

Article

CONTACT AND THE UNUSUAL PARENT

DISTRICT JUDGE JOHN MITCHELL

In their article 'Asperger's Syndrome in Child Contact Cases' [2002] Fam Law 199, Lynn Henderson and Nicole Hackett discussed the problems posed for contact when the non-resident parent suffers from Asperger's syndrome, a condition related to autism, which can manifest itself in bizarre behaviour. They commented that, where the underlying reason for a parent's behaviour is a mental health issue 'it will have a bearing on the perpetrator's capacity to recognise the problems in his past behaviour and to change and modify his behaviour'.

The law reports for the last 10 years contain cases where the High Court or the Court of Appeal has considered whether to grant contact orders or orders for parental responsibility in favour of fathers who behave in ways that their children and the resident parent find bizarre and disturbing. A distinctive feature of these cases is that the fathers cannot be blamed for their behaviour, the cause of which lies in illness or fixed personality traits. For this reason, until there has been a full investigation of the behaviour and its impact on the child and the resident parent, courts have been careful to avoid reaching a conclusion that direct contact should not take place.

THE CASES

The reported cases vary in their relevant features, which include the age and understanding of the children, whether or not they had lived with their father before the difficulties arose, the attitude of the mother, and the effect of the father's behaviour on her and on the children. *Re B (Minors: Access)* [1992] 1 FLR 140 concerned

a father who was socially awkward and displayed considerable anxiety. He and the mother had separated shortly after the birth of the youngest child. There was no suggestion that he might be violent towards his children (aged 12 and 11) but his eccentric behaviour, for example, walking along a street with a plastic bag on his head, distressed them.

In *Re F (Minors) (Denial of Contact)* [1993] 2 FLR 677 and *Re L (Contact: Transsexual Applicant)* [1995] 2 FLR 438, the fathers were transsexual, in transition to full gender reassignment. Both had lived with the children. In the first case, the children were boys aged 9 and 12. After the father left home, the elder boy, not knowing about his father's condition, refused to see him and displayed phobic symptoms for which he was now receiving help from a child psychiatrist. The younger boy had accidentally met the father when dressed in female clothing and, although displaying no psychiatric disturbance, currently refused to see him. In the second case, the child was a 6-year-old girl who was unaware of her father's condition. The child's mother was resolutely opposed to the intermittent contact that had taken place.

The father, in *Re W (Contact: Parent's Delusional Beliefs)* [1999] 1 FLR 1263, suffered from paranoid delusions. He and the mother separated when the younger of the two children (now aged 10 and 11) was one year old. The father had been violent towards their mother on one occasion at a contact centre. Contact had been unsatisfactory for 6 years. Although the two children enjoyed seeing their father, they found contact at a contact centre boring and were made anxious by their father often

ignoring them. They were now saying they did not want to see him.

In *M v M (Parental Responsibility)* [1999] 2 FLR 737 the father suffered brain damage as the result of a road accident, before the child (now aged 3) had been conceived. His resulting memory impairment and limited capacity for problem solving led to frustration and anger, resulting in violence towards the child's mother who was afraid of him. They had never lived together.

In the most recent case, *Re H (Contact Order)* (2001) 1 FCR 49 and *Re H (Contact Order) (No 2)* [2002] 1 FLR 22 the father suffered from Huntingdon's disease, a progressive, degenerative disorder. He and the mother separated when the younger of the two children (aged 5 and 9) was 2. He experienced sudden mood swings, had been violent towards the mother, and had abducted the children, threatening to kill them and commit suicide. He had no real insight into how his behaviour impacted on the children's mother.

PROCEDURE AND EVIDENCE

Despite the complexity of the applications, all of which seemed appropriate for trial in the High Court, they all commenced in the county court with the exception of *Re L (Contact: Transsexual Applicant)*. When the Court of Appeal directed a rehearing in *Re W (Contact: Parent's Delusional Beliefs)*, Hale J commented (at p 1268) that: 'It is a case which has elements which might make it suitable for trial in the High Court as it will obviously contain both adult and child psychiatric evidence'. But because of the delay that this would cause, the rehearing was directed to take place in the county court. In *Re H (Contact Order)* the Court of Appeal directed a rehearing before a High Court judge.

In most cases, there was a history of previous proceedings, for example injunction proceedings, and/or a history of failed attempts to resolve contact issues without resort to the courts. The application in *Re W (Contact: Parent's Delusional Beliefs)*, for example, had been issued 4 years before the appeal was heard and nearly 2 years after the mother had applied to vary the contact order, which had been made by consent. By the time cases reached the

reported hearing, the need to avoid further delay inhibited the obtainment of further expert evidence and the proper representation of the children's interests.

In all cases, at least one, and sometimes more, court welfare officers had reported and, in all cases other than *Re B (Minors: Access)* and *M v M (Parental Responsibility)*, the court heard evidence from an adult psychiatrist. However, in only one-half of the cases (*Re F (Minors) (Denial of Contact)*, *Re L (Contact: Transsexual Applicant)* and *M v M (Parental Responsibility)*) was there evidence from a child psychiatrist. This is surprising, given the perceived risks to the children posed by contact. In two of the cases, where there was no such evidence, the court expressed the view that evidence should have been sought. In *Re W (Contact: Parent's Delusional Beliefs)* the Court of Appeal remitted the case for a rehearing and gave leave for a child psychiatrist to be instructed: 'The case is crying out for a proper psychiatric assessment, not only of the father ... but more importantly, of the effect upon the children'.

In the other, *Re H (Contact Order) (No 2)*, Wall J said that the court, the children and both parents would have benefited from the advice of a consultant child psychiatrist. However, he decided not to adjourn the hearing because of the prolonged uncertainty this would cause.

In none of the cases other than *M v M (Parental Responsibility)* were the children represented. In *Re W (Contact: Parent's Delusional Beliefs)* the Court of Appeal directed that the children be joined as parties and invited the Official Solicitor to represent them. In *Re H (Contact Order) (No 2)* Wall J said (at p 36):

'It does seem to me, as a matter of principle, that where the court is faced with contact issues as difficult as those which arise in this case, consideration should be given to the children being separately represented and, where appropriate, expert evidence being sought on their behalf. In such cases children quite frequently have particular interests and standpoints which do not coincide with and are not necessarily capable of being adequately represented by their parents. Absence of separate

representation in the present case means, in my judgment, that the court cannot give the children all the assistance they need.'

However, again because of the delay and uncertainty, which would be caused by an adjournment, he decided not to order separate representation.

THE ATTITUDE OF THE MOTHERS

By definition, the children's mothers opposed contact otherwise there would have been no contested hearing. The background to their opposition varied. In some cases, most markedly in *Re H (Contact Order)*, there was a history of violence and/or threats to themselves or the children and a fear of future aggression. In others, for example *Re L (Contact: Transsexual Applicant)* there was an objection to contact that was not based on a fear of physical harm. Where a father changes during the course of the relationship and that change brings about an end of cohabitation, there are bound to be feelings of anger and betrayal. As Thorpe J (as he then was) commented in *Re L (Contact: Transsexual Applicant)* (at p 442):

'The only obstacle to ordinary contact between the applicant and S is transsexuality. That is a huge challenge for any family, particularly when its emergence post dates the break down of the relationship and when its progress is so rapid and when its disclosure is through antagonistic and not co-operative channels of communication ... In all the circumstances, the strength of the mother's emotional rejection of what has happened and therefore of what is offered to help her adjust is entirely understandable.'

In some of the cases, there had been a period when mothers, perhaps against their better judgment, agreed to contact but gradually came to oppose it. In *Re B (Minors: Access)*, although there had been contact for a number of years, albeit with difficulties: '[the mother] has made no attempt to conceal her opposition from the

children or encourage them to make the best of what, in her view, is a very bad job'.

THE APPROACH OF THE COURTS

Although there was no cross-referral between cases and the welfare checklist was seldom explicitly applied, the judgments demonstrate a uniform approach. They adopt what Waite J in *Re B (Minors: Access)* (at p 142) called:

'[the] normal assumption that a child would benefit from continued contact with a natural parent who, in that very limited sense only, has a right to access, although that natural parent who, in that very limited sense only, has a right to access, although that assumption and that right are always liable to be displaced if the paramount interests of the child demand it.'

In a number of cases, judges expressed their opinion that it was important that the children should grow up understanding the nature of the father's condition and knowing that he loved them:

'The very limited access proposed by the court welfare officer was humane and sensible. It would, on the one hand, prevent the father from becoming an unknown quantity in the children's minds, elevated, perhaps through absence, to a status inviting fear or fantasy in crucial teenage years ... He may be a social misfit. He may merely be an eccentric. The children's best interests do require at least this, however, that they should have an opportunity of gradually understanding those attributes in their father, perhaps even coming eventually to accept and appreciate them as something of which neither he nor they need feel ashamed.' (*Re B (Minors: Access)*, at p 146, per Waite J)

'I ... still believe, that [J] should in principle grow up in the knowledge of [her father]. I am clear that he loves her dearly and that it is important for her to feel his love and to understand that his present inadequacies are the product only

of a cruel twist of fate.' (*M v M (Parental Responsibility)*, at p 742, per Wilson J)

The risks to the children of a contact order in cases of this kind are bound to appear high on the checklist factors and need to be investigated with care. Hale LJ in *Re H (Contact Order)* explained that:

'[The judge] had to balance firstly the risks to the children if they saw their father, secondly the ways of containing and managing those risks and, thirdly, the wider needs of the children ... As to the first, the risks of some sort of harmful behaviour towards the children in this case must be taken very seriously ... Nor can the impact of [the father's behaviour] upon the mother who bears the principal responsibility for looking after those children and safeguarding their futures be ignored ... [Strategies] for containing and managing the risks of what the father might actually do ... [are] not an issue which can be left on one side.' (at p 56)

Although the courts considered the views of the children, the weight that was given to them varied, sometimes because, although the children (as in *Re H (Contact Order)*) had a close relationship with their father, the risk posed by direct contact was significant and sometimes because they had little understanding of the situation (as in *Re L (Contact: Transsexual Applicant)*). In *Re B (Minors: Access)* the two children, aged 12 and 11, had said that they did not want to continue to see their father but the Court of Appeal allowed the father's appeal against a termination of contact on the grounds that their best interests required contact. In contrast, the Court of Appeal in *Re F (Minors) (Denial of Contact)* held that the trial judge was right in giving 'very considerable' weight to the views of the two boys, aged 9 and 12, that they did not want to see their father.

THE ORDERS

In *Re B (Minors: Access)* the risks of contact were insignificant and the objection of the mother to contact was held to be unjustified. Contact at a contact centre with a review was ordered.

Where the risks of contact were insignificant, but the objection of the children required psychiatric input or the mother's objections were either reasonable or were so deep-rooted that they would seriously impede direct contact (as in *Re F (Minors) (Denial of Contact)* and *Re L (Contact: Transsexual Applicant)*), the question of direct contact was adjourned in the hope that therapy would help:

'[The mother] needs to be helped into professional relationships which will enable her to come to terms ... In the end she has to put S's interests before her own hurt, anger, incomprehension and distaste.' (*Re L (Contact: Transsexual Applicant)*, at p 442, per Thorpe J)

In the latter case, the court also made a family assistance order and ordered indirect contact. In *M v M (Parental Responsibility)* and *Re H (Contact Order) (No 2)*, the risks of contact were held to be so great that it could not safely take place even under supervision and direct contact was refused. In both cases indirect contact was thought to be in the best interests of the children, the father not only being able to send cards, photographs and presents, but also receiving photographs and reports on the child. In *Re H (Contact Order) (No 2)* email and video contact was also proposed.

PARENTAL RESPONSIBILITY

In most cases the fathers already possessed parental responsibility but it was applied for in *Re L (Contact: Transsexual Applicant)* and *M v M (Parental Responsibility)*. Thorpe J was in no doubt that the transsexual father should have parental responsibility. There was attachment, commitment and reasonable motives for wanting it (the threefold test set out in *Re H (Illegitimate Children: Father: Parental Rights) (No 2)* [1991] 1 FLR 214). In *M v M (Parental Responsibility)*, however, Wilson J with 'a real sense of discomfort' held that the father's lack of understanding of the concept of parental responsibility and the consequences of it being misused dictated the refusal of his application.

CONCLUSIONS

These six cases, linked by a common thread of personal difficulties on the part of non-resident fathers, were decided on their own facts but show a common theme:

- (1) the reasons for refusing direct contact and the possibility of managing and containing risks need to be thoroughly investigated;
- (2) case management needs to ensure that there is no delay in:
 - transferring cases to the High Court if that is thought appropriate;
 -
- (3) considering whether or not children need to be joined as parties;
 - taking steps to ensure that there is expert evidence as to the impact on the children of the difficulties and any order;
- (4) therapy and the making of a family assistance order should be considered when direct contact cannot be excluded in the future, but is not immediately appropriate; and
- (4) where direct contact is not appropriate, indirect contact should always be considered.