Shared Care – an antidote to issues of control after separation.

What seems like many years ago now I remember thinking that a shared residence order or shared care order (the terminology has regularly changed over the years and is now the sharing of the time when the child/children concerned will live with both parties) was a flawed ideal and hugely impractical. Whilst I have changed my view it appears to me amongst many practitioners and CAFCASS Officers this view sadly continues, and many practitioners retain the view of Russell J from the case of F v L *(Permission to Relocate: Appeal) [2017] EWHC 1377* where the Honourable Ms Justice Russell on appeal in the High Court stated about an order made by a Circuit Judge Owens sitting in Oxford County Court:

'the judge was wrong not to have considered and made findings in respect of the complaints of abusive and controlling behaviour on the part of L as alleged by F. It was the Cafcass officer's view that the child was living between, "what must be [an] incredible strain that both parents are clearly under". The judge simply split the child's time between two homes in what may seem to be an even-handed approach to a difficult and all too common problem. This is an unsophisticated, over-simplistic approach, all too often taken by the Family Court when making child arrangements orders, to attempt to adhere to the amendments to the CA brought in by the Children and Families Act 2014 by making an order for shared care which is an even split of time and to compel parents to co-operate. Splitting a child between two homes which are antagonistic and unsupportive of each other is not consistent with the best interests of a child nor congruent with that child's welfare'.

My view was short-lived as I was tipped off by a colleague about the second Appeal of the FvL case and at the second appeal where in the Court of Appeal Jackson LJ said the following about this approach :

'*When considering what arrangements are best for a child, the court's powers are broad. There was a time when the orthodox view was that shared care should not be ordered where the parental relationship is bad. There will certainly be cases where that will be the conclusion on the facts, but the authorities show that there is no longer a principle to this effect: A v A (Shared Residence) [2004] EWHC 142; Re R (Shared Residence Order) [2005] EWCA Civ 542; Re W (Shared Residence Order) [2009] EWCA Civ 370. ….It may be that equal shared care arrangements are unusual for children of D's age, but HHJ Owens gave several reasons for deciding that a week on/week pattern was suitable "on the actual facts of the case before me." She referred to the fact that it minimised change as it had been the reality for D for most of his life, and that D was thriving despite the difficulties. She noted the likelihood that the parents' communication would*

improve. She considered that equal shared care would neutralise any opportunity for one parent to seek to exert greater rights than the other.

Jackson LJ commented on the words of Russell J *'I am afraid that analysis is wrong in a number of ways. In the first place, the approach of HHJ Owens was the very opposite of how it is characterised. In no sense did she make the child arrangements order in a weak attempt at even-handedness. Nor did she make it because of the amendments to the Children Act in October 2014, which do not speak for equal shared care but provide that the court is to presume, unless the contrary is shown, that involvement of a parent in the life of a child will further the child's welfare (s.1(2A)), but that this does not mean that there should be any particular division of a child's time (s.1(2B)). Instead, Judge Owens made her order for the reasons that she gave, and she should not have been castigated for doing so. Secondly, the last sentence in the above passage is plainly wrong as a matter of law and goes beyond the proper role of the appeal court, which is to review the decision under appeal, not to substitute the view of the appeal court for that of the judge who heard the evidence.*

By the time of the second appeal, I had worked hard to understand the impact of domestic abuse and control and coercion upon my cases and I had begun to appreciate how the appeal judges and the family courts had been at the forefront of understanding of some of the human issues and traits following separation. The Family Courts in the development of the law in this area had an awareness of how children can be used as a vector of control between parents, they can be used to undermine one another, to annoy, make a point to the other parent. This can be by frustrating contact, not paying maintenance, not doing homework with a child etc. The Courts realised that by sharing responsibility and placing the parents as close as they could to the situation they would have been in if they were living in the same home and have equal shared time with their children then the Courts were negating the chances of the children being used as a pawn in some continuing dynamic of control by either party.

The tools for shared care orders have been with us for some considerable time. Section 11(4) of CA 1989 provides:

> 'Where a residence order is made in favour of two or more persons who do not themselves all live together, the order may specify the periods during which the child is to live in the different households concerned.'

And so the concept of shared care has been developed by the Courts. A list has been provided in a 2012 article by Bindu Bansal, Solicitor, now at SA Law in London [1]

i. *Re F (Shared Residence Order)* [2003] EWCA Civ 592).

1. The parents lived a significant distance apart, it did not prevent an order from being made.
2. It also recognised the time did not need to be equal between the two homes if the homes offered equal status and importance.

ii. *A v A* [2004] 1 FLR 195

1. Where parents were incapable of working in harmony, the order reflected the reality of the children's lives. Where sole residence could be misinterpreted as enabling control by one parent, the [2]order would show that the parents were equal in the eyes of law and had equal duties and responsibilities.

iii. *Re R (Residence: Shared Care: Children's views)* [2005] EWCA Civ 542)

1. Where the children wanted the shared arrangements to continue
2. Again, there was no need for a harmonious relationship as a prerequisite to an SRO.

iv. *Re P Shared Residence Order)* [2005] EWCA Civ 1639

1. The order made reflected an existing reality that parents had established.
2. Shared residence did not automatically follow equal time, or proportions approaching it. The day-to-day decisions would be with whomever the child was with at the time, but the important decisions would be made jointly. Parental responsibility made them equal in the eyes of the law and gave equal duties and responsibilities as parents ().

[2] Family Law Week: 'It's Good to Share' – Should there be a presumption of equality between parents when it comes to caring for their children?

v. <u>*Re M (Residence Order)* [2008] EWCA Civ 66</u>

1. Where equality was thought to be the starting point

vi. *Re W (Shared Residence Order)* [2009] EWCA Civ 370

1. Where it is psychologically beneficial to the parents in emphasizing the equality of their responsibilities towards the child and would thus indirectly benefit the child

This all came together in the case of Re AR (A Child: Relocation) [2010] EWHC 1346 in a case involving the proposed relocation of a child. It was held by Mostyn J as follows:

i. A shared residence order is nowadays the rule rather than the exception, even where the quantum of care undertaken by each parent is decidedly unequal.

ii. At Para 52 of his Judgment His Lordship stated :
'*I am clearly of the view that a joint or shared residence order should be made. Indeed, such an order is nowadays the rule rather than the exception even where the quantum of care undertaken by each parent is decidedly unequal. There is very good reason why such orders should be normative for they avoid the psychological baggage of right, power and control that attends a sole residence order, which was the one of the reasons that we were ridden of the notions of custody and care and control by the Act of 1989.'*

iii. At Para 52' *I would go further. If one were to draw up a hierarchy of human rights protected by the Convention, I would have thought that very near to the top would be the right of a child, while he or she is growing up, to have a meaningful participation by both of his parents in his upbringing. Although this is (strangely) not explicitly spelt out in the text it must be implicit in the notion of the right to a family life.'*

It is submitted that what is clear from the above cases are the following principles:

b. Equality is the starting point.

c. Shared residence (Joint living with order/shared care) does not automatically follow equal time, or proportions approaching it.

d. Recognition that equal shared care would neutralize any opportunity for one parent to seek to exert greater rights than the other.

e. Overriding Welfare Principle is paramount.

f. The importance of establishing facts if shared care is not to be followed.

In S11 of The Children and Families Act 2014 we were introduced to the '*presumption of parental involvement*'. The presumption means that when a court is considering whether to make an order relating to a child (in particular a child arrangements order) it is to presume, unless the contrary is shown, that involvement of both parents in the life of the child concerned will further the child's welfare. It is submitted that without any facts being found to the contrary then there should be a shared care order made in this case.

Child arrangements orders regulate with whom and for how long a child is to live, spend time or otherwise have contact with a person. The types of orders available to the court were listed by Kara Swift of The Family Law Partnership in her article October 2017 'Divorce and children – is shared care a right or responsibility?'[3]

i. a 'live with order' –sets out with whom the child should live.
ii. a 'spending time with order' – sets out the amount of time the child should spend visiting or staying with the person named.
iii. A joint 'live with order' the child lives with both parents does not necessarily mean that there is an equal division of time. Courts can make a joint 'live with order' whereby the child technically lives with both parents but the time at each other's house is not equal.
iv. A 'shared care arrangement' is a 50/50 division of time between the parents.

[3] Divorce and children – is shared care a right or responsibility? (familylaw.co.uk)

Private Law children disputes have recently become a battleground for parties seeking to establish they were controlled by the other party and that, because of this perceived control, it should in some way affect the other party's relationship with the child. The almost commonplace use of arguments of care and control often minimises the abuse suffered by the victims of significant domestic abuse because parties who 'just don't get on' claim they have been abused when the reality is, they had a child with someone whose temperament was never going to be suited to their own . This makes it harder for those parties who are real victims of control and coercion to be heard.

I would argue it is the 'standard' cases where the parties' relationship has broken down and parents have not been 'significantly harmed' by the abuse they have suffered or don't establish those facts and harm they have suffered at a fact finder then a shared care arrangement should be made automatically . This should be treated as a presumption and as the Courts have regularly commented this stops one party exerting control over the other. This may stop unwarranted applications being made to court to try and establish some element of domestic abuse when a threshold of causing actual significant harm to a person has not been reached . The Court should always ask itself even unprompted is there any reason I should not make a shared care /live with order ?

However, where there has been a significant level of abuse then shared arrangements will not be appropriate : In the recent case of X, Y and Z (Children : Agreed Transfer of Residence) [2021] EWFC 18 (26 February 2021) in this case Elizabeth Isaacs QC sitting as a Deputy High Court Judge said the following about shared care arrangements :

'The benefit of a shared care arrangement would be that it removes the burden of responsibility from the children. It places the locus of control firmly and equally in the hands of the parents. That in turn is likely to reinforce to the children that both parents have equal status in terms of their parental powers and responsibilities. This option would also enable all three children to stay together. Finally, a shared care arrangement would enable all three children to have equal contact with both parents in a predictable and stable routine'.

However, the Judge distinguished cases where there is significant domestic abuse established through a fact finding hearing then a shared care arrangement after a welfare assessment may not be in a child's welfare interest . The Judge went on.

'*The risk of a shared care arrangement is that it will involve yet more chaos and upheaval for the children. The previous two shared care arrangements, ordered by the court, have failed in the past. The shared care arrangement to which both parents subscribe would involve also a fair amount of weekly upheaval and is likely to be unsettling for all three children. The proposed shared care arrangement would require the children to move between the houses every three or four days. A further detriment of this option is that it is contrary to the expressed wishes and feelings of all three children, particularly X.*

Again, I find that the likely detriments of this option far outweigh any likely positives. In the context of such a long-protracted history of acrimony and discord between the parents, it seems highly unlikely, if not impossible, that these parents could make such an arrangement work successfully, at least in the medium to long-term. Such regular transition between the households provide simply too many opportunities for things to go wrong in what remains an incredibly fragile, finely balanced and delicate situation. F needs to demonstrate significant and sustained shift in his actions and behaviour, not just his words and language. That cannot be done quickly and needs to be tested and proven over time. I therefore do not consider this option to be realistic at this stage of these children's lives.

The case of X, Y and Z was a case of significant domestic abuse in this case parental alienation as said by the President of the Family Division *(see [2018] Fam Law 988) that where behaviour is abusive, protective action must be considered whether or not the behaviour arises from a syndrome or diagnosed condition..... Where a process of alienation is found to exist, there is a spectrum of severity and the remedy will depend upon an assessment of all aspects of the child's welfare, and not merely those that concern the relationship that may be under threat.* Because of that significant abuse a shared care arrangement was not made in X, Y and Z . However, I would argue that such an order should be made in all other cases where merely a failure of the parties to 'get on ' should not thwart such an order and this needs to be understood by all family lawyers.

Only a shared arrangement can stop one party 'lording' it over the other to the detriment of the children. It is the shared care arrangement that should be put at risk by a person perpetrating significant harm on the other party by abusing them otherwise practitioners need to realise a shared care arrangement is the order of preference for the Courts where parents are separated .

John Jackson
Park Lane Plowden Chambers
Leeds and Newcastle

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