Neutral Citation Number: [2014] EWCA Civ 336

Case No: B4/2013/2104

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM PORTSMOUTH COUNTY COURT
HER HONOUR JUDGE BLACK
BK13P00247

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/03/2014

Before :

LORD JUSTICE MOSES
LADY JUSTICE BLACK
and
LORD JUSTICE KITCHIN

- -

Between :

RE G CHILDREN

- -
- -

Mrs Jane Campbell (instructed by **Evans Main**) for the **Appellant**
Miss Rebecca Foulkes (instructed by **Family Law in Partnership**) for the **Respondent**

Hearing dates : 22nd January 2014

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Judgment

Black LJ:

1. This appeal concerns twin girls ("the twins") who were born in the summer of 2008 and are therefore now 5 years old. The issue is whether Her Honour Judge Black was wrong to refuse to grant a shared residence order in relation to them. The reason why the appellant sought such an order was because it would bring with it parental responsibility for the twins which she does not otherwise have.

2. The appellant and the respondent, who is the twins' mother, met in the 1990s. Initially, they had an intimate relationship. At some point, the relationship became platonic but they continued to share a house until October 2012. The respondent says that before the twins were born, they had ceased to be in a relationship and were simply living together as close friends; the appellant considers that the relationship continued until the autumn of 2012.

Parentage

3. I need to explain the parentage of the twins. Following unsuccessful attempts by the respondent to conceive using her own eggs, the appellant agreed to donate eggs so that the respondent could become pregnant. She donated eggs which were fertilised with sperm from an anonymous donor. The embryos were implanted in the respondent who carried and gave birth to the twins.

4. Some embryos remained and one was used to enable the appellant to carry and give birth to her daughter, D, in November 2012.

5. The appellant is therefore genetically the mother of D and the twins and the children all have the same father; biologically, they are full siblings. The appellant is also, in law, D's mother. However, she is not the twins' mother. By virtue of section 27(1) Human Fertilisation and Embryology Act 1990, the respondent is the twins' mother.

Factual background

6. The proceedings have precipitated long and detailed statements from the parties in which each set out her perception of their joint history, of the steps taken to conceive the twins, and of the upbringing of the children. The statements date from June 2013 and were prepared in the context of what was then a wide ranging dispute between them. The appellant's applications at that time included an application for an order that she should be the twins' main carer which was fiercely resisted by the respondent. There has not been a hearing at which evidence has been given and findings made which would provide us with a firm factual foundation. I will therefore attempt to describe the history as neutrally as I can, avoiding straying too much into disputed territory.

7. After the twins were born, the respondent had some months of maternity leave and then went back to work. In mid-2010, she changed jobs in order to have more flexibility to work from home sometimes so that she could spend more time with the children.

8. The appellant had the opportunity to take redundancy from her job and did so in early 2008. She was therefore able to stay at home and to look after the children whilst the

respondent was at work. The respondent says of this that the appellant "continued to live with me as a friend and assisted me in the early years with my daughters and housekeeping". The appellant, in contrast, paints a picture of herself as the main carer for the twins, describing herself as "the homemaker" whilst the respondent was "the provider". As counsel for the appellant put it in her skeleton argument for this appeal, her case is that she is "the genetic and psychological parent". The twins grew up calling the respondent "mummy" and calling the appellant by a pet name derived from her first name.

9. Even the appellant says that there was increasing strain between the parties from 2011. It is clear from both parties' statements that by the middle of 2012, things had become very difficult between them. The respondent had formed a new relationship with C who is now her civil partner. There were what may best be called "scenes" as the friendship between the parties came to a final end.

10. Since the final parting, the twins have lived with the respondent but the appellant has remained part of their lives, continuing to be part of the arrangements for their regular care for a few months and thereafter having contact with them, including staying contact. C is also part of their lives and seems to be involved in their care, for example regularly collecting them from school. C has parental responsibility for the twins by virtue of a parental responsibility agreement with the respondent.

11. At the time they filed their statements, each party was mistrustful of the other. The respondent said, for example, that the appellant's application was motivated by malice, selfish interest and revenge. The introductory paragraphs of her statement (which is dated 29 June 2013) include this assessment of the appellant's position:

> "The [appellant] does not have my daughters' best interests as her priority and focus, and apart from the prospect of a contact order to have my daughters remain in contact with the [appellant] and her family, which I have not resisted subject to the detail and monitoring the [appellants'] behaviour in going forward, the [appellant's] application is without merit."

The appellant, for her part, criticised the respondent's care of the children for various reasons and asserted that the children come second behind the respondent's work and that the respondent was trying to push her out of their lives.

12. In May 2013, shortly after the commencement of the proceedings, the appellant suggested that she was going to see if she could have her story published in the press. Dealing with this in her statement, she said that she had been chatting with a freelance reporter at a wedding reception and the reporter had been interested in making a story of her situation but, on taking legal advice and taking the views of her parents into consideration, she would not have pursued the matter. The respondent's response was that this was calculated to distress her personally and embarrass her professionally.

The hearing before HHJ Black

13. Against this background of mistrust, it was to the parties' enormous credit that when the case came before Her Honour Judge Black on 4 July 2013 for a hearing to settle

the interim contact arrangements, pending a three day hearing scheduled for the end of August 2013, they managed to resolve much that was in dispute between them.

14. The appellant conceded that she would not pursue a sole residence order. The judge then gave the parties time to discuss contact and this resulted in an agreement for the appellant to have substantial contact including alternate weekends during term time, a telephone call on the intervening weekend, and additional staying contact during school holidays. What remained in debate was whether a shared residence order should be granted so as to give the appellant parental responsibility for the twins, there being no other way in which she could acquire parental responsibility.

15. The respondent acknowledged that the appellant is an important adult in the children's lives, that they have spent considerable periods of time with her and her family, and that this should continue. She was prepared to agree to provide the appellant with information about the children's education, including such matters as their progress at school and the dates for any significant events such as sports days and concerts but not parents' evenings. She also agreed to provide the appellant with information about any significant medical issues affecting the children and to delegate parental responsibility to the appellant during the periods when she had contact to enable her, if necessary, to arrange emergency medical treatment for them. Further than that, she would not go.

16. Not wishing to put themselves through the emotional and financial cost of further contested proceedings, the parties asked the judge to deal with the remaining dispute on the basis of submissions there and then and the judge agreed. The judge recorded that she had not been asked to resolve any of the disputed facts and took the view that it was unnecessary for her to do so.

17. The judge observed that the authorities did not provide much guidance as to what to do in circumstances such as these. She said that her attention had been invited to Re A (Joint Residence: Parental Responsibility) [2008] EWCA Civ 867 [2008] 2 FLR 1593 as referred to in the Family Court Practice but that it did not seem to be applicable here.

18. She began her judgment by explaining that she thought it appropriate that the order made by the court should recognise that only one of the parties was the twins' mother and therefore she should have sole parental responsibility for them. In contrast, she remarked that the appellant is not a parent of the children and that her status should not be elevated in that way (§4). She considered that the contact arrangement, coupled with the agreement to provide information about education and medical issues and for a limited delegation of parental responsibility was sufficient to recognise the importance of the appellant's involvement in the children's lives (§9).

19. The judge thought it of significance that in relation to D, the parties had not taken advantage of the provisions of the Human Fertilisation and Embryology Act 2008 which would have enabled them both to be parents of D. From this, she inferred that there had not been an intention to bring D up as joint parents and, I think, drew the further inference that the same was true of their intentions in relation to the twins. This led to her saying that "there is no question at any point of [the respondent] sharing parental responsibility of [the appellant's] child with her and, therefore, it

would seem on that basis alone, to be wrong that she should expect to share responsibility for [the respondent's] children" (§8).

20. A theme of the argument on behalf of the appellant was that without a shared residence order, she would be marginalised by the respondent. The judge said that she did not see from reading the parties' statements that there had been inappropriate marginalisation of the appellant and she considered that the respondent had shown that she recognised the importance that the appellant has in relation to the children by her agreement in relation to contact and the provision of information.

21. In contrast, the judge said that she was concerned about how the appellant "may operate her parental responsibility if she were given it" (§5) and in fixing on a sole residence order as appropriate, she referred to "the risks which may be involved in [the appellant] sharing parental responsibility" (§9).The source of her concern appears to have been particularly the threat to take matters to the press, although I think I interpret her correctly (§5 of the judgment) as saying that it had not been suggested in submissions that this continued to be a problem. It seems she may also have been taking into account what she described as "a sad history to how things have developed over certainly the course of this year and last year".

The respondent's notice

22. The respondent seeks to bolster the judge's reasoning in a number of ways. She relies on the history and the written evidence as a whole as showing that the appellant was not intended to be and was not a psychological parent to the children. She adds that it was in the best interests of the children that the legal framework for their care mirrored that of D, that if the appellant had parental responsibility for the twins, there would be a significant risk that she would seek to undermine the respondent as their primary carer, and that a shared residence order would be likely to increase the possibility of conflict between the parties.

The issues on the appeal

23. Ms Campbell, who appeared on behalf of the appellant, argued that the judge had failed to give weight to some important features of the case, including that the appellant was the biological mother of the twins, that she had cared for them for four and a half years, and that she would be taking a parenting role in respect of them for the rest of their lives.

24. Ms Foulkes for the respondent argued that these matters were known to the judge but she was entitled to give weight to the fact that the respondent is, as she put it, drawing on the speech of Baroness Hale in In re G (Children)(Residence: Same-sex Partner) [2006] UKHL 43 [2006] 1 WLR 2305, "their gestational parent, their legal parent and their social and psychological parent".

25. Ms Campbell argued that the judge had set too much store by the fact that, by virtue of the Human Fertilisation and Embryology Act 1990, the respondent was "the mother" and therefore overlooked the fact that the appellant was a "parent". She submitted that the twins have regarded the appellant as their parent all their lives and, during the extensive contact that there will be in future, she would continue to take that role. She submitted that they would naturally expect her to be as involved in

matters such as schooling as the respondent and, without parental responsibility, she would not be able to be.

26. Ms Foulkes responded that the law deliberately distinguishes between the genetic mother and the gestational mother. It is of note, she said, that it is the gestational mother who has automatic parental responsibility. The mere fact of genetic parentage is not sufficient, she said, to justify a shared residence order, and even if the judge did find that the appellant had played a parental role, that did not *require* her to make a shared residence order, see Re R (Parental Responsibility) [2011] EWHC 1535 (Fam) [2011] 2 FLR 1132 where Jackson J did not grant a free-standing parental responsibility order to a step-father who had been and continued to be a psychological parent to the child.

27. Ms Campbell complained that the judge had not identified the risks that she felt may be involved in sharing parental responsibility, submitting that there are no grounds to believe that the appellant would interfere with the respondent's exercise of her parental responsibility. Ms Foulkes said that the judge's reference to the threat of the press was enough and the judge could have cited many examples from the appellant's statement of her referring to her own biological role, failing to recognise the importance of the respondent in the children's lives, and criticising the respondent's care of them.

28. Ms Campbell submitted that the judge was wrong to have been influenced by the fact that the respondent was to have no parental role in relation to D; that was irrelevant when considering what was in the interests of the twins. Ms Foulkes' answer was that this *was* a relevant factor because it undermined the appellant's case that the intention had been that she and the respondent would be joint parents of the twins and were intending, with the birth of D, to add to their family. On the contrary, it was said, the evidence showed that the intention had always been for the respondent to be the sole legal parent for the twins and the appellant the sole legal parent for D. It was also relevant, Ms Foulkes said, that the three children would be in different legal situations if a shared residence order was made and the twins would struggle to make sense of why they had two parents with parental responsibility and D did not.

Discussion

29. It was common ground between the parties that a shared residence order could be made in order to confer parental responsibility. The question is whether the judge was wrong to take the view that it was not in the twins' best interests to make such an order here.

30. Families are formed in different ways these days and the law must attempt to keep up and to respond to developments. To some extent, the judge was right to say that no decided authorities assisted her greatly. Certainly there is nothing which is precisely in point. It might, however, have been helpful if the parties had invited her to consider the legal framework, including some of the authorities dealing with the nature of parental responsibility and showing how the concept had been approached in new situations which were not centre stage when it first made its appearance. Because, for reasons I will give in due course, I would dispose of this appeal by overturning Judge Black's order and remitting the matter for rehearing, I thought it might be of assistance to gather together some of the learning that is available even though, in

order to do so, I have departed from the parties' submissions and relied on my own research.

Legal parenthood

31. Over the years, the boundaries of legal parenthood have expanded. I will give a few examples to illustrate this, but without setting out all the intricacies of the relevant legal provisions. The twins were conceived before the Human Fertilisation and Embryology Act 2008 (the 2008 Act) came into force, and their situation was governed by the Human Fertilisation and Embryology Act 1990. The 2008 Act brought in some significant changes. Section 42 of the 2008 Act provides that if, at the time of the placing in her of the embryo or the sperm and eggs or of her artificial insemination, a woman was a party to a civil partnership, then (subject to certain exceptions) the other party to the civil partnership is to be treated as a parent of the child unless she did not consent to the process. Section 43 of the 2008 Act caters for the situation where two women agree that both should be parents but they are not in a civil partnership. In such a situation, provided that certain conditions are satisfied which include the treatment services that result in the child being provided by a licensed person and the woman who bore the child and the other woman giving written notice stating that they agree, the other woman can be treated as a parent. Where a woman is treated by virtue of section 42 or 43 as a parent of the child, section 45 of the 2008 Act provides that no man is to be treated as the father of the child, thus denying the biological father the status of a parent. Baker J examined the implications of this latter provision in Re G; Re Z (Children: Sperm Donors: Leave to Apply for Children Act Orders) [2013] EWHC 134 (Fam) p2013] 1 FLR 1334 to which I will return later.

Parental responsibility; shared residence orders

32. Section 3(1) Children Act 1989 says that "'parental responsibility' means all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property". Although the Act gives little further assistance as to the attributes of parental responsibility, it is clear that it includes taking decisions about aspects of the child's upbringing such as education, religion, medical treatment, and holidays abroad as well as, subject to section 12(3) Children Act 1989, consenting (or not) to adoption albeit that that is in a rather different category. Leaving adoption to one side, where those with parental responsibility are in dispute over decisions that need to be made about the child, the court can regulate the situation by means of specific issue and prohibited steps orders under section 8 Children Act 1989 determining some aspect of parental responsibility.

33. If someone had asked in the early days of the Children Act 1989 how one came by parental responsibility, the answer would have concentrated principally upon the child's biological mother (who always had parental responsibility automatically) and father (who acquired it through being married to the mother, making a parental responsibility agreement with her or obtaining a parental responsibility order from the court).

34. Over the years, there have come to be different ways of acquiring parental responsibility and the categories of those who can do so have broadened. For example, an unmarried father now acquires parental responsibility by the inclusion of

his name on the child's birth certificate, see section 4 Children Act as amended; a woman who is a parent by virtue of section 43 of the 2008 Act can acquire parental responsibility under section 4ZA Children Act; a step-parent or civil partner can acquire parental responsibility (as C has done here) under section 4A Children Act.

35. The approach of the courts to parental responsibility has also evolved.

36. The Children Act contains no guidance on when a court should make a parental responsibility order save that the child's welfare is to be the court's paramount consideration. In its influential decision in Re H (Minors)(Local Authority: Parental Rights)(No 3) [1991] Fam 151, sub nom Re H (Illegitimate Children: Father: Parental Rights)(No 2) [1991] 1 FLR 214, the Court of Appeal highlighted three particular features from amongst the factors that a court considering an application by a father for parental responsibility must take into account, namely the degree of commitment the father has shown to the child, the degree of attachment between them, and the motivation behind the father's application.

37. In the traditional context, parental responsibility was seen as a question of status, see for example Re H (Parental Responsibility) [1998] 1 FLR 855, where Butler Sloss LJ said:

> "Parental responsibility is a question of status and is different in concept from the orders which may be made under section 8 in Part II of the Children Act. The grant of the application declares the status of the applicant as the father of that child. It has important implications for a father whose child might for example be the subject of an adoption application or a Hague Convention application. In each of those examples, a father with parental responsibility would have the right to be heard on the application. He would have the right to be consulted on schooling, serious medical problems, and other important occurrences in a child's life."

38. In Re C and V [1998] 1 FLR 392 at 397, echoing what he had said in Re S (Parental Responsibility) [1995] 2 FLR 648, Ward LJ also referred to parental responsibility as conferring status (there "the status of fatherhood which a father would have when married to the mother") and said that:

> "a child needs for its self-esteem to grow up, wherever it can, having a favourable positive image of an absent parent; and it is important that, wherever possible, the law should confer on a concerned father that stamp of approval because he has shown himself willing and anxious to pick up the responsibility of fatherhood."

39. In the recent decision of Re M (Parental Responsibility Order) [2013] EWCA Civ 969, Ryder LJ said of the role of status in the court's consideration of an application for parental responsibility:

> "§27 …. The status conferred by parental responsibility is an important legal recognition of the delicate balance between the

> rights, duties, powers, responsibilities and authority that are the components of family and private life. It is integral to the concept of parental responsibility. It is not, however, a separate 'stand alone' factor, let alone a presumptive factor to be weighed alongside other Re S (Parental Responsibility) factors in the welfare consideration of whether a parental responsibility order should be made. The status of parental responsibility underlies the authorities and the guidance….."

40. A particular influence in Judge Black's decision was the "question mark over how [the appellant] may operate her parental responsibility if she were given it". The authorities show that parental responsibility *can* be refused where it is feared that it will be misused. The early authorities might have given one to think that this was not appropriate, see for example Re S (supra, at 657) where, Ward LJ said that the possibility of parental responsibility being used to interfere with the day to day management of a child's life had "nothing to do with" whether a parental responsibility order should be made as orders under section 8 of the Children Act could be used to control any abuse of parental responsibility. However, over time, there have been examples of parental responsibility being denied because it was likely to be misused. A recent example is Re M (Parental Responsibility Order) (supra) in which the Court of Appeal upheld the judge's refusal of parental responsibility to a father who the judge had found would misuse it in ways which would undermine both the child and the child's mother.

41. Of course, in this case, it is not possible for a free-standing order for parental responsibility to be made in favour of the appellant; the only way in which she can acquire parental responsibility is by a shared residence order being made in her favour. It is no surprise that it was common ground that a shared residence order could be made in order to confer parental responsibility as there is long standing authority to that effect, see for example Re G (Residence: Same-Sex Partner) [2005] EWCA Civ 462 [2005] 2 FLR 957. That appeal concerned two women (CG and CW) who had separated following an 8 year cohabitation, during which time CG had given birth to two children by anonymous donor insemination. Thorpe LJ (§27) decided that an order that conferred parental responsibility on CW (namely, a shared residence order) was required in order to give "a clear and strong message to the mother that she could not achieve the elimination of [CW], or even the reduction of [CW] from the other parent into some undefined family connection". His judgment in many ways aligned the position of CW with that of a father seeking a parental responsibility order, but I do not think one can completely ignore that parental responsibility derived from a shared residence order is not quite the same as free standing parental responsibility. To name an obvious difference, parental responsibility acquired through a shared residence order lasts only as long as the shared residence order remains in force, see section 12(2) Children Act 1989.

42. There are a number of authorities which are useful in demonstrating how the courts have approached the issue of parental responsibility with single sex families. What follows is by no means a comprehensive review of the authorities, but rather an attempt to isolate aspects that may be of assistance in the present case. It has been said many times that there is no universal solution and that each case depends on its

individual facts, but a consideration of previous decisions can help to shape thinking appropriately.

43. Re G (Residence: Same-Sex Partner) (supra) is one of the catalogue of relevant authorities. The litigation in that case continued and a later issue between the same parties found its way to the House of Lords as In re G (Children)(Residence: Same-sex Partner) [2006] UKHL 43 [2006] 1 WLR 2305. Baroness Hale there considered the weight to be attached to the fact that one party is both the natural and legal parent of the child and the other is not. In a well-known passage in her speech, beginning at §32, she considered the different ways in which a person may be a parent to a child dealing with legal parenthood (§32), genetic parenthood (§33), gestational parenthood (§34) and social and psychological parenthood (§35).

44. In A v B and C (Lesbian Co-Parents: Role of Father) [2012] EWCA Civ 285 [2012] 2 FLR 607, this court declined to give generalised guidance for this area of family law and stressed that:

> "In the end the only principle is the paramountcy of child welfare." (§23 and see also §39)

45. Thorpe LJ rejected the submission that great weight should be attached to adult autonomy and the plans that the adults had made for future relationships between the child and the relevant adults observing (§27) that human emotions are powerful and inconstant and that faced with reality, plans may prove to be illusion or fantasy. The adults' preconception intentions can be a relevant factor but they are not determinative and what must dictate is not the interests of the adults but the welfare of the children (§44). As I said (§45), it is likely to be important in deciding what is in the child's best interests to identify the source of the child's nurture, stability and security. Some children are used to an amalgam of parenting, some less so. Disruptions to the child's security and stability, even if arising indirectly because one of the adults is distressed, are relevant as potentially harmful to the child. Particular consideration also has to be given to the part that each adult can play in the child's life (§46).

46. I said that I would return to Re G; Re Z (Children: Sperm Donors: Leave to Apply for Children Act Orders). I need not go into all the intricacies of that case. It suffices to know that a man provided sperm to a female couple who were civil partners. The first child was born prior to the 2008 Act and the father had not infrequent contact. The second child was born after the 2008 Act came into force. The father had contact with that child too. He was entitled to apply for section 8 orders in relation to the first child as of right but the 2008 Act provisions meant that he was not considered the legal father of the younger child and he therefore required leave to apply for section 8 orders in relation to that child, which he sought from Baker J. He wished to apply for contact but also, as he could only acquire parental responsibility through a residence order, for 'parental responsibility/joint residence'. The decision is of importance because it was thought to be the first involving an application for leave to apply for section 8 orders by men who were the biological fathers but, by virtue of the 2008 Act, not the legal fathers of their children. The issues requiring determination exposed the tension between the legal position as to fatherhood and the biological reality.

47. Baker J examined the policy underpinning the relevant provisions of the 2008 Act which he considered to be "simply to put lesbian couples and their children in exactly the same legal position as other types of parent and children" (§114), acknowledging that alternative family forms without fathers are sufficient to meet a child's needs (§113). He observed (§116) that as a matter of law, it was right to describe the father as a "stranger" to the child but that in another sense, he was not a stranger. He had been chosen by the lesbian couple to father their children, they had involved him in the preparations for birth and allowed him regular and frequent contact thereafter. Baker J said that whilst the 2008 Act denied the biological father the status of legal parent it did not prevent the lesbian couple, in whom legal parenthood was vested, encouraging or enabling the biological father to become a psychological parent. So, he accepted the submission that "the potential importance of genetic and psychological parenthood is not automatically extinguished by the removal of the status of legal parenthood, and that social and psychological relationships amounting to parenthood can and often do co-exist with legal parenthood" (§119).

48. Baker J granted the father leave to apply for contact with the child, the most important factor in this case being, to his mind, the connection that the father was allowed by the couple to form with the child (§132). However, he refused leave to apply for residence on the basis that it was "disproportionate and …the effect of the application, intentionally or otherwise, may be to undermine the autonomy of the family unit" (§122). Similar considerations were in play in Re D (Contact and Parental Responsibility: Lesbian Mothers and Known Father) [2006] EWHC 2 (Fam) [2006] 1 FCR 556 (see particularly §89 and §93) albeit that, in the pre-2008 Act era, the father retained his legal status as father. He was there granted parental responsibility for his child but on the basis that his use of it would be limited in ways which he proposed himself and which were recited in the order (see §90 et seq).

Consideration of the issues arising in this appeal

49. I return to consider the issues arising in this appeal. It seems to me that the judge was put in a difficult position, albeit that this happened for the best of reasons. As the authorities show, a decision such as that which she was asked to take is heavily dependent on the particular facts of the case. Many of the facts here were hotly disputed and there was neither an agreed factual framework nor any factual findings made by a court. No judge wishes to put parties through more litigation, particularly not where, as here, they have at last managed to reach a sensible agreement on much that was in issue between them. Sometimes a judge has no choice but to do the best he or she can to ascertain the facts on the basis of the written material and submissions only; proceedings under the 1980 Hague Convention quite frequently have to proceed in this way. Sometimes the appropriate factual findings are sufficiently obvious for oral evidence not to be required. However, sometimes it is not at all clear on the papers where the balance of probability lies in relation to disputed facts which are central to the judge's thinking. In those cases, notwithstanding an invitation from the parties to act on submissions only, it may not be realistically possible for a judge to make a determination without hearing some evidence. It seems to me that this case was such a case.

50. Although not the only factor influencing the judge, the likely attitude of each of the parties to the other's role in the children's lives was clearly of central importance in the judge's decision. As Judge Black did not hear any live witnesses, this court is,

unusually, in no worse position than she was to evaluate the relevant evidence on this subject. I have read the papers that were available to the judge and upon which she based her view that, on the one hand, there had not been (and would not be) inappropriate marginalisation of the appellant by the respondent but, on the other, there was a risk of the appellant misusing her parental responsibility. The passage from the respondent's statement which I quoted at §11 of this judgment represented the respondent's view less than a week before the judge arrived at her determination. It is in terms which do not offer a great deal of reassurance as to the role that the respondent saw for the appellant in the future. I am not sure that the position was necessarily significantly improved by the respondent's agreement to a traditional contact arrangement and to the provision of information to the appellant, which the judge took as a recognition by the respondent of the importance that the appellant has in relation to the children. The appellant for her part had also made a concession which might be thought to have had considerable significance, that is to say that she was no longer seeking to have the children living with her for the majority of their time and would be content with the contact/information provisions that were agreeable to the respondent; it is unclear whether the judge took into account the possible implications of that.

51. It may not be very surprising that the grounds of appeal did not include a complaint that the judge had made findings without hearing any evidence, as the parties had asked her to rule on the issue on submissions only. Looking back at the process however, I think that it resulted in the judge's decision being built on foundations which were rather wobbly. This was compounded by her not having articulated, beyond the threat of the press which the appellant had abandoned, what led her to believe that the appellant would interfere with the care of the children if she had parental responsibility, why she thought that would continue to be a risk notwithstanding the appellant's abandonment of her residence application, and the form she thought the interference would take.

52. I accept the appellant's submission that the judge failed to give weight to the fact that she is the biological mother of the children. The judge was absolutely correct to observe that the appellant is not the parent of the children in law. That was undoubtedly a significant factor, but it was not the end of the story as one might think the judge thought it was, from her opening paragraph and the opening sentence of her fourth paragraph.

53. Judge Black took the view that the respondent recognised the importance that the appellant has in relation to the children but the judge did not articulate the ways in which the appellant is important. The impression from her judgment is that she was concentrating upon the importance of the appellant as someone the children would see for contact (see for example §9). I think there needed to be consideration given also to the appellant's importance as the children's genetic parent and as the mother of their full sibling, D, with whom they will form a relationship through contact. As they grow up, the children will appreciate the significance of both of these roles. This case demonstrates, as did Re G; Re Z (Children: Sperm Donors: Leave to Apply for Children Act Orders) (above), the tension between legal parenthood and biological parenthood. Here, however, the tension is probably even more marked than it was there, given the presence of D in the equation and given that, whether one works on the appellant's version of the twins' first years or the respondent's, the appellant

played a large part in their early day to day care. Another factor contributing to the complexity may be that C now has parental responsibility for the twins. I entirely appreciate why this was thought appropriate, in view of her role in their day to day lives and as their mother's civil partner, but some consideration may need to be given to whether it might be material to a decision as to what is in the twins' best interests that in their lives there would be a non-biological parent with parental responsibility and a biological parent without it.

54. It would be regrettable if too much time were to be devoted to trying to work out whether the appellant can properly be called the children's "psychological parent" or one of their psychological parents when what matters is her involvement in fact, both past and future. However, I can see that if the evidence were to establish clearly that the children did or did not see her as a parent that might have some influence in determining whether an order should be made which reflected that by giving her parental responsibility (or not).

55. I accept Ms Foulkes' submission that weight needed to be given to the fact that the respondent was the gestational parent and is now the one who has the twins' care for the majority of their time, but in my view that could not be considered in isolation from the appellant's position. Of course, it would ultimately be for the judge, taking into account the whole picture, to balance the various features and give them appropriate weight. Ms Foulkes is right that the mere fact that the appellant is a genetic parent and/or that she played a parental role would not *dictate* the making of a shared residence order.

56. Judge Black dealt with the question of whether there was an intention that the women would be bringing up the children as joint parents, concluding that as they had not taken the opportunity that was available to them to be joint parents of D, they did not intend this. The judge's inference may turn out to be correct but one proposition does not necessarily follow from the other as the relationship between the women was different by the time D was conceived. The judge went on to reason that because there was no question of the respondent sharing parental responsibility of D, "it would seem on that basis alone, to be wrong that she should expect to share responsibility for [the respondent's] children". I do not accept that reasoning. The decision as to whether a shared residence order was made in relation to the twins was governed by their welfare. Equality between the adults in relation to all their three children was not to the point except in so far as it may affect the children's welfare. It would be well to keep in mind the observations of Thorpe LJ in A v B and C (Lesbian Co-Parents: Role of Father) (supra) about the relevance of preconception intentions and other adult plans.

57. For all the reasons I have just gone through, I have formed the view that in her decision, the judge did not take into account all the factors that were relevant and that she attributed disproportionate weight to some of the factors that she did consider. I would therefore set her decision aside. That leaves the case in an unsatisfactory position. The appellant asked us to determine the application for shared residence ourselves. This would have the considerable benefit of freeing the parties from the emotional and financial expense of further litigation. However, given what I have said about the need to make some factual findings as a basis for the decision, I do not think this is a real option. Indeed, the respondent said that more had happened during the last six months which supported her argument that shared residence would carry a risk

that the appellant would undermine her care of the twins. Particulars were not given by the respondent but the appellant denied the assertion in general. We are in no position to deal with such disputed matters, which may or may not be relevant to the decision. I have therefore concluded that there is no choice but to remit the matter for a fresh hearing. I do not know whether the parties would consider it desirable or appropriate for the matter to go back to Judge Black but would invite them to make submissions about this immediately following the circulation of the draft judgment. Counsel should feel free to disclose to the parties the bare bones of our decision in order that they can discuss this question with them.

58. It will be for whichever judge conducts the hearing to determine what factual issues are relevant to the decision and how much oral evidence is required. It seems to me very unlikely that it would be necessary to resolve every one of the many factual disputes between the parties and I would not like it to be thought that I am seeking to dictate a prolonged and comprehensive hearing.

59. I would end with some words to the parties. I urge them to reach agreement about the issues that remain between them. One can well see that, subject to issues about interference and undermining, a judge might be inclined to recognise the distinctive features of this case by making a shared residence order to confer parental responsibility on the appellant, given her past and continuing involvement in the twins' lives, her role as their genetic parent, and the fact that she is the mother of their sibling. Whether that turns out to be appropriate will depend very much upon what transpires in the new hearing and I express no concluded view about it. What I am, however, quite confident about is that a further hearing should be avoided if at all possible. I repeat what I said in T v T [2010] EWCA Civ 1366 at §49:

> "Childhood is over all too quickly and, whilst I appreciate that both sides think that they are motivated only by concern for the children, it is still very sad to see it being allowed to slip away whilst energy is devoted to adult wrangles and to litigation. What is particularly unfair is that the legacy of a childhood tainted in this way is likely to remain with the children into their own adult lives."

I think the parties realised this when they reached the agreement that they did in front of Judge Black. I am sorry that the arrangements fixed that day cannot stand in their totality. But further agreement is still an option.

Kitchin LJ:

60. I agree.

Moses LJ:

61. I also agree.