

**SHARED RESIDENCE ORDERS**  
**FROM DINOSAURS TO THE 2012 OLYMPICS**

**SIGNIFICANT INVOLVEMENT OF BOTH PARENTS POST SEPARATION**  
**IN THE LIVES OF THEIR CHILDREN**

**David Hodson**

Part of these notes are taken from “A Practical Guide to International Family Law” (Jordans) by David Hodson, with acknowledgments to Jordans

## ABOUT THE AUTHOR

David Hodson is a family law dispute resolution specialist. He is a English solicitor (1978 and accredited 1996), mediator (1997), family arbitrator (2002), Deputy District Judge at the Principal Registry of the Family Division, High Court, London (1995) and an Australian (NSW) solicitor (2003) and mediator. He deals with complex family law cases, often with an international element.

He is practising in London and Surrey, England and Sydney, Australia. He is a partner and co-founder of The International Family Law Group, [www.iflg.uk.com](http://www.iflg.uk.com).

He was joint founder in 1995 of probably the world's first metropolitan practice to combine family lawyers, mediators and counsellors and with an emphasis on a conciliatory and holistic approach. It was subsequently copied in many practices across the world. He is past chairman of the resolution/Solicitors Family Law Association's Financial Provision Reform Committee, Training Committee and Good Practice Committee and founder member of its International Committee. He is a member of The President's International Committee. He is past vice chair of the UK College of Family Mediators, the umbrella organisation for family mediation. He is a member of the Chartered Institute of Arbitrators. He is co-author of "Divorce Reform: a Guide for Lawyers and Mediators", "The Business of Family Law" and consulting editor of "Family Law in Europe". He is an Accredited Specialist (with portfolios in Substantial Assets and International Cases), a Fellow of the International Academy of Matrimonial Lawyers, a past trustee of Marriage Resource and member of the Family Law Section of the Law Council of Australia and a member of the Lawyers Christian Fellowship. He is chair of the Family Law Reform Group of the Centre for Social Justice

He has written and spoken extensively on family law including many conferences abroad. Some papers and articles can be found at his web site below.

He is the author of "A Practical Guide to International Family Law", (Jordans July 2008), probably the leading textbook on international family law, of which part of this is an extract.

More details can be found at [www.davidhodson.com](http://www.davidhodson.com). He can be contacted on [dh@davidhodson.com](mailto:dh@davidhodson.com).

The International Family Law Group is a specialist law firm providing services to the international community as well as for purely national clients. iFLG has a special contract with the Legal Services Commission for child abduction work and is regularly instructed by the UK Government (Central Authority). It acts for international families, ex pats and others in respect of financial implications of relationship breakdown including forum shopping and international enforcement of orders. It receives instructions from foreign lawyers and, as accredited specialists, acts for clients of other law firms seeking their specialist experience.

iFLG is situated in Covent Garden near the Law Courts. Its mobile telephone accessible website includes valuable information, podcasts, a government approved child abduction questionnaire and formulae as a starting point for calculating fair financial settlements. It has emergency 24 hour contact arrangements. Contact at [www.iflg.uk.com](http://www.iflg.uk.com).

## Introduction

In the beginning, or at least in the 1970s and 1980s, three dinosaurs roamed the post-parental separation world: custody, care and control and access. When parents divorced, and most then were married rather than cohabited, they knew each would get one of these, and one might even get two! Dads were often fortunate to have the child one night a fortnight and they definitely only had access. The children lived with mum and she had care and control. That meant she also had custody, taking the major decisions of the child's life. Most lawyers never worried about the distinction anyway between custody and care and control as they went together so automatically. Very occasionally custody would be joint but this was reserved for exceptional couples. Custody was clearly the gold medal, care and control the silver medal and access was for the also-rans. There was no option about having no medal ceremony!

Suddenly in 1989 a meteor fell out of the sky and made these dinosaurs extinct forever. For the vast majority of separating parents, there was no replacement. No medal ceremony. No piece of paper to take away from the divorce court about the children. The no order principle. Many had automatic parental responsibility but few in 1989, and still in 2011, fully comprehended what this really meant, especially at its margins. Simply most parents got on with their post separation parenting arrangements.

## The amorphous residence order

But some parents needed help with the arrangements. For them, the dinosaur was replaced by fuzzy amorphous creatures, somewhat resembling the logo to the London Olympics, infinitely capable of changing shape, colour, dimension and meaning.

Primarily the creatures came in two different shapes. Residence and contact. These were, we were told, most definitely not replacements for care and control and for access. They were very different. The first was where the child resided, a geographical issue. The second was the opportunities for contact of various forms, direct and indirect, daytime and overnight. Even in 1989 there was the possibility in the legislation of shared residence orders. Section 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 periods during which the child is to live in the different households concerned.

Note immediately it is not "joint" residence orders which only applies when the two people live together: Re K (Shared Residence orders) (2008) 2 FLR 380

Although after 1991 a number of us seized the opportunity and asked for shared residence orders, the judiciary were generally conservative and anxious not to follow what was then the largely discredited "equal time initiatives" coming out of California and elsewhere. In A v A (Minors) (Shared Residence Orders) (1994) 1 FLR 669, the High Court judge said they should only be made when there was "*something unusual*" about the case

From the early/mid 90s for a decade three events occurred, probably in parallel.

First, it was discovered the 1989 changes had gifted the residence order with more than just simple residing time with a parent. It allowed holidays abroad for up to one month without the permission of the other parent who instead needed permission from the other. It gave extra rights on testamentary guardianship. It was much easier to apply to live abroad permanently. It gave automatic parental responsibility. Most crucially in the dynamic of the parents, it meant the other parent was described as "the non-resident parent". This appears nowhere in the 1989 legislation. But it was seized upon by the modern-day dinosaur, the Child Support Agency! And so during the 1990s, the residence

order went from being an literally about residence, to starting to look again like the first prize, the gold medal, and so a dinosaur stepped back from extinction.

Yet ironically during the very same time, the non-resident parent, whom we shall call dad, was re-discovering on parental separation the joy of parenthood, the potential loss of both the other partner and the child at the same time of separation, the alarm bells of the work, life, parenthood balance and that he was in most circumstances just as able to look after and parent the child. To describe him as the non-resident parent when the child was spending increasing periods residing with him was simple nonsense and grossly offensive. Over this period contact changed dramatically for many fathers from one night a fortnight to, often although certainly not always, half of all holidays, Friday after school until Monday morning at school once a fortnight, perhaps one additional evening a week and regular telephone calls. Yet this was the non-resident parent who, for example, alone got hammered for child support without any account of the means of the resident parent. And so the start of the unhappiness gathered pace.

And the third change occurred within the courts. Whether in response or whether abreast of social trends, lawyers now started making shared residence orders. They have been a predominant theme of the past 10 years.

In Re K (Residence Order: Securing Contact) (1999) 1 FLR 583, a case concerning a two year old child with a dispute of residence between mother and father which the father won, the Court of Appeal said it was "*important to bear in mind that nowadays, as opposed to a considerable number of years ago, fathers are at times better equipped to look after children than they were*". Perhaps not the dramatic endorsement some might seek in 2011 but it was the evidence that times were a changing

In D v D (Shared Residence Orders) (2001) 1 FLR 495, the Court of Appeal (Dame Butler-Sloss, then President, and Hale LJ, as she then was), held that the test was the child's best interests and that it did not require exceptional circumstances to justify the order. It was sufficient to show that it reflected the child's best interests.

The circumstances stand up to scrutiny. The children spent substantial amount of time with their dad. There was lots of animosity. Dad said the authorities were treating him as a second-class parent and not giving him information about the children. Mum tried to reduce contact. The Watford County Court made a shared residence order. Only a few months later there were more problems and the mother now said dad should only have supervised contact order or even contact suspended. The Watford County Court said no. Mum appealed to the Court of Appeal and lost.

However there was still the continued expectation in practice that it would only arise when the parents were having the children for approximately equal time, were geographically close and (often) well able to communicate. Progressively this changed.

In Re F (2003) 2 FLR 397, Lord Justice Thorpe said a shared residence order had to reflect the underlying reality of where the children lived their lives. The fact that the parents' homes were separated by a considerable distance, Aldershot and Edinburgh, did not preclude the possibility that the children's year will be divided between the homes in such a way as to validate the making of a shared residence order. A shared residence order was not intended to deal with issues of parental status. He also dealt with the question of equality. He said any lingering idea that a shared residence order is only where, for example, children will be alternating between the two homes evenly, say week by week or month by month, is erroneous. If the home offered by each parent was of equal status and importance in the lives of the children, a shared residence order could be valuable. It is the court's seal upon an assessment that the home offered by each parent to them is of equal status and importance.

In A v A (2004) 1 FLR 1195, Mr Justice Wall, now the President, made a shared residence order in circumstances where previously the mother had had a sole residence order and there had been intractable acrimony over many years and it was found that the mother was making unilateral decisions about health and education without reference to the father and marginalising him. Sadly, a quite common occurrence before the courts. NYAS had intervened. The case went through many stages and the mother showed she would not comply with orders. The father obtained an interim residence order and the children lived with him approximately half the time. The judge made a shared residence order specifically setting out in the order the days of the week the children were to spend with each parent. They shared residency between each parent. The judge reflected that they were dividing their time between two homes and he wanted to reinforce the idea that the parents were equal in the eyes of the law, and in the eyes of the children, and have equal duties and responsibility to the children. Very dramatic hostility was no longer a bar to a shared residence order

From this time onwards, shared residence orders became a very familiar sight on the post-parental separation highway.

In Re P (Shared residence order) (2006) 2 FLR 347, the court moved even further saying that it did not need exceptional or unusual circumstances for a shared residence order to be made. Where a child effectively had two homes with time divided roughly equally then an order should be made. The court, again Lord Justice Wall, said that the additional value of a shared residence order was conveying the court's message that neither party is in control and that the court expects parents to co-operate with each other for the benefit of the children.

The judge went on to say that it was not the case that a residence order gave one parent the authority to make the final decision on issues. Day-to-day decisions had to be taken by the parent with whom the child was residing for the time being. Important decisions should be taken jointly. As both parents had parental responsibility, both were in any event equal in the eyes of the law and had equal duties and responsibilities as parents.

In the case, CAFCASS recommended a shared residence order. The mother post and the father conceded and a sole residence order was made. Two years later, the father was getting 45% of the time and asked for a shared residence order. Mother opposed and this time CAFCASS said it should be a shared residence order because of the deteriorating relationship with parents. The judge refused the shared residence order and the father successfully appealed.

A shared residence order is a residence order. It therefore obviously carries the other benefits of a residence order. This is not itself necessarily a reason to make it. But it is relevant. Lord Justice Wall in the above case said that a shared residence order emphasises the fact that both parents are equal in the eyes of the law and they have equal duties and responsibilities. The order can have the additional advantage of conveying the court's message that neither parent is in control. Frankly, this is what many of us expected of parental responsibility in 1989. However this automatic status has got lost somewhere over the past 20 years. Shared residence seemed increasingly to be filling that gap around the margins

In passing, in Re R (Residence: Shared Care: Children's views) (2005) EWCA 542, the Court of Appeal said the first instance judge had referred to the significant shift in case law over the last 10 years but did not seem to have understood the pace or direction of that movement! The judicial equivalent of following the Sat Nav up a cul-de-sac

The judges were swiftly overtaking the notion that there had to be close to equality of time. In Re K (Shared Residence Order) (2008) 2 FLR 380, the Court of Appeal said the first instance judge could

quite properly refuse equal division of time and still make a shared residence order. Indeed, the court in this case said that a court should look at what time was appropriate between the respective parents as best for the children and only then decide whether it should be a residence order or shared residence order. This is a very long way from the binary decision before 1989 of care and control or access. It is also more than a decade away from the constant accusation of being the non-resident parent.

In this case the father was having 40% of the time with a three-year-old child with Down's syndrome. He then had 45% of the time and asked equal time and was refused. He was given no more time but he was given a shared residence order.

The court said it had to be alert to any malign intent on the part of the parent to use an application for a shared residence order as a means of interfering with or disrupting the other parent's role in the management of the child's life. However, although it was profoundly regrettable that the father had to date been unable to give the mother due credit for her achievements in caring for the child, a malignant intent had not been established against the father. On the facts, a shared residence order should be made to emphasise the child had two parents of equal importance in the overall direction of his life, notwithstanding that the division of his time between the two homes remained slightly unequal.

By now, the judges were seriously motoring! In Re D (Leave to remove: Shared Residence) (2006) Fam Law 1006, the High Court made a shared residence order where the parents were in different countries, USA and England and spending significant time with each. This outcome however carries real problems with habitual residence but certainly showed the intent.

In Re AR (A Child: Relocation) (2010) EWHC 1346, the newly appointed Mr Justice Mostyn said that nowadays a shared residence order is the rule rather than the exception even where the quantum of care undertaken by each parent is decidedly unequal. There was a very good reason why such orders should be normative as they avoided the psychological baggage of right, power and control that attends a sole residence order, which was one of the reasons that we got rid of the notions of custody and care and control in the 1989 legislation.

This was probably going too fast on the outside lane and within a matter of months, the speed cops had arrived in the shape of Lady Justice Black in the Court of Appeal in T v T (Shared Residence) (2010) EWCA 1366. She said his comments went too far. Whether a shared residence order was granted depended upon a determination of what was in the best interests of the child. However she said it certainly has been established that it is not a pre-requisite that the periods of time spent should be equal nor is it necessary that there should be cooperation and goodwill, and shared residence orders have been made in cases where there is hostility, including the parents said to be at loggerheads.

#### The Australian transportation

England would almost certainly be coasting at top gear with increasing shared residence orders if it had not been for the landing on these shores of those proclaiming the Australian equal time legislation. The Family Law Amendment (Shared Parental Responsibility) Act 2006 significantly changed children law in Australia. It placed increased focus on the rights of children to have a meaningful relationship with both parents. It set out a presumption that it is in the best interests of the child for each of the parents to have equal shared parental responsibility. Although parental

responsibility means similar to England, the presumption has gone further. The first thing a court must do is to consider in making an order if it is consistent with the best interests of the child and reasonably practicable for the child to spend equal time with each of the parents. If equal time is not in the interests of the child or reasonably practicable, the court must consider making an order consistent with the best interests and reasonably practicable for the child to spend substantial and significant time with each parent.

The statute says substantial and significant time means time to allow the parents to be involved in the child's daily routine and occasions and events of particular importance to the child and also those of special significance to the parent.

The legislation was announced with great flourish by the incumbent government anxious for the votes of the disillusioned dads. They were very mischievous with the truth. They gave the impression that it would now lead to equal time. Dads descended on mediators and family relationship centres demanding equal time in circumstances where it was clearly impracticable and not in the best interests of children. Despite the higher courts making it clear that the emphasis was on substantial and significant time, their message was not heard mainly because the recipients did not want to hear it. The legislation made the major mistake of moving from parenting, as in important decisions regarding parental responsibility, to that of time. They are very different. Coming from Australia, so often the home of all that is good in family law, it was a dreadful mistake and lead to many difficulties.

#### Centre for Social Justice recommendations

In July 2009 the Centre for Social Justice published its report "Every Family Matters". It was probably the most comprehensive consideration of family law and family law reform of the past 40 years. It was a holistic set of recommendations from pre-relationship education and information, relationship counselling, information before proceedings, divorce and financial matters and of course, issues of parental separation. There was extensive consultation including many individuals and groups unhappy with the present law and practice concerning children. There were some dramatic suggestions including a view that the 1989 legislation was passed its sell by date.

Their conclusion was that significant reform was not needed. However they did recommend that there should be reform to state the following principles. First, all with parental responsibility shall be presumed to have an equal status in their children's lives following separation unless the contrary is shown. Secondly, children are most likely to benefit from the substantial involvement of both parents in their lives subject to the need for protection where appropriate.

These recommendations have been well received in places and caused controversy in others. They would not radically change the law. They would however reinforce, consolidate and improve the existing statute law and, perhaps more important, build on case law developments for example in relation to shared parenting orders. Again they are not just about time. They are not just about status. However if these reforms were implemented, they would benefit children and parents.

#### Conclusion

England has not gone down the "time" route. Shared residency does not mean equal time. It does mean equality of parenting in the eyes of the children, in the eyes of the law and in the eyes of third parties with whom the parents have dealings. It does restate the existing equal parental responsibility. It does mean significant involvement in the life of the child. Shared residency is not

a presumption. That would be against the best interests of the child which should be considered in each case.

The 1989 legislation is not past its sell by date. Certainly we are glad the pre-1989 dinosaurs seem extinct. Some of the 1989 reforms have been incredibly valuable such as the no order principle and, in theory at least, the non-delay principle! A decade after the new law, the judges remodelled the concept of residence, having embraced the much greater involvement of both parents in the life of the child post separation, they have taken cognizance that it is for the benefit of the child to have both parents significantly involved and they have produced the shared residence order. It recognises shared parenthood but doesn't invade parental responsibility. It will share time but not necessarily equally. It will often require parental communication. It avoids what is sometimes the excessive concentration on time spent with each parent.

It is simply what happens in their lives of many children: they reside for some of their time with one parent and some of their time with the other parent. During holiday times they may spend close to equality. During term time they spend as much time as is practicable and best for them.

The Centre for Social Justice advocated modest reform to the 1989 legislation, primarily the recognition of the benefit of each parent having a significant involvement in the life of the child. It encourages shared residence orders. It encourages better parenting. It encourages greater involvement. It is best for the child. It is the right of the child. It is the reform that is needed. No more is necessary

David Hodson  
dh@iflg.uk.com  
07973 890648  
(c) February 2011