What's in a shared care 'label'? Reflections from *AZ v BX* [2024] EWHC 1528 (Fam)

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Shared living arrangements are now 'the rule rather than the exception' (*Re AR (A Child: Relocation)* [2010] EWHC 1346 (Fam), [2010] 2 FLR 1577 at [52]). This marked a significant shift in judicial attitudes towards shared care, which was once considered a 'wholly exceptional' order (*J v J (A Minor) (Joint Care and Control)* [1991] 2 FLR 385 at 386). In light of the recent judgment in *AZ v BX* [2024] EWHC 1528 (Fam), this article critically examines the court's evolving approach to shared lives with orders and questions whether the judicial trend towards shared care is advancing too quickly and too far. It concludes that the pro-shared care trend in the family courts may undermine the paramountcy principle under s 1(1) of the Children Act 1989 and risks establishing shared lives with orders as the presumptive default in private child arrangements disputes.

Case background

AZ v BX concerns a father's appeal against a child arrangements order made for his three children. He challenged, among other things, the first-instance judge's assessment of both the legal principles and the facts in concluding that the children should live with the mother and spend time with him. Mr Justice Poole allowed the appeal on this ground and substituted a shared lives with order. He helpfully summarised several key principles for deciding whether to make a shared lives with order at [77]:

> '(i) The choice of whether to make a shared lives with order or a lives with/spend time with order is not merely a question of labelling – it is likely to be relevant to the welfare of the subject children and must be made by applying the principles of CA 1989 s1. In some cases where, for example, an unmarried father does not have parental responsibility, a shared lives with order will result in him having parental responsibility whereas a lives with/spend time with order (the children living with the mother) will not. That is a material difference to take into account, although it did not apply in the present case. In every case the appropriate choice of order depends on a full evaluation of all the circumstances with the child's welfare being the court's paramount consideration.
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> (ii) The choice of the form of any lives with order should be considered alongside the division of time and any other parts of the proposed child arrangements order.
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> (iii) A shared lives with order may be suitable not only when there is to be an equal division of time with each parent but also when there is to be an unequal division of time.
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> (iv) It does not necessarily follow from the fact that the parents are antagonistic or

> unsupportive of each other that a shared lives with order will be unsuitable.'

Positive takeaways

This decision is welcome for several reasons. First, it reaffirms the definition and scope of shared lives with orders. Shared parenting does not necessarily require an equal split of time between parents. In *P v P* [2024] EWFC 347 (B), a shared lives with order was made when the child would live with her father on alternate weekends, Wednesday nights, and during school vacations. The key question for the court is whether the time spent by the child with each parent can properly be characterised as a shared lives with arrangement. In *H (Children)* [2009] EWCA Civ 902, Ward LJ sets out a practical test at [13]:

> '… ask the children, where do you live? If the answer is "I live with my mummy but I go and stay with my daddy regularly", then you have the answer to your problem. That answer means a residence order with mummy and contact with daddy, but if the situation truly is such that the children say, "Oh, we live with mummy for part of the time and with daddy for the other part of the time", then you have the justification for making a shared residence order.'

Second, it underscores the legal implications of a shared lives with order that go beyond mere labelling. Mr Justice Poole described it as 'unfortunate' that the first-instance judge referred to the decision of whether to make a shared lives with order or a lives with/spend time with order as 'label litigation'. The practical benefits of a shared lives with order extend beyond this. For example, in *Re A (Joint Residence: Parental Responsibility)* [2008] EWCA Civ 867, [2008] 2 FLR 1593, Sir Mark Potter P held, at [70], that a shared lives with order is 'a legitimate means by which to confer parental responsibility on an individual who would otherwise not be able to apply for a free-standing parental responsibility order, such as a step-parent or same-sex partner'. Moreover, even if both parents have parental responsibility, s 13 of the Children Act 1989 allows a parent with a lives with order to remove the child from the jurisdiction for up to a month without permission of the court or agreement of every person with parental responsibility, as long as they are not preventing the child from spending time with the other parent as per the child arrangements order. This right does not apply to a parent without a lives with order in their favour.

Third, this judgment serves as a helpful reminder that an acrimonious relationship between parents is not a barrier to the making of a shared lives with order. In fact, such order may be made precisely to manage and mitigate the antagonistic relationship, as seen in *AZ v BX*, such that it 'puts the parents on an equal footing when seeking to make arrangements for the children' (para [81]).

Potential dangers?

Nevertheless, *AZ v BX* raises several concerns for the future of private child arrangements law. First, the court has placed significant reliance on symbolic or psychological reasons, rather than direct child-focused considerations, to justify the making of a shared lives with order. At [81], Mr Justice Poole justified his decision on the basis that a shared care order 'would make it more difficult for either

parent to regard themselves as being in control of contact or to seek to control contact', and in particular, to 'mitigate the effects of the Respondent's attempts to control contact'. He also stated that such an order puts the parents 'on an equal footing', and 'signals to each parent that each was of value in the lives of the children', ultimately promoting 'a sense of stability within the family' in the event of disagreements between the parents.

This approach demonstrates that 'shared [lives with] orders have arguably come to represent the new way of giving separated parents equal authority' (Harris and George (2010)). However, this was explicitly frowned upon in *Re F (Shared Residence Order)* [2003] EWCA Civ 592, [2003] 2 FLR 397. Thorpe LJ made clear at [21] that:

> '…the residence order reflects just that – the place of the children's residence. It is not intended to deal with issues of parental status.'

This approach is also inconsistent with the child focus required by s1(1) of the Children Act 1989, as emphasised by the House of Lords in *Holmes-Moorhouse v Richmond-Upon-Thames London Borough Council* [2009] UKHL 7, [2009] 1 FLR 904. Baroness Hale held, at [30]:

> 'When any family court decides with whom the children of separated parents are to live, the welfare of those children must be its paramount consideration: Children Act 1989, s 1(1). This means that it must choose from the available options the future which will be best for the children, not the future which will be best for the adults.'

While a good working relationship between parents can ultimately be beneficial to the child, an overemphasis on signalling the right messages and maintaining equal footing for both parents risks distracting the court from prioritising the child's welfare.

Further, this risk is exacerbated by the seemingly limitless application of shared lives with orders. While, as a matter of law, an arrangement can be called shared care even if the child's time is divided unequally, some arrangements are better reflected in a lives with/spend time with order. One such example was illustrated by Thorpe LJ in *W (Children) (Residence Order)* [2003] EWCA Civ 116 at [9]:

> 'It is not open to a judge to make a shared residence order in circumstances such as this where the children sleep perhaps 320 days of the year with their mother and visit their father on a pattern of contact which, although regular and frequent, is at the lower end of what is conventionally ordered.'

Interestingly, Mr Justice Poole took a slightly different stance. He said, at [82]:

> '[A shared lives with order] might well not be suitable if the children would spend only a very small proportion of their time with one parent, but even in such a case, a joint live with order is not automatically excluded.'

Under his framework, it appears that any child arrangements order made in favour of two parents or carers can reasonably be characterised as a 'shared lives with order'. In fact, this starting point was endorsed by Wall LJ in *Re P (Shared Residence Order)* [2005] EWCA Civ 1639, [2006] 2 FLR 347:

> '[where] a shared residence order is most apt to describe what is actually happening on the ground … good reasons are required if a shared residence order is not to be made.'

This position is reinforced by s 1(2A) of the Children Act 1989, which presumes that parental involvement in a child's life will further the child's welfare unless the contrary is shown. As a result, a shared lives with order will generally become the presumptive default position in cases with no safeguarding concerns, where both parents play an active role in the child's lives.

It is acknowledged that Mr Justice Poole clearly stated that 'in every case, the appropriate choice of order depends on a full evaluation of all the circumstances with the child's welfare being the court's paramount consideration' ([77]). However, his seemingly strong starting point has the potential to encourage courts to make shared lives with orders too readily. This over-readiness risks diverting the court's attention from the diverse circumstances each families face. For example, a default shared lives with arrangement would not be appropriate in *Re K (Shared Residence Order)* [2008] EWCA Civ 526, [2008] 2 FLR 380, where one parent had 'malign motivation' to use the order as a 'useful vehicle' to interfere with, or disrupt, the other parent's role in the management of the child's life ([21]).

This judicial trend is particularly concerning given that existing research does not support the view that a shared lives with order, in and of itself, improves outcomes for all families and children. Merson, Tuffin and Pond (2020) found that the *quality* of relationships, rather than the frequency of interaction, is more crucial to a child's well-being. The formal shared care structure itself did not necessarily foster a sense of wellbeing, contentment and security for children.

Furthermore, shared lives with orders may sometimes be harmful to children who are in the care of a vulnerable parent. Archer-Khun et al (2024) reported that female survivors of domestic violence in Canada described co-parenting with an abuser as akin to 'walking a tight rope', feeling that shared parenting arrangements provided a means for coercive control to continue. They experienced ongoing fear and anxiety even after the formal relationship had ended. This is consistent with Lux and Gill's research (2021), which strongly argues that shared parenting is inadvisable when domestic violence and coercive control are present, as these behaviours undermine children's best interests.

Given the concerns, the courts must rigorously apply the paramountcy principle under s 1(1) of the Children Act 1989 and avoid the temptation to introduce blanket guidelines that could undermine the flexibility of family law in addressing the complex dynamics of each case. This would be consistent with the emphasis given to the point by Hale LJ, as she then was, in *D v D (Shared Residence Order)* [2001] 1 FLR 495 at [32]. As we move forward, it is crucial that the law continues to focus on what is truly in the best interests of the child, rather than adopting an over-broad presumption of shared care that may not be appropriate in every circumstance.

Conclusion

In conclusion, while the shift towards shared lives with orders in family law, exemplified by *AZ v BX*, has some benefits, it raises concerns about these orders becoming a presumptive default, potentially undermining the paramountcy principle under the Children Act 1989. Courts must remain cautious and ensure that each case is evaluated individually, prioritising the child's welfare over parental preferences. A more nuanced, case-specific approach is essential to prevent shared care from becoming an overused or unsuitable solution.

Written under the supervision of Kate Hudson