Re K (A Child) [2008] EWCA Civ 526 (04 April 2008)

Case No: B4/2007/2823

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL (CIVIL DIVISION)

ON APPEAL FROM TAUNTON COUNTY COURT

(HIS HONOUR JUDGE BROMILOW)

(LOWER COURT No: YE07P00006)

Royal Courts of Justice

Strand, London, WC2A 2LL

4th April 2008

B e f o r e :

LORD JUSTICE BUXTON

LORD JUSTICE WALL

and

LORD JUSTICE WILSON

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IN THE MATTER OF K (A Child)

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(DAR Transcript of

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Official Shorthand Writers to the Court)

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THE APPLICANT "FATHER" APPEARED IN PERSON, ASSISTED BY A MCKENZIE FRIEND.

Mr Nkumbe Ekaney (instructed by Porter Dodson Solicitors) appeared on behalf of the Respondent "Mother".

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HTML VERSION OF JUDGMENT

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Lord Justice Wilson:

A father, who appears in person, assisted by a McKenzie friend, applies for permission to appeal against a decision made by His Honour Judge Bromilow in the Taunton County Court on 16 November 2007. The judge dismissed an appeal by the father against the dismissal of an application by the father under the Children Act 1989 by District Judge Smith in the Yeovil County Court on 5 June 2007. The application related to a boy, G, who was born on 20 November 2001 and who is thus now six years old. The father's application to the district judge was for a ruling that G should divide his time equally between the homes of the father and of G's mother and that the ruling should be expressed as terms of an order for shared residence in favour of both parents. In both courts below the father, again, appeared in person; the mother was represented before the district judge by her solicitor and before the circuit judge by counsel other than Mr Ekaney, who appears for her today.

It follows that the proposed appeal to this court would be a second appeal. At a hearing on 13 March 2008 attended by the father without notice to the mother, my Lord, Lord Justice Wall, adjourned this application for permission to be heard on notice to her and on the basis that, were permission granted, the substantive appeal should follow forthwith.

The parents of G were never married but, by order dated 15 February 2005, the father shares parental responsibility for him with the mother. The parents began to cohabit in June 2000 and separated in October 2004. A month prior to the separation, when he was aged almost three, G was diagnosed as having mosaic Down's syndrome. This is a variant of Down's syndrome which apparently reflects a somewhat lesser degree of chromosomal abnormality than is suffered by those with the full-blown syndrome. The physical features of those with the mosaic variant may be less distinctive and their development in their early years, say until the age of seven, may be somewhat more akin to those of children who do not suffer the syndrome. Some of the profound difficulties which children with Down's syndrome confront tend to afflict those with the mosaic variant only at that slightly later stage.

An order under the Act of 1989 made by consent between the parents, dated 30 June 2005, did not include a residence order referable to G in favour of the mother but instead recited an agreement that he should reside with her. The actual order related only to the father's contact and provided that, from December 2005, it should take place on a staying basis on alternate weekends. Following the making of that order, as Mr Ekaney stresses to us, the mother agreed extensions of the father's contact with G such that, at the time when the father issued his application in January 2007, G, who had begun to attend mainstream school in September 2006 but who at some stage has been made subject to a statement of special educational needs, was staying with the father for one half of each school holidays, for alternate weekends from Friday evening to Monday morning during term time and for one night during each week of school term, namely from Wednesday evening to Thursday morning. The arrangement afforded to the father about 40% of G's time and, thus, to the mother about 60% of it.

By his application to the district judge the father sought an increase in the time to be spent by G with him which would yield precise equality of time with that to be spent by him with the mother. Thus, in that there were in effect four relevant nights of the week during school terms and in that G was spending only one of them with him, the father sought a ruling that G should stay with him on one extra night for each such week and argued that the times to be spent by G in each home should be expressed as terms of a shared residence order rather than, as before, as terms of a contact order in his favour.

In my experience it is now quite common for a parent with a substantial degree of contact with a child to apply, as here, for a ruling that the time to be spent by the child with him (or, less often, her) should be increased to a level of equality with that to be spent with the other parent and for the arrangements favoured by the court to be expressed as terms of a shared residence order. Equally, in my view, the proper legal approach to the application is now clear: it is that, because a shared residence order may serve the interests of the child not only in circumstances in which the division of his time between the two homes is equal, the two aspects of the application, namely for a ruling in favour of an equal division of time and for a shared residence order, do not stand or fall together. On the contrary, they have to be considered separately; and the convenient course is for the court to consider both issues together but to rule first upon the optimum division of the child's time in his interests and then, in the light of that ruling, to proceed to consider whether the favoured division should be expressed as terms of a shared residence order or of a contact order.

Thus in Re F (Shared Residence Order) [2003] EWCA Civ 592, [2003] 2 FLR 397, when sitting as a temporary member of this court, I observed, at [34], that it was significant that a shared residence order had been held to be appropriate in a case in which the children were to spend only 38% of each year with the father; and I added that "any lingering idea that a shared residence order is apt only where, for example, the children will be alternating between the two homes evenly … is erroneous". Then, in A v A (Shared Residence) [2004] EWHC 142, [2004] 1 FLR 1195, my Lord, Lord Justice Wall, then sitting as a judge of the Family Division, reiterated what I had said and, at [115], pointed out that, in the report of the Law Commission No.172, upon which the Act of 1989 had been based, it had been expressly envisaged that a shared residence order might be appropriate even in circumstances in which the division of the child's time between the two homes was unequal. Still more recently, in Re P (Shared Residence Order), [2005] EWCA Civ 1639, [2006] 2 FLR 347, this court considered an appeal against the dismissal of a father's application, first, that the division of his child's time between his home and that of the mother should be increased from 45%/55% to equality and, second, that the division should be expressed as terms of a shared residence order. Thorpe L.J. said, at [10], that the father's application had raised "two quite separate questions"; and in the event this court dismissed such part of the father's appeal as challenged the judge's refusal to adjust the division of time to equality but granted such part of it as challenged his refusal to make a shared residence order.

The problem in the present case is that the district judge did not approach the issues raised by the father's application separately. He approached them on the basis that they stood or fell together and, specifically, that, if he was of the view that it would be wrong to adjust the division of G's time between the homes to a level of equality, the father's application for a shared residence order fell away.

We have an official transcript of all that was said in evidence and by way of submission to the district judge as well as an approved transcript of his judgment. It is fair to say that, in their closing submissions, neither the solicitor for the mother nor the father clearly reminded the district judge that the two issues did not stand or fall together and that, even if he did not favour an equal division of G's time between the two homes, he should proceed to consider the application for an order for shared residence. I have, however, referred above to the decisions in A v A (Shared Residence) and Re P (Shared Residence Order) in part because it is clear that copies of them were at any rate placed before him. With respect, he should have collected the proper approach from them.

In his judgment the district judge surveyed a large amount of evidence placed before him by the father as to the extent of his commitment to G and his concern to act, in the many years likely to lie ahead, as a major provider, indeed so the father hoped an equal provider, of the especial degree of physical, educational, social and emotional support which, by reason of his condition, G will probably need. In a passage on which, in the event, Mr Ekaney himself relies, the district judge said:

"10. The father says, as a matter of some pride, that he has taken the time and trouble in [G]'s best interests to go upon these courses [for carers of persons with Down's syndrome] and to learn what he can and to apply it when [G] is with him. Thus it is that the father says that he is fully involved in [G]'s upbringing. He encourages him with reading and writing, with social interaction, with any activity that develops his fine motor skills, be it cooking and various other things, jigsaws and the like. It is, he says to his credit, that it was -- or it came about -- that [G] was statemented as having special educational needs. He says that he is very child focused. He takes [G] swimming, he takes him climbing, model making, on holidays, to zoos and any activity which involves an improvement in [G]'s concentration, in his fine motor skills and in his inter-reaction with the outside world. I must say that he does downplay precisely the same contribution which the mother undoubtedly makes in exactly the same ways when [G] is with her. For example he claims for himself the initiative of getting [G] statemented at all and it's perfectly clear to me that, while he was undoubtedly heavily involved in it, he was not by any means the only mover.

11. But my impression of the father is that of a devoted father, a loving father but one who puts himself forward to the court as being peculiarly accomplished and qualified to help [G] through his young life. He is, as I say, to be commended for all of the efforts that he has made to get himself familiarised with the syndrome and its potential in respect of the child-rearing sphere but there is a risk, I find, that in doing so he is so focused that he loses sight of the fact that the mother, who has not gone on such courses, is absolutely able to provide exactly the same care, which the father claims almost uniquely to be his own."

Then the district judge addressed the father's argument in favour of a shared residence order. In that regard the district judge said "firstly, he says that it would be advantageous for G to spend equal time with each parent". There we clearly see the district judge's elision of the issue relating to the division of G's time with that relating to shared residence. The district judge then referred to the father's

contention that a shared residence order would better reflect the respective roles of the parents in G's life. He addressed the mother's opposition to shared residence in the following words:

"13. The mother's case is that in the past she has found the father somewhat controlling although, to the great credit of both parties, neither has made any real allegation against the other and indeed the mother's case continues in this way: that she welcomes the father's considerable efforts in assisting with [G]'s upbringing. She welcomes his continued involvement. She has no difficulty whatever with the current contact arrangements and her concern about a shared residence order, involving as it does only a fairly insignificant increase in the amount of time he spends with his father, is that it would be disruptive to [G], who is happy and well settled in the current arrangement. And it is also advanced on her behalf that it might damage what is currently her very positive attitude towards the father and towards the father's continuing involvement in [G]'s upbringing."

The district judge's choice of words again betrays his treatment of the issue as to shared residence as "involving" the suggested increase in the division of time.

The district judge summarised the issue as follows:

"…the tension really is between this position: the additional contact that is required to lead perhaps to a shared residence order is relatively insignificant, so why not order it? Against the position that the mother, fulsome in her appreciation of the father's efforts, considers that that last step would be unduly disruptive and would make her concerned about the whole contact arrangement in the sense that she regards the father as a manipulative man and it would serve to undermine her present equilibrium in her attitude to contact."

There the district judge asserted that the additional contact was "required" to lead to a shared residence order, albeit that he made the intriguing insertion of the word "perhaps", which may indicate that he half realised that the approach which he had resolved to take had doubtful legal foundation.

In the end the district judge summarised his conclusion as follows:

"24…there is no welfare requirement at all to change a system that is working well. That is a long way from saying, of course, that in years to come the whole situation will not need looking at again. It may well be that his behaviour becomes challenging. It may well be that at that juncture the parties may sensibly agree that each should have a break and that they should indeed share [G] equally. But all of that is for the future and, despite what the father says, the court need not take account of it at this juncture when [G] is only five. I am not therefore going to make a shared residence order because there is no welfare requirement at all that I should do so."

So there the district judge equated 'sharing G equally' with making a shared residence order.

Insofar as one could argue, albeit with some difficulty, that the presentation of the law to which I have referred had not clearly been made to the district judge, one cannot say the same of the presentation to the circuit judge. By paragraph 2 of his skeleton argument placed before the circuit judge, the father complained in terms that the district judge's comments betrayed his view that equality of division was a prerequisite for a shared residence order and that, so the father argued, in the light of the decisions in A v A (Shared Residence) and of Re: P (Shared Residence Order), cited above, such was plainly wrong. The father also, however, challenged the ruling that the division of G's time should remain other than equal.

How did the circuit judge fail to discern the error of law which the district judge had made? Early in his reserved judgment he had seemed to recognise the need to separate the two decisions for which the father's application called. For he stated that the district judge had had two principal decisions to make, firstly whether G's contact with his father should be enlarged and secondly whether there should be what the circuit judge described as a "joint" residence order. I add in parenthesis that the phrase "joint residence" (as opposed to "shared residence") is now reserved for situations in which a residence order is invested in two people living together, for example a mother and a step-father (see Re F (Shared Residence Order), cited above, at [31]). Then the circuit judge referred to various authorities placed before him, particularly by the father, including A v. A (Shared Residence) and Re P (Shared Residence Order), cited above. He referred, accurately, to the district judge's apparently careful judgment and his conclusion that it was preferable for G not to disturb the current division of his time between the two homes, which was working well. The circuit judge then said as follows:

"Having reached this conclusion, the judge went on to consider whether or not there should be a shared residence order. At paragraph 23, he said this: "At this stage of the child's life I am not

persuaded that there are any welfare reasons whatever to require the court to change the current contact arrangement…"".

It seems to me that that quotation might have alerted the circuit judge, insofar as he needed an alert, to the link which the district judge had made between equality of division of time and shared residence. The circuit judge proceeded, however, to observe that all the relevant authorities had been cited to the district judge and that, although the district judge had omitted to mention any of the developments in relation to shared residence reflected in the recent decisions of this court, he had expressed his conclusion by reference to where in his view the welfare of G lay. The circuit judge concluded as follows:

"The judge was faithful to the welfare and no order principles. In my judgment [the father's] criticisms of the [district judge's] decisions and reasoning fail to demonstrate any errors of principle and application of the law to the facts as he found them to be. [The father] has to show that the judge's decisions in respect of contact and residence were plainly wrong. On the contrary; in my judgment, both decisions were well within [his] wide discretion."

I am sorry to say that I cannot explain, nor, says Mr Ekaney to us, can he explain, how the circuit judge could have concluded that the district judge had not demonstrated an error of principle in his treatment of the two issues as standing or falling together.

In my view the circuit judge was correct to conclude that the district judge's refusal to adjust the division of G's time between the two homes to equality was within the ambit of his discretion and so lay beyond the reach of appellate interference. This morning the father has argued to us to the contrary. He has argued that for various reasons it would be in G's interests to adjust the level of time spent between the two homes to one of strict equality by placing G in his home for that extra night in each term-time week. He refers to the special needs which G has. He points to the fact that, under the current arrangements during term-time, in relation to such alternate weekends as are to be spent by G with the mother, G has to go from the prior Wednesday to the following Wednesday without having any communication with him. He cites the need for G to be helped with his homework during term time and he argues that the mother, who has two other older children by a previous relationship, has commitments to them in the evening which make it less easy for her to help G with his homework than it is for him to do so. I understand those arguments. The father is an articulate man and seems to have had valuable assistance from his McKenzie friend in all three courts. I have no doubt that those points were well put to the district judge. But it was clearly open to the district judge to conclude that the movement of G to the father's home for that extra night each term-time week would have only slight benefits for him, outweighed by the disruption for him of a routine which appeared to be suiting him well. Accordingly I do not consider that we can disturb the circuit judge's refusal to interfere with that ruling. We have, however, to attend to his failure to discern the flaw in the district judge's

consequential rejection of the application for an order for shared residence. In such circumstances it was the circuit judge's duty to determine this application notwithstanding that the division of G's time between the homes would and will, until altered by agreement or otherwise, remain at 40%/60%.

In my view there is no need for us to remit this issue to the circuit judge for him to address; and it is not suggested that we should do so. For we have before us all the material necessary for making a decision upon it. Here is a father who has won the plaudits of the district judge and of the mother herself for the level of his commitment to G and for his efforts to equip himself with the particular knowledge and skill necessary for the support of a person afflicted as G is. Here we have a boy aged six who is likely to need a degree of assistance in a variety of forms much more intense than that needed by children who do not so suffer and who is likely to need it for a vastly longer period of his life than that for which other children continue to need parental or other support. Subject to two points urged upon us by Mr Ekaney this morning, it is an obvious case for G's residence to be shared between the two parents so that each can sense, and G can sense, his equally solid foundation in each of their homes.

Mr Ekaney's first point is that, although at the moment, perhaps reflective only of their embroilment in litigation at a high level, the parents are not on speaking terms, nevertheless they have in the past been able to co-operate in relation to G. Indeed it is fair for Mr Ekaney to stress that the mother was very flexible in moving from the constraints of the contact order dated 30 June 2005 to a considerable enlargement of the amount of time which, from about September 2006, G spent in the home of the father. Such is the platform – in my view a weak one -- upon which Mr Ekaney argues, by reference to the no order principle set in s.1(5) of the Act of 1989, that a shared residence order in this case is not necessary in order to afford to G the sense of equally solid foundation to which I have referred.

Mr Ekaney's second point is that some of the findings of the district judge indicate, and certainly some of his client's fears suggest, that, if invested with a shared residence order, the father would be empowered, or at least feel empowered, to implement some disposition to undermine G's foundation in the mother's home. Thus Mr Ekaney draws our attention to the district judge's criticisms of the father to the effect that he is so consumed with what he has achieved for G that he has lost sight of the mother's analogous achievements for him; that the father has downplayed the high level of the mother's service of G's needs; and that, according at any rate to the mother, she had in the past found the father "somewhat controlling". Nevertheless, as I have already set out, the district judge went on to praise the fact that the mother had not made any real allegation against the father, just as the latter had not made any real allegation against her; and indeed he commented on what currently was the mother's very positive attitude towards the father and to his continuing involvement in G's upbringing.

I accept that, although of course a shared residence order gives to one parent no greater control over the child's life than it gives to the other, it is sometimes viewed by a parent intent upon interfering with, or disrupting, the other parent's role in the management of the child's life, as a useful vehicle by which to do so; and I have experience of cases in which parents, although allowed to have substantial contact with the child, are nevertheless rightly refused shared residence on the basis that their motivation seems to be to strike at the other parent's role in the management of the child's life. In any application for an order for shared residence the court should in my view be alert to discern such malign motivation. In my view, however, Mr Ekaney cannot, by reference to the findings of the district judge, come near to establishing that the father falls into that category. It is, so I consider, profoundly regrettable that the father has been unable to date to give the mother due credit for her achievements referable to the care of G; and, for so long as he fails in that way, he fails in one important aspect of the parenthood in which he is so determined to succeed. But his relative blindness to the mother's achievements is in my view far too light a counterweight to the considerations which militate in favour of placing upon G a stamp that he has two parents of equal importance in the overall direction of his life, notwithstanding that the division of his time between the two homes will remain slightly unequal.

Accordingly I would grant permission to the father to appeal against the order of the circuit judge; would allow the appeal; would set aside his order of dismissal of the appeal against the district judge; and, in lieu, would provide that the appeal from the district judge should be allowed and that an order should be made that G's residence be shared between the parents. The time to be spent by G in each of his two homes should be so specified in the order as to reflect the current division.

Lord Justice Wall:

I entirely agree with everything my Lord has said and like him I take the view that the division of this child's time as it currently is between his parents is a matter which was one for the discretion of the district judge and one with which this court cannot interfere.

I add only a word on the question of shared residence to emphasise what my Lord said in the concluding passage of his judgment. For the mother this morning Mr Ekaney recognised that Re P, to which my Lord has referred, is a recent decision of this court. In my judgment it bears a certain number of similarities to the instant case, in that the circuit judge's reason for refusing to make a shared residence was his fear that the granting of the order would affect the issue of control of power

between the parents, and would thereby empower the father in a way contrary to the interests of the child.

I note that in my short judgment, after the leading judgment of Thorpe LJ, I made this observation about shared residence orders which I would wish to repeat this morning:.

"…… Such an order emphasises the fact that both parents are equal in the eyes of the law and that they have equal duties and responsibilities as parents. The order can have the additional advantage of conveying the court's message that neither parent is in control and that the court expects parents to co-operate with each other for the benefit of their children."

I entirely echo my Lord's observation that G is extremely fortunate in having two devoted parents, both of whom clearly have his best interests at heart. I very much hope that this order for shared residence will not be seen by the mother as a defeat or by the father as victory. It is simply this court's recognition of the passage which I have just read from Re P. I also hope very much that in the future G's parents will indeed be able to co-operate with each other in his best interests.

Lord Justice Buxton:

I agree with both judgments and I would also in particular associate myself with what has just fallen from Lord Justice Wall, with regard to the implications of this order and the part it is to play in the future life of this child.

Order: Appeal allowed