

Neutral Citation Number: [2013] EWHC 399 (Fam)
IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Date: Thursday, 14th January 2013

HIS HONOUR JUDGE HAYWARD SMITH QC
(Sitting as a Judge of the High Court)

B E T W E E N :

N Applicant

- and -

C Respondent

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Charles Hale (instructed by **Dawson Cornwell**) appeared on behalf of the **Applicant**.
Judith Murray (instructed by **Clintons Solicitors**) appeared on behalf of the **Respondent**.

J U D G M E N T (Revised)

JUDGE HAYWARD SMITH:

INTRODUCTION

1. This is an application under Schedule 1 of the Children Act for financial relief for the benefit of a child, P, who is now aged twelve (nearly thirteen). The application is brought by her mother against her father. In this judgment I will refer to the parties as "the mother" and "the father".
2. The mother was born in Scandinavia in the late 1970s. She came to live in England in 1995. Close members of her wider family live in Scandinavia and she returns there as often as she can. P is bilingual in English and another language. The father was born in the late 1960s. He is a professional musician. He goes on tour, although he now dislikes touring and tries to remain at home as much as possible.
3. The mother and father had a relationship in the late 1990s. They had their one child. They never married. Initially the father did not have parental responsibility as his name was not on P's birth certificate.
4. In 2001 the relationship between the mother and the father came to an end. The father then owned, and still owns, two properties in London. He owns a three-bedroomed house, Property "A" where he lives with his present partner and their baby. He also owns another three-bedroomed house, near Property A (Property "B"). After the mother and the father separated it was agreed that the mother and P would live in Property B and the mother and P lived there together until August 2011. The mother still lives in Property B. The father still lives in Property A.
5. There were difficulties between P and her mother in August 2011. P moved to live with her father. I have read the details of what happened, but they have not been explored in oral evidence before me. It has not been necessary to do so. Although P still sees her mother she has made it clear that she does not want to stay with her mother. She has not stayed overnight in her mother's home since August 2011.

6. In September 2011 the father began proceedings seeking a residence order and a prohibited steps order to prevent the mother from removing P from his care or from her school. After much paper was generated and reports obtained from an independent social worker, S B, a consultant child psychiatrist, Dr. B, and a consultant psychiatrist, Dr. M, the section 8 proceedings were eventually compromised and an order made by Mr. Justice Coleridge on 29th November, 2012, only about two and a half months ago. The order includes the following provisions. It was recorded and acknowledged by the mother and the father that neither of them sought a residence order in respect of P. They agreed the arrangements for care of P. It was agreed that P should stay overnight with her mother if she wishes. It was agreed that both parties and the father's current partner would continue to encourage P to stay overnight with her mother and have more time with her mother. The father told me that he does encourage P in that manner. The father undertook not to consume alcohol during P's minority and to continue to undertake hair strand testing, blood testing, and liver function testing in respect of alcohol until 30th November, 2013 and to provide to the mother's solicitors with copies of the test results as soon as they are available. In addition, the father's current partner undertook to inform the mother and the mother's solicitor immediately of any relapse or suspected relapse by the father in his abstinence from alcohol during P's minority. The arrangements for care of P, as agreed and enshrined in the order, were that P should be in the care of her mother during term-time every Friday from school until 9.00 p.m.; on alternate weekends, on Saturdays from 10.00 a.m. until 7.00 p.m. and on Sundays from 10.00 a.m. until 6.00 p.m. and for half of all school holidays and for such other periods as may be agreed in accordance with P's wishes. At all other times it was agreed that P should be in the care of her father. On that basis it was agreed that there should be no order on the father's applications for residence and prohibited steps orders.
7. Although the order does not say so, its effect is that P now lives with the father as resident parent and has contact with the mother as the non-resident parent. Mr. Hale, counsel on behalf of the mother, has sought to argue that as the order is silent as to residence and contact, the concepts of resident and non-resident parent are inapplicable to this case. I disagree. In my view it is important to look at the underlying reality. The concepts are relevant in considering whether there is any jurisdiction to make a maintenance order in view of the bar imposed on the court's jurisdiction by section 8 of the Child Support Act. The mother seeks a maintenance order of £2,200 per month, but if there is no jurisdiction to make that order according to a letter from her solicitor, dated 24th January, 2013, she seeks a lump sum payable by instalments to cover such payments until P reaches the age of eighteen or finishes full-time education. Mr. Hale, on behalf of the mother, has not pursued that alternative because the circumvention of section 8 of the Child Support Act is precluded by a decision of Mr. Justice Johnson in the case of *Phillips v. Peace* [1996] 2FLR, 230.
8. In addition, the mother seeks a lump sum of £200,000 for the complete refurbishment of Property B. She wishes to have sole conduct of the refurbishing work. She asks that the property be put in trust for P until P is aged eighteen or ceases full-time education. In the letter that I have referred to the mother also asks the father to pay P's educational expenses, to include non-compulsory school trips and excursions, university fees, university accommodation and living costs while P is at university, gap year travel expenses, expenditure in respect of motor vehicles, tax and insurance for P, and any other large *ad hoc* sums required as may be agreed from time to time, and Swedish summer camp in the sum of £2,000. The mother also seeks a further lump sum of £6,000 to enable her to purchase necessary items for the Property B.

9. It is thus a substantial claim for housing and maintenance by a non-resident parent.
10. The father's position is that the mother can remain at Property B for a further six months. He offers to pay her a lump sum of £10,000. He will agree to pay for P to fly to Sweden each year to see her extended family - in particular, her maternal grandmother to whom she is very close. Through his counsel, Miss Murray, the father maintains that there is no jurisdiction to make the maintenance order that the mother seeks. He contends that the mother has a substantial earning capacity; that he has provided a home for her and P for ten years; but now that P is living with him the time has come for the mother to stand on her own feet financially. He contends that the mother's claims are a thin disguise for financial provision for herself and that he is under no obligation under Schedule 1 to provide that. Their respective positions are, thus, poles apart.
11. It is an unusual case. Counsel have found no case where an order under Schedule 1 for substantial financial relief has been made against a resident parent in favour of a non-resident parent albeit for the benefit of a child.

THE FINANCIAL POSITION OF THE PARTIES

12. The father's total capital is about £3 million. Property B is valued at £912,500. Property A is valued at about £1,156,000. It is subject to a mortgage of about £600,000. The father has a farmhouse in the country, which is a three-bedroomed house standing in about an acre of land. It is worth about £850,000. The father's other assets include bank accounts, shares, ISAs and investment bonds. His income fluctuates. But, for the year 2010/2011 it was about £112,000 net. For the subsequent year, 2011/2012, it was about £244,500 net. Although the husband gave financial details in his Form E which were not far distant from those figures it is an unfortunate feature of this case that he has been required to produce accounts, bank statements, and valuations. The case has been conducted as though this were a full-scale financial inquiry in proceedings following a divorce, even though it should have been obvious from the father's Form E that he could honour any order the court might make. The mother has been able to pursue her claim in the manner that she has because the father has already provided for her costs of doing so.
13. The mother has no capital of any substance. Her income is about £8,800 per annum. She does landscape gardening work which she says provides an income of £2,880 per annum, charity work which provides £792 per annum, and she has rent from a lodger at property B who pays rent to her of £5,161 per annum. I will come later to the issue of the mother's earning capacity.

THE HISTORY LEADING TO THIS APPLICATION

14. As the father did not have parental responsibility for P he consulted solicitors and on 31st July, 2003 the father's solicitor wrote to the mother, asking if the mother would agree to the father having parental responsibility. The letter also raised issues concerning the mother's occupation with P of the property B and the father's maintenance of P. The father was then paying £600 per week maintenance to the mother and £350 for a nanny that the mother and the father shared. He paid the mother's mobile 'phone bill of £200 per month. P was then at a private fee-paying school. The father paid her fees of £1,300 per term. She left that school and went to a non-fee-paying school in September 2011. The father was having regular contact with P. It was a very obvious case for the father to have parental responsibility.

15. The mother did not immediately agree to the father having parental responsibility. Her solicitor raised various questions as to how the father's parental responsibility was to be exercised. The matter was not resolved until March 2004. As the mother did not agree to the father having parental responsibility - she neither agreed, nor disagreed - he issued an application which came before the court on 24th March, 2004. On the previous day, 23rd March, negotiations took place which resulted in an agreement written in manuscript and signed by both the mother and the father. I propose to read that agreement in full.

"C [the father] and N [the mother] acknowledge that they are both involved and committed to P's care and that N is P's principal carer, although P spends a lot of time with C. They agree that a parental responsibility order in C's favour should be made.

They agree that the terms of N and P's occupation of Property B should be regulated by means of a trust deed which will provide that N can occupy the property until P is eighteen or ceases full-time secondary education whichever is the later and also that if N marries the terms of her future occupation should be reviewed.

C's solicitors will prepare the necessary documentation.

[the lodger's] occupation of Property B shall be regulated by means of a tenancy agreement to be drawn up by C's solicitors. The Lodger will pay rent to N in a sum to be agreed.

Anyone else occupying Property B whilst N is living there must occupy it under a tenancy agreement to be agreed with C.

From the 1st May, 2004 C will pay N £250 per week, together with agreed childcare costs and for the avoidance of doubt N will keep the rent received from the lodger. The maintenance for P will be reviewed at the end of June 2005 when N will have completed her college course.

C will continue to pay agreed school fees and agreed extras for P".

It was envisaged that after the mother had completed her degree course she would be earning and the financial position would then be reviewed because she would have an income and maintenance might be reduced.

16. Mr. Hale, the mother's counsel, has argued that that agreement was in the form of a contract which entitled the mother to live at Property B under a contractual licence which is still in being and continues to entitle her to live there until P is eighteen or ceases secondary education. Mr. Hale contends that the consideration for that contractual licence was mother's agreement to the father having parental responsibility. I do not read the agreement in that way and I do not believe that that is what the parties intended. The agreement is expressly predicated on the basis that the mother was the principal carer of P because P was then living with the mother at Property B. I reject Mr. Hale's contention that only part of the agreement is to be read and the first paragraph is to be ignored. Mr. Hale suggested that the authority of *Mexfield Housing Co-Operative Ltd. v. Berrisford* [2012] 1AC assisted his argument. I disagree.

17. On the following day, 24th March, 2004, an order was made granting the father parental responsibility. Mr. Hale suggested that the written agreement, to which I have referred, was an agreement giving the father parental responsibility. In fact, the document states that a parental responsibility order would be made. That is not necessarily the same thing.

18. There is an issue as to whether a written document purporting to regulate the mother's occupation of Property B was ever prepared in 2004 or before 2010. Although searches have been made no such document has been found. In a letter dated 5th July, 2010 the father's solicitor said that she had sent such a draft document in 2004. However, it has not been found. Hence its terms are unknown. The father told me that he did have a draft agreement which his solicitor had given to him and he asked the mother to sign it more than once. She does not accept that. However, I think the father is probably right about it.
19. The mother and P remained living at Property B. An issue then arose about the repair of the property. The mother said that the property was falling into disrepair and the father was not rectifying it. She was right. He was not. In 2009 the father sought to re-activate the issue of a formal document referred to in the manuscript agreement of 23rd March, 2004. He instructed solicitors and they wrote to the mother's solicitors on 7th December, 2009. Matters proceeded slowly.
20. On 5th July, 2010 the father's solicitors sent a document to the mother in the form of a formal draft agreement. It was not in the form of a trust deed. The document contains an error on the first page in that it gives the wrong date of the parental responsibility order. However, no doubt that would have been corrected if the agreement had ever been signed. The agreement includes the following provisions (I will not read them all):

"C has made provision for a home for P and this Agreement is intended to regulate the terms of N's occupation of the property with P ...

3. N shall continue to occupy the Property until such time as P has reached the age of eighteen or has ceased full-time secondary education [whichever is the earlier] ("the agreed date"). The right to occupy the Property is personal to N and can only be exercised by N and is not assignable and nor is N entitled to share the Property or part thereof, sub-let the Property or part thereof, or create any interest whatsoever in the Property. N shall vacate the Property by the Agreed Date with all her personal belongings and deliver to C the Property vacant and in accordance with the terms of this Agreement.

4. C will be responsible for the repair maintenance and insurance of the Property and shall pay the buildings insurance premiums for the building when they fall due and the costs of maintaining and keeping up a suitable burglar alarm system. C will also continue to pay for all structural and decorative repairs and maintenance and replacement of necessary equipment such as the boiler, electricity, and gas supplies and any improvements to the Property.

5. C confirms that it is not his intention to seek a sale of the Property prior to the Agreed Date but nothing in this Agreement shall prevent C from selling the Property and purchasing another property ("the Substitute Property") for N and P to live in until the Agreed Date. The same provisions and obligations as apply to the Property under this Agreement will apply to the Substitute Property.

6. C agrees to make provision in his will to the effect that should he die prior to the Agreed Date or while this Agreement is still in force his executors shall consider themselves bound by this Agreement and will implement its terms ...

10. N confirms and agrees not to allow any third parties to occupy or reside at the Property save for occasional guests or invitees and not to accept any monies or consideration from any such third party".

That provision was not in accordance with the written manuscript agreement of 2004 which expressly provided for the mother to continue to receive rent from the lodger that she then had.

21. The mother objected to the terms of that draft document. Correspondence followed at a leisurely pace. I will come in a moment to the reasons for the leisurely pace.

22. On 5th October, 2010 the mother's solicitors wrote to the father's solicitors a letter which included the following:

"My client wishes to resolve matters speedily with your client, but acknowledges that it would be a good idea to meet. However, as you must appreciate, I am not in a position to advise her effectively as to the terms of the draft agreement prepared by your firm, given that I do not have any financial disclosure from your client. My suggestion is that Forms E are exchanged voluntarily. Please would you take your client's instructions".

I fail to understand, given that this document was intended to regulate the mother's occupation of the property pursuant to the 2004 agreement why full disclosure of father's finances were relevant at all. But, that is what the letter says. The letter goes on:

"My client is concerned that the property is in urgent need of repair.

In relation to child maintenance I understand that your client is paying the sum of £250 per week in respect of P. I have discussed with my client the possibility of her applying to the Child Support Agency for an assessment so that this can be used as a guide in the event that there is no agreement."

The mother did apply for an assessment and the assessment was £214 per week when the father had been paying £250 per week. Regardless of the assessment the father nevertheless continued to pay £250 per week.

23. On 14th October, 2010 the father's solicitors replied in the letter which includes the following:

"Maggie and I [the father's solicitors] fail to see why you require financial disclosure from C before you can advise on the draft agreement (the 'Agreement') the only purpose of which is to regulate the terms on which N occupies C's property at Property B ...

C is prepared to undertake to carry out the necessary works to Property B once the nature and scope of these works had been agreed and the aforementioned Agreement has been executed. In order to provide N with the comfort of knowing that these works will be carried out once the Agreement has been executed he is willing to agree that the Agreement is amended to include an Annex setting out the work that it has been agreed will be undertaken.

C has agreed to pay £2,000 on account so that N can be advised on the contents of the draft Agreement by you so that this Agreement can be finalised and executed ...

Maggie and I ask that you provide us with your comments on the draft Agreement and a list of the work which N wants undertaken on Property B for C to consider. I then suggest we fix up a time for us all to meet to finalise and execute this Agreement".

24. On 10th December the mother's solicitors replied. They did not suggest any proposed amendments, but made a number of observations which included the following:

"My client does not wish to enter into the draft agreement sent to her during the summer. My client instructs that the agreement does not accord with the discussions which took place at court in 2004. In any event, the agreement is manifestly unfair to my client and it would not be in her best interests to sign it".

25. The mother's solicitors were right in saying that the agreement did not wholly reflect the 2004 agreement. One obvious difference was the mother's ability to retain the rent from a lodger. Other differences were highlighted in the letter of 10th December, 2010. One is that it was not a trust deed. Second, it was said that the agreement offered the mother no protection in the event that the father wished to sell the property. Next, it was said that,

"The agreement signed in 2004 states that the maintenance for P will be reviewed at the end of 2005 when the mother will have completed her college course. This has not been done. My client's financial position has deteriorated and she requires more than £250 per week in child maintenance which your client has been paying her since March 2004."

The intention in 2004 was not that the review would lead to an increase, but a decrease after the mother had finished her university course. The letter goes on to say that the mother wished urgent works to be carried out on the property and that she would like the father to agree for those to be done immediately. The letter concludes with this paragraph,

"My client does not wish to attend a round table meeting, but wishes to hear back from you as soon as possible with regard to whether your client is willing to fund the necessary works on the property as detailed above and when this will be done. Please would you take your client's instructions and revert?"

26. It is to be noted that there was to be no attempt on the mother's side to negotiate terms of the agreement acceptable to the mother. It was just made clear that the agreement was said to be manifestly unfair and she would not sign it.

27. That letter gave rise to a response from the father's solicitors on 14th January, 2011. It includes the following:

"I disagree with your comment that the agreement is manifestly unfair to N. I was present in court on the day in question and in my view the agreement does record the agreement made at court."

His solicitor was wrong about that.

"Please explain why the mother does not believe the agreement reflects the agreement made at court."

The letter goes on to say:

"The father is prepared to go further and say that the substitute property will be equivalent to the property at Property B."

And:

"A review at the end of 2005 was agreed upon as it was intended that the mother would then have finished her course and would have obtained employment. It was anticipated that the review would be to vary down the level of child maintenance which the father pays, not increase it. The father is arranging for builders to come round to Property B at a time when the mother is present to draw up a list of works needing carrying out on the property.

I suggest you amend the agreement to incorporate your comments. I can then consider your amended draft agreement with the father."

It was clear in that letter that the father was prepared to negotiate terms of the agreement.

28. On 10th March, 2011 the mother's solicitors wrote to the father's solicitors a letter including the following:

"My client has thought long and hard about the situation in which she finds herself and she has asked me to communicate just some of her concerns. She hopes that your client will be able to reflect further on the arrangement that is currently in place and consider the changes that she is suggesting".

The letter finishes:

"I am instructed that both my client and P are unhappy at Property B. They find the property too large and would like to be somewhere smaller where they do not need to share with a lodger.

The situation cannot continue. My client finds herself in an impossible position. She cannot increase her earnings and she cannot afford to live in the property that your client has provided to her. My client wishes to be re-housed in a more affordable property and, in addition, she seeks an increase in the maintenance payments from your client".

29. On 9th August, 2011 the father's response, through his solicitors, was as follows:

"C has reflected on the comments made by N as set out in your letter, namely that she wishes to be re-housed in a smaller and more affordable property and that she seeks an increase in the maintenance payments.

In order to resolve matters now, C makes the following proposal:

- (1) C will agree to pay the rent on a two-bedroom property for N and P on a long let basis. The property is to be located within one mile of P's school. C is prepared to pay rent for a two-bedroom property of up to £350 per week;
- (2) C will also meet N's and P's moving costs into the new property;
- (3) N will choose the two-bedroom rental property in consultation with C, who will not unreasonably withhold his consent, so long as the property N chooses is suitable, within one mile of P's school, and is well insulated and therefore easy to heat and manage;
- (4) C will increase the child maintenance from £250 per week to £350 per week".

On the face of it, it was a very sensible offer.

30. The response came on 27th September, 2011 from the mother's solicitors and included the following,

"What is clear is the proposal by your client of 9th August, 2011 does not meet the mother's needs and P's needs. In particular, the offer of rental accommodation in the sum of £350 per week does not offer my client and P any security".

I pause to wonder why not?

"As to maintenance, I first requested financial disclosure from your client in October 2010, but this was refused. As you are aware, I am not able to advise my client appropriately in relation to this offer until this has been provided."

Again, I fail to understand why advice could not be given without the father completing a Form E.

"My client is unwilling and unable to wait any longer for this matter to be resolved. Therefore, she has instructed me to issue an application under Schedule 1 of the Children Act and I enclose by way of service the following documents --"

She enclosed the documents leading to this application.

31. While those letters were being exchanged much else had happened. The father suffers from alcoholism. He cannot drink without a relapse. He managed to abstain from alcohol from 2001 to 2009. He then relapsed. He recovered. He again abstained. However, he had another relapse in the Spring of 2011. In May 2011 he was admitted to The Priory for twenty-eight days. He says he has abstained from alcohol since then. Reports have been obtained from Dr. M, the main report being dated 26th April, 2012. Dr. M points to a positive head hair strand test since May 2011, but a body hair test and other laboratory tests were negative. Dr. M opines that the positive hair strand test may have been caused by hair products used on the father's hair while performing with his band. According to Dr. M it is probable that the father has been abstinent from alcohol since May 2011. The father's problem with alcohol is, of course, reflected in the order made by Mr. Justice Coleridge to which I have referred.
32. P was not told that her father was in The Priory and while he was there P was told that he was at the farmhouse, working on his music. She accepted that because it was not unusual. The mother, too, was not told of the father's relapse or his stay in The Priory until it came out during the section 8 proceedings when the mother's legal advisers pressed for details of a reference in Dr. M's report. That led to the disclosure of the father's period spent in The Priory.
33. Having seen the mother I can well understand why the father sought to hide his relapse from the mother. She would no doubt immediately have talked to P about it and have been highly critical to P about her father.
34. Furthermore, in August 2011, during that correspondence, P went to live with her father.
35. It is against that background that the negotiations to which I have referred faltered at times during the Spring and Summer of 2011.

36. In the meantime, no repairs had been carried out to the property, although I think I have been told that the boiler has been repaired. The father accepts that repairs are needed. However, he says that he wanted the matter regularised in a written document first and always envisaged that that would happen. The father's stance is, to some extent, understandable. However, I believe he could have done more to assist in basic repairs, if not everything the mother required - in particular, the boiler which was faulty and which caused the mother much understandable grievance.
37. Nevertheless, it is clear from the correspondence that when these proceedings were issued the mother was saying that she did not want to stay at Property B and the father had made what I regard as a sensible and reasonable proposal to provide her with a flat. I do not believe that the mother was considering the welfare of P when she turned down the father's proposals either to renegotiate the draft agreement or to provide her with a flat. I believe she was considering her own needs. If she had been thinking of P's welfare I believe she would have been much wiser, either to negotiate sensibly the terms of the proposed agreement or to take more seriously the father's offer to fund the rental of a flat. Instead, she launched these proceedings.

THE MOTHER

38. The mother is bitterly resentful of the father to the extent that she can be vindictive. She was asked in cross-examination whether she had ever threatened to go to the press. The father is well-known and is a member of a famous and successful band. She could do him much damage through the press. No doubt the public would be interested in what she had to say. She denied, in her evidence, that she had ever threatened to go to the press, but she then added these words, "But I would now". She then said that she would not disclose any information that is contained in the documents in this case, but she added, "There's a difference between disclosing documents and disclosing your life story". I do not believe the mother when she denies ever threatening to go to the press in the past. I believe she has.
39. The mother has produced a report suggesting that it would cost £200,000 to do the necessary repairs to the Property B. The house was built in 1983. It is not a very old property. The mother was asked during her evidence in chief to give details of the repairs needed. She said the boiler was not working. She said there was no proper lighting in the house. That was clearly untrue. She then said, "The lamps go back to the 1980s. I'd like them updated. Some lights don't work, including the light on the cooker". She said the garage door was broken. She said, "The house is in a terrible state". She spoke of windows in the roof not fitting properly and leaking. The father accepts that the house needs attention, but he does not accept that it is so bad that it needs £200,000 spending on it. He produced a report to the effect that repairs could be done costing £75,000.
40. I believe the mother is exaggerating the problem. I do not believe that the house needs anything like £200,000 spending on it. I do not believe it requires any more than the father's figure of £75,000.
41. The mother says that she should be in sole charge of the refurbishment of the property. Having seen the mother I have no doubt that if she had sole charge there would be endless problems between the parties. The prospect of the mother organising and supervising the work at the father's expense, and the disputes that would arise, is too appalling to contemplate. Mr. Hale suggested that an independent professional could supervise the work. That was not the mother's evidence and it is not the mother's case.

42. The mother justifies her claim for maintenance in a schedule. It is a detailed schedule. I will not read it all out. It includes Council Tax (£2,640), water bills (£321), fuel bills (£1,450), telephone landline, even though there is no landline (£420), television license although there is no television and she and P watch programmes on a computer (£143). The mother seeks an internet connection (£297) and computer maintenance (£150) because she says that her computer keeps breaking down. She seeks £500 for plants. The mother has been learning to drive, on and off, she told me, for ten years. She has failed her driving test four times. Yet, she asks for the father to pay for driving lessons in the sum of £1,050. The list includes household cleaning products, shoe repairs, newspapers, medical expenses and food for the cat. The mother seeks the cost of a physiotherapist and cranial-sacral therapy, weekly, for herself, costing £960; yoga costing £624. The mother said that that is for her and P. She said, "P attends with me". When she was challenged upon that, she said, "Well, she hasn't yet been, but she will come". It includes money for public transport. It includes £1,000 for petrol, even though the mother does not have a car. It includes sums for holidays. It includes a sum for homeopathic consultations for P. It includes horseriding. It includes parties and birthday presents. It also includes £400 for P to give Christmas presents. The mother said, "I do not see why the father should not pay for Christmas presents that I give to P". In effect, she is asking for an order that the father continue to provide her with a home and the funds to run it, as well as providing directly for P.
43. In my view she is putting her claim on a false basis. In her oral evidence she said to me, "My list of expenditure is on the basis that P lives with me. If she is not with me, I should pay for all that expenditure myself". That raises the question of whether P is likely to return to live with her mother. During the section 8 proceedings reports were obtained from an independent social worker, SB. In a report dated 12th December, 2011 the mother told SB wrote:

"P had seen her mother crying and frustrated and saying she "could not handle this any more". She had said to P to go to her room when she (the mother) was upset. She had then said sorry to P and reassured her it was not to do with anything P had done but just that they had no money. I asked her [the mother] if she thought P had ever been frightened seeing her mother like this. She said, " Maybe she has at times".

The mother told SB that she would like to move out of their current house, which of course was communicated to the father's solicitors in the letter to which I have referred. SB says in that report that she considers it was premature to introduce overnight stays by P to her mother.

44. When she saw P, P told SB:

"P stated that her mother had episodes (lasting up to twenty minutes and occurring up to five times a day) of shouting, crying, swearing and kicking the wall, and throwing things when she will say that she can't go on. P told me when this happened she would take herself off to her bedroom and wander around wondering what to do. P told me that she thought 'adults should be able to hold their tears' as her father and S [his current partner] do".

The report goes on to say:

"P took pains to tell me that she really wanted to live with her father".

SB expressed the view that P has been frightened by some of her mother's outbursts and has suffered emotional harm. Her report goes on,

"P wants to remain living with her father and S[his partner] and I support her position on this. She would like to have contact with her mother but does not want overnight contact. On 18th October, 2011 P was tearful and shaking as she detailed her feelings about contact. I was struck by the strength of her feelings and the impact her anxiety was having on her wellbeing (worrying at bedtime and in school) to the extent that I told her that I thought it was too early for her to have overnight contact with her mother and that I would take responsibility for making that decision".

I well appreciate that all that was over a year ago, in a report dated 13th December, 2011.

45. There is a later report when SB records seeing P on 17th May, 2012 when P said:

"Her mother 'always' told her that she would move away from the area and says she feels trapped in the house. Her mother talked a lot about her lack of money. She did not like her mother saying 'horrible things' to her or about her father and S [his partner]. P told me that she watched how her mother was with their cats, to try and gauge her mood. Her mother told her one Friday (not a therapy day) that she decided whether she 'would be nice or not because of what I put her through'".

In that report, dated 21st May, 2012 SB said:

"I have now met P on six occasions since my initial instruction. She is an articulate and engaging girl and is growing in maturity. In my meeting with her at her father's home on 17th May, 2012 she appeared to be more relaxed and less anxious about the issues than in the past. She had thought about what she wanted to say in advance and checked her journal to make sure that she had not missed out anything out. P is clear that she wishes to remain living with her father and S".

The report continues:

"-- currently I consider it unlikely that P would wish to return to her mother's care in this event but this may change as she grows older ... [The mother] appears to dispute any difficulties in her relationship with P and appeared angered by her understanding of my previous analysis of their relationship".

46. There is a further report from SB which is much more recent, dated 26th November, 2012, a few weeks ago. It includes:

"N [the mother] confirmed that she had had some conversations with P about the risk that P would become an addict and commented that the trouble was that these conversations came back to her within a different context, i.e. the court proceedings, so that any comment she made sounded 'outrageous'. She had told P what the lawyers had reported that P had said and that P had told her she did not say that. She said she used to get e-mails complaining about something on a Friday when P was with her and believed these were sent at this time deliberately to try and derail her. She had spoken to P about her father's alcoholism and his stay in rehab 'a few months ago'. She added that she had thought P had already known about this. She told me that she did not want this 'swept under the carpet' whilst 'all the issues' were focused on her as a mother. She thought P did not know whether to believe her as she had been told not to trust her mother and P had initially responded, denying her father had been in rehab".

The report includes:

"I have had two further meeting with P on 7th November, 2012 and 21st November, 2012. P told me that she was cautious about how much she said to me knowing her views would be reported as she was concerned about the repercussions, fearing her mother would be angry. She said that her mother had said that she (P) lied when she was talking to me. P was adamant that she had been truthful in her discussions with me and appeared upset that her mother could think otherwise. P said that her mother had read the solicitors' letters out to her and she would prefer it if this stopped.

P was clear that she wanted to remain living with her father S and her new baby sister ...

P wishes to remain living with her father and S [his partner]. Her new baby (half)sister is now almost a month old and P seems to be adapting well at this early stage. She seems settled with the current contact arrangements and would like this to continue; she likes having a structure around contact. She remains anxious about her mother's response to her reported wishes and feelings and is cautious about what she shares for this reason ...

She does not want to stay with her mother whilst her father is touring and her view seems unlikely to change until or unless she begins some overnight stays, and even then it may be that she would choose to remain with S".

47. P's views, as communicated to SB, are confirmed in a report from Dr. B, who has also seen P.
48. Unfortunately, the mother has no insight as to why P does not want to stay with her. The mother told me that it was the father who was stopping P coming to live with her. The father told me that last Saturday - in other words, the weekend before this hearing began - P said to him that her mother "talked 24/7 about it all. She told me this on Saturday evening. She was extremely upset when she came home from her mother and told me about it. She was upset by fragments of information about this court case that her mother had told her. She said that her mother had told her that I was threatening to throw her out on the street and that I wanted to regain Property B for the use of my girlfriend to use as a studio and that she [the mother] would be out on the street with no money. P said that her mother had told her that she would write a book -- or write to a magazine about this case. P said on Saturday that she would like the Property B property to be sold because it has unhappy memories for her. She was upset and angry at her mother because her mother had threatened to go to a magazine. P was very emotional. P said that she finds it frustrating that her mother does not work and yet complains all the time about having no money and being in an awful house. She wouldn't tell her mother that because P feels that she has to watch everything she says when with her mother. P would want to stay with her mother if there was no more talk of court proceedings and there was no more anger, and there was a loving, normal relationship".
49. Although none of that was put to the mother - and clearly was not in any of the father's statements because it had occurred only the weekend before this hearing - Mr. Hale told me that the mother denied that she had said any of those things to P.
50. However, the father's evidence as to what was said is wholly consistent with the report of SB and it is wholly consistent with the mother's demeanour before me. I accept and believe that P did say those things to the father. I believe that it is highly probable, and I find, that the mother did say those things to P.

51. The mother herself said to me, "It was the game of the father and his lawyer to take P away from me. I'm saying that absolutely 100 per cent. And now it's their game to get me out of the house". I repeat, the mother has no insight as to the problems that she has with P. I think it unlikely that P will return to live with the mother. That is why I say, and believe, that the mother is making this claim on a false basis.
52. The mother puts her case before me on an alternative basis - that she must have a home to be able to enjoy contact with P and the financial ability to run it. That home, says the mother, should continue to be at Property B.
53. 53. There was a hearing at court on 25th January, 2013 on the issue of whether the father should provide more money towards the mother's costs. At that hearing the father tried to settle this matter by making an offer to the mother. He offered that she could continue to live at Property B until P was eighteen or complete her full-time secondary education, even though P was living with the father. In addition, the father offered to carry out repairs to Property B to the value of £75,000. It was on the basis that the mother would not have a lodger at the property and that if she were away for more than six weeks the property would revert to the father. He put in that stipulation because after the order was made by Mr. Justice Coleridge, to which I have referred, the mother then revealed that she was going away for a month and would not be seeing P. The father's offer would have given the mother continued occupation of Property B to enable her to have contact with P, even though P is living with the father. The offer was made as a commercial offer to avoid this litigation. It was not to be taken as the father's stance before me and I have not so taken it. It was a very sensible offer – not the first made by the father. The father had made a proposal which the mother ought very seriously to have considered, if not accepted. Again, I do not believe she was thinking of P's welfare when she refused. The offer was in the context of a Schedule 1 application and ought to have been accepted in my view. In refusing it, the mother was thinking of herself and evinced a determination to get her own way.
54. Of course, if the mother does leave Property B she must have somewhere else to live and the ability to fund it. That leads to a consideration of the mother's earning capacity. One of the father's complaints against the mother is that she has taken no steps to support herself financially. In a recent statement the father said,
- "Since her arrival in the United Kingdom the mother has carried out the following studies: (1) Certificate in Proficiency English at university; (2) a course in Sociology, Anthropology & Women's Studies at University; (3) a foundation course in Photography & Film; (4) a BA (Hons) degree in Mixed Media Art. With the above level of qualifications there must be a world of opportunity in London for the mother. I understand the employment market is not at its most buoyant, but the mother is sociable and I have no doubt she would be very good in a job interview".
55. I, too, am not blind to the current economic climate. However, the mother has taken no steps at all to obtain proper, paid remunerative employment. She has had plenty of time to try, but she has not. The mother has various possibilities open to her. She describes herself primarily as an artist, doing drawing, sculpture, embroidery and some painting. She has sold a drawing for £4,000 and a piece of sculpture for £400, but that was some time ago. Her artistic endeavours have brought her little by way of income. She is involved in photography. In a very recent statement the mother said, referring to her month away recently,

"I have spent the past month in America working on the forthcoming issue of L magazine. This will be my first editorial work in a long time. I do not know how much I will be paid since, again, this depends on how many copies of the magazine we are able to print and sell. The publication will be sold worldwide. Whilst in America I have also been working as a photographer in Alabama, Pensacola, and the Everglades in Florida, for the New York Times magazine and the Wall St. Journal. The trip was entirely paid for by the New York Times magazine and the Wall St. Journal. I have not received any additional income for my work, but these organisations have paid for my air fare and accommodation. I was also planning work on a farm in Fresno, California, but without warning the father decided to stop paying me any maintenance and therefore I could not afford the flight to California".

It is true that in January, last month, the father did stop paying the £250 per week.

56. The mother told me that she is still working at home eight hours a day on that magazine without payment. She said that in the United States she took photographs for the magazine which will be published with an article she is writing. The photographs are of food and travel in unusual places. The mother told me that for the landscape gardening work she does she is paid £60 per day and works four or five days a week doing that. She said she could earn more than £2,080 through her gardening work. In November 2012 she had an exhibition of her artwork in Sweden. She has also rented a studio in London to show her work there. Her CV shows that she has also taught the guitar. She also does her charitable work and she is involved in creative writing. When asked why she had not yet applied for any jobs the mother told me that she did not feel that she had to. However, she told me that after these proceedings were over, she will try to obtain employment with a United Kingdom magazine. She said she accepts that she should obtain regular employment and provide for herself and P and that she should provide financially for P when P is with her.
57. I find that the mother has an earning capacity much greater than her present income. She has many talents. The father's proposal is that she should be able to stay at Property B for a further six months to enable her to find work and be able to support herself. I believe she has the ability to do that. I cannot put a figure on her potential income, but I believe she can support herself financially. In my view it is a great pity that she has not yet tried to do so and has taken the view that there was no need to try.

P'S WELFARE

58. In reaching my decision I must consider all the circumstances and have regard to the specific factors in paragraph 4 of Schedule 1 of the Children Act. I will not repeat them here. In the context of this application, P's welfare is not my paramount consideration, but it is nevertheless an important factor. I have considered it carefully and the father was asked about it at length during his oral evidence before me. If I do not provide for the mother to remain at Property B I have no doubt that she will be very upset and see it as a great injustice. She is bound to involve P in her disappointment. The problem would be compounded if, contrary to my findings about her earning capacity, she cannot or will not find and fund other suitable accommodation.

59. The father's position is that P will understand if matters are explained to her carefully and truthfully without spin. The last two words are mine and not the father's, but they encapsulate what he said. I have considered whether P's welfare should lead me to require the father to make some housing provision for the mother if that could be justified in law under Schedule 1, which I doubt. The father at one stage proposed to rent a property for the mother of up to about £350 per week. When she was asked in cross-examination to look at various alternatives to Property B, but not far from P's school, she dismissed them on the basis that they were obviously inferior to her requirements. I do not believe they were. Even if I required the father to provide such a property I doubt if the mother would go there. As far as the mother is concerned the only acceptable outcome of this case is her remaining at Property B with £200,000 being spent on it, plus substantial maintenance. She has made it clear that nothing else will do and she has turned down other reasonable proposals as I have outlined.
60. The father told me that P may well be relieved to see her mother moving from Property B and obtaining employment, and acquiring her own property. That is consistent with what P has said to the father. I do not believe P's welfare dictates that I must permit the mother to remain at Property B and require the father to provide another home for her, even if I had the power to do so under Schedule 1. If the mother is unsuccessful in this application I foresee short-term upset for P. But, the father believes it may be the best thing for her in the long term. Mr. Hale suggests that the father's view is simplistic and lacks insight. I disagree. I think the father may well be right.

THE FATHER

61. The father gave evidence before me calmly. He did not show much emotion. But, I am sure he is much troubled by this litigation. He tried to avoid it by making a sensible offer on 24th January. In the witness box he thought carefully before answering questions. He smiled only once - when Mr. Hale challenged his evidence about whether he had asked the mother to sign the agreement. Mr. Hale did not accuse the father of lying, but that was the implication of his questioning. The father could not have been mistaken. Either he did or he did not ask the mother to sign the agreement. I myself then asked the father if he was making his evidence up and lying to me. He looked at me and, for once, he smiled a little wanly and said very calmly and quietly, "No".
62. I was impressed by the father. I believe his evidence. I prefer his evidence where it conflicts with that of the mother. In making that finding I have not overlooked the father's failure to tell the mother of his relapse into alcohol in the Spring of 2011. It was unfortunate. It was deceitful. But, I understand the reasons for it and it has not caused me to doubt his evidence at this hearing.
63. The mother contends that the father must provide a home for her and P in case the father again has an alcoholic relapse. He was abstinent from alcohol from 2001 to 2009, and from then until the Spring of 2011. There is a reasonable prospect that he will remain abstinent for the rest of P's minority. But, of course, a relapse cannot be ruled out. Even if there is a relapse it does not follow that P would return to live with her mother. In any event, the mother ought by then to have acquired her own home, financed by her.

64. The section 8 proceedings and this application have hit the father very hard financially. He has funded the mother's costs. Pursuant to various orders, and sometimes by agreement, the father has provided funds to the mother totalling £162,422 for the litigation. About £70,000 of that has been provided to the mother to cover the costs of this application. In addition, of course, he has his own costs to pay. Because the father has been funding this litigation the mother has been able to have the case conducted in the manner that it has without, it appears, much regard for costs. In my view, it has not been necessary for the father's finances to have been so closely examined. Although the father is comfortably off financially he is not a very rich man and much money has been wasted.

THE JURISDICTION TO MAKE A MAINTENANCE ORDER

65. The reality of this case, as I have said, is that the resident parent is the father, the non-resident parent is the mother. There is a letter from the Child Maintenance & Enforcement Commission, dated 19th September, 2012, ending the father's liability under the Child Support Act in regard to maintenance of P.

66. Sections 8(1) and 8(3) of the Child Support Act, when read together, provide that:

"In any case where the Secretary of State would have jurisdiction to make a maintenance calculation with respect to a qualifying child and a non-resident parent of his, on an application duly made or treated as made by a person entitled to apply for such a calculation with respect to that child ... no court shall exercise any power which it would otherwise have to make, vary, or revive any maintenance order in relation to the child and the non-resident parent concerned".

I read into that section "non-resident parent" - the mother; "person entitled to apply" - the father. Section 8(6) provides that,

"This section shall not prevent a court from exercising any power which it has to make a maintenance order in relation to a child if -

- (a) a maintenance assessment is in force with respect to the child;
- (b) the non-resident parent's net weekly income exceeds the figure referred to in para. 10(3) [a figure of £2,000 per week]; and
- (c) the court is satisfied that the circumstances of the case make it appropriate for the non-resident parent to make or secure the making of periodical payments under a maintenance order in addition to the child support maintenance payable by him in accordance with the maintenance calculation".

67. Mr. Hale submits that as the father's income is beyond £2,000 net per week I can make a maintenance order. But, if the mother is the non-resident parent one must look at her income and not his. Mr. Hale further submits that if I find that the father is the resident parent then the Child Support Act does not apply to a claim for maintenance by a non-resident parent. I cannot agree with Mr. Hale. In my view I have no jurisdiction to make a maintenance order. As Mr. Hale accepts, and does not argue otherwise, I am precluded by authority from getting round the problem by ordering a series of lump sums by instalments. If I am wrong about my construction of the Child Support Act I would not, in any event, make an order in this case. The mother's focus in this application, in my view, has been primarily to seek provision for herself. The mother would have me believe otherwise, but I do not accept her contention.

COUNSELS' SUBMISSIONS

68. The very helpful submissions of Miss Murray on behalf of the father and of Mr. Hale on behalf of the mother are contained in position statements for which I am very grateful. I have referred already to some of the arguments in those documents.

69. Miss Murray referred to the authority of *Re P (Child Financial Provision)* [2003] 2FLR, 865. She referred to the passage at p.875, para. 48 where Lord Justice Thorpe said,

"Thus there is an inevitable tension between the two propositions, both correct in law, first that the applicant has no personal entitlement, second that she is entitled to an allowance as the child's primary carer ...

Thus in my judgement the court must recognise the responsibility, and often the sacrifice, of the unmarried parent (generally the mother) who is to be the primary carer for the child, perhaps the exclusive carer if the absent parent disassociates from the child".

Miss Murray submitted that that passage supports the proposition that the court should not make - indeed, cannot make - a financial order under Schedule 1 against a resident parent in favour of a non-resident parent.

70. I agree that such an order would be unusual. However, an example is to be found in *Re S (Child Financial Provision)* [2005] 2FLR, 94, to which Mr. Hale referred. In that case the Court of Appeal looked favourably upon a non-resident mother's application under Schedule 1 for funds to travel for contact to her child in Sudan. The jurisdiction to make an order in favour of a non-resident parent was there available for the benefit of the child to see the mother. The jurisdiction appears only rarely to have been exercised and counsel have found no other reported case where it has been exercised. They, and I, know of no other case.

71. Mr. Hale argued that the mother should have a home commensurate with the father's in order to enjoy contact with P, even if P does not return to live with her mother. This is not a father who lives in palatial surroundings. The father's home in London has three bedrooms, as does his farmhouse. Given the current high values of properties in London, the values of the father's homes are comparatively modest. I am not persuaded by that argument that the mother must stay on at Property B or that she will be unable to acquire another suitable property in which to have contact with P. Moreover, the father said that P was not worried about the standard of her home. Much more important, he said, is her relationship with her mother. I agree.

CONCLUSIONS

72. I reach the following conclusions based upon the evidence and facts of this case.

1. The father has no legal obligation under Schedule 1 to provide a home for the mother.
2. The father has no legal obligation under Schedule 1 to maintain the mother.
3. The father's obligations relating to housing and maintenance relate only to P and to the mother only insofar as they are of benefit to P.
4. The father is providing a home for P with him.
5. P will continue to have contact with her mother wherever her mother resides.

6. The father is under no obligation to provide Property B as a home to enable the mother to have contact with P.
7. P is unlikely to return to live with her mother, even if the mother remained at Property B.
8. The mother has made this claim on a false basis that P will return to live with her.
9. The father made an offer that the mother could remain at Property B until P reaches the age of eighteen or finishes full-time education and would repair and refurbish Property B at a cost of up to £75,000. The mother refused that offer and was very unwise to do so. When she refused it, she was not thinking of P's welfare.
10. The mother was not thinking of P's welfare when she launched this application without properly considering the draft agreement or entering into negotiations relating to its terms and, furthermore, without more carefully considering the father's offer to provide rent for a flat for her.
11. The mother has an earning capacity which, until now, she has not developed. She is likely to be able to earn enough to provide for herself.
12. There is no jurisdiction to make a maintenance order under Schedule 1.
13. If I am wrong about that, I do not regard this as a case for making the resident parent pay maintenance to the non-resident parent.
14. I should guard against a claim by a parent under Schedule 1 which is, in reality, a disguised claim for the benefit of the parent. In my view this is such a claim. I refer to *N v. D* [2000] 1FLR, 1629.
15. The mother has no contractual right to remain at Property B.

For all those reasons I dismiss this claim.