CA on appeal from Exeter County Court (HHJ Mackintosh) before Thorpe LJ; Scott Baker LJ; Wall LJ. 9th November 2005.

JUDGMENT : LORD JUSTICE THORPE:

1. The parties to this appeal have an only child, Megan, who is six years of age. When they separated she was three years of age. The arrangements for sharing thereafter were managed sensibly, and the parties were communicating in a civilised way, certainly at the time of a hearing on 19 December 2002. The CAFCASS reporter at that stage felt that the effective establishment of two homes for Megan made this a case suitable for a shared residence order. But that solution was not then acceptable to the mother, and as a result of negotiations, the father conceded that there should be a residence order in her favour on the basis of a rota which divided Megan's time between the two homes in proportions that certainly pointed towards the mother's home as the primary home, but by a comparatively narrow margin.

2. The father issued an application for a shared residence order and for an extension of the proportion of the year that Megan spent with him on 4 September 2003. For reasons which we have not explored, the application did not come before the court until 3 December 2004, when Judge Mackintosh, in the Exeter County Court, blessed an arrangement then agreed by the parents for referral to mediation. There was a debate before him as to whether the rota that had been in force then for some two years should be adjusted to give the father an extra day in each fortnight within the school term. The mother was very unhappy about that, but the judge imposed it. The consequence of that adjustment was to give the father roughly 45 per cent of Megan's time, taking one year with another.

3. Unfortunately, after the hearing the mother changed her mind and refused to pursue the mediation route. Accordingly, the case was referred to the judge's list, and on 6 April he devoted a day to evidence and submissions from the parties and their then counsel.

4. The CAFCASS reporter had filed a second report for the purposes of what may be regarded as day one, namely 3 December 2004, and in her conclusions she recorded a shift of opinion away from a shared residence order to the status quo, namely residence order to mother. The basis of her shift was the marked deterioration in the relationship between the parents. They had sadly reached the point where they were incapable of communicating, certainly verbally, without either altercation or the risk of altercation. However, her oral evidence to the court was given on 3 December, and it seems that very little additional preparation was undertaken for the April hearing, and when the case was called, it was counsel for the mother who opened and who produced a schedule which represented the mother's proposal for the immediate future.

5. The mother's position was essentially to advocate the continuation of the status quo. Mr Hickmet, who represented the father here and below, set out his stall at a relatively early stage. He, on instructions, sought the shared residence order and also an equal division of Megan's time. So those were the two issues for the judge to decide.

6. There is a transcript of the proceedings, which shows full and relatively informal exchanges between the parties, their advocates and the court, at the end of which the judge gave a judgment which apparently lasted something like an hour. Unfortunately, that crucial part of the proceedings was not transcribed, or, if it was transcribed, the tape was then lost. So the only record we have of judgment is a note which was taken by Mr Hickmet and agreed with counsel, who appeared below for the mother. It was put before the judge for his approval. He was not particularly happy with it, but made what he regarded as essential alterations. The note is only some six pages long and is clearly, at best, a summary or distillation of what the judge actually said. Mr Hickmet has engagingly confessed that he had flagged a bit towards the end of his endeavours to note the judgment. However, he submits that the essential reasoning of the judge is discernible from the note, and Mr Lyne, who did not appear below, has not challenged that proposition.

7. Mr Hickmet submits that this was a classic case for a shared residence order: the child had two homes; the division of time between those two homes was nearly equal; both parents had parental responsibility. A shared residence order would quite simply reflect the reality. He criticises the paucity of the judge's reasoning for not acceding to the simplicity of equal division of time. Mr

Hickmet submitted that were the parties to move from the present relatively sophisticated rota to a simple process of alternative weeks during the school terms and equal sharing of the school holidays, the opportunity for bickering and dissension would be reduced to a minimal level.

8. Mr Lyne, who has argued his case with skill and strength, relies on the clear exercise of a judicial discretion, the judge having had the supreme advantage both of seeing and hearing the parties, and also of continuity of management. He particularly emphasises that the principle is not and should not be that a shared residence order automatically follows from proof of the underlying foundations, namely two homes, and more or less equal sharing of time. In those cases, as in all others, Mr Lyne emphasises the importance of the exercise of a judicial discretion on a case by case basis, always guided by the paramount consideration of welfare.

9. I have not found this a particularly easy appeal to decide, partly because we have no transcript of the judgment below and partly because it was seemingly agreed that the judge should not investigate and make findings upon mutual allegations of misconduct in the month of February 2005, that is to say in the interim between the two hearings. It does not seem to me profitable for the purposes of this judgment to say any more about that aspect, but it is an aspect that has undoubtedly extended the argument of the appeal.

10. I then approach the two quite separate questions that we have to decide. Has Mr Hickmet made good his submissions first in relation to the judge's refusal to increase father's share of Megan's time in his home: and second, has he made good his criticisms of the judge's refusal of his application for a shared residence order? The judge explains himself relatively briefly in relation to an extension of the father's share. He said in paragraphs 9 and 10:

"The court is a little concerned about father saying he has not got what mother has got. 'I'll try to get one or two extra months'. One has got to look at it from the child's point of view and one looks to move contact on. Mr Hickmet's strongest argument regarding the shared residence order is that the child has indeed and the CAFCASS reporter said 'she knows two homes'. It could be based on the fact that she stays with dad weekends.

Megan would know it as her father's home and she spends six nights per fortnight with her father, which includes the extra night which I ordered in December. I am reluctant to make another change so soon after that. In this case Mr Hickmet says round it up so that it is totally equal and make a shared residence order."

11. The extension that the judge had imposed on the mother in December was still relatively novel. There was evidence that Megan had been doing very well at school in that brief interim. Her report for March 2005 is a glowing report. In those circumstances, I conclude that it was a permissible exercise of the judicial discretion to decide that further extension of father's time, only four months after the last, would be too soon.

12. I turn then to consider the judge's reasons for rejecting the father's application for a shared residence order. Here his reasoning is somewhat fuller and it is perhaps relatively easy to distil. In paragraph 14 he commented that the question of whether or not there should be a shared residence order was a more difficult issue. He then said: *"What does concern me and continues to concern me is whether fully knowingly or not, in the back of their minds, and it discomforts me, is the issue of control. A power battle should never be allowed to develop in relation to contact to a child."*

13. In the following paragraph he returned to this territory, saying: *"Equally the court is not convinced that if the father was given shared residence he would not order the mother to do something."*

14. Finally, in paragraph 19 the judge added: *"This is on the ground a situation where it is agreed that the child has two homes at the moment. The child needs to know that where there is a disagreement the mother has to take the final decision."*

15. Those paragraphs in conjunction seem to me to demonstrate that the judge felt that the consequence of acceding to the father's application would be to empower the father in a way that would be contrary to the interests of the child. We have been referred by Mr Hickmet to the decision of my Lord, Wall LJ, in the case of **A v A [**2004] 1 FLR 1195. At 1221 my Lord says: *"It is a basic principle that, post separation, each parent with parental responsibility retains an equal and independent right and responsibility to be informed and make appropriate decisions about their children. However, where children are being looked after by one*

parent, that parent needs to be in a position to take the day-to-day decisions that have to be taken while that parent is caring for the children. Parents should not be seeking to interfere with one another in matters which are taking place while they do not have the care of their children. Subject to any questions which are regulated by court order, the object of the exercise should be to maintain flexible and practical arrangements whenever possible."

16. One feature of this case is that the skirmishing ground between the two parents seems at least to be confined to the practical arrangements for transition during the operation of the rota. It is not a case in which there is any evidence of either parent having interfered, or having sought to interfere, with the exercise of responsibility and judgment of the parent in possession. Whilst Megan is with her mother, father respects mother's responsibility and judgment. Conversely, when Megan is with father, mother respects his responsibility and judgment. Accordingly, I am simply unable to comprehend what were the anxieties that drove the judge's decision. What did he envisage would be the risk to Megan of making the change? In what respects did he understand that the father would be empowered by the grant of his application for a shared residence order? He already had parental responsibility. He had proved his responsibility as a parent by the manner in which he cared for Megan whilst she was at his home, and he seems equally to have respected the mother's responsibility as a parent whilst Megan was in her home. If that factor be put out of account - removed from the scale pan - this seems to me to be a plain case for a shared residence order. It reflects the reality that the parents have established for Megan, and it is to their credit and to her advantage that they have succeeded in making for her two homes in substitution for the one home that she lost when they separated. It is much to their credit that she has progressed so well over the course of the last three years and is doing so well at school.

17. Accordingly, it seems to me that Mr Hickmet makes good his submissions in relation to that part of the judge's order. I would accordingly allow the appeal to that extent and substitute for the residence order of 19 December 2002 a shared residence order.

18. I wish to record that the mother has instructed Mr Lyne today that providing the mechanics of mediation do not involve face-to-face meetings, or certainly not initially, she would be willing to enter into a mediation within the Court of Appeal ADR scheme. The scheme is available to any case that enters the court at any stage. The fact that we are making an order that disposes of the appeal finally does not in any way close the gate to the ADR scheme. Mr Hickmet has made it very plain that his client remains anxious to mediate. Mr Lyne has sensibly observed that these parents have got at leat another decade during which they must collaborate for the benefit of Megan, and he has sensibly observed the post-appellate mediation for these parents should have as its primary objective restoring their capacity to communicate in a courteous way, as they were doing only two or three years ago. So I will make arrangements for letters to be sent out to the parties, and we will at the earliest convenient date identify a local mediator who would be ready to accept the referral. I would only express the hope that there will be no second thoughts on the part of either parent and that the mediation can proceed and we can achieve the objectives identified by Mr Lyne.

LORD JUSTICE SCOTT BAKER:

19. I agree. A shared residence order reflects the reality of the present arrangements, and, in my judgment, there is no compelling reason why such an order should not be made. Megan has two loving parents, who both have equal responsibility for her. Her time is divided broadly equally between them.

20. I would allow the appeal to the limited extent indicated by my Lord.

LORD JUSTICE WALL:

21. I too agree that this appeal should be allowed to the limited extent proposed by my Lord, Thorpe LJ. As to contact, I agree that the judge was entitled to take a cautious view. He was the judge on the ground and was entitled to exercise his discretion. Speaking for myself, I would like to congratulate the parties on the level of contact which they have been able to achieve, and perhaps Megan's mother the more so, because when the judge imposed additional contact on her of which she did not initially approve, she loyally obeyed the order of the court and the contact has gone forward to Megan's benefit.

22. As to the question of the shared residence order, I agree with Mr Lyne that the making of such an order plainly involves the exercise of a judicial discretion and does not automatically follow because children divide their time between their parents in proportions approaching equality. However, where that does happen, as here, and where a child in Megan's position lives for nearly 50 per cent of the time with her father, it seems to me, as it seems to my Lords, firstly that a shared residence order is most apt to describe what is actually happening on the ground; and secondly that good reasons are required if a share residence order is not to be made. 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.

23. In my judgment, the judge's reasons for not making a shared residence order on the facts of this case are unsatisfactory. I am very conscious that we do not have a transcript and that I should not place too heavy reliance on counsel's note of the judgment, even if it has been approved by the judge. Nonetheless, if the judge thought that the father would abuse the shared residence order, or seek to use it so as to control the mother, he should, in my judgment, have said so in terms and identified the factual basis upon which he had formed that view. He does not do so. His finding that there was "too much instability" at the moment to make a shared residence order does not seem to me in tune with Megan's longstanding living arrangements.

24. Furthermore, I do not agree with the judge's conclusion that the child needs to know that where there is a disagreement the mother has to make the final decision. Day-to-day decisions have to be taken by the parent with whom the child is residing for the time being; important decisions should be taken jointly.

25. As to the difficulty of communication, that is an issue which the parties plainly need to address, but it is not, in my judgment, a reason, on the facts of this case, not to make a shared residence order.

26. For all these reasons, this is, in my judgment, a case for such an order. As both my Lords have said, it reflects what is happening on the ground. It reflects the importance of both parents in Megan's life, and re-emphasises their joint parental responsibility for her welfare.

27. I was also pleased, like my Lord, to hear through Mr Lyne that Megan's mother is willing to re-enage in mediation, and I wish the parties every success in it.

MR RICHARD HICKMET (instructed by Porter Dodson) appeared on behalf of the Appellant
MR MARK LYNE (instructed by Messrs Stones) appeared on behalf of the Respondent