CA before Gibson LJ, Ward LJ : 18th March 1998.

JUDGMENT : LORD JUSTICE WARD:

1. This case is thankfully unusual. It is unusual in the sense that the order under appeal that the two girls of this family should reside with their father, was made by His Honour Judge Durman as long ago as 13th June 1996. Those familiar with the hearing of children's cases in this court know that to wait for 21 months or so for a final hearing of a residence application is exceptional. The result of that awful delay is that this court is confronted with such a substantial change in the circumstances of the parties, and, possibly, the circumstances of the children involved, that it is almost academic to go through what is usually necessary, namely the judicial task of analysing the judgment in order to determine whether or not the appeal against it should be allowed or dismissed.

2. It is academic because in the intervening 21 months matters have changed to such an extent that counsel recognise - reluctantly of course on the mother's behalf - and I understand her reluctance and I am sympathetic towards her in her predicament - that it is difficult for this court to resolve untested matters and make final decisions here today. The predicament I face is how to deal with the appeal as anodyne a way as possible.

3. The background is this. The girls with whom we are concerned are sisters: K., who was born on 19th May 1986, so she is not far short of her 12th birthday; and A., who was born on 22nd December 1987, so a few months past her 10th birthday. Their parents had married in November 1985 but had separated in July 1995. It is quite unnecessary to detail what led to the unhappy breakdown of that marriage. The first point to note, which makes this case a sadder one than many, is that the mother was apparently so affected by the unhappiness in her life that in September 1995 she made a serious attempt to end that unhappiness by taking quite a massive overdose from which, fortunately, she has recovered. The result of that was that the children moved to live with their father in the home of his parents, and it is there that they have remained ever since. He applied for a residence order in his favour, and it was that which came before Judge Durman in the summer of 1996.

4. I must deal shortly with his judgment, but I hope that, when those who later read this judgment do so, they will readily recognise that I am expressing the views in as tentative a way as I possibly can consistent with having to reach a decision one way or another. I do so in these neutral terms in order to give the maximum flexibility to whomsoever it falls to decide the eventual questions.

5. The gist of the judgment was effectively this. Both girls had expressed a preference to live with their mother. A., though the younger child - and perhaps even because she is the younger child and was then just 8 - expressed a stronger preference to live with her mother, and K. then expressed herself in terms of wanting to live with mother, though she would not mind living with her father. An important issue for the judge was to decide what weight to be given to the expression of wish by those girls, whose intelligence is not to be doubted at all. He clearly had in mind that their wishes were a relevant factor, and it seems to me therefore that he clearly placed them in the balance. I will turn to the weight he gave to them in a moment.

6. He then analysed the circumstances of the parents. It goes almost without saying that these intelligent parents bring equal skills to bear in their care of their children. Until the unhappy breakdown of the marriage, the mother was the primary carer of the children as the father was at work. There is nothing to suggest she was not able fully to perform those duties, save and except in so far as the unhappiness of her attempted suicide impinged upon it. Likewise, there seemed to be, as the judge found, and indeed as the court welfare officer apparently conceded, no reason to doubt that the children would not be well cared for in their father's care. He found (at page 12D), for example, that Mrs Bird, the court welfare officer, "had no concerns if the children ultimately, as the result of my decision, continue to live with the father."

7. What was troublesome in the case were two aspects: first, the view expressed by the court welfare officer that they should move back to their mother. That the judge did not follow, and he seems to me to have given some reasons for differing from her - principally, the judge concluded she had exaggerated the incident at the children's school and that undermined her opinions formed as a result adverse to the father; secondly, because of the weight she gave to the wishes of the children. Those

wishes included an antipathetic view of their grandmother which the judge thought was based on the *"**flimsiest evidence**"*, to quote his words.

8. The other major factor was that mother was about to remarry. It seems to me, as I read the judgment, that the judge analysed that new relationship and its effect on the children, and his conclusion was that, to introduce them to a new home, to a new marriage, to all that is involved in that for them and for their mother was too distracting and he contrasted, therefore, their settled position with their father against the introduction of the uncertainty of this new relationship; he concluded that (p. 19G): *"To make an order to that effect [to live with mother] would introduce two many new factors in the girls' lives so soon after the experiences they have had over the last year."*

9. Having come to that conclusion he seems then to have gone on to discount the wishes of the children, and balancing the fact that (p. 18A): *"I do not think that children of this age can have any inkling of the possible problems of adjustment that are likely to result in the changes that are contemplated,"*

he concluded that: *"Although I would regard the views of the children at this age as of considerable weight in other circumstances, I do not think I should regard this, in so far as they have been ascertained, as being a **decisive** (my emphasis) factor in this case."*

Consequently, he concluded that they should be left with their father.

10. The attack upon that judgment, to summarise the attack, is that the weight of the children's wishes was given insufficient prominence by the judge; that he failed to bear in mind their antipathy to their grandmother, who was substantially involved in their care; that he discounted the welfare officer's views without adequate justification for rejecting them; and that young girls approaching puberty needed their mother. They are, each of them, forceful submissions which clearly troubled this court when the appeal was heard before Butler-Sloss LJ and Sumner J in June 1997.

11. Without, therefore, going into the detail of the matter, I come to the conclusion that there was nothing wrong in principle with the judgment and, as for the balancing exercise, though other judges may have decided otherwise, Judge Durman did not portray that degree of error which puts it outside the generous ambit within which agreement is possible. So I, for my part, would dismiss the appeal.

12. I repeat that in the new changed circumstances it does not much matter effectively whether I dismiss the appeal or allow the appeal and then direct a trial of the issues that have now arisen before a judge. I would have undoubtedly concluded, but for the concession - I think one can properly call it - wrung from Miss Chavasse - dragged out of her, more accurately - by us, that it is not for this court to weigh the fresh evidence which remains untested when the task of factual evaluation is not entrusted to this court but imposed upon the trial judge. That there is a delay is deeply to be regretted, a delay is inimical to children's welfare and I need no persuading that to put off a decision which should be taken when it can be taken is to do a grave disservice to the children. But, as Bingham LJ observed in **A v A (Custody Appeal: Role of Appellate Court) [**1988] 1 FLR 193, at 205E-F: *"...the judge ought, I think, to have the opportunity of reviewing those premises in the light of whatever findings he reaches on the new evidence. That involves prolonging the period of uncertainty and strain existing in this case which is highly undesirable. It is, however, wrong in my judgment to avoid that undesirable delay by our taking it upon ourselves to make a decision one way or the other which is not entrusted to us and which could in the long run prove even more disastrous."*

I respectfully agree with that observation, and it was because of that observation that we prevailed upon counsel to treat this appeal effectively and for all practical purposes as a decision to be made by this court what order should be made in the interim pending that rehearing.

13. That rehearing should, in my judgment, be a rehearing before the Coventry County Court, if that court is able to provide a date for hearing, which should be for two to three days, and if that cannot be organised in Coventry by the end of July, and it cannot be indicated by Coventry within a matter of a fortnight whether or not they can accommodate it, then the case should be transferred to the Birmingham County Court to be heard by one of the section 9 judges or one of the licenced judges of the County Court, and, in default of that, perhaps transferred to the High Court.

14. The parties are at liberty to make their representations to the appropriate courts and to the liaison judge and this judgment can be used to that end.

15. The question then is what to do in the meantime. The court is dealing with two girls who are 10 and 12. They are intelligent children; no one doubts that. The younger, A., has maintained the preference to live with her mother. She expressed it again to the court welfare officer who was appointed at the instigation of this court last year, and in December 1997, Mr Reilly, one of the court welfare officers in London, took a fresh look at the case and was quite satisfied that Alice was expressing a firm wish to live with her father. Alice's views were expressed in terms of ideally wanting to live with mother; that father opposed that; that she was unhappy about the father and grandparents *"not liking them"* -- to use her words -- *"to phone mother"*, which Alice thought to be quite unfair. That view was repeated to Mr Reilly as recently as reflected in his report of 17th March, when he concluded*: "I think there can be little doubt that Alice wants to live with her mother."*

16. On the other hand, K.'s position is, as Mr Reilly recognises: *"Different and somewhat more difficult to assess."*

That difficulty arises because, whereas she had, for the purposes of his December report, said to him in her father's home that, much as she loved both of her parents and difficult though she found it to put her feelings into words, her wish as then expressed was to live with her mother, but her views even then were, as she expressed them, *"very mixed"* when seen for the purposes of the March report, which was only procured because father, through his solicitors, had written to say that both girls had changed their mind. When it came to find out what K. was then thinking, she was expressing views that she just wanted to live with her father: *"I do not want to lose my dad. I want to live with my father. I do not want to justify it. If I have to live with my mother, I do not know how I will cope with it."*

17. She was in a clearly distressed emotional state, as Mr Reilly acknowledged. That was confirmed by her then going back to school, making or expressing her anxiety about that interview with Mr Reilly and repeating her wish to be with her father.

18. Thus, this court is presented with this dilemma: on the face of it, a clear maintained wish by A. to move into her mother's home, maintained despite manifest affection for father, never a word but that she loves her father, nonetheless that she would prefer to live with her mother; on the other hand, vacillating and totally, it would seem, to be torn in two by the choice that she was being required to make. We are asked at least to order A.'s transfer.

19. I have already adverted to the fact that matters have to be looked at afresh. I know not what case father will present to resist A.'s move. There is clearly opposition to that move, for otherwise he would have given in to it already. I do not feel that this court is therefore in a position to come to so firm a judgment as to make the interim order which the mother seeks. For a start, it would be wrong to separate these girls without a full inquiry, and whilst K. is in the frame of the mind as she is, I cannot possibly be satisfied that it is in her interest to move. I derive comfort - it may only be modest comfort but some comfort - from reading the conclusions of Mr Reilly's December report, in which he seeks to affirm (para 42 p. 17*): "The physical well being of the children has been well provided for by [the father]. He has done well. .... I think moving them would undoubtedly cause disruption and would be unsettling for K. and A.. However to move to their mother's would not, in my view, lead them to necessarily feel dislocated. .... Their father has met their needs and he and the girls have become closer. If they move they will miss him."*

20. Yet, their wish to move with their mother was so strong that he could not ignore it. I respect that view. That he should hold it is no surprise to me on the material then presented to him, but his task of assessing their wishes and our task of deciding what is ultimately in their best interests on evidence which is untested is quite different and, sadly, I cannot find it in me to move K. at the moment.

21. There remains the question of contact. Father has conceded before us - though I have not seen the concession made earlier - that there is no objection to phone calls being received by the girls provided only the mother makes the telephone calls, presumably at her expense. That may be parsimonious of him; that may be unwise of him. It may be - but it is a matter for him to reflect about - that to give the girls a freedom to use the telephone, which they acknowledge to carry financial consequences, is a

freedom which would not be abused and which may remove from their life with him some of the pressures they currently feel. But again it would be wrong for me to impose that at this stage, and therefore I would direct that there be extra contact by mother being at liberty to telephone the children on two evenings each week between hours that can be agreed between counsel and, in default of that agreement, to be between the hours of 7.30 and 8.30 pm.

22. The next problem is whether it would be beneficial to these girls to increase the amount of their contact with their mother. They have expressed their concern that they are not allowed to be collected from school by their mother on Friday afternoon and not returned to school by her on Monday morning. Again, the concession is made in a limited way today that that is perfectly acceptable to the father but only if that extensive contact takes place every alternate weekend, he seeking the other two weekends for his contact because he does not see enough of them.

23. I do not, for my part, at the present moment - emphasising this is a temporary decision to endeavour to keep both balls as high in the air in favour of both mother and father as possibly can be done in an interim decision - accept his need to have weekend contact with the children when he is unemployed and undertaking a course of study. He has ample time during the week to establish his good relationship with his daughters. There is plenty of home work to do and his place is by their side assisting during the week. I would not allow him a weekend of his own, but for my part I would in the interval (and the judge who reads this will see in the 'interval' underlined and without prejudice to the decisions he takes, because I doubt whether Friday to Monday contact every weekend would necessarily be the right answer in the long-term) vary the contact to give the girls that which they want of Friday afternoon to Monday morning each weekend until this case is resolved.

24. In the result, therefore, I would dismiss the appeal as a formality rather than as an act of anything more than that. I would vary the judge's order by permitting the contact twice a week by telephone by the mother telephoning them at the grandparents' home between 7.30 and 8.30 pm, and I would extend her contact to enable her to collect the children on Friday afternoons and return them on Monday mornings to their respective schools. To that extent I would dispose of the appeal with the directions given for its listing.

25. I would add this further direction: that it now being incumbent technically and formally on the mother to issue a fresh application for a residence order, this being now by way of variation of the order which has technically been confirmed by us and in the hope that this judgment will speed any possible delay there may be about the grant of legal aid for this purpose (and those remarks can be conveyed to the Legal Aid Board with all the authority we can muster), that the moment that the application is made there should be a directions hearing at which directions should be given, with a view, if possible, to limiting the amount of evidence that is to be presented at the fresh hearing or to give such directions as will not mean that the hearing is delayed beyond the cut-off date of 31st July. It would be better that the most summary statements be served and that the case get on than that we waste time with lengthy statements or other complicated directions which serve only to delay. I hope those thoughts, which may be difficult to translate into an order, can be noted by counsel and conveyed to the District Judge in suitable form. If need be, counsel can draw an order to make some attempt to put those contributed thoughts into a direction. Personally, I think it is better that they remain hopes rather than directions.

LORD JUSTICE PETER GIBSON:

26. There are aspects of the judge's judgment which, with all respect to him, have concerned me and they are the same aspects which concerned this court at the hearing on 12th June 1997 and which are recorded by Butler-Sloss LJ (see pages 4F-5G of the transcript of the judgment given on that occasion). In particular, I am concerned by the fact that these girls are approaching puberty, living in a household where the only woman in the house is the paternal grandmother, who is in her 70s. But as my Lord has said, it is largely academic whether or not we allow the appeal, in view of the fact that it is plain that there must be a rehearing as soon as possible. For the reasons given by my Lord, I would concur with him in the dismissal of the appeal.

27. As for what is to happen in the interim before the rehearing takes place, in my judgment it would be inappropriate to change the residence of these two girls, even though I recognise the strength of what Miss Chavasse has said about A. repeating her wish to be with her mother. It is in my view inappropriate at this stage to be splitting the two girls. As for contact, I entirely agree with the increased contact which my Lord would order for the reasons he gives. I therefore concur in the order which he proposes.

MISS MACUR: *My Lord, so far as the costs of the appeal are concerned, both parties are legally aided; would you order legal aid taxation of the costs and no other order?*

L.J.PETER GIBSON: *Yes. I take it that is acceptable to you?*

MISS CHAVASSE: *Yes, my Lord.*

L.J. WARD: *Miss Macur, I could not quite decide at one stage when I mentioned 'mediation' whether a movement of your client's head was an acknowledgement of its benefits or of the futility of its endeavour; but if ever there was a case which cried out for these sensible parents to acknowledge that the girls are saying to them, clearly as they possibly can, 'Look we love you both. Do not put the pressure on us to work out where we want to live' it is a case like this. If no mediation has been attempted, there seems to me to be no reason why it should not be pursued in parallel with this case moving to judgment. Coventry has a mediation service, I think.*

MISS MACUR: *It does. The movement of my client was not that of a dismissal of the suggestion that is being made in the welfare report. In fact Mr H proposed it, and has found two mediation services in Warwickshire.*

L.J. WARD: *Then it is a pity mother is not there to hear those remarks, but I hope Miss Chavasse will convey them.*

MISS CHAVASSE: *My client is waiting outside; she preferred to do that.*

L.J. WARD: *I am not complaining; I am sure it is distressing. But, you know, what are they going to do about what the girls are saying, even if they are saying separate things. They are two adults and it is their responsibility, not the grandparents' responsibility, to try to meet their concerns.*

MISS CHAVASSE: *I think, my Lord, that mother's position about mediation is that she felt it would be very difficult for mother and father to wholeheartedly enter into a mediation exercise with a view to reducing the hostility whilst this matter was still in issue. Once there was some certainty --*

L.J. WARD: *No, I do not expect that, but it might be that some independent person - and Mr Reilly is unfortunately not seen to have that independence, I suspect, in the father's camp - but somebody to ask them to consider exactly what are these girls trying to say to each of them, and what are the girls' true wishes and what ought they, as parents, do about it? The judge has to take a decision as to what weight he places on it, but so ultimately, at the end of the day, do they. Somebody who stands outside the frame might be able to give them a bit of a nudge and a push to see quite where they are going, and to make them realise that at the moment they have the affection of both their daughters but they are in serious risk by continuing this battle of leaving the girls forming an adverse view about one or other, or possibly both of them, which is why it is their responsibility to think again. But enough of the lecture ....*

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