T v S (WARDSHIP)
[2011] EWHC 1608 (Fam)

Family Division

Hedley J

27 May 2011

Residence – Contact – Sustained parental conflict – Awarding care and control – Exercise of parental responsibility – Restraining future applications

Wardship – Residence – Contact – Sustained parental conflict – Awarding care and control – Exercise of parental responsibility – Restraining future applications

The parents, who were separated, had become deeply conflicted over residence and contact arrangements shortly after the child's birth. The child had been largely cared for by the mother, and had not for any sustained period lived away from her, but the parents had remained conflicted and the child had been made a ward of court. Although the ongoing parental conflict had dominated the child's life, there had been substantial compliance with court orders, and the experts considered that the child, now 4 years old, was thus far emotionally unscarred by the dispute. As a result of the court proceedings, the child was currently having regular staying contact with the father. However, the mother was continuing to make allegations that the court considered were unsubstantiated, while the father was showing no insight into the problems caused by his behaviour. The judge was seriously critical of the credibility of both parents. The court was currently considering a number of issues, including whether or not the wardship should be continued, to whom a residence order should be granted, what the contact provisions should be, how parental responsibility was to be exercised, whether the child could be taken abroad and the circumstances in which the child should be circumcised. The child had a potentially serious physical condition, and his medical advisors considered that he should be circumcised in hospital as soon as reasonably possible, to facilitate a diagnosis and to ease discomfort. Both parents were from a Muslim background; both supported the idea of circumcision, but the mother accepted the medical advice as to timing and conduct of the operation, while the father wished to arrange a religious circumcision later in the year.

Held – making a detailed order in wardship for the child to live with the mother, while spending significantly increased time with the father; making a family assistance order for 6 months; ordering the circumcision to take place as required by the doctors on the basis that the father was at liberty to arrange such religious ceremonies as were practicable; making directions for future applications –

(1) Although unusual, wardship remained permissible where the needs of the child so required within a private law context; the consequences of determining that a case remained in wardship were that care and control were in the gift of the court, and that parental responsibility rested in the court, save insofar as the court was prepared to delegate its exercise to the parents. When dealing with a case within wardship the inherent jurisdiction could be used to restrain future applications, as an alternative to s 91(14) of the Children Act 1989. The court should retain this case within wardship because: (i) the exercise of parental responsibility had been effectively abrogated by incessant parental conflict; (ii) a residence order had assumed totemic status in the parents' minds and the grant of an order to either parent was likely to be unhelpful to the child's future long-term care; (iii) there was an unusual need for the court to exercise control through detailed provisions of its order. In these circumstances the court would make prescriptive orders and require the parties' compliance: the parents

would each have individual care and control of the child in wardship during the time the child spent with each of them. All applications for the next 16 months were reserved to the judge, to be listed ex parte, to see whether a judicial enquiry was merited (see paras [17], [22]).

(2) Every aspect of parental responsibility was to be delegated to the parents in respect of matters on which they were able to agree; only in respect of matters on which they did not agree would the court direct how parental responsibility was to be exercised. No foreign travel would be permitted with the child pending a review of these arrangements, but if the parents were to apply consensually in writing for an overseas holiday, it was highly probable that permission would be given (see paras [23], [28]).

Statutory provisions considered
Children Act 1989, ss 1(1), (3), 16, 91(14)

Cases referred to in judgment
A v A (Shared Residence) [2004] EWHC 142 (Fam), [2004] 1 FLR 1195, FD

Samantha King for the plaintiff
Jacqueline Roach for the first defendant
Francesca Wiley for the guardian

Cur adv vult

HEDLEY J:

[1] H was born in May 2007, so he celebrated his fourth birthday during the hearing in front of me. His father is AT, his mother FS.

[2] Although unquestionably both his parents love him, they are in a deeply conflicted relationship and have been so since soon after his birth. It also has to be said that, although that conflict has dominated his life and his care, there has been substantial compliance with orders of the court. Moreover, the expert evidence indicates that H is securely attached to both parents and also indicates that he is emotionally thus far unscarred by the dispute, although, as the experts indicate, nobody should presume on that and there is a limit to the resilience of all children.

[3] This judgment should be read in the context of my judgment given in October 2009 in the finding of fact hearing. That judgment was seriously critical of the credibility of each of the parents in this case and I would still not be prepared to base any finding simply on their evidence unsupported by anything independent of either parent.

[4] The difficulty in the case is that each of them has heard clearly what I have said about the other, but, for the most part, have not heard what was said about them. Hence the inherent unreliability of their evidence continues and that applies, of course, to the paternal aunt who gave evidence before me.

[5] There are a host of applications that are required to be considered by the court. The question about whether or not wardship should continue, where H should live and under what auspices, whether any order for residence should be shared, what provisions should be made for contact, how parental responsibility is to be exercised, whether foreign travel should be permitted, questions relating to H's circumcision; as well as more technical issues like the making of a family assistance order, or restraining future applications, or reviewing progress or disclosure of the judgment.

[6] Moreover, one cannot hide from one's consideration the fact that there are two other sets of concurrent proceedings. There are ancillary relief proceedings which have hitherto been conducted by Parker J. I was provided with transcripts of those hearings. In the end both sides seem reasonably keen that I should look at bits in the transcripts. I only comment that, if I were either of the parties, I would cringe with embarrassment with the thought that anybody else might read it. There are also proceedings in the Queen's Bench Division launched by the father and his sister against the mother in relation to misappropriating and/or recovery of goods said to be of the value of £100,000. Those are the current proceedings which together with the history of this case hardly provide an encouraging backdrop for a rational consideration of the needs of H.

[7] What has happened since October 2009? The child has continued as a ward of court. He has lived most of his time with the mother and, indeed, has not really, for any sustained period, lived away from her care. His contact with his father has been built up to what is now a regular pattern of staying contact. That is clearly enjoyed by and beneficial for H, and its continuance is now accepted by the mother.

[8] The conflict continues unabated. The mother continues to make allegations which the court has found unsubstantiated in her discussions with other professionals. The father still has no chink of understanding about why it all went wrong in the first place as far as his behaviour was concerned. Neither side seems able to let loose the removal of the child to the United States in 2008. There are all these other disputes. There is a volume of correspondence over contact and parental responsibility issues and a protracted dispute over circumcision, notwithstanding the fact it appears that both parents agree it should occur.

[9] The father's present position is that he is a practising Muslim. He is a professional man, if currently unemployed. He lives with his sister in Ealing as he has done since before the separation. He would in due course like to return to work which might involve some foreign travel, but his sister will be permanently at home. He has a good, albeit developing, relationship with the child and he seeks for himself a sole residence order.

[10] The mother shares the same religious background as the father. She trained as a teacher, but she is currently unemployed and is effectively the full-time carer of H. She would, no doubt, like to work in due course. She has a good and secure relationship with the child, according to the expert evidence, and she too seeks a sole residence order.

[11] H is essentially in good health, subject to one matter which is tied in with the issue of circumcision. He attends nursery. His difficulties with speech are manifestly much improved. He has an easy and secure relationship with both his parents and, although his life has been blighted by this conflict since its inception, he remains himself emotionally undamaged by it.

[12] An inordinate amount of court and judicial time (mostly mine) has been devoted to this case since its inception in 2008. Both parents have shown themselves unwilling or unable to address the central conflict between them. The psychiatric assessment offers little for future encouragement on that front. Each parent has heard what I have said about the other, but remains deaf to what is said of them. However, each parent has heard enough at least to procure compliance with the orders of the court. I do not intend to indulge the

parents with any further recitation of their grievances nor to make any further findings, unless necessary, to explain a particular decision in relation to H's care. The focus of this court's concern is the child, not the endemic and multiple adult disputes and this judgment hence forward will reflect that priority.

[13] Section 1(1) requires me to make the child's welfare my paramount consideration. Section 1(3) draws the court's attention to a number of matters that it ought to have in mind in deciding a case. Those are:

- the ascertainable wishes and feelings of the child concerned at his age and, in the light of this conflict, I do not think anything of substance can be attached to that;
- his physical, emotional and educational needs. They are of course at the centre of this. His physical needs are fundamentally met. His emotional needs are currently met, but, in the light of circumstances, they will not be so indefinitely. His educational needs are being addressed;
- I have to consider the likely effect on him of any change in his circumstances. That must relate either to a change of primary care or to a significant increase in the sharing of care;
- I have to consider his age, sex, background and any characteristics of his which the court considers relevant. This is a child who is entirely dependent on adult care at the present time and that care is deeply conflicted and that has its implications;
- any harm which he has suffered or is at risk of suffering is all tied up with the conflict as is the question of the capacity of the parents to meet his needs. There is no question mark over or doubt about the capacity of the parents to meet his needs except the destructive force of their conflict working itself out in his life.

[14] All that said, however, it is right to acknowledge that the parents have found time and energy in the conflict to devote to their son's welfare and he has manifestly benefited from that.

[15] The father's proposals are that the child should live with him and his sister in Ealing. He should have frequent and generous contact to the mother. He should receive private education in Ealing funded by his family. The child should be circumcised in the manner and in the style proposed by him and all that ought to be conducted under the umbrella of wardship.

[16] The mother's proposals are that the child's primary home should be with her. That there should indeed be increased contact to the father. The child should receive state education in Brighton, unless the father is willing to pay for private education. That the child should be circumcised in a manner proposed by the local health trust and she would prefer the wardship to be discharged.

[17] Almost every aspect of the exercise of parental responsibility was in dispute. Accordingly, I propose to treat these parents as having forfeited their parental responsibility to the court. I intend to make far more prescriptive

orders than is my usual practice and then to require the parties' compliance, which, as I say with thanks, has been forthcoming in the past.

[18] I have been assisted by the judgment of Wall J (as he then was) in the case of *A v A (Shared Residence)* [2004] EWHC 142 (Fam), [2004] 1 FLR 1195 and particularly the schedule of the exercise of parental responsibility at 1224/5.

[19] I have heard other evidence in this case. Dr M conducted a psychological assessment of the parents. Dr K conducted a psychological assessment of the child. Mr Crawhurst, the guardian, gave evidence in this matter. Ms A, a paediatric surgeon, gave evidence relating to the issue of circumcision. I am grateful to each of them for the assistance that they have given the court.

[20] Dr M's contribution is made more difficult because he is, in my judgment, quite right in his suspicion that both parents in rather different ways were managing or controlling the image that they presented to him and the court. Dr K helpfully assessed the attachments of the child to each parent. The guardian has come very late into these proceedings, and I am grateful for the time and care that he has given to them.

[21] I hope that none of those witnesses, whose expertise is beyond question, will feel their work disparaged if I say that I have formed my own clear views about this case. Therefore, I will make little, if any, further mention of their individual evidence. When they see my views they may, however, feel with some justification that they have exercised some influence over their formulation.

[22] So I come then to deal with the actual issues that I am required to decide:

(1) Should this case be dealt with in wardship or by conventional orders under the Children Act? Without reciting a great deal of rather old case law it suffices to say that, in the circumstances of today, a wardship is unusual but remains permissible where the needs of the child so require within a private law context. I have been guided by that in my consideration whether wardship is appropriate in this case.

In the end I have concluded that this is a case which the court ought to retain within wardship. My reasons are briefly these: first of all, it is a case in which (as I have indicated) the exercise of parental responsibility has been effectively abrogated by incessant conflict; secondly, I formed a clear view in listening to this case that a residence order has assumed totemic status in the minds of the parties. The granting of a residence order to either or even both of them is likely to be unhelpful at present to the future long-term care of H. Thirdly, because of the unusual (indeed, almost unique) need in this case for the court to exercise control through detailed provisions of its order. The consequences of determining that this case should remain in wardship is that care and control is in the gift of the court and parental responsibility rests in the court, save insofar as it is prepared to delegate its exercise to the parents. In all the

circumstances, I have concluded that this is a case which should (for the time being at least) be continued in wardship.

(2) Where should the child's principal home be? It is important just to say one or two preliminary matters. The first is that, in terms of providing for the physical and educational needs of this child, I am satisfied that both parents are well equipped so to provide. The child is familiar with both parents, is comfortable with both parents. I have absolutely no basis on which I could make assertions that one parent is manifestly a better parent than the other. The very fact that H has thrived in the care of both of them suggests that they both have much to offer him, but the child must have a principal home. In doing that the court has to have regard to the effect on him of a change of circumstances, given his life experiences to date. I have no doubt that there is simply nothing which would justify a transfer of care and control from one parent to the other. It would be inimical to his experience of consistency. The cost of such a change, although grievous to one parent, would in truth be paid by the child himself. At the end of the day there is evidence (which I accept) which suggests that the mother is intuitively more in tune with H's emotional needs. In saying that I am not seeking (as I say) to draw any distinction in the quality of parenting between the two of them. It is simply a feature of their respective characteristics.

Having said that, I am equally satisfied that he needs to know his father much more than before and that the time that he spends with his father requires to be significantly increased. I do not think it would be helpful in this case to use different nouns to describe his status when in the company of each parent. I propose effectively to divide his time on the basis that each has his care and control in wardship for the time that he spends with them. That has nothing whatever to do with the exercise of parental responsibility (to which I will come back in a moment).

(3) How then should the time be divided? The ultimate goal and purpose of the order is to achieve a state of affairs where H spends the first, third and fifth weekend of each calendar month with his father from school until Sunday evening; that there should be an equal division of half-terms and holidays and that that should be achieved by no later than the next 15 months or so. I am not going to weary this judgment with a detailed analysis of how that is to be built up because in this case I have thought it proper to draft an order which sets out the exact details of how that is to happen.

I propose then, for the periods that are specified in the order, that the father is to have the care and control for H. For all other times, the mother is to have the care and control of H. There should be no contact with the other parent during any period of one parent's care and control, save where the parents can agree on some contact and there should of course be a phone call on arrival after handover to confirm safe arrival. Otherwise the parents either agree something or there is nothing.

[23] Let me turn then to the exercise of parental responsibility. I recognise that both parents as a married couple hold parental responsibility as of right. I propose to respect that by delegating every aspect of parental responsibility to the parents in respect of matters on which they are able to agree. It is only in respect of matters on which they either will not or cannot agree that the court will direct how parental responsibility is to be exercised. I propose to adopt the schedule promulgated by Wall J in *A v A*, subject to certain minor amendments to reflect specific provisions in the order that I have drafted. However, I am going to deal now with two specific matters, namely education and circumcision.

[24] If the parents can agree on private education in Brighton, so be it. They have an entirely free hand to make whatever arrangements they think proper upon which they can agree. If they cannot agree then H will be educated in accordance with state provision in Brighton, subject only to the parents' rights to use the educational appellate process in such a way as is permitted to them.

[25] So far as the question of circumcision is concerned, I think it is important to set the context of this. I accept the evidence of Ms A as to the need for circumcision. I accept that the child has a potentially serious physical condition. I accept that no diagnosis can be made firmly about that condition except after histology and I accept that, in the context of this case, histology is not possible until in fact a circumcision has been performed. I accept further her evidence that, whilst a circumcision is not urgent, it is something that should be done as soon as it reasonably can be, partly to afford some relief of discomfort and partly to obviate the risk of the serious condition (if it exists) getting worse. The mother supports that approach. The father accepts, broadly, that a circumcision should take place, albeit that his principal concern is (as one might expect) in relation to its religious significance. It was for those reasons that he wanted to arrange it himself and for it to take place after the end of the nursery year in July.

[26] I have thought carefully about these conflicting approaches. I have come to the conclusion that, subject to the matters where the legitimate concerns and aspirations of the father can be met, the circumcision should take place as advised by Ms A. That means that it will take place at the hospital in Brighton. In my view, he should remain with his mother thereafter for at least 48 hours. If that cuts into any contact time, that will be compensated as provided for in my draft order. In my view, a circumcision should take place as soon as Ms A is able to make and confirm a booking. Both parents are entitled to be present on the occasion in the manner that the hospital permits parents to be present, as Ms A described. The father should be at liberty to arrange such religious ceremonies as are practicable and are consistent with the practice at the hospital. Again, Ms A made it clear that they were familiar with these requests. The father is entitled to request a Muslim surgeon if available, but the clinical responsibility for the procedure remains that of Ms A.

[27] There are some other outstanding issues with which the court ought to deal. First of all, should there be a review? In my judgment, the answer to that is yes, if only because wardship should not be indefinite. My proposal is not to review this matter until October 2012 because by then either the family will have fallen apart and the local authority will have become involved or the

family will have sorted out some means of co-existence. I would hope on that occasion – if the latter is the position – to be able to make final shared residence orders under the Children Act, but that may be unduly optimistic. I merely mention it as indicating the goal.

[28] I then ought to deal with the question of foreign travel and passports. I think it would be wise not to permit foreign travel pending the review in October 2012 except by specific order of the court. If the parents were to agree on an overseas holiday they may apply consensually in writing and it is highly probable that the order would be made. Otherwise, there is no travel by either parent abroad with H without permission of the court. The mother's passport should be returned to her. H's passport should either be lodged with Cafcass or if they would prefer with the Tipstaff to the High Court.

[29] I am asked to consider a family assistance order. I have not found this completely straightforward. The local authority, for reasons with which I have some sympathy, are not terribly enthusiastic. The guardian thought it was a good idea. The parents are willing to go along with it. I think that in the implementation of this order, it may have some real value in the early stage of this case. It must be understood that the local authority may have a mediating role in the case, but they are not arbitrators and I do not expect them to solve the family's problems for them. What I propose to do is to make an order under s 16 of the Children Act for a period of 6 months. The order will be made to the East Sussex County Council and it will name the child and the parents. At the end of 6 months I shall invite East Sussex County Council to report briefly to the court by letter. I do not propose any further extension in that unless it is requested by the East Sussex County Council when, of course, subject to any views expressed by the parents, I would look again at that conclusion. But it seems to me its real justification is to assist in the launching of a new regime, which, by the time it has operated for 6 months, the parents will either have found a way of doing it or the whole thing will have fallen apart.

[30] The next issue that I was asked to consider was the question of restraint of applications. Whilst this case has involved a prodigal use of court time, there is in fact no history of unreasonable applications themselves. On the other hand, I can well see the force of an argument which said that this family needs a break from litigation. In fact, because I have decided to deal with this case within wardship, I propose to use the inherent powers rather than the powers under s 91(14) of the Act, although the principles that govern s 91(14) are present in my mind.

[31] What I propose to do is simply to direct that all applications between now and October 2012 are reserved to me. Any application should be listed ex parte before me without service on any other party for directions. The purpose of which is really to see whether a judicial inquiry is merited and, if so, to what extent.

[32] Dissemination of the judgment is a matter that was raised by me because I have anxieties about it. I am concerned about the parents' capacity to provide partial or inaccurate reporting of what the court may have said or decided; the most obvious example being the mother's conversation with the local authority's social worker, which was clearly radically different to what the social worker appreciated was the case when the judgment itself was read. I think, until a very much greater degree of calm has entered into this case, it

would simply be completely unreal to accept that either party is going seriously to attempt objectivity in their reporting of the proceedings to any other interested professional.

[33] Having said all that I am also acutely aware of the reasons why widespread disclosure of the judgment may be seen to be an infringement of the privacy of the family. At the moment I am satisfied that the judgment must of course be disclosed to the local authority as the holder of the family assistance order. I have not reached a final view about further dissemination because the parties asked for an opportunity last time to consider whether some kind of summary could be agreed. I do not want to deprive them of that opportunity. I have appended to this judgment a draft of an order to implement it. I propose to give parents and advisers an opportunity to reflect on it and make observations. I am not prepared to entertain any further submissions on the merits or substance of the order, only issues of practicality in its implementation. I propose to direct that a transcript be prepared of this judgment at the joint and equal expense of the parties; that being a reasonable charge on each party's public funding certificate.

[34] I very much hope that, whatever the parties think of these proceedings or of each other, it will not be necessary to convene a court again before the review in October 2012. It would be quite wrong to part from this case without an expression of my gratitude to counsel for their ordered and controlled management of the case and their ability to help me keep the central issues of H's welfare clearly in mind as we have had to deal with a very large number of issues that have arisen. I propose at the moment to make no order as to costs, save directing a detailed assessment of each party's publicly funded costs, and I have in fact provided to counsel for consideration with their clients a copy of the proposed draft order.

Order accordingly.

Solicitors: *Dawson Cornwell* for the plaintiff
Fitzhugh Gates for the first defendant
Mayowynne Baxter for the guardian

PHILIPPA JOHNSON
Law Reporter