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Introduction

- Radical move from middle and upper class fathers’ remote relationship with their children to today’s fathers’ close involvement in their upbringing is reflected in the law.
- 9-12% of separated parents share care in the UK (recent study by Gingerbread and Nuffield Foundation, Liz Trinder Fam Law (10) 1192.)
- Mediation operates in the shadow of law and is informed by research findings about the effect of separation on children. Therefore this presentation will include a review of current legislation and judicial attitudes, as well as of research on the kind of arrangements that benefit children in particular situations.

Shared Residence - Research evidence

“...The important role which research plays and the value of knowledge of the research evidence is in securing awareness of those factors which may particularly impact upon the child’s welfare in this context”, Stephen Gillmore, “Shared Parenting: The law and the Evidence (Part 2), Seen and Heard, Vol. 20, Issue 1, March 2010.”
Comparison of outcomes for 2 groups of litigating parents who attended mediation over parenting disputes:

- Child inclusive mediation: school-aged children’s needs and views were assessed separately and incorporated into the mediation.
- Child focused mediation: children’s needs and views were not assessed.

**Shared residence:** if children spend at least 5.9 days per fortnight with one parent, i.e. 35% of the time.

Data collected at: mediation intake, and 3 months, 1 year and 4 years post-mediation.

Children, mother and fathers from 169 families interviewed. Data for 133 families over 4 year period.

**Australian legislation:** courts must consider making orders for shared residence unless:

- the presumption of equal share responsibility is rebutted and
- the order is either not in the children’s best interests, or not reasonably practicable.

**Important conclusions of Australian research after 4 year follow-up:**

- Shared residence is mostly wanted by fathers and often resisted by mothers.
- After 4 years 41% families maintained consistent primary care arrangements and 27%, consistent shared residence arrangements.
- Parents are happier than their children with shared residence arrangements.
- Shared residence children reported higher levels of conflict and being caught in the middle than primary residence or changing residence children, as the more frequent the moves between homes the more likely the child will be exposed to parents’ disputes.
- One third of children in high conflict situations experienced psychological symptoms and children between 5 and 10 were more likely to have been caught in middle of parents’ disputes and to feel distress.
- Conflict generally reduces over time. Fathers experienced lower level of conflict after 4 years than mothers and had a clearer sense of having moved on.
• Patterns of care did not predict mental health scores.
• Children who had experience of shared residence over 3-4 years had greater difficulties in attention, concentration and task completion.
• In all respects children in shared residence whose parents had child inclusive mediation did better than children whose parents had child focused mediation, e.g. 1.5 times more stable pattern of care.
• Over time shared residence tended to revert to the care arrangement that existed prior to mediation. It proved to be the least stable pattern of care.

Two especially vulnerable populations:

• children under 4, due to attachment and separation issues
• children in high conflict families

Characteristics of families with stable shared residence pattern (Australian research):

• Sons
• Children under 11
• Small sibling group
• Fathers and mothers in tertiary education
• Fathers who were active carers in infancy
• Fathers who were confident about their parenting ability
• Fathers who were experienced as emotionally available by the child
• Mothers who had new partners
• Good parenting alliance

Additional characteristics of shared residence families with positive outcomes (Australian research and other studies):

• Flexibility of arrangements
• Children’s needs prioritised
• Children feel settled and at home in both households.
• Practical considerations: having what they need when needed; proximity between households and to school; friends and activities available in both households.
• Parents respect the competence of the other parent and there is a supportive relationship between them.
• Emotional responsiveness of parents: listening to child and prioritising his/her needs, being supportive and also able to impose discipline.
Mothers who do not have safety concerns

Possible advantages of shared residence:

- Children’s lives are enriched by having a meaningful relationship with both parents.
- A parent who obtains a shared residence order instead of a contact order may be much more willing to become actively involved in the child’s life.
- It makes it more likely for such parents to be able to have a balanced relationship, including monitoring and disciplining the child, rather than being primarily the providers of treats.
- The arrangement may convey a very positive message to such parents in recognising their role and commitment to the child.
- It is less likely to allow the ties with the child to weaken significantly as the parent who has obtained shared residence will feel less resentful and excluded from the child’s life.
- Provided a child is not separated from an attachment figure at too young an age, overnight stays can reduce separation anxiety and maintain and deepen attachment with both parents.
- It may reduce the antagonism between the parents if they are able to co-operate successfully.
- Children are less likely to experience feelings of loss or rejection.
- If there is a parental dispute about residence children will not feel the need to take sides or to have to choose between parents if shared residence is considered and subsequently adopted.
- It is an arrangement that suits contemporary families, in which it is common for women to work and often essential for them to do so after divorce.

Conclusions:

- The quality of the relationship with a parent is more important than the quantity of time a child spends with him/her. Hence the way in which relationships are sustained and managed is more significant than the formal structure of the child’s living arrangements.
- If shared residence works successfully it has the great advantage of fostering a meaningful relationship with both parents.
Shared Residence – The Law

Legislation:

• S 11(4), Children Act 1989: “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”.

Shared or joint residence orders?

• The Welfare principle: “The child’s welfare will be the court’s paramount consideration”, s 1(1) Children Act 1989.

• Checklist, s 1(3):
  a) “the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding);
  b) his physical, emotional and educational needs;
  c) the likely effect on him of any change in his circumstances;
  d) his age, sex, background and any characteristics of his which the court considers relevant;
  e) any harm which he has suffered or is at risk of suffering;
  f) how capable each of his parents and any other person in relation to whom the court considers the question to be relevant, is of meeting his needs;
  g) the range of powers available to the court under this Act in the proceedings in question.”

• No order principle, s 5

• Parental Responsibility, ss 2, 3 and 4

Shift in the courts attitudes to shared residence:

• Before the Children Act 1989:

  Riley v R (1986) 2 FLR 429
  Court of Appeal: “an order keeping a child going backwards and forwards between mother and father is prima facie wrong”
Since the Children Act 1989:

“an exceptional order” : Re H [1994] 1 FLR 717, Court of Appeal, Purchas, LJ: “an order that would be rarely made and would depend upon exceptional circumstances”. “The establishment of 2 competing homes only leads to confusion and stress and would be contrary to the paramount concept of the welfare of the child himself”.

“although unusual, should not be viewed as exceptional “: A v A [1994] 1 FLR 669, Court of Appeal, Butler Sloss LJ, who required “a high degree of co-operation between parents” and a “positive benefit to the child”.

“residence orders are not nowadays unusual”: Lord Hoffman in House of Lord’s Holmes-Moorhouse v Richmond-upon-Thames LBC [2009] 1FLR 904. Baroness Hale, agreed, but emphasised that the Court must choose the option which is best for the child, not best for the adults” and “the importance of considering children’s ‘s wishes and feelings:

“These ought to be particularly important in shared residence cases, because it is the child who will have to divide their time between two homes and it is all too easy for the parent’s wishes and feelings to predominate”.

Shared residence orders will be made:

- Even if time is not shared equally
- Even if parents are in conflict
- Even if they live in different locations within the country
- Even if they live in different countries
  BUT
- Only if practicable, e.g not if only one parent can offer a home to the children, Holmes-Moorhouse (above).
- A parent should not seek to interfere with or disrupt the other parent’s exercise of parental responsibility.

However 1st instance judges refused to make residence orders where high conflict, not equal time with each parent and because the order would enable one parent to exercise control over the other.
Rationale behind shared residence orders:

- They reflect the reality of living arrangements
- They convey important messages to parents:
  I. Both parents “are equal in the eyes of the law”, Re P [2006] 2 FLR 348 and “of equal importance”, Re K [2008] 2 FLR 380
  II. “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”, Re G [2008] 1 FLR 1587
  III. That parents need to cooperate.
  IV. Neither parent is in control, Re P (above): “shared residence orders avoid the psychological baggage of right, power and control that attends a sole residence order”, Re AR [2010] 2 FLR 1577, [2010] EWHC 1346
  V. “A parent should not try and marginalise the other parent”, Re W [2009] 2 FLR 436

Two issues that should be dealt with separately, (Re W [2009] 2 FLR 436):

- How much time children should spend with each parent
- Whether to make a shared residence order

Relevance of relocation cases:

- Criterion established by Court of Appeal in Payne v Payne, [2001] 1 FLR 1052:
  Although the welfare of the child is paramount there is a presumption that the parent who wants to move to another country should be allowed to do so if she/he has good reasons for wanting to do so. The distress caused by the refusal to grant leave is prioritised over the reduction in contact with the other parent.

  Criticism: it disregards modern views on the importance of co-parenting and is based on outmoded assumptions about there being a primary carer.

- More recent development:
  Declaration on International Family Relocation at an international meeting of judges in Washington DC, March 2010 (text in Re AR [2010] 2 FLR 1577, at 1583-4: paramountcy principle determines decisions as in Payne, but its application is very different, given the list of factors (13) to be taken into account, inter alia:
  I. Right of the child to maintain relationships and direct contact with both parents on a regular basis;
II. Views of children having regard to their age and maturity.

Important questions:

- What has led to a change in judicial attitudes to shared residence?
- To what extent are judges aware of research on the psychological effects of different living arrangements and the circumstances in which they may or may not be beneficial to children (counter example: Re H [2010] 2 FLR 866)?
- To what extent are the messages given in their judgements to parents effective?

Mediation

Goals:

- Helping couples to negotiate agreements
- Reducing conflict, if any
- Protecting children from parental conflict
- Improving communication
- Facilitating parental co-operation

Principles of Mediation:

- Voluntariness
- Impartiality
- Neutrality
- Confidentiality

Other features of mediation practice

- Not counselling
- Mediators may provide relevant information but not advice
- Focus on present and future, and on past only if relevant to future
- Focused on strategies designed to resolve practical and communication issues
- Mediation can lead to reconciliation or to improvement in communication
- Relatively short intervention: 1 to 6 joint sessions lasting an average 1.5 hours each.

**Reaching Agreements:**

- Focusing on the unique features of the family situation
- Generating options
- Assessing their appropriateness in the particular situation
- Avoiding divisive labels, like primary or sole carer versus parent with contact
- Focusing on children’s needs and wishes – children’s voices can be heard directly or indirectly
- Planning detailed arrangements and how to make them work
- Anticipating difficulties and how to overcome them

**Agreements reached in mediation:**

- Not binding
- Open to being put to the test
- Open to review
- Opportunity to return to mediation if difficulties arise

**What gets in the way of achieving mediation goals**

- Emotions: fear, anger, pain
- Power struggle
- Fixed positions
**Shared Residence Cases**

**My cases:**

**B & M**
- Child aged 4
- Mother was a banker with very high earnings and father was unemployed.
- Father was primary carer.
- Mother wanted shared residence, although she worked very long hours and travelled frequently.
- Mother did not want to make high maintenance payments to him as the primary carer; she said she would work less if he found employment.
- He complained that mother over-indulged the child; he valued discipline.
- Father was very unwilling to move from his original position on child care and finances but they reached a compromise agreement that she would have the child 3 weekends out of 5 and 2 nights a week.
- Mediation broke down because he went back on the agreed terms.

**Z & Z**
- Children aged 9 & 6
- Parents shared care equally.
- Arrangement worked very well.
- She said he was a great father. Also he offered to help with child care when she was working.
- Fact that both wanted to move out of London but live close to each other showed how they prioritised children’s needs.
- Very good communication about the children but not about anything else.
- Dispute mainly about money.

**MCA & W**
- Children aged 11 & 9
- Good communication between the parents, who were still living in the same house.
- No financial difficulties.
- Shared care arrangements but no labels.
- Most weekdays, and 3 out of 8 weekends with mother.
- Most holidays and ½ terms with father.
- Flexible arrangements about holidays (agreed between parents outside mediation) and generally, flexibility.
• Very detailed agreements about arrangements for the children and about finances, to cover every eventuality.

**M & N**
• Child aged 4
• Very conflicted couple due to father being very angry with mother over the breakdown of the marriage.
• Very little money to share.
• However, father wanted mother to stay with the child in the family home, while he temporarily moved to a caravan.
• He wanted share residence but given that he worked full-time plus overtime and she could not find employment it was agreed that the child would spend most weekdays and nights with mother but weekends, holidays and ½ terms were shared equally.

**My colleagues’s cases**

**T & W**
• Children aged 8 & 4
• Professional couple
• Shared care arrangement; 60% of time with mother and 40% with father.
• Children to stay in the former family home and each parent would rent a flat and take turns living in the home with the children.

**R & F**
• Children aged 10 & 8
• Professional couple; she earned more than he did.
• Each parent rented own home but were going to buy new properties.
• Shared care arrangement involving almost equal time.
• The nanny would continue to look after the children in the parents’ new homes.
• Good communication and the arrangement worked well.

**D & H**
• Children aged 6 & 4
• A shared residence agreement was made giving the mother 60% of the time. However after the mediation ended the father phoned my colleague to say he had found out from Families Need Fathers that shared residence meant 50-50. He could not accept the evidence provided by my colleague about judicial decisions to the contrary.
• Another issue was that he wanted 50% of child benefit and mother agreed to pay him ½ once she started working.
Example of a detailed Statement of Outcome:

A. **Issues for Mediation**

   Shared care arrangements for Ellie, Peter’s and Sarah’s 12 year old daughter.

B. **Parents’ Goals and principles**

   To do what is best for Ellie.
   Both parents acknowledge that they will continue to have parental responsibility for Ellie and recognise the importance of good communication concerning her, particularly with regard to issues relating to health, education and welfare.
   Both parents commit themselves to comply with the decisions reached in mediation.

C. **Decisions reached**

1. The established pattern of shared care to continue, i.e. during one week Ellie will stay with Peter from Wednesday after school to Sunday, and the following week from Thursday after school to Sunday.
2. On the weeks when Ellie goes to Peter’s home on a Wednesday, she will be returned by Peter between 4 and 4.30 p.m. on the Sunday of that week.
3. On the weeks when Ellie goes to Peter’s home on a Thursday, she will be returned by Peter between 6.45 and 7.15 p.m. on the Sunday of that week.
4. During holiday periods the same pattern of shared care will continue but Peter will collect Ellie at 6 p.m. on Wednesdays and Thursdays.
5. Ellie will spend Christmas on alternate years with each parent.
6. When Ellie spends Christmas with Sarah, if Sarah decides to take her abroad she will only do so for a maximum period of 2 weeks.
7. Ellie will spend birthdays on alternate years with each parent.
8. Sarah and Peter will avoid arguments in front of Ellie or within earshot of her and there will be minimum contact between them.
9. Any communication between Peter and Sarah will be done by email, unless it is necessary to telephone in an emergency.
Main conclusions

- In mediation, as in adjudication, the unique characteristics of the family must be taken into account before considering whether shared residence is a suitable option for the children.
- Focusing in mediation on how the children’s time is divided between the parents can be more productive than attaching legal labels to the proposed arrangements.
- Shared residence should not be considered as an option for children under 4 unless, possibly, when parents shared care of their children equally before separation and other factors that predict positive outcomes are present.
- It would be very beneficial for children and their parents to introduce child inclusive mediation in this country.