58 above). In relation to the passages I have quoted, Miss Branigan alights upon paragraph 46 of the judgment which she says highlights the Recorder's misguided approach when he spoke of "sanctioning the move ... in return for granting a joint residence order and parental responsibility to Mr A" and she links those words to the Recorder's reference in his earlier judgment to the wife's undertaking to remain in Bath as a *quid pro quo* for not making a joint residence/parental responsibility order at that time (see para. 37 above). She submits that those remarks demonstrate that the Recorder simply treated the one as meriting the other whereas, having sanctioned the mother's relocation as a legitimate and understandable move on the part of the primary carer (see paragraph 51 of his judgment), he should have reconsidered the appropriateness of a shared residence order on the basis of matters as they then stood which, as she submits, he failed to do. It is Miss Branigan's submission that (1) there was at that time no evidence of the mother's failure to comply with the contact regime hitherto provided for and hence no reason to bolster it with a shared residence/parental responsibility order simply because of the move to the South Coast; (2) there was a likelihood of further strife arising from officious intervention by Mr A if granted parental responsibility.

83. Considered in isolation, the sentences highlighted by Miss Branigan do indeed invite the submission that what were on the face of it legal issues calling for separate consideration were simply treated by the Recorder as a *quid pro quo* for each other. However, that submission overlooks the fuller content of the Recorder's judgments read together and the shorthand which the highlighted sentences represent when considered in context, namely that because of the increased likelihood of marginalisation invoked by the move and the mother's refusal since the earlier hearing to change her attitude so as to recognise a parental role for A, a shared residence/parental responsibility order was appropriate. Further, the next two sentences of the judgment showed that the Recorder had close regard to the expert evidence upon the question of the benefits of a shared residence order. The first sentence refers to his finding that an order for joint residence was the optimum provision on the basis of Mr P's evidence (see para. 49 above), and the second sentence states that it met the concerns of Miss D (see paragraphs 31 and 51 above). I do not therefore consider that the Recorder's careful process of reasoning is negated by the passages relied on by Miss Branigan.
84. Nor do I think that Miss Branigan's complaint that the Judge failed properly to reconsider the position as it existed before him at the time of the second judgment is made out. As already indicated, this was a five day hearing in which the Judge had been treated in detail to the history of the matter since the last hearing and the complaints on either side as to the other's conduct and motivations. The fact is that the matter which caused the Judge to make the order he did was that he considered on ample evidence including that of the mother herself that, despite the opportunities presented to the mother in the 18 months since the existence of the last order, her antipathy towards Mr A's exercise of any parental role or function and her desire to marginalise his influence over, or involvement with, H had continued unabated. Indeed the Judge's found that the mother's move to Brighton would not merely have

the effect, but was motivated by the intention, of marginalising a relationship which was in H's best interests. Thus, while in broad terms it is clear that the contact regime provided for in the interim had been observed, that observation was grudging rather than co-operative, the mother continued to erode Mr A's position by her attitude and observations in front of H, and a parental responsibility order was necessary in order to secure the position of Mr A as well as to recognise the nature of his beneficial influence and relationship as a social and psychological parent to H.

85. So far as the likelihood of further strife was concerned, the Judge recognised the continuing difficulty between the parties but noted that authority did not preclude the making of a shared residence order in such a case, indeed it might support the reasoning behind such an order. The Recorder plainly considered the order desirable both an appropriate recognition of the role of Mr A and a clear message to the parties. I find no error of principle in his reasoning or approach.
86. I should add that Miss Branigan has also submitted that the Recorder's view that a parental responsibility order was appropriate failed to have regard to the fact that Mr A was making no financial contribution to H's support (it was Mr C who was paying support to the other through the Child Support Agency) and that Mr A was only willing to purchase accommodation for the mother and H if they remained where they were. However, it is plain that the position whereby Mr C made payments for H's support had the common consent of the parties and it was Mr A's case that, following the DNA test, the mother had been unwilling to take money from Mr A for H's support. The question of payment for accommodation was also the subject of dispute. It is plain that these factors were not in the forefront of the submissions of the parties below on the issue of shared residence, nor do they find mention in the grounds of appeal. I am not inclined to disturb the Recorder's decision by reason of Miss Branigan's submissions on this point.

Approach to ongoing contact – ground (iv)

87. Miss Branigan scarcely addressed this ground of appeal, save to make clear that the wife is contemplating a return before the Judge for the purposes of reducing contact since her move to the South Coast, in particular on the ground of inconvenience in that Mr A has not acquired a base in or near her new place of residence as was contemplated before the Recorder. However, she has advanced no argument to show error on the part of the Recorder at the time, and it is clear that the order for generous contact which he made reflected the views of the CAFCASS officer, as well as his own, that there should be a build up to generous staying contact at a pace suited to H on the basis of the weekend and holiday contact provided for in the eventual order.

Favouring of Mr A/Undue criticism of the mother – grounds (v) and (vi)

88. These grounds are essentially an expression of dissatisfaction with the views of the Recorder, as carefully formed and set out in his judgments as to the character of the parties and his assessment of their motivation. The complaint is broadly of the Recorder's failure to condemn Mr A more roundly and to regard him as disqualified from parental responsibility because of his ruthless, and on occasions high handed and untruthful conduct exemplified in paragraphs 11, 16, 16 and 20 above, and, because of his aggressive use of litigation as a form of control and interference (as seen by the mother) rather than being genuinely concerned with the interests of H. So far as the

mother is concerned, Miss Branigan did not identify particular respects in which the Judge was unduly critical of her conduct. However, the burden of her submissions was that, in the light of the character and conduct of Mr A, the Recorder should have recognised and been more sensitive to the concerns of the mother, more understanding of her attitude towards Mr A as a threat to her peace of mind, and more sympathetic to her view that his interest lay in exercising control rather than in genuine concern for the welfare of H.

89. I do not consider these grounds of appeal are made out. The Judge saw, heard, and became deeply familiar with, the protagonists over the course of four years of proceedings and was peculiarly in a position to assess their character and motivation. He had criticisms of both. In fact, he expressed acceptance and understanding of the mother's desire to free herself from the dominance of Mr A. However, this was not inconsistent with his finding that, despite her sensitivities, she too was in her way a controlling personality and that her desire to move to the South Coast was not merely to escape the dominance of Mr, but to marginalise the relationship between him and H which the Recorder and the experts recognised as strongly in H's interests. Again, I can find no obvious error of principle or any flaw in the Recorder's findings or overall approach in that regard.

Undermining the position of the mother as biological parent – ground (vii)

90. In relation to this ground of appeal, Miss Branigan has submitted that the Recorder ignored or overlooked the observations of the House of Lords in *Re G* which assert the importance of the position of the biological parent as against that of the "social and psychological", but non-biological, parent who seeks parental rights. In the light of passages I have cited above, I do not consider that she makes out her complaint in that respect.
91. First, as I have already noted, the strong emphasis on the role of the natural parent as opposed to the "psychological" parent was in the context of an appeal from an order which would have removed the primary care of the child from the natural mother and awarded it to the former partner. In this case, no such element is present. Indeed, Mr A recognises that primary care should be with the mother. Further, Baroness Hale stressed that the social and psychological parent's role (whether "equal" or not) is one which requires recognition as a form of parenthood and that the order made in any individual case depends upon the Court's judgment as to what is in the welfare interests of the child; in which context there is no presumption in favour of the role of the natural parent (see para. 76 above). It is plain from passages in the Recorder's judgment, as well as the submissions of Miss Probyn before him, that the Recorder principally had resort to *Re G* for the purposes of establishing the legitimacy of making a shared residence order to support an order from parental responsibility in favour of a non-biological parent in an appropriate case. He was also concerned with the recognition given by Baroness Hale to the role of the psychological parent as an element in his consideration of the child's welfare to which he had primary regard throughout.
92. I do not consider that the Recorder said or did anything to undermine the mother's position as biological parent, albeit he made findings which were not in accordance with her wishes. The Recorder (and for that matter Mr A) plainly recognised her status, not only as a fact but as a feature which entitled her to be the primary carer of

H. At the same time he emphasised the role of Mr A as the only father figure H had ever known and with whom he felt safe and happy. The purpose of his order was to require the mother, as biological parent, to recognise the role of Mr A as H's social and psychological parent, in circumstances where, for the two years prior to the break-up of the marriage, she had herself engineered and recognised his role as father, only to repudiate it once it became apparent that the CAFCASS officer was recommending a joint residence order in December 2004. In that context, the assertion in the grounds of appeal that the Judge gave disproportionate weight to the wishes and ambitions of Mr A is simply a complaint that the Judge found those wishes and ambitions to be genuine and legitimate in the circumstances of the case.

Failure to give proper consideration or weight to the existence and future role of H's biological father (Mr C) – grounds (viii), and (xii) – (xiv)

93. As already made clear it was the concern of the Recorder that Mr C, the birth father, should be afforded an opportunity to participate in the proceedings and he was given leave to apply. However, at the 2005 hearing it was common ground that Mr C wished to play no significant part in H's life. The Recorder therefore proceeded on that basis, taking the reasoned and evidence-based view that a shared residence order could and should be made without "perpetuating a deception": see paras. 31 and 32 above. He was of the view that, given an appropriate explanation of the differences between the roles of Mr A and Mr C, if and when he became aware of the latter's existence, then undue problems should be avoidable. In that respect, the Recorder was dealing with an intelligent child so far coping well with the parental strife and capable of adapting his behaviour accordingly: see para. 30 above.
94. By the time of the delayed review hearing in 2007, matters remained as they were save that, in the course of her evidence, the mother asserted that the biological father was showing an interest in being introduced to H. This was not backed by any statement from Mr C or any attempt by him to engage in the proceedings. The recorder was therefore entitled to proceed on the basis of such evidence before him as he accepted and, in particular, on the basis that the mother, who had hitherto never thought it appropriate to introduce Mr C to H should refrain from doing so unless with the agreement of Mr A or order of the Court. The Recorder did not make any order which failed to recognise the need for H to be given a clear consistent and honest message about his paternity as the grounds of appeal assert. Indeed he made it clear that this should be done in due time and in child appropriate terms. The Recorder did not exclude Mr C from H's life. He simply did not follow a hare raised by the mother, but unconfirmed by Mr C, that his interests fell to be considered. If it were indeed the case that, at some future time, Mr C wished himself to play a meaningful role in H's life, or indeed to exercise parental responsibility, it was open to him to make appropriate application to the Court. It is of course the position under s.2 of the *Children Act 1989* that there is no limit upon the number of persons who may have parental responsibility for the same child at the same time (see s.15); nor does any person who has parental responsibility for a child at any time cease to have that responsibility because some other person subsequently acquires parental responsibility.

By order and/ or otherwise, forcing the mother to treat Mr A “for all purposes” as the father of H – grounds (ix), (x), (xi).

95. There is nowhere in the order of the Court appealed against any express requirement that the mother treat Mr A as the father “for all purposes”. Nor indeed is there any such statement in either the 2005 or 2007 judgment. The form of the grounds derives from a short written judgment of the Recorder headed “Clarification of the final order by Recorder Adam” dated 10 December 2007 and written, I suspect, in a mood of some exasperation in the light of the failure of the parties to agree a number of details in the order which, with a little good will, might have been expected to be agreed without further return to the Court. In the event, written submissions of some length were made on behalf of the father and mother which included a dispute over the description of the father to be adopted in the final order. It appears that Mr A’s solicitors submitted an original form of order which referred to Mr A as H’s “father”, to which the mother’s solicitors objected and suggested that it would be more appropriate to refer to the parties as the applicant and respondent in order to avoid a dispute. In relation to this question, the Judge wrote:

“5. I do not wish to have to repeat to [the mother] that for all purposes [Mr A] is to be regarded as [H’s] father. Relying on expert evidence at an earlier hearing, I found this to be in [H’s] best interest. In the absence of an appeal, [the mother] **must** accept this finding, whether she likes it or not. In the court order, [Mr A] should be referred to as “the applicant/respondent (as the case may be) Father”.

96. This is an unfortunate passage. The fact is, Mr A is not H’s father or parent either in common parlance or under any definition contained in the Children Act or other legislation (cf *J v J (A Minor: Property Transfer)* [1993] 2 FLR 56). He is not a father by biological paternity or adoption, nor a stepfather by marriage. He is a person entitled, by reason of the role he has played and should continue to play in H’s life, to an order conferring parental responsibility upon him. He is thus a person who, jointly with the mother, enjoys the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to that child (see s.3 (1) of the *Children Act 1989*) but he does not thereby become the father of that child. The Recorder therefore went too far in what he said and, and in relation to the disagreement, should have accepted the suggestion of the mother’s solicitors. However, I do not consider that the passage complained of, or the change which I would therefore direct to the nomenclature adopted in the order of 11 January 2008, otherwise constitutes any ground of appeal from the terms of the order or the substantive judgment of the Recorder.

97. I would only add that while, in one sense, the mother may derive some comfort from my observations on the legal position, she should not seek to make capital from them. They cannot and should not in any way justify her in seeking to ignore or belittle Mr A’s role as the father figure in H’s life, which the judgment and order of the Recorder rightly require her to recognise without erosion or denigration in the eyes of H who enjoys and derives such benefit from it.

Conclusion

98. I would dismiss the appeal save to the limited extent that Miss Probyn for Mr A has indicated that she does not seek to uphold it. In this respect, she has conceded that the order made by the Recorder pursuant to s.91 (14) of *The Children Act 1989* and contained in paragraph 10 of the order under appeal should not have been made. Mr A did not seek any such order and the parties were not invited to address the Recorder before he made it of his own motion. It is of course the position that such orders are to be used with great care and sparingly and, where a judge contemplates making such an order, he should not do so without affording the parties an opportunity to address him on the topic. I would therefore delete paragraph 10 of the order but otherwise leave it intact.
99. By way of addendum, I record that Miss Branigan made clear to the Court that whatever the outcome of the appeal, it was the mother's intention to return to Court in relation to the contact provisions currently in force. In the light of the deletion of paragraph 10 of the order made pursuant to S.91 (14) she is entitled to do so. However, I would echo the views of the Recorder that it is high time that this extended history of litigation should cease; that the parties accept the pattern of contact laid down by the Recorder; and that they seek to reach agreement upon any fine tuning for which the need may arise from time to time in the face of unexpected difficulty or inconvenience over dates and times.

Lord Justice Scott Baker:

100. I agree. I have had some doubts, in view of the way the father has behaved, whether a joint residence order is appropriate on the facts of this case. The bottom line is, however, the best interests of H during the whole of his minority and I can see the force of the father having the benefit of the parental responsibility that goes with a joint residence order. The judge has had a good opportunity over a period of time to weigh up the strengths and weaknesses of the characters of the mother and the father and their likely impact on the welfare of H. In the end I have concluded that there is no basis for interfering with his order, save to the extent indicated by my Lord with regard to s.91 (14).

Sir Robin Auld:

101. For the reasons given by the President, I agree without reservation that the appeal should be dismissed, save as indicated by him in respect of the order made pursuant to section 91 (14) of the 1989 Act.