Case No: BE97PO5759

Neutral Citation Number: **[2004] EWHC 142 (Fam)**

IN THE HIGH COURT OF JUSTICE

FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Wednesday 4th February 2004

Before:

THE HONOURABLE MR JUSTICE WALL

- -

Between:

A FATHER (Mr. A)	**Applicant**
- And –	
A MOTHER (Mrs. A)	**First Respondent**
and THEIR TWO CHILDREN (B and C) (Represented by the National Youth Advocacy Service (NYAS) and their Guardian Mrs. P)	Second Respondents

- -

Mr. Peter Horrocks (instructed by Gordon Bancks & Co) for the Applicant
Mr. Lee Arnot (instructed by Woodfine Batchelor) for the First Respondent
Mr. Rex Howling (instructed by NYAS) for the Second Respondents
Hearing dates: 16 December 2003

- - - - - - - - - - - - - - - - - - - -

Judgment

Mr Justice Wall:

Introduction and overview

1. This case concerns two children, whom I will call B and C. They are the children of Mr and Mrs A. B is a boy who was 11 in August 2003. C is a girl aged 9 and a half. Their parents are both professional people. Mr A is a hospital consultant now aged 55: Mrs. A is a teacher, now aged 50. They were married in April 1992 and separated in October 1997. Their divorce was made absolute in September 2001 By virtue of an order made in the county court on 27 March 1998; Mrs. A obtained a residence order in relation to both children.

2. Although I have not investigated the history, my understanding is that there was litigation effectively from the date of the parties' separation in October 1997, when Mrs. A removed the children from the former matrimonial. Although ultimately compromised, the divorce was, as I understand it, initially defended. Given the subsequent hostility between Mr. and Mrs A, it is unlikely that the period leading up to their separation was entirely amicable.

3. Early in 2002, Mr A issued an application for a joint residence order and a defined contact order. His complaint was that Mrs A had been making unilateral decisions about the children's health and education and marginalising him from those decisions. He had objected to a proposed change of school for C, and asserted that as a consequence, Mrs A had informed him that C was frightened of him. Contact between Mr A and C stopped in March 2002.

4. It is not necessary for me to recite all the interlocutory orders made in the county court. For my purposes, the important order is that made on 11 July 2002, which invited the National Youth Advisory Service (NYAS) to respond on the two questions of contact between C and her father, and Mr. A's application for a variation of the order for residence made by the district judge on 27 March 1998.

5. A consultant psychiatrist, Dr. L was instructed to advise on the attitudes of the children to contact, C's wishes in regard to schooling, and to give an assessment of what if any therapeutic input would assist the children regarding contact. She reported on 3 July 2002. She described B as a rather vulnerable, very sensitive child, who was

www.thecustodyminefield.com

"devastated and distracted" by his parents' disputes. C had been very fond of her father but had now apparently turned against him. She did not want contact. Dr. L was not sure how she could be helped to see him again, but said that C needed to make her peace with her father. She reported that C wanted to move schools, and that B needed and would make use of some therapeutic input. She was not sure if C would make use of a similar therapeutic input, but that did not mean she did not need it.

6. On 11 July 2002 she gave evidence to the district judge. The result appears to have been a compromise of the school question, but the dispute over shared residence and contact was set down for a three-day hearing commencing on 20 November 2002 before the district judge.

7. NYAS' response to the invitation contained in the order of 11 July 2002 was a preliminary report from Mrs. P, an independent social worker and the NYAS' caseworker, dated 16 October 2002 and written for a directions appointment to be heard on the following day. I shall return to the detail of this report later. In summary, however, it recommended the making of a defined interim contact order between C and her father in the period leading up to the final hearing on 20 November 2002. The first period was to be at a family gathering due to take place on 21 October 2002. There were then to be further contacts observed by Mrs. P.

8. On 17 October 2002 the district judge joined the children to the proceedings and appointed Mrs. P their guardian. In accordance with Mrs. P's advice, he made a detailed order providing for the first period of contact on 21 October and thereafter two periods of contact to be observed by Mrs. P. The court recorded its understanding that the contact visits were directed with the parties' agreement and expressed its expectation that Mrs. A would make C available for all of them.

9. The contact fixed for 21 October 2002 did not take place. On 18 November 2002, Mrs. P filed her second report. It set out in considerable detail the work she had done since 16 October 2002. Her recommendations were dramatic. She proposed an interim residence order for a period of three to four weeks in Mr. A's favour to allow the children what she described as a "short respite break". Those arrangements should be reviewed before the children broke up for Christmas. The court should set down a finding of fact hearing to resolve concerns expressed by Mrs. A that C was at risk

www.thecustodyminefield.com

from her father. She suggested this be heard either by an experienced circuit judge or transferred to the High Court. She also expressed the view that the court might well wish to consider making an order under section 37 of the Children Act 1989 inviting the intervention of the local authority on the basis that the children were suffering significant harm. She also invited consideration of a psychiatric or psychological assessment of both parents.

10. The district judge acted promptly on Mrs. P's recommendation that the case be transferred to the High Court. On what was intended to be the first day or a two-day hearing, he secured the immediate whereabouts of the children for the day and transferred the case to the High Court forthwith.

11. Thus it was that Mr and Mrs. A, their legal advisers, Mrs. P and counsel for NYAS all arrived unexpectedly in my court during the afternoon of 20 November 2002. Mr. A and NYAS were seeking the immediate removal of the children from Mrs. A's care in accordance with the latter's recommendation. Fortunately, I was sitting as applications judge and was able to accommodate an immediate hearing, which lasted into the following day. I decided not to follow Mrs. P's primary recommendation. I directed that there should be contact between both B and C and their father as recommended by Mrs. P, and that contact should take place in the presence of C's godmother, Mrs. H. I also directed a finding of fact hearing to take place on 16 and 17 December 2002 to deal with Mrs. A's allegations that Mr. A represented a threat to C.

12. Contact remained problematic, but the finding of fact hearing took place. At the conclusion of it, I was a certain as I could be that Mr. A was not a risk to C, and that, in particular, there had been no sort of sexually inappropriate behaviour by Mr. A towards C, and that there was no lack of appropriate sexual boundaries between Mr. A and C as Mrs. A had alleged. I concluded that C had a loving relationship with her father, and that there was no reason why she should not both see him and stay with him.

13. Mrs. A assured me that she would accept my judgment and the findings of fact I had made. On this basis, although I was invited to do so by Mr. A, I declined to make any change in the residence order, but made it clear that in the light of my findings, I expected contact between Mr A and C now to be fully restored.

www.thecustodyminefield.com

14. Most unfortunately, Mrs. A did not accept my decision. She allowed a friend to interview C. The allegations were repeated and elaborated through the friend. Mrs. A also involved another friend and her local vicar. Contact between Mr A and C was frustrated.

15. The result was a further hearing on 30 December 2002. Mrs. A had applied for a suspension of my order directing contact, and directions as to whether C should be seen by a member of the local police or social services child protections team. I dismissed that application and ordered that the children should live with their father.

16. The plan was that the questions of residence and contact should be listed for a full hearing on the last three days of the Summer term commencing on 28 July 2003. In preparation for that hearing, I had ordered on 19 December 2002 that NYAS should obtain a report on Mr and Mrs A from a psychologist, Mr. BC – that report to be available by 30 April 2003. In the event, Mr BC's report was delayed. However, sufficient progress had been made by Mrs. P and Mr. BC for them to be able to recommend that the July hearing should be postponed for six months. I therefore listed the case for further directions on 16 December 2003

17. On 16 December 2003, there were further reports from Mrs. P and Mr. BC. Their joint view was that there was no purpose in the case proceeding to a full hearing. The children were now spending 50% of their time with each of their parents. That was acceptable to the children and to both Mr. and Mrs. A. The only issue was that Mr. A wanted the interim residence order, which I had made, in his favour to be retained: Mrs. A wanted there to be a shared or joint residence order. Although it was recognised as being highly unusual, both parents and NYAS wanted the joint residence orders to last until each child was 18, and also sought an order under section 91(14) of the Children Act 1989 preventing each of them making any further application to the court without the court's permission. Details of the shared care arrangement, with careful identification of what days in each week would be spent with whom throughout 2004 were agreed, as was a schedule of items in relation to the exercise of parental responsibility, identifying those items which required mutual consultation and those which could be exercised unilaterally. I regard this as an extremely useful document, and attach a copy of it to this judgment.

www.thecustodyminefield.com

18. In a nutshell, Mr. A's argument was that the current shared care arrangements had only come into being after the interim residence order had been made in his favour. The only way they could be guaranteed to continue was if he retained the sole residence of the children. He was committed to the shared care arrangements, and assured me through counsel that he would honour them. But if, he said, Mrs. A obtained a shared residence order, she would abuse it, and there would be a return to the strife which had beset the family since 1998, when a sole residence order had been made in Mrs. A's favour.

19. Mrs A was not at court on 16 December 2003. I was told that she had recently been diagnosed as suffering from breast cancer. She would, however, abide by whatever order I made.

20. After hearing submissions from counsel on behalf of both parents and on behalf of the two children, I stated that I intended to make shared residence and other consequential orders designed to ensure; (a) that the children spend equal periods of time with each of their parents; and (b) that the proceedings should come to an end. I agreed that I would make an order under section 91(14) of the Children Act 1989 barring any application by either party without the permission of the court, and I also agreed, again unusually, that the joint residence order should last until each child was 18.

21. As the orders I was making were unusual, I stated that I would put my reasons for making them into writing, in an anonymised form, which could be published. This I now do.

22. I have described the parents as Mr and Mrs. A, and I have called the children B and C. As will be apparent, none of these initials represents the true names of either the children or their parents. As will already be equally apparent, however, this is a case in which identification of the children and their parents would be seriously detrimental to the welfare of the family, whose privacy must be fully protected. At the same time, the case demonstrates points of interest and importance in the ongoing debate about the role of the courts in contact and residence disputes. It is, therefore right, in my view, that my reasons for reaching my decisions in the case should be made public. I am therefore handing this judgment down in open court, but directing that nothing should be published which would identify the children or their parents.

www.thecustodyminefield.com

The facts as summarised by NYAS

23. I have already summarised the history of the case from the court's perspective. In her final report for the court dated 14 December 2003, the children's guardian, Mrs. P, summarises the case from the children's perspective in a manner, which I cannot better. I therefore propose to set it out in full: -

> 1.2 When I first met B and C in October 2002, they appeared troubled children. C had stopped seeing her father in March 2002, and was stating that she no longer loved him or wished to see him. She gave me a very unconvincing list of her worries and anxieties about seeing her father. B had stopped seeing his father in March 2002, but at his own insistence he had started seeing his father again in April 2002. B felt desperately sad that C was no longer going for contact. He did not know, as a 10 year old child, how to resolve the problems in his family. B appeared an emotionally burdened child.
>
> 1.3 With respect to the parents, Mr. and Mrs. A, a virtual state of war had been going on for over 5 years. It appeared that the first response of both parents in the event of even the most minor disagreement was to rush to solicitors or to make applications to the court. The bundle of case papers I was sent at the start of this case was so large it could be measured with a ruler. I can confirm that I read the whole bundle fully; this is a recent concern of Mr. A. In my opinion, reading the bundle was a sad testimony that two intelligent people had lost all perspective and common sense in their hatred of each other and their need to battle and win over their ex-partner. I was clear they had lost the focus on their primary role, which was to raise their children to adulthood, either separately or apart, as best they could.
>
> 1.4 The children told me that handovers or meetings between the parents were difficult for them, as they would always resort to shouting matches and conflict. The parents could not communicate together or make decisions about the children without solicitors being involved.

www.thecustodyminefield.com

1.5 In November 2002, I re-introduced C to having contact with her father. This went well; it was obvious that C had a strong attachment and a loving relationship with her father. Overnight stays were started and became successful. Confusingly, C became more and more distressed to leave her mother's care when I collected her, but would settle down quickly after the separation. I had no doubt that contact was positive for C.

1.6 Mrs. A was convinced that C was at sexual risk from Mr. A. In the early days of my involvement, the more I tried to re-assure Mrs. A, as an experienced social worker in child protection, the more this issue assumed credence in Mrs. A's eyes. A finding of fact hearing was held. The court gave similar assurances to Mrs. A by finding that her concerns were unwarranted. This did not stop Mrs. A. She involved a friend in questioning C about these matters. On 30 December 2002 the court considered whether the children's residence should change. The court ordered Mr. A to become the residential parent, and for the children's contact to their mother to be at my discretion. This order put me in the driving seat. I had no doubt that the best way forward for B and C was a shared care arrangement.

1.7 Slowly the children moved to spending equal time in both their parents' care. This arrangement, which has been detailed in my earlier reports, has been running successfully since April 2003. The one undisputed fact in this case now is that the shared care arrangement suits both children well. The children are happy and thriving. They are making excellent progress at school, and in their social lives. B and C both feel they can maintain a neutral stance, as they spend equal time with each parent. I believe that the parents have now leant not to involve the children in their adult disputes to the same extent as before. B and C no longer see the need for me to keep seeing them. To them, the problems have been resolved.

The points which this case illustrates

www.thecustodyminefield.com

24. This case highlights 9 particular points, which I identify below.

1. First and foremost, yet again, it demonstrates the difficulty and complexity of cases of this nature. The dispute between these children's parents has lasted from the date of their separation in October 1997, and was amongst the most bitter and protracted of my experience. C was 3 when her parents separated. Thus throughout her short life she had never consciously experienced a time when her parents lived together in harmony.

2. It demonstrates the distress and the damage caused to children by long-standing and continuous hostility between their parents. The pressure on B and C has been enormous. B at one point told NYAS that he could not bear it any longer. It is, of course, too early to tell if the damage caused to these two children will spill over into their adolescent and adult lives. I hope, of course, that it will not. However, there is nothing more that the court can do, and I am satisfied that the litigation must come to an end with the making of the shared residence order.

3. It demonstrates the manner in which parents can impose their own wishes and feelings onto children and thus frustrate the formation or maintenance of a proper and loving relationship between the children and the other parent. C had been persuaded by her mother that she did not love her father and did not want to see him, when the opposite was the truth. Fortunately, the work done by NYAS, in conjunction with firm court orders, has restored the relationship between C and her father, and she now lives with him for half of her time.

4. It demonstrates the value and importance of the children having their own separate representation in certain cases. The children in this case were separately represented in the proceedings by the NYAS. The work done by NYAS was invaluable, firstly in restoring contact between C and her father and then in achieving a shared care arrangement. It was a paradigm of what can be achieved by skilled and energetic social work intervention by the children's guardian. It was also; it has to be said, exceptional in the amount of time and effort Mrs. P put into the case;

www.thecustodyminefield.com

5. It demonstrates what the court can and what the court cannot achieve. On the positive side, the court was able to engage NYAS, also by conducting a formal hearing and making clear and specific findings of fact, I was able to decide categorically that allegations made by Mrs. A that Mr. A had been guilty of sexually inappropriate behaviour with C were untrue. On the negative side, neither NYAS nor I was able to improve the relationship between the parents or convince them of the damage, which the unrelenting power struggle between them was causing to their children.

6 It demonstrates the highly damaging and destructive nature of false allegations of sexual misconduct and abuse, and the caution, which is required when such allegations are made for the first time in the middle of a bitterly contested family dispute. In this case, the allegation did not come spontaneously from C: it came from C's mother reporting something C had allegedly described. I was quite satisfied that nothing untoward had occurred between C and her father, but that because of the intensity of her feelings towards her former husband, Mrs. A had distorted and misinterpreted entirely innocent activities between Mr. A and C.

7 This is a case where a shared residence order is appropriate. But it also demonstrates clearly that shared residence orders are not a panacea. Shared residence and an equal division of the children's time between their parents' houses is possible in this case because the parents live close to each other, and the children can go to school from either home. The children welcome it because, in C's words, which I have already quoted, it gives his parents nothing left to fight about. But it is a pragmatic solution, which does nothing to address the underlying hostility between the parents. Whether or not is succeeds; only time will tell.

8. The case demonstrates that intractable contact and residence disputes cut across all class barriers. In this case, the father of the children is a hospital consultant: the mother is a teacher. In their different ways, and away from each other, both are individually charming and attractive people. Their hostility towards each other, however, was tangible and frequently led to quite irrational behaviour. The Children Act Sub-Committee of the Lord Chancellor's Advisory Board on Family Law commented in its consultation

www.thecustodyminefield.com

on contact disputes that it was frequently the case that the more intelligent the parents, the more intransigent and bitter the dispute. This case is an example of that. Contact and residence disputes are no respecters of class barriers.

9. Finally, the case demonstrates the benefits of judicial continuity. From the time the case unexpectedly into my list on 20 November 2002 to its final resolution on 16 December 2003, I heard every application in it. My familiarity with the facts and with the parties meant that applications could be made to me at short notice, and I could make decisions swiftly. When a crisis occurred shortly before Christmas 2002, I was able to arrange a hearing swiftly to deal with it. It was not necessary for colleagues to read their way into a case to which they would be coming for the first time.

25. The judgment, which follows, is very long. I propose to set out the facts in detail in order to demonstrate the difficulty and complexity of the case, and to illustrate and explain the points I have identified in the previous paragraph. Before setting out the facts, however, I wish to make it clear that I am not seeking to demonise either parent. Although some of Mrs. A's actions were particularly inappropriate and damaging to the children, I am satisfied that both parents love their children deeply. However, both share the responsibility for the impossible and damaging position in which they placed them

The facts in detail

26. The difficulties, which Mrs. P encountered in restoring contact between C and her father, are a clear demonstration of proposition number 3 set out at paragraph 24 above. When Mrs P met C for the first time on 10 October 2002, C told her that she did not wish to see her father. Mrs. P explained carefully about the court, and that the judge wanted Mrs. P to see C having contact with her father. Mrs P and C spoke at length about C's worries and C agreed to write out a list of them. This is a very sad document for an eight-year-old child to produce, particularly when nearly all of it turned out to be untrue.

www.thecustodyminefield.com

27. C wrote: -

1. I don’t want him to go all smoochy over me.
2. I keep having bad dreams about him.
3. I don’t want to go on Sunday!!!
4. He always smacks me!!
5. I don’t love him!!!!!!
6. I don’t like him sending cards or presents to me!
7. I don’t like him coming to my school.
8. I don’t like his voice on the phone.
9. He never laughs!!!!
10. I don’t like falling asleep at the table.
11. I don’t like eating late!!!!!
12. I don’t love M (Mrs. H, her godmother)
13. I don’t like his big house it is creepy!!!!
14. I’m always late for school!! And horserides!
15. (illegible)

28. Mrs P observed that C’s body language was quite incongruent with her verbal statements. She tried to reassure C that she would speak to her father before the first contact and gave her a guarantee that her worries would not come true on the first contact. She helped C plan how she might greet her father. She also arranged for Mrs. A to come to the meeting place, and that when she left, Mrs. P would remain close by C’s side. They would have a mobile phone number, and therefore would be able to summon her mother at any time.

www.thecustodyminefield.com

29. Mrs. P says, and I accept, that when she left after the meting on 10 October 2002, C appeared to her to be happy to agree to go for the contact which, it was agreed with Mrs A, was to take place at 5.00pm on Sunday 13 October 2002 at the local MacDonalds. Mrs. P also says that B was delighted that contact between his father and his sister was to re-start.

30. I am satisfied that Mrs. P prepared C carefully and sensitively for the contact due to take place on 13 October 2002. However, when she arrived to collect C for the contact, she was told by Mrs. A, in C's absence, that C had decided she did not want to see her father, and would not come for the contact. Mrs. A also showed Mrs. P a Women's Aid Information Pack, which she had obtained after listening to a programme on Radio 4 on the previous day. As it happened, Mrs. P had listened to the same programme, which was about children forced to continue to have contact against their will and when the children had disclosed previous serious sexual or physical abuse against their father. Mrs. A made a comparison between C's situation and the situation of the children discussed in the programme, and told Mrs. P that having read the Pack, she was reluctant to push C to go for contact against her wishes. She said she needed to get to the truth about why C was reluctant to see her father.

31. Mrs. P saw C who told her several times that she did not want to see her father and that Mrs. P could not make her go. Mrs. A said that C did not trust Mrs. P as she was going to force C to go to the contact. Mrs. P did not force the issue. She said she hoped C would come, and that she intended to wait outside until 5.00pm so that C could talk to her mother. She would then drive off and go and meet her father as planned. Mrs. A came out to the car at about 4.55 to speak to Mrs. P, but C did not emerge.

32. Mrs. C met Mr A and B at MacDonalds. Mrs. P then drove B in her car to Mr. A's home. In the car, they were able to have a long discussion B talked at length about how upsetting he found the conflict between his parents. B also said he could not understand why C was expressing concerns about her father smacking her. He had hardly ever done so - at most four or five times ever. She had also been smacked by her mother.

33. B also agreed to write down his wishes and feelings. This is a document entitled: "Most Important Things", which are:

    1. Equal time with my mum and dad

    2. To be able to have an Australian passport and to be able to see my relatives in Australia

    3. To (sometimes) be able to choose when I go to see my mum and dad.

    4. To be able to go on business trips with my dad.

34. Mrs. P was able to observe the interaction between B and Mr. A. She thought they had a warm, loving and entirely appropriate father son relationship. Mrs. P returned home at about 9.00pm to find a telephone message from Mrs. A, to whom she then spoke. Mrs. A told her that the more she had read the Women's Aid literature, she more concerned she was about C having contact with her father. She related a number of incidents, with which I will deal later. She also told Mrs P that C had asked her to tell Mrs. P that she wished to see Mrs P as she had something to tell her.

35. Mrs. P discussed the matter with NYAS and they agreed that as C had made no disclosure of sexual abuse, the case should not be referred to social services and the police, but that Mrs P should see C as a priority. Thus on 14 October 2002, Mrs P saw C at her school, in the company of her head-teacher. Mrs P asked C why she wanted to see her. C replied that she wanted to tell Mrs. P about her father not wearing underwear in bed when she woke up in the middle of the night and climbed into his bed. She also said that she had seen him getting dressed and undressed and described a particular way he took off his underpants.

36. Mrs. P and C discussed a number of her anxieties. Mrs P was concerned about C's demeanour. For the most part, she was happy, smiling and enjoying the attention of Mrs. P and her headteacher. Her body language and non-verbal communication were incongruent with the things she was saying.

37. Mrs. P's interim conclusions, after what was on any view a very intensive piece of work, of which I have described only a small part, was that both B and C appeared to be children who were traumatised by the conflict between their parents. She was a

www.thecustodyminefield.com

satisfied as she could be that C was not at risk from her father, that there was no need for her contact with her father to be supervised, and that her worries and concerns about seeing her father could be sorted out, with the right support from Mrs. A and herself.

38. Mrs. P accordingly made the recommendation that contact should be re-started at a family gathering on 21 October when C's paternal aunt and her cousins as well as other relatives would be visiting her paternal grandmother. That, accordingly, was the order made by the district judge. C's paternal aunt was to collect her from her mother's house, and her mother was to collect her after the contact from the home of her paternal grandmother. The district judge also ordered two other contact periods on Saturday 9 November and Saturday 16 November 2002. On each occasion Mrs. P was to collect C from her mother's home and return her. The contact was to last for a minimum of two hours.

39. Mrs P was on leave on 21 October 2002. The contact, which had been ordered, did not take place. C's aunt arrived to collect her with her two cousins. Mrs. A answered the door with C. C said she did not want to go. She had prepared a card for her grandmother, which was handed over. Nobody was invited into house. The entire conversation took place on the doorstep.

40. On Saturday 9 November 2002, Mrs. P arrived to take C to contact. She says C looked extremely frightened and was shaking. Mrs. P held her hand and said she would look after her. The contact was due to take place at Megabowl. They arrived at the same time as Mr. A and B. C was shaking and clung on to Mrs. P. On the way across the car park, B told his father that C was feeling very frightened and nervous. Mr. A said he felt the same. This made C laugh. Mrs. P says she felt the tension disappear, and C stopped clinging to her and just held her hand.

41. Mrs P reports that within minutes of arriving C relaxed and responded well to Mr. A. When she scored a goal against B, she leapt naturally into her father's arm for a celebratory hug. There was a lot of natural physical touching between C and Mr. A. After about 30 minutes, C told Mrs. P and her father that she was enjoying seeing him and that she wished to start seeing him again, but not to stay overnight. Mr. A said he

www.thecustodyminefield.com

was delighted to see her again, as he had missed her terribly. However, she would not be pushed to stay overnight until she was ready.

42. When Mr A, the children and Mrs. P went to the park prior to going to MacDonalds, C appeared so content, relaxed and happy in her father's company that Mrs. P withdrew and observed from a distance. She says that over a 15-minute period she noted that C sought out her father to give him a hug or a kiss on six different occasions.

43. The party then repaired to MacDonalds. The next week's contact was discussed and C said she wanted to go swimming. It was arranged that Mrs. C would collect her and take her to her father's home. She wanted to show Mrs P her bedroom there. Mrs. P had a commitment, which meant she had to leave at 5.30pm, but if all was going well, her father would take her home.

44. Mrs. A's response to Mrs P's description of the contact on 9 November 2002 was to say that she had concerns about Mrs. P's professional practice. She said she did not feel Mrs. P had spent enough time with C prior to suggesting contact, and that she had failed to listen to C's views.

45. Between the contact on 9 November and that on 16 November, Mrs. P set up a meeting between Mr and Mrs A. This, however, proved to be a disaster, firstly because of arguments between the parents about what Mrs. P considered minor matters, but also because Mrs. A began to talk about her concerns about the lack of sexual boundaries between Mr. A and C. As it happened, Mrs. P had only that morning received a letter from Mrs. A's solicitors in which those concerns were particularised. Mr. A read the letter and became extremely angry and distressed. He accused Mrs. A of trying to ruin his reputation. He shouted abuse at Mrs. A. Mrs. P said the meeting was over and decided to take Mr. A outside. He continued to shout abuse at Mrs. A, who turned to Mrs. P and said: "I told you he was like this". Once outside, Mr. A broke down.

46. Despite the events of 15 November, contact took place on Saturday 16 November as arranged. This was, in my judgment, a particularly significant contact. Mrs. A told Mrs P that C had said she did not wish to remain with her father after Mrs. P had left and that C wished to return with Mrs. P. Mrs. A said that after yesterday's outburst

www.thecustodyminefield.com

there was no way she would allow Mr. A to bring C home. Mrs. P said she would prefer to be guided by C's wishes at the time and if need be C's godfather, who was staying with Mr. A could bring C home.

47. During the journey to contact, C expressed the wish that her parents got on better, and talked about how difficult it was for her that they did not. She was glad she was seeing her father again, and revisiting her old home. She wanted the presents that were there for her. She hoped very much that there would be reconciliation between her mother and her godmother Mrs. H, whom she missed a great deal.

48. When they went swimming, C chose to get ready with her father. In the light of the allegations made against him by Mrs. A, Mr. A was nervous about this. Mrs. P advised him that if C wanted him to help her get ready, he should do so.

49. When the time came for Mrs. P to leave, C said that she would like to stay on with her father and go out for a Chinese meal. Mrs. P telephoned Mrs. A to tell her what C had decided and to give details of the arrangements for returning her. C wanted to tell her mother her plans herself. She started talking excitedly to her mother. Mrs. P describes what happened next: -

> Suddenly C's demeanour changed. She said to me that she wanted to go straight home. C looked crestfallen and extremely distressed. I took the telephone off her and spoke to Mrs. A. W (a cousin) who was nearby leapt forward and cuddled C who was sobbing. Mrs. A demanded in an extremely aggressive way that C be returned (home) immediately by myself. I told Mrs. A that it was now too late for this as I needed to be (elsewhere) by 7.00pm. I told her that I wanted to speak to C who was most distressed, to see why she had changed her mind about the plans so abruptly and that I would telephone Mrs. A back.
>
> C was sobbing inconsolably, even though she was being cuddled by B, her father and W, who were all most concerned about C's distress. B asked to speak to me on his own. He told me that C would be frightened about his mother being angry because she wanted to stay on. I went back to speak to C. She told me that she would like to go out for dinner and to Toys R Us but she felt that she needed to go home. C was terribly distressed. When I asked her if

www.thecustodyminefield.com

B was right that she was scared of her mother being angry for wanting to stay, C confirmed that this was the case. I asked her what she wanted to do. C told me that she wanted to go to Toys R Us as planned. but that she no longer wanted to go out for dinner and could she be taken straight home. I telephoned Mrs. A to tell her this was what was happening. Mrs. A made it clear that she was angry about this to me.

In my judgment, this incident speaks volumes.

50. Before they went swimming on 16 October, B spoke to Mrs. P and told her his wishes and feelings. He described how difficult he found the situation. He made five points, all of which seem to me to be remarkably percipient for a child of his age. They were: -

1. He would like to be able to telephone his father or his mother when he is in the other's home without any comment or him having to ask.

2. He would like his father to promise that no telephone calls would ever be tape-recorded;

3. He would like both of his parents to promise not to talk to him about the other parent or the court case.

4. He felt it may be better if his parents never met. He suggested that Mrs. H may be the best person to do the handovers

5. He suggested that if there were decisions that needed to be taken about him and C perhaps both his parents could talk to Mrs. P to make the decision.

51. It was following these events, that Mrs. P made her recommendation in her report of 18 November 2002 that there should be an interim residence order in favour of Mr. A; and it was that recommendation which caused the case to be transferred to the High Court and to come into my list on 20 and 21 November.

The finding of fact hearing on 16 and 17 December 2002

52. In the event there were 7 areas of concern raised by Mrs. A. These were:

www.thecustodyminefield.com

(1). Disclosures from C to her mother that her father had said C had “fluff” in her “minnie” (vaginal area) and that she had to rub at it to remove it.

(2) C’s disclosure to her mother that when her father cleaned her bottom after C had been to the toilet, he sometimes hurt her.

(3) That B had defecated whilst squatting on the toilet rim and that he had defecated in the bathroom whilst C was taking a bath.

(4) That C had seen Mr A flick off his underpants whilst he was naked in bed.

(5) That Mr. A had used the toilet in front of C whilst she was in the bath.

(6) C’s worry list about her father (set out at paragraph 28 above) and

(7) C’s disclosure to her mother that her father used to pull her down on top of him; that she did not like it; that it was like people having sex and that Mr. A was naked at the time.

53. As to (1) there was really no dispute. Mrs. A did not suggest that there was anything sexual in this. Mr. A agreed he had used the word fluff” and I was satisfied that this was simply Mr. A, quite appropriately, telling his daughter to clean herself properly.

54. As to (2) assuming, as I was prepared to, that C had said this, I was quite satisfied this was, once again, quite innocent. Mr A had wiped C’s bottom when she was younger. I accepted his evidence that he had not done it at any stage inappropriately or when C was too old for him to be doing it.

55. As to (3) this seemed to me a point, which demonstrated how the parents’ inability to communicate with each other made for difficulties. B had developed the habit of defecating in what he described as “oriental style” by squatting on the rim of the toilet bowl. Apparently in so doing he had caused a mess at home in his mother’s house. His father allowed him to defecate in this manner in his house, and no doubt B told his mother so. My own view was that this was something, which was not socially acceptable in middle class England, and that B should have been so told by his father.

www.thecustodyminefield.com

I did not, however, regard it as in any way relevant to the question of C's contact with her father.

56. As to the manner in which Mr. A removed his underpants, I commented that no doubt people do remove their underpants in different ways. The only relevance would be if Mr. A was in some way exposing himself to C. That was not alleged, nor had it happened.

57. As to (5) I was quite satisfied that Mr. A at no point had gone to the lavatory whilst C was in the bath, and I accepted his evidence that he had not done so.

58. As to (6) I regarded the "worry list" as a very sad document. Much of it was simply untrue, including the assertions that she does not love her father and that she did not like him sending cards or presents. Both had been disproved by the contact, which Mrs. P arranged.

59. That left the final allegation (7). This, on any view, was the most significant allegation. If true, the clear implication is that Mr. A had used what would otherwise be the entirely innocent activity of C sitting on top of him in bed for his own sexual gratification. The incident, accordingly, deserved careful examination.

60. The first point which had to be made was that the incident arose in the context of what can only be described as a more than usually acrimonious separation and divorce between C's parents, and bitterly contested proceedings between them relating to residence and contact. Any allegation of sexual impropriety arising in these circumstances has, in my judgment, to be approached with great caution.

61. This need for caution was, in my judgment, reinforced where, as here;

(a) the parties have been separated for some 5 years before the allegations was made,

(b) the immediate issue before the court at the time was Mr. A's contact with C which Mrs. A had stopped in March 2002;

(c) the parties were preparing for what they understood at the time to be a final hearing, fixed by the district judge in July 2002 for 20 November 2002;

www.thecustodyminefield.com

(d) on any view, Mrs. A was highly anxious about contact;

(e) on 16 October 2002 Mrs. P had produced her first report, which, after recording a failed attempt at contact made a specific recommendation for the reintroduction of contact, which was carefully crafted to meet C's needs and assuage any anxieties she might have;

(f) that recommendation had been specifically endorsed by the district judge on 17 October;

(g) according to Mrs. P in her first report, Mrs. A had listened to a Radio 4 Woman's Hour programme about children who were allegedly forced to continue to have contact with an abusive parent;

(h) finally, the contact arranged for 21 October 2002 had, in Mrs. P's absence on holiday, not taken place.

62. There were several other factors, which, in my judgment, are of significance in making an assessment of this allegation. They were the following: -

(1) This allegation is not on C's list of worries dated 10 October 2002, which she gave to Mrs. P;

(2) C has not repeated it to Mrs. P, although given appropriate opportunities to do so;

(3) Mrs. A's own conduct in relation to it. Although alerted to sexual abuse by the Women's Hour programme, she did not alert Mrs. P to it, even though she wrote to her the next day asking her for a copy of her CV. At that time, Mrs. A was acting in person, and there is correspondence from her to Mr. A's solicitors after 21 October dealing with other issues, including the allegation that Mr. A inappropriately wiped C's bottom. Her solicitors did not come on the record until 14 November, although Mrs. A had plainly instructed them by 7 November, which is the date they wrote to NYAS setting out the allegation against Mr. A. In my view, Mrs. A's failure to tell Mrs. P about the incident herself is surprising – particularly in the light of the fact that her solicitors' letter to NYAS says in terms that Mrs. A looked to NYAS for advice on it.

www.thecustodyminefield.com

(4) Finally, on this head, it appears that Mrs. A had spoken to the NSPCC after 21 October 2002, but did not mention this incident to them.

63. Having heard Mrs. A's evidence, I concluded that there were several possible explanations for an allegation of this kind in the context I had already described. The first, of course, was that it is an accurate reflection of what the child said, and that the child was speaking the truth. At the other extreme was the proposition that the allegation was not only untrue, but had been fabricated by the parent to whom it is alleged the child spoke. Between the two were a variety of possibilities.

64. Sometimes, in my experience, the anxiety about contact or residence demonstrated by the resident parent is so great that he or she simply misinterprets an innocent remark made by the child. That is what I have found may well have happened in the other incidents with which I have dealt. Sometimes, the anxiety displayed by the parent is so great that it induces the adult to lead the child into a description of an event, which has not occurred, but which the adult believes may have occurred. Sometimes the child, anxious to please the residential parent, and acutely aware of that parent's heightened anxiety, is led by the parent into an allegation which, once again, simply has not occurred, but which both the adult and the child, in due course, come to believe. Sometimes, an innocent event is misinterpreted, either deliberately or through parental anxiety, and wrongly translated into an allegation of abuse.

65. In attempting to decide what had happened in this case, and applying the principles relating to the standard and burden of proof set out by Lord Nicholls in Re ***H (minors) (sexual abuse: standard of proof)*** [1996] AC 563, I was not impressed by Mrs. A's oral evidence, or her demeanour in giving it. There were serious inconsistencies between her evidence in the witness box and the version on paper. I did not think she was an accurate historian. Her explanations for the inconsistencies lacked all conviction. An incident like this, which she clearly believes to be very serious, would, I think, have been clearer were it an accurate account of what happened. Whilst I was quite sure that she has good qualities as a mother, I was equally sure that her level of anxiety over contact was so great that not only had it badly affected C, but that it had also been responsible for this allegation being made.

www.thecustodyminefield.com

66. I was entirely satisfied that C, who is a tactile child, and who loves kisses and cuddles from her parents, enjoyed, in an entirely innocent way, getting into her father's bed, kissing and cuddling her father, and as well as sitting on top of her father when he was in bed, no doubt sometimes straddling him. I was entirely satisfied that all of that activity was innocent, and a normal part of family life. There is absolutely nothing wrong with children seeing their parents naked – as Mrs. A herself agreed. Nakedness is only abusive when, in the adult mind, an adult sexual motivation is introduced, and the adult's or child's nakedness is used for adult gratification. Having heard and watched both Mr and Mrs. A in the witness box, I was as satisfied that I can be that Mr. A's contact with his daughter had been entirely innocent at all times. I accepted his denial of any form of sexual impropriety.

67. How then did this allegation emerge? I must avoid any temptation to engage in amateur psychiatry or psychology. But, on the balance of probabilities what I find has happened is that following the unfortunate failure of the contact on 21 October, Mrs. A spoke to C about her father. I cannot believe that C instigated the conversation. Questioned by Mrs. A, C may well have told her mother about getting into her father's bed, and sitting on top of him when he was in bed. That innocent activity has been transmuted by Mrs. A into an allegation of sexual misbehaviour. That had happened, because, despite her protestations to the contrary, Mrs. A remains profoundly angry with Mr. A, and profoundly anxious that C and B may be removed from her care.

68. The alternative, of course, is that Mrs. A had fabricated the whole incident. That may be the case, but on balance I think it unlikely. I think it more likely that in an unwholesome and inappropriate conversation following the failure of contact on 21 October, Mrs. A spoke to C, and distorted something C said

69. I am anxious not to demonise Mrs. A, and I hope I am not doing so. The evidence in this case – the medical bundle in particular, cries out with the message that these two children were suffering because of their parents' mutual hostility. That is a message, which I endorse. Each of the parents dealt with their anger in different ways, but that each was very angry I had no doubt. I think Mr A is sometimes able to disguise his anger under a professional veneer, but equally, I think he underestimates the effect of his anger about Mrs. A on the children. They are well able to appreciate how angry he

www.thecustodyminefield.com

is. Children should not either be exposed to, or to be expected to cope with such a complex emotional dynamic.

70. Mrs. A had assured me that she would accept my findings and work with them. In my judgment on 18 December 2002, I said that the next few weeks and months would be crucial. I made it quite clear that there was absolutely no reason why C and B should not see their father and stay in his household. They were not at risk of any form of physical or sexual abuse. The only risk was emotional abuse caused by difficulties over contact. There was no reason why, with Mrs. P's help, extensive contact over Christmas should not be agreed. I looked to both parties, but Mrs. A in particular, to work with Mrs. P to facilitate contact. I told Mrs. A that I would not be impressed, if this case came back to me for a further contested hearing, if I was told by her that C did not want to go to contact. If C continued to say she did not want to go to contact that could only mean that Mrs. A did not want her to go to contact. She had assured me this is not the case. The proof of the pudding, in the trite phrase, would be in the eating.

Events after the finding of fact hearing

71. Most unfortunately, Mrs. A proved unable to accept my findings. Worse than that, she attempted to revive and expand the allegations. As related by Mrs. P, who in my judgment is a reliable historian, the sequence of events was as follows.

72. At around 11.45am on 21 December 2002. Mrs. A telephoned Mrs P and told her that during the car journey home, C had made a further serious disclosure to her. Mrs. A told her that C was now saying she would tell Mrs. P her secret, and Mrs A requested Mrs. P to visit C to talk to her. Mrs. P asked Mrs. A seriously to consider the implications of her not accepting the court's judgment, given on 18 December, and the finding that Mr. A was not a risk to C.

73. Around 12.30pm the same day, Mrs. P telephoned Mrs. A who told her that C had recounted the same allegations which she had first disclosed on 21 December, but this time Mrs A said that C had mentioned that her father had underpants on, and his 'willy' had got hard and then gone soft.

www.thecustodyminefield.com

74. Mrs. A asked Mrs. P's advice about what to do. Mrs. P stressed the importance of her accepting the judgment of the court, and keeping to contact arrangements. She suggested she could report C's recent statement to the Police and Social Services for further investigation, if she felt this was warranted. Mrs. P said that she was not available to interview C due to family commitments until the New Year, and that she would need to seek legal advice, given the judgment of the court, prior to doing so in any event. She suggested that Mrs. A carefully thought through the full implications of any decision she made.

75. Around 5.00pm on the same day, Mrs. A telephoned Mrs. P. She told her she had had further discussions with C and told me that she now "had concerns about C's demeanour." She said that C was now willing to go to her father's for staying contact. She asked Mrs. P to telephone Mr. A to inform him she was bringing C. Mrs P suggested that Mrs A should drop C off and knock on the door, and ensure that there was not a further dispute between the adults in front of the children. She then telephoned Mr. A to inform him of C's imminent arrival. C was then taken to Mr. A's home and Mrs P was told by Mr. A that she arrived smiling, and was settled and relaxed all evening, although she wanted to sleep with B.

76. Sadly, that was not the end of the pre-Christmas difficulties. Having previously, as she thought, clarified the arrangements for all the pre-Christmas handovers, Mrs. P arrived home on 23 December around 5.15pm, to find that C had left her 3 telephone messages to say she did not want to go back to her father's as he was having an adult party that night. At 5.20pm, C telephoned Mrs. P to say she did not want to go to her father. Mrs. P told her that the adults all wanted her to go, and reminded her it was Christmas and she would have a nice time. Mrs. A came onto the telephone, and was angry that Mrs. P had not been available earlier. Mrs. P emphasised to Mrs. A the need for her to promote positive contact between C and Mr. A, and she should be helping C to attend as arranged. This prompted an angry tirade from Mrs. A. Mrs. P reminded her of the time and that it was not convenient for her to have any further discussions with her as she needed to go out, and she hoped that Mrs. A would take C and B to meet Mr. A as arranged.

77. Mrs. P's report then continues: -

www.thecustodyminefield.com

I returned home at 6pm to messages from Mrs. A saying that they could not get C to go. Mr. A had also left me a message asking me to telephone him to find out if I knew were the children were. I telephoned Mr. A and explained my earlier telephone conversations with C and Mrs. A. It was agreed that I would telephone Mrs. A and ask her to bring the children to meet Mr. A by 6.15pm or she would have to take them to Mr. A's home herself. Mr. A had arranged for several work colleagues to come to his home, and needed to get back to meet them. Mr. A told me that C and B that morning were looking forward to having a small party that night, and had helped plan it. Mrs. P telephoned Mrs. A and asked her to deliver the children to McDonalds by 6.15pm at the latest, and stressed the need for her to demonstrate that she could promote C going for contact with Mr A, as she had done on Saturday 21 December 2002.

I then received a flurry of telephone messages from Mrs. A and also her friend, SM, saying they could not get C to go. Mr. A telephoned me to say that Mrs. A had brought B at 6.15pm, but C refused to get out of the car. There had been an argument as Mrs. A was requesting that he take the responsibility to drag C out of the car. **Mr. A told me he was distressed when SM mentioned to him Mrs. A had told her that the judge had made findings against him that he was emotionally and psychologically abusing the children. This was said in front of B and C**.

B had also telephoned me and left me a rather sad message saying he could not stand any more of this. I telephoned him back at Mr. A's home. B asked me to explain why SM had talked about his father psychologically abusing him. B said about 15 times, in a very distressed way, he needed a break from all the pressure. (my emphasis) I carefully explained to B, that just like C, his mother had her own worry list, and she was concerned about C staying with Mr. A, as his mother believed C to be at risk of harm from Mr. A. I told B that the judge had carefully listened to everything his mother and father had to say, and then decided that his mother did not need to worry about the things on her worry list. I told B that the judge now wanted C to stay with Mr. A. I said that C may need time to understand that she was safe to stay with her father, and that Mummy supported C staying. B and I discussed that when C was at her father's home she was happy. He agreed with this, but he was struggling to understand why C gets so upset.

www.thecustodyminefield.com

> Around 7.30pm, Mrs. A telephoned me. She told me that C had talked to her mother about her "secret'. Mrs. A told me she had telephoned the local Social Services Emergency Duty Team and the NSPCC who had all advised her that C should not go for contact. Mrs. A told me her vicar was present as well. I advised her to seriously consider her position if she could not accept the findings of the court and advised her that the contact arrangements agreed at court should continue. I suggested to Mrs. A that her current stance may mean that a change of residence for the children would have to be considered.
>
> Around 8.45pm, I was telephoned by a JJ, She told me she was a friend of Mrs. A and she had just been talking to C in her bedroom and C had made disclosures to her. I asked that she let me take a careful note of what she wanted to tell me. I firstly asked her address and telephone number. JJ told me she worked for a Welfare Rights Team doing administration and filing. She told me she was not one of the front line staff and had no experience of child sexual abuse.
>
> JJ told me that she talked to C in her bedroom and explained to C it was serious, if she did not go to her father's tonight. J said C told her she had a secret, she had not told (me), but would tell JJ. I shall write up my notes of the conversation I had with JJ

78. Mrs. P then records in meticulous detail everything JJ told her C had said. JJ had not taken notes of her conversation with C, but when Mrs. P read her back my completed notes, JJ agreed that she had recorded their conversation truthfully.

79. I will not burden the already overlong judgment with the detail of JJ's conversation with C. I did not hear oral evidence from JJ, and therefore do not want to be too critical of her, but what she did was plainly extremely unwise and altogether unacceptable. She had no experience in interviewing children. The interview took place through a fantasy, with C allegedly describing what happened to a boy called Calvin who had the same birthday as C. There are leading and suggestive questions, and dolls are used to demonstrate what allegedly happened. As a piece of evidence it is worthless, and, sensibly, no attempt was subsequently made to rely upon it by Mrs. A's counsel at the subsequent hearing.

www.thecustodyminefield.com

80. Statements were made by Mrs. A, JJ, SM and Mrs. A's vicar Mr. H. These were sent to me. I also received an Email from Mrs. P advising me that in her view the situation for the children had become intolerable. Mrs. A's solicitors had drafted an application seeking a variation of the order I had made on 18 December and directions that C be seen by the local police child protection team or social services.

81. I sent a FAX to counsel on 24 December stating that I was not prepared to make any order on a without notice basis. I stated, however, that I would hear Mrs. A's application on 30 December 2002. I was not, in the meantime, prepared to make any order suspending or varying contact unless NYAS advised that contact to C should be informally suspended until 30 December because of the distress currently caused to her.

82. On 29 December 2002, the indefatigable Mrs. P produced her third report. She expressed her surprise that the issue of C being at risk of sexual abuse had been raised again by Mrs. A, and that she had involved her vicar and two friends. The consequence had been that, for the first time, B and C had spent Christmas apart, and Mr. A's Christmas arrangements for himself and his extended family had been wrecked.

83. Mrs P had conducted a number of visits and interviews on 29 December, the date of her report. In particular she had a long conversation with C. She also had a significant conversation with B. She also spoke to both Mr and Mrs A.

84. The outcome of her long and careful discussion with C is best described in Mrs. P's own words: -

> NYAS and I decided that prior to the hearing on 30 December 2002, I should see both B and C to carry out the most up-to-date assessment of the children as possible. From my interviews today with C, it is clear that she is rather fed up with talking about an incident, which she herself does not describe as a serious event, when she was playing with her father in his bedroom, some time ago. During the play, her father lifted C on top of him. C did not like this. C says that they continued playing afterwards. She did not exhibit any undue stress on talking about this; apart from when she was asked by myself to clarify why she had said it was like sex.

www.thecustodyminefield.com

> It is apparent that C is still rather innocent about sexual matters, and thinks sex is like kissing and lying on top of each other, as she had seen in a James Bond movie. I am of the view that C's rather innocent statements about this event have been distorted and exaggerated out of all proportion by her mother and her friends. I believe that C's understanding about what constitutes sex has been misinterpreted. SM and JJ have not explored with C the context that this event took place. I accept that C, with prompting from her mother, now says she did not like this, but to me she put it clearly in the context of having taken place during a play session with her father, rather than being in a context where Mr. A gained sexual pleasure out of it…
>
> **I am most concerned that C talked to me today about never seeing her father again, and not until she is at least 21 years old. This is a new development. C admitted to me she had been happy seeing her father, but now says it was only because someone from the court was present. She says she does not love her father and does not want to see him. She says this repetitively, without emotion and rather as if this is a learnt mantra. I am now concerned that C's own reality has been taken away from her. She can only see what her mother wants her to see….**
>
> **… C now believes that she will not see her father again until her majority. At the age of only 8, C cannot understand the full implications of that decision. I no longer believe C is stating her own views, but is now only reciting, parrot fashion, the views of her mother** (my emphasis)**.**

85. Equally worrying, in my view, was Mrs. P's conversation with B. B had been instructed by his mother to tell Mrs. P about Mr. A telling C off and smacking her several years ago. This was why she did not want to see him. Mrs. P later asked B about this incident. B said it was nothing. He had told Mrs. P because his mother had told him to. He said he was a bit frightened of his mother, if he did not do as she said. He said that his mother wanted to know every detail of what he did with his father, in order to pick fault.

86. B said he was "fed up" with what he described as "the war". He needed a break. Perhaps he could live with Mrs H, C's godmother. He would like to live with his father, but his mother would never agree.

www.thecustodyminefield.com

87. Mrs. P was particularly concerned that despite seeking her advice, Mrs. A nonetheless permitted JJ to interview C. Mrs. P had explained to Mrs. A the need not to contaminate evidence by questioning C, and the importance of only properly trained and experienced professionals speaking to children about potential sexual abuse. Mrs. P's assessment was that Mrs. A appeared to be stuck in battling for power and control of the children with Mr A and incapable of seeing the emotional damage she was causing them.

88. Mrs. P was in no doubt that the children should be removed from their mother's care. There were various options. There was that which I had adopted in ***Re M (Intractable Contact Dispute: Interim Care Order)*** [2003] 2 FLR 636, namely the making of an order under section 37 of the Children Act 1989 inviting the local authority to investigate and report with a view to applying for an interim care order. However, I took the view that this course was not appropriate on the facts of the instant case. There would be a substantial delay, and the children were in urgent need of respite. Foster care was inappropriate. Although Mr. A had been as engaged in the battle as Mrs. A it was more likely that, at least in the interim, the children would be under less pressure living with him than with Mrs. A. Equally, a removal into Mr A's care was the only means of ensuring that C would maintain her loving relationship with her father.

89. I duly heard Mrs. A's application on 30 December 2002. The evidence was limited to that of Mrs. P, who was extensively cross-examined by counsel for Mrs. A. At the conclusion of the evidence and submissions I was in no doubt that the best course, in the interests of both children was to make a residence order in favour of Mr. A and to dismiss Mrs. A's application that C be interviewed by social services or the police. I was entirely satisfied that Mrs. P's analysis was correct, and that the extended disclosures made by C were the result of additional pressures placed on C by her mother.

Events after 30 December 2002

90. It was quite clear that my decision on 30 December 2002 was in no way the end of the case. A great deal of work remained to be done with both Mr and Mrs A, and I accepted Mrs. P's advice that there should be a psychological assessment by a

www.thecustodyminefield.com

psychologist, BC, and that the position should be reviewed in three months. I also agreed with the introduction of a careful pattern of contact between the children and their mother, and ordered that the case should be listed for directions on 24 February 2003.

91. After an initial period of distress, both children settled down with their father. Contact with their mother was introduced in accordance with the proposals made on 30 December 2002. Both children appeared happy at school. Work began with the psychologist designed to establish how best Mr. and Mrs. A could exercise their shared parental responsibility. In her report for the directions hearing dated 24 February 2003 Mrs. P identified NYAS' goal as moving towards shared residence. Contained within the report was a proposal for the equal division of the children's time over a given fortnight. Annexed to the report was a more ambitious schedule setting out the proposed division of time up until 24 April 2003. Shared residence accorded with what the children wanted. NYAS recommended that Mr. BC have permission to see the children and observe their relationship with both parents as part of his assessment, and that the case be listed for final hearing.

92. The final hearing had been fixed for 28 July, but the timetable slipped and on that date I relisted it for further directions on 16 December 2003. I did this because I was advised by NYAS that considerable progress had been made in the case and that the children were now happily dividing their time equally between their parents. There was also a suggestion that, following meetings between Mr and Mrs A with Mr. BC and Mrs. P, Mr and Mrs A were beginning to be able to reach amicable agreements about how they were going to communicate and make decisions about the children in the future. Mr. BC's opinion was that this work should continue for another six months, as there were still many issues unresolved.

93. The way the system operated in term time was that over a given fortnight, the children spent the first Monday and Tuesday with their mother; Wednesday and Thursday with their father; Friday to the following Tuesday with their mother and Wednesday to Sunday with their father. The cycle would then recommence. The advantage of the scheme was that in term time the children were delivered to and collected from school, thus avoiding parental contact at handovers.

www.thecustodyminefield.com

94. Mrs. P reported that both children felt relaxed about the 50-50 split and both felt equally at home in either household. C echoed her brother in telling Mrs. P that 50-50 was best because her parents had nothing to argue about. Mr and Mrs. A had begun to communicate by Email. Further areas of work were identified, notably agreeing how decisions in the future were to be made. A detailed calendar dealing with the arrangements from July through to December was annexed to Mrs. P's report.

95. For the directions appointment on 16 December 2003, I had further reports from Mr. BC and Mrs. P. Although they were agreed on the way forward, the reports did not make altogether happy reading. There was plainly an unbridgeable divergence of view between Mr A and Mr. BC and Mrs. P as to the nature of the work, which still required to be done.

96. Mr BC had recorded the belief expressed in his earlier report that if there was going to be meaningful progress in the lives of the children, both parents would need to take responsibility for attempting to create a healthy emotional climate, rather than put their energies into locating responsibility onto the other. That required both parents to engage actively together in the process, for which they would need professional intervention. Mr. BC therefore recommended further joint sessions of the type, which had preceded his earlier report.

97. It became quite clear, however, that Mr. A had a different agenda. This emerged in the two sessions organised by Mr. BC and Mrs. P and attended by Mr and Mrs A. I am conscious that I have not heard oral evidence about these meetings, and am reliant for their content on the reports of Mr. BC and Mrs. P. I am reasonably confident, however, that what they report is accurate.

98. In the first session, Mr. A made it clear that in his view the meetings would get nowhere unless the important underlying issues to do with Mrs. A's problems were resolved. He stated that he and his family had suffered and that the children did not know where they were over the current arrangements. He felt Mrs. A had not changed an inch. Understandably, as Mr. BC felt, he wanted an apology from Mrs. A over the allegations of sexual impropriety. Mr. BC describes Mr. A's statement as "an emotionally charged tirade" to which Mrs. A listened patiently. She then apologised,

www.thecustodyminefield.com

saying she was deeply sorry for what had happened and that she could not say how sorry she was. She also indicated that she wanted to move on.

99. Mr. BC reports Mr A scoffing at her apologies, which he did not accept. The word "sorry", he said, trips off the tongue very easily. It had to be supported by action and he would not accept Mrs. A was sorry unless she did something to demonstrate contrition – something which caused her some discomfort. When Mrs. P intervened to say that Mrs. A was clearly asking him to forgive her, Mr. A's response was that the allegations were part of a wider problem with Mrs. A which was such that he felt things could not be resolved.

100. When Mr. A was asked what Mrs. A could do to show contrition, he suggested sorting out the mess over the children's passports. Mrs. A agreed that he could have the passports. It was apparent, however, that Mr. A wanted there to be an acceptance that Mrs. A had significant psychological problems, which were the primary causal, factors in the family's previous difficulties.

101. Mr. BC and Mrs. P hoped that, since Mr. A had expressed himself so vigorously in the first session, it might be possible in the second to shift the focus from the past to the present more practical matters relating to the children. Unfortunately, however, Mr. A continued his heated criticisms of Mrs. A. He accused her of telling a pack of lies; that everything she said was distorted; that it was a pathological problem and that the problems of her fantasy had to be addressed.

102. Mr BC reports Mr A saying that he wanted the "fundamental issues" dealt with and that this was what he had been promised. In an increasingly intemperate fashion he said he did not want to sit in the same room as Mrs. A; that he found her "revolting" and "flesh-creeping". After a brief discussion about taking responsibility for the allegations of sexual impropriety, Mr. A exclaimed loudly: "this woman is a monster", and left the room.

103. In these circumstances, Mr. BC understandably concluded that the prospects of any further useful work being successful were minimal. Mr. BC expressed his understanding of the depth of Mr A's feelings, and that a man in Mr. A's professional position would inevitably feel intensely bruised and battered by the allegations of sexual impropriety. That said, Mr. BC

www.thecustodyminefield.com

> … would have hoped that Mr. A might have been able now to put this matter on one side, and focus primarily on the needs of the children, and on developing means of working with and communicating with Mrs. A.
>
> It seems that he is not yet able to do so. It appears that Mr. A wishes to have others accept what he feels are the fundamental issues in this case: by which he means accepting that Mrs. A has serious psychological problems…

104. Mr BC's report concludes:

> Neither Mrs P nor myself shared Mr. A's view that such an approach of examining the fundamentals of the case, to support the view that Mrs. A was psychologically disturbed, would be either helpful or productive.
>
> Given the stance adopted by Mr. A, and the fact that further professional intervention would appear to be contra-indicated in the short to medium term future at least, I believe that Mr and Mrs A will have to find a way of communicating and dealing with one another in matters relating to the children.
>
> It is my opinion that given the volatile family dynamic it would not be prudent to allocate residence to either of the parents, which would be likely to leave one parent feeling disadvantaged, and which could then fuel further difficulties.
>
> It seems that B and C have benefited from shared care, and they have both made it clear that they wish the current arrangements to continue.
>
> Therefore I am of the opinion that Mr and Mrs A should have equal shared residence of their children for the rest of their minorities.

105. In more moderate terms, Mr. A's solicitor, in a long and carefully drafted letter to NYAS dated 2 December 2003 states Mr. A's belief that if Mrs. P is to recommend a shared residence order she would be failing in her duty to NYAS if she did not confirm that she had read and digested the three lever arch files of material placed before the court. He also records Mr A's belief that both parties should be seen by an adult psychiatrist / psychologist. If no experts specialising in adult psychology /

www.thecustodyminefield.com

psychiatry were engaged, it was argued, the family would never be able to deal with the "adult issues".

106. Mrs. P, in her report, dated 14 December 2003, does not agree with this approach. She summarises her position as follows: -

> In June 2003 I did not feel that Mr. A could be trusted with being the parent with a residence order. I felt if he was given the power to do so, he would disrupt the children's shared contact schedule to meet his own needs rather than the children's. I predicted that it would only be a matter of weeks before conflict would arise and the parents would be back fighting again. Mr. A has not been able to see for himself that the current shared care and contact arrangements allow the children to feel safe and that they can maintain a neutral stance. I am afraid as Mr. A withdrew from the joint work with Mrs. A and has adopted a rather hostile stance to NYAS, that I trust him now even less than I did in June, to promote the children's best interests, if a residence order were made in his favour…
>
> Given Mrs. A's current situation, I would suggest that any change in the shared care / contact arrangements at the current time would be detrimental to B and C. They are aware that their mother has cancer and will need to spend the usual amount of time with her. If not, they will have increased anxiety and stress.

107. In her conclusion Mrs. P made it clear that in her opinion the time was right for a final order to be made. She regretted the lack of progress made since June 2003. She did not think that a psychological / psychiatric report on Mr and Mrs A would assist the court. She did not think that any further intervention could be offered to Mr and Mrs A to help them resolve their difficulties.

108. Her primary recommendation was that since both parents share parental responsibility, and the children's time was to be equally divided, no residence order is necessary. However, if the court thought an order necessary, it should be a joint residence order. There should be a defined contact order stating that B and C have an equal amount of contact with each parent, continuing the pattern of the current shared care arrangements during term time and the school holidays being divided equally.

www.thecustodyminefield.com

Unusually, those orders should be expressed to last until the children are 18, and there should be an order under section 91(14) of the Children Act 1989.

Discussion

109. I read the latest reports of Mr BC and Mrs. P and the letter from Mr. A's solicitor with dismay. Mr. A's conviction that all the family's difficulties were attributable to Mrs. A, and that she suffered from some defect of personality which made it impossible for her to change made me think that, despite his understandable sense of outrage at the allegations of misbehaviour made against him, he had really learnt nothing from the whole process. The damage caused to these children flows directly from the mutual antipathy of their parents. That is simply not the responsibility of one or the other: it is the responsibility of both. Mr. A demonstrated that antipathy in the meetings with Mrs. A, Mr. BC and Mrs. P. He does not appear to be able to see that this is an antipathy, which his children do not share, nor should they. That, after all, was his complaint against Mrs. A – that she was alienating C in particular from him.

110. Mrs. A's illness will be a time of considerable anxiety for the children. I do not know the stage or extent of her cancer. But the children will need sympathetic handling during her illness, and it will not help them if their father is demonstrably indifferent to their mother's condition. If Mr. A's attitude cannot soften in any way towards Mrs. A, I see real tensions ahead between the children and himself, and further harm caused to the children arising from his attitude.

111. At the same time, despite his intransigence, I believe that Mr A is a man of integrity and was acting in good faith when he instructed his counsel at the hearing to assure me that, if I made a sole residence order in his favour, he would continue to honour the shared care arrangements, which he accepted were in the best interests of the children.

112. Very few family cases have neat endings. This one has reached the end of the court process, but clearly the implications of any order I make for the children will reverberate into their adult lives. Mr. BC already thinks B a damaged child, further strife will only serve to damage him further. What order, therefore should I make before parting from the case?

www.thecustodyminefield.com

The Cases on Joint residence orders

113. There are three recent decisions of the Court of Appeal dealing with the question of shared residence orders. They are, in chronological order, ***D v D (Shared Residence Order)*** [2001] 1 FLR 495 (***D v D***); ***Re A (Children) (Shared Residence)*** [2002] 1 FCR 177 (***Re A***); and ***Re F (Shared Residence Order)*** [2003] 2 FLR 397(***Re F***).

114. The most important of these, in my judgment, is ***D v D.*** In that case there were three children who, following their parents' separation, spent substantial amounts of time with each, despite the fact that there was a high level of acrimony between their parents and frequent applications to the court to sort out the detail of the arrangements. The father argued that without a shared residence order he was treated as a second-class parent by authorities with whom he had to deal over matters relating to the children. The judge made a shared residence order, and the mother appealed.

115. The judgment of Hale LJ (as she then was) is valuable both for its statement as to the current law and for its historical analysis. Hale LJ cites a passage (at [2001] 1 FLR 499) from the Law Commission's Report (Law Com No 172 published in 1988) on which the Children Act 1989 is based, and which bears repetition.

> Apart from the effect on the other parent, which has already been mentioned, the main difference between a residence order and a custody order is that the new order should be flexible enough to accommodate a much wider range of situations. In some cases, the child may live with both parents even though they do not share the same household. It was never our intention to suggest that children should share their time more or less equally between their parents. Such arrangements will rarely be practicable, let alone for the children's benefit. However, the evidence from the United States is that where they are practicable they can work well and we see no reason why they should be actively discouraged. None of our respondents shared the view expressed in a recent case [***Riley's*** case] that such an arrangement, which had been working well for some years, should never have been made. More commonly, however, the child will live with both parents but spend more time with one than the other. Examples might be where he spends term time with one and holidays with the other, or two out of three holidays from boarding school with one and the third with the other. It is a far more realistic description of the responsibilities involved in that sort of arrangement to make a residence order

www.thecustodyminefield.com

covering both parents rather than a residence order for one and a contact order for the other. Hence we recommend that where the child is to live with two (or more) people who do not live together, the order may specify the periods during which the child is to live in each household. The specification may be general rather than detailed and in some cases may not be necessary at all.

116. It is for those reasons, Hale LJ comments, that section 8(1) of the Children Act 1989 defines a residence order as an order "settling the arrangements to be made as to the person with whom a child is to live.

117. In her judgment in the case, Dame Elizabeth Butler-Sloss P helpfully cites a passage from the guidance contained in the ***Children Act 1989 Guidance and Regulations, Volume 1, Court Orders*** published by the Stationery Office in 1991 paragraph 2.2(8) at page 10: -

> it is not expected that it would become a common form of order, partly because most children will still need the stability of a single home, and partly because in the cases where shared care is appropriate there is less likely to be a need for the court to make any order at all. However, a shared care order has the advantage of being more realistic in those cases where the child is to spend considerable amount of time with both parents, brings with it certain other benefits (including the right to remove the child from accommodation provided by a local authority under s.20), and removes any impression that one parent is good and responsible whereas the other parent is not.'

118. The essence of the decision in ***D v D*** seems to me to be as follows. 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.

www.thecustodyminefield.com

119. ***D v* D** makes it clear that a shared residence order is an order that children live with both parents. It must, therefore, reflect the reality of the children's lives. Where children are living with one parent and are either not seeing the other parents or the amount of time to be spent with the other parent is limited or undecided, there cannot be a shared residence order. However, where children are spending a substantial amount of time with both their parents, a shared residence order reflects the reality of the children's lives. It is not necessarily to be considered an exceptional order and should be made if it is in the best interests of the children concerned

120. These themes are reflected in to other two decisions. In ***Re A***, there were three children, a boy and two girls. The girls lived with their mother and the boy lived with his father. The boy was unwilling to see his mother, and was not doing so. A Recorder made a shared residence order. The father applied for permission to appeal. Granting permission to appeal and allowing the appeal in part, the Court of Appeal set aside the shared residence orders. In so doing, Hale LJ said (at [2002] 1 FCR 177 at 181: -

> **17] I** completely appreciate why the recorder wished to make a shared residence order in this case. He wanted to recognise the equal status of each parent in relation to all three of these children. He may, although he does not say so, have been afraid that the father would not recognise this if he did not make a shared residence order in relation to all three children. But the law is that the parents already have shared parental responsibility for their children. They have equal and independent power to exercise that parental responsibility. A residence order is about where a child is to live. It is very difficult to make such an order about a child who is not only not living with one of the parents but is, for the foreseeable future, unlikely even to visit with that parent. Notwithstanding, therefore, that that parent does not wish there to be any distinction between the children, because she does not wish M to feel rejected by her, the court's order has to be designed to reflect the real position on the ground. That being the case, in my view the shared residence order in relation to M was inappropriate. For that order there should be substituted an order that M is to live with his father and to have contact with his mother in the same terms as the order laid down by the learned recorder.

www.thecustodyminefield.com

121. In ***Re F*** a judge made a shared residence order in relation to two small children, notwithstanding the fact that the mother lived in Edinburgh, a considerable distance from the father's home in England. The Court of Appeal, upholding her decision, said that such a distance did not preclude the possibility that the children'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. A shared residence order had to reflect the underlying reality of where the children lived their lives, and was not made to deal with parental status. 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 the children an order for shared residence would be valuable.

122. Applying these cases to the instant case, it is plain that in terms of time spent in each home and the importance of each home to the children, this is a prime case for a shared residence order. Such an order directly reflects the situation on the ground.

123. I appreciate, of course, that a residence order in Mr. A's favour would not, as a matter of law, diminish Mrs. A's status as a parent, or remove her equal parental responsibility for the children. But it would, in my judgment, nonetheless be making a statement that although the children shared residence with her and their father equally, that fact was nonetheless not to be recognised in the court order.

124. If these parents were capable of working in harmony, and there were no difficulties about the exercise of shared parental responsibility, I would have followed Mrs. P's advice and made no order as to residence. Section 1(5) of the Children Act 1989 requires the court to make no order unless making an order is better for the children concerned than making no order at all. Here, the parents are not, alas, capable of working in harmony. There must, accordingly, be an order. That order, in my judgment, requires the court not only to reflect the reality that the children are dividing their lives equally between their parents, but also to reflect the fact that the parents are equal in the eyes of the law, and have equal duties and responsibilities towards their children.

125. In addition, there is the risk, in my judgment, that a sole residence order in Mr. A's favour is likely to be misinterpreted. Mr. A has already given a strong indication that

www.thecustodyminefield.com

this is the case. Whilst, as I have already indicated, I regard him as an honourable man, and one who will implement the 50-50 living arrangement, I have no doubt at all that he wishes to be in control, and believes that the arrangements between 30 December 2002 and now have only worked because he has had a sole residence order. That, he believes, is the reason why Mrs. A had not made any trouble.

126. I disagree with that analysis. This case has been about control throughout. Mrs. A sought to control the children, with seriously adverse consequence for the family. She failed. Control is not what this family needs. What it needs is co-operation. By making a shared residence order the court is making that point. These parents have joint and equal parental responsibility. The residence of the children is shared between them. These facts need to be recognised by an order for shared residence.

Section 91(14) of the Children Act 1989 and orders to last until the children are 18

127. Section 91(14), which I do not need to set out, is a very flexible tool. The scope of the circumstances in which it can be used is extremely wide. I do not intend to add to the jurisprudence on it. The leading case is the decision of the Court of Appeal in ***Re P (Section 91(14) Guidelines)***[1999] 2 FLR573.

128. In the instant case, an order under section 91(14) is sought by consent as a recognition of, and to underline the fact that this family has spent some six years in litigation and does not wish to litigate any more. An extremely clear, sensible, equal division of the children's time between the homes of their mother and their father has been agreed. It is a regime with which the children are content and which meets their needs. It is the regime, which is to operate for the remainder of the children's minorities providing there is no overwhelming supervening event, which renders it impossible to maintain.

129. The court has intervened. It has succeeded, latterly, to the extent of dispelling the allegations of impropriety against Mr. A. It has also, through the work undertaken by NYAS, achieved a shared care arrangement, which meets the children's needs. The court has no further role to play, and the order reflects the fact that neither the parties nor the court believes that the parties should resort to it for the resolution of any further difficulties.

www.thecustodyminefield.com

130. In my judgment, section 91(14) is broad enough to encompass these objectives. Section 9(6) of the Children Act 1989 requires the court to be satisfied that the circumstances are exceptional before it makes an order for residence extending beyond a child's 16th birthday. Exceptional is, of course, an elastic word, but I do not think I am stretching it too far in making the order sought in this case. Once again, it is part of the same message. This is the regime which is to last until the children attain their respective majorities. It is now up to Mr and Mrs A to exercise their parental responsibility responsibly.

Footnote

131. I cannot leave this case without expressing my gratitude and admiration for the work done by NYAS and by Mrs. P in particular. As the narrative of events shows, she not only worked many unsocial hours and at weekends, but also produced reports of high quality with enormous speed. She was available to the children whenever she was needed, irrespective of the time of day or night. Hers was a paradigm of how a guardian should act.

132. This case demonstrates what can be achieved by intelligent and purposeful social work intervention. The courts cannot expect in every case a service of the quality given to it by NYAS in this case. CAFCASS Reporting Officers in any event have a much more limited role. CAFCASS guardians, no doubt, are more tightly restrained by budgets and workloads. But there is no doubt that the excellent service provided by NYAS in this case was crucial to its successful determination.

133. It is very often the case that contact has to be organised for weekends when no social worker or CAFCASS officer is available to supervise or oversee it. One particular point which could not fail to strike me in this case was that Mrs. P, by organising and attending contact at weekends, was able to play a role in re-starting contact between C and her father which simply could not have been achieved otherwise.

1 Decisions that could be taken independently and without any consultation or notification to the other parent.

- How the children are to spend their time during contact
- Personal care for the children

www.thecustodyminefield.com

- Activities undertaken
- Religious and spiritual pursuits
- Continuance of medicine treatment prescribed by GP

2 **Decisions where one parent would always need to inform the other parent of the decision, but did not need to consult or take the other parent's views into account**.

- Medical Treatment in an emergency
- Booking holidays or to take the children abroad in contact time
- Planned visits to the GP and the reasons for this

3 Decisions that you would need to both inform and consult the other parent prior to making the decision.

- Schools the children are to attend, including admissions applications. With reference to which senior school C should attend this is to be decided taking into account C's own views and in consultation and with advice from her teachers.
- Contact rotas in school holidays
- Planned medical and dental treatment
- Stopping medication prescribed for the children
- Attendance at school functions so they can be planned to avoid meetings wherever possible
- Age that children should be able to watch videos. ie videos recommended for children over 12 and 18.

www.thecustodyminefield.com