Neutral Citation Number: [2012] EWCA civ 999

Case No: B4/2012/0548

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM SWINDON COUNTY COURT
HER HONOUR JUDGE MARSHALL
SN08P02829

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/07/2012

Before :

LORD JUSTICE RIX
LORD JUSTICE TOMLINSON
LORD JUSTICE MCFARLANE

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Re: W (Children)

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- -

Miss Sarah Evans (instructed by Devereux & Co.) for the **Appellant Father**
Miss Grace Ong (instructed by Family Affairs Solicitors) for the **Respondent Mother**
Miss Hari Kaur (instructed by NYAS) for the **Respondent Children**

Hearing date : 28 May 2012

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Approved Judgment

Lord Justice McFarlane :

1. This appeal arises out of private family law proceedings in relation to two children A, a girl, born 17th June 2003 and therefore now aged nine years, and B, her sister, born 10th July 2006 and therefore just six years old. The children's mother ("M") and father ("F") are not married but were involved in a close relationship between 2002 and 2008, being together throughout that time save for a period of some six months separation in the latter part of 2003. In 2004 the parents purchased a property together which provided a home for themselves and the two children.

2. On 1st May 2008 M left the family home taking the girls with her without giving F any form of advance warning. Instead, she left a solicitor's letter for F to find on his return home. She moved to another town in the same region and enrolled the eldest girl in school, again without notifying or consulting F. Solicitors' letters then began to be exchanged over the issue of contact.

3. F commenced proceedings seeking orders for parental responsibility and contact on 16th May 2008. The question of parental responsibility was readily resolved by the signing of an agreement on 12th June 2008. F therefore has parental responsibility for both of his daughters.

4. On the 3rd February 2012 these proceedings concluded when Her Honour Judge Marshall dismissed F's application for direct contact to his children, but directed that M should facilitate indirect contact in the form of appropriate cards, letters and gifts between F and the children at the frequency of once per month. The judge did not rule out 'future contact at a time when the children are older'. It is against that order that F now appeals.

Background

5. Initially, following the separation, the question of contact was resolved by consent on the basis that the girls would stay with F every other weekend and on some additional occasions. During the second half of 2008 the relationship between the couple was on amicable terms, but that state of affairs ceased in about November 2008 following a number of arguments which included M expressing concern about the children visiting the paternal grandparents. On 27th November 2008 M made an application for a residence order and for a prohibited steps order preventing the children from being removed from her care. She also applied for and obtained, without notice to F, a non-molestation order under the Family Law Act 1996 based upon allegations that she made of significant violence against her by F.

6. M's allegations that F had behaved abusively to her were set down for a fact finding hearing on 16th January 2009. There were ten specific allegations. A District Judge heard evidence but felt unable to find any of the allegations proved, save that F conceded on one occasion in 2004 that he had spat at M. In addition the judge concluded that: "F is a forceful character whom M finds difficult to deflect and resist. It is difficult for her and causes her anxiety which may well reflect on the children who may sense that."

7. Notwithstanding M's failure to establish almost all of the factual allegations relied upon, the non-molestation injunction remained in force and F was arrested on a number of occasions in early 2009 for allegedly breaching it's terms, some of the alleged breaches relating to a period before the January hearing.

8. Despite the fact that the judge on 23rd January 2009 made an order for F to have weekly direct contact with the two children for most of the day every Saturday for the following three weeks, M, in part relying on allegations of breach of the injunction, failed to comply with the contact order and, unsuccessfully, sought to have it suspended. An order in similar terms was made on 13th March 2009, with the first visit actually taking place on 11th April. Two further contacts took place on 18th and 25th April 2009. Contact was to a degree hampered by F's bail conditions, which arose from the criminal process relating to the alleged breaches of the injunction. However, although M stated in a court statement dated 1st May 2009 that she was "happy to consent to the children having regular contact with their F on the condition that he remains within the ambit of the court order and does not allow the children to have any contact with his father", no further contact actually occurred. It follows that the last occasion on which F saw his children was 25th April 2009.

9. From mid 2009 onwards the issue of what, if any, contact F should have with the children has been before a circuit judge. In July 2009 the children were joined as parties to the proceedings and provision was made for them to be represented by the National Youth Advocacy Service ("NYAS"). By this time M had made allegations that the eldest child, A, had stated that the paternal grandfather had touched her inappropriately and had locked himself in a room together with the two girls. A had undertaken a police and social work ABE interview, in the light of which the police had declined to pursue any allegations against the grandfather. The circuit judge, understandably, felt that matters could not be left there and a fact finding hearing was listed for March 2010. The grandfather was given leave to intervene. In the interim, M was ordered to make the children available for contact with F as required by NYAS. However, the NYAS worker, Mr C, encountered considerable difficulties because the children maintained that they did not wish to see F and became very distressed when the topic was raised. In turn, F became frustrated, distressed and angry and spoke to Mr C in a manner which he now accepts was entirely inappropriate and intimidating.

10. In December 2009 leave was given for the instruction of a child psychologist with a report to be filed in May 2010. Despite this lengthy timetable, it appears that there were substantial delays in drafting a letter of instruction, and the expert report, by Dr G, was not in fact filed until the end of September 2010, some 10 months after permission was given to instruct an expert.

11. On the occasion in March 2010 for the fact finding hearing into allegations against the paternal grandfather, the hearing was vacated. The court order contains the following recital: "And upon the court noting that M does not wish to pursue the allegations of physical and sexual abuse against the PGF on the basis that the evidence is such that the court would be unlikely to be able to find the allegations proved to the necessary standard" and "And upon the court, all professionals and experts henceforth proceeding on the basis that the alleged physical and sexual abuse by PGF of the children did not happen".

12. Having referred to past findings of fact, it is of note that F was arrested on a number of occasions for alleged breaches of the non-molestation order. Such breaches are to be dealt with by a police prosecution in the criminal court under FLA 1996, s 42A. There is no indication on the case papers that any of these alleged breaches have actually been prosecuted and, therefore, no indication that any of the alleged breaches have in fact been established.

13. Dr G, who is a consultant clinical psychologist, filed her main report in September 2010. The key points of her analysis are as follows:

    a) The eldest child, A, exhibited abnormalities in psychological functioning consistent with a protracted experience of stress and, probably, of emotional distress.

    b) These abnormalities are part of a complex defensive strategy developed by A as a result of the extent of the distress that she has experienced within her family and between her parents.

c) When she was a child, M experienced domestic abuse in the relationship between her own father and mother.

d) Whilst the specific allegations of violence raised against F were not proved at the fact finding hearing, both parents accept that at times F was angry, shouted at M, called her names and spat at her. M continues to be very afraid of F.

e) F has difficulty in understanding the emotional states of others and does not accept that M is afraid of him.

f) The child A has been left with a feeling that F, and perhaps men generally, have the capacity to cause harm, pain and engender fear. Her refusal to see F is part of her defensive strategy and is not based upon a genuine desire not to see F, whose company she has enjoyed and whose ongoing presence in her life she needs.

g) A may be in a position where she feels unable to manage the internal conflict associated with developing a relationship with F.

14. Dr G recommended that A would require reassurance that she can have a relationship with M and, at the same time, develop a relationship with F. Both children will require "long term desensitisation to contact" with F which must be managed by a trusted adult, for example the children's guardian. Dr G recommended therapeutic intervention for F to facilitate the development of his emotional awareness and empathy and, secondly, to assist him in controlling his anger. M could benefit from some assistance in supporting the children in contact and might also require personal support in managing the effects of contact once it takes place.

15. The case was set down for final hearing in November 2011, but that date was vacated due to difficulties with M's public funding. At that stage, the judge who had held this matter since 2009 retired. In January 2012 the case came, for the first time, before the trial judge, Her Honour Judge Marshall.

16. Pausing there, it is necessary to note that almost four years had elapsed between F's initial application for contact in May 2008 and the first substantive hearing in January 2012. Between those dates important decisions had been made by no less than five judges prior to the trial judge. It is to be particularly noted that the one judge who had heard the parties give evidence at the fact finding hearing ceased to hold the case soon after that hearing. F had not seen his children for nearly three years, since April 2009. The papers display a significant element of drift, not least the ten months that expired between the decision to instruct an expert and the filing of her report.

17. The period of fifteen months between the filing of Dr G's main report and the final hearing was spent in attempting to arrange the various therapeutic and supportive interventions that the expert had recommended. The only success achieved in this regard was that F, promptly upon receipt of Dr G's report, engaged in a substantial course of counselling with a Mr S. All attempts to arrange appropriate work with the children failed. With respect to M, no progress was achieved and the judge recorded that M had "refused to engage with services offered, or with the desensitisation plan of Dr G" [judgment paragraph 26].

18. The final hearing before HHJ Marshall lasted for four days in January and concluded with a reserved judgment dated 3rd February 2012. The judge heard oral evidence from both parents, Dr G and from Mr C, the NYAS Guardian. Before the judge, F accepted that his past behaviour had been far from ideal and that he had in the past allowed his frustration to spill over into aggression and anger, which was often misdirected. Mr C spoke of the change in F's behaviour and the judge recorded the following:

> "Through these proceedings there has been much comment that F as he presents now is hardly recognisable from the angry and difficult litigant in person who reduced two members of Dr G's staff to tears and bombarded the court with emails to the point that the clerk required to change her e.mail address."

19. The NYAS Guardian's proposal was that there were two options, namely to end matters now with no order for direct contact, or establish desensitisation work using the children's paternal aunt, HW, who previously had had a good relationship with M and the children. F supported this second proposal. At the outset of the proceedings M's position was that she supported direct contact in principle but that she had difficulty in agreeing matters of practicability and detail in the proposed plan. However, by the close of the case the judge held that in reality "M would find herself unable to support any direct contact between the children and F".

20. The judge declined to make any findings about matters that had been the subject of alleged breaches of the non-molestation order. It therefore remained the case that the only adverse findings in relation to F's past behaviour were those relating to anger, shouting, name calling and spitting that he had previously accepted and which related to a period prior to the therapeutic input he had received from Mr S.

21. Prior to attending to give her oral evidence, Dr G had filed a number of additional short reports. In the report of 1st July 2011 she recorded M's position as follows:

> "Unfortunately M has informed me that she would be emotionally unable to engage with [the process of desensitisation]. I am aware that M was traumatised in her relationship with F. Unfortunately M reported that she feels she has been further traumatised by the behaviour of F within these proceedings and feels unable to engage with any desensitisation or any therapeutic process."

That assessment was based upon a telephone conversation in May 2011 during which M sought to explain why she had (without notice) failed to attend an assessment appointment with Dr G.

22. Dr G's opinion was that if M was required to co-operate in the desensitisation process she would experience significant distress and her emotional functioning would be compromised to such a degree that the expert was unable to recommend contact with F.

23. In Dr G's final report, dated 13th January 2012, she described her recent assessment of F following an interview with him and an interview with Mr S who was providing

therapeutic input. The judge summarises Dr G's conclusions in this respect at paragraph 48 of the judgment:

> "[Dr G] acknowledges the profound commitment that F has always shown to his children and to having contact with them, genuinely based on his firm belief that it is in the interests of the children for them to have a relationship with him, a view endorsed by Dr G. She identified the affective (emotional) and behavioural presentation of F was significantly different from the last assessment; F was willing to engage in the time of assessment and remained calm throughout. She acknowledged that F was engaged in the intervention with Mr S who is providing a cognitive and emotional based intervention focussed on facilitating the development of insight and change in emotional and other behavioural responses. F has responded well to the intervention. She found there was evidence during this assessment that F has developed some insight with regard to his own emotional and other behaviour and the effects that his behaviour has had on others. The insight F has developed is at a cognitive level and that the changes that have occurred in his behaviour have been achieved by the implementation of useful and appropriate cognitive strategies. There was evidence of some significant emotional development and she understood that further, more in-depth, emotional work is proposed to facilitate the development of empathy in F and will lead to a greater understanding of his own emotional functioning and that of others. This she regarded as an essential aspect of the intervention that is required by F. F has developed some capacity to control his emotional expression [and some] insight with regard to the advantages that this will have on his communication and interaction with others."

24. In her oral evidence Dr G maintained her core opinion which was that M's experience of trauma as a result of her relationship with F, which had continued through the court process, had led to "an adversive response" to F which had, in turn, frustrated the contact orders and led to Dr G's opinion which was that contact could not now take place. Dr G did not consider that M was deliberately seeking to influence the children or feed them negative information about F. M had no express intention of manipulating the court orders, rather it was a case of M simply being unable to comply with them. It is, however, significant that Dr G was prepared to support contact if M said that she herself felt strong enough to support it (which was M's position at that stage).

25. The parents gave evidence after Dr G had given evidence and after Dr G had departed from the court. Although the judge's account of the parent's oral evidence is in succinct terms, it is plain that each of them impressed the judge in different ways. F gave evidence calmly and displayed more insight than might have been expected previously. He expressed regret for his past behaviour and admitted the negative matters to which I have already made reference. Having summarised his testimony

the judge concluded "I found F's account to be an honest one, and his beliefs genuinely held".

26. By the end of the proceedings, Mr C, the guardian, had firmed up his recommendation in favour of an attempt at re-introducing the children to direct contact with F with the assistance of their paternal aunt, HW, who would recommence her relationship with the children prior to them meeting F. Mr C's recommendation was made with full knowledge of M's position and having, as had the judge, witnessed M's collapse in the witness box.

27. The judge's conclusions make it plain that M's presentation in the witness box had a significant impact upon the ultimate decision in the case. I therefore propose to set out in their entirety the two paragraphs from the judgment summarising M's evidence:

> "57. M came across as surprisingly robust while giving her evidence and gave the initial impression that she was now able to deal with past emotional upset caused by F's behaviour, but that her concerns as to the desensitisation work were similar to those of Dr G. However, as her evidence unfolded, a different picture emerged, and without any particular warning, M simply broke down. She was asked to give careful thought to her position on direct contact, and confirmed that in reality, she could not support it, the idea of F having contact was "exhausting", and I commend her for an honest answer. I did not understand this to be out of any desire to prevent F having contact, but genuinely as a result of considering her own ability to cope.
>
> 58. I had a great deal of difficulty with much of M's evidence. There were a number of occasions where what she said was inconsistent with what she had said previously. Having read Dr G's report, she had filed a statement indicating that she thought "any reference to A hearing me in distress is reflective of her stress rather than accurate recollection", but in evidence she said she thought A must have heard her, if that is what A had said. She could not explain why this line of reasoning had not been what she put in her statement. She told the court that the children do not ask about F at all, but later accepted that there were conversations generated through the weekly cards F sent. She told the court initially that she had kept the majority of them, but when pressed as to how many that would be, said "the last five or six". When asked on behalf of the Guardian about what A was reported to have alleged, she accepted that what A was saying was disturbing, "kicking, spitting, strang…." M did not go on to complete what she was saying, but confirmed she had been going to say "strangling". There is no evidence that A has ever said that she has been strangled. M explained this by saying she was "thinking off the top of my head". My assessment

> of M's evidence is that these inconsistencies were not deliberate attempts to mislead the Court, but simply a reflection of how this M functions. I note that District Judge A found M's evidence to be confused, but genuine. As a result, I find that her evidence has to be treated with extreme caution when it comes to matters of fact, particularly when considering Dr G's evidence about the sort of behaviour trauma with an adverse reaction can engender. However, I form the view that in terms of how M expresses her feelings, in particular about F and what she felt when asked to consider the prospect of the children having future contact, and whether she could support it, she is entirely genuine and this evidence can be relied on. It is my view that anyone seeing this M suddenly crumple, as she did in the witness box, would believe that to be the case."

28. In setting out her findings and conclusions the judge made the following key points:

a) Each of the two parents love their children, are committed to them and are motivated by a desire to do what they consider to be in the children's best interests.

b) The difficulties arise as a result of the relationship between the adults, rather than that between the adults and their children.

c) It is in the best interests of these children that they are able to have a meaningful relationship with both of their parents.

d) Dr G's analysis of the reason for A's stated refusal to see F is accepted. The children's behaviours are now well entrenched and significant work will need to be done with the children to reassure them they can have a relationship with F.

e) Dr G's opinion that M has experienced trauma as a result of the relationship with F, and has continued to be traumatised by the court process, is accepted. There is a clear pattern of M acting in what Dr G describes as an "adversive reaction" at every stage when contact is ordered or attempted.

f) F has made "considerable progress" in therapy and demonstrates "profound change". F, however, has a need to undertake a deeper level of work aimed at achieving empathy and understanding for the impact of his behaviour upon M.

g) F would be able to manage contact with the children appropriately, if it were possible to arrange this.

h) Dr G's concerns about the use of the paternal aunt, HW, as a means to re-introduce F are accepted.

29. The principal element in the judge's decision to refuse direct contact is to be found in her assessment of M in paragraphs 65 and 66 and, again, I propose to quote these in full:

> "65. I am satisfied M remains vulnerable to continuing trauma through this court process and that attempts to re-introduce F to the children are likely to be met with similar adversive behaviour. M's initial stated position that she supported direct contact "in principle" was no doubt a position that she genuinely adheres to in the best interests of her children; however considering all of the evidence to date I find it more likely than not that regardless of her stated position, M would be unable to avoid acting in a manner that frustrated the programme. Indeed, M's passing shot as she finished her evidence that F had stared at her in an intimidating fashion was, in my assessment, yet more evidence of M's continuing adversive behaviour as described by Dr G. She remains innately hostile to F, as a result of the trauma she has experienced and continued to experience for some considerable time as the proceedings progressed. I conclude that she is unable to support the children in having contact with their F and in this regard only I find M is unable to meet the children's needs.
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> 66. It is unfortunate that M has not taken the opportunities offered to her to engage in therapy to assist her in dealing with her trauma. It is my view that this is imperative if she is to be able to fully meet her children's needs in the future. Her refusal to engage remains a barrier to contact. It is also unfortunate that through 2011, the focus was on F's need for therapeutic input and how far that needed to be advanced before contact could commence. M's position as communicated to Dr G in May 2011 was acknowledged by the professionals, but not in my view given sufficient consideration as to its significance which has only now become apparent."

30. In her final analysis as to the children's welfare the judge, rightly, stated the general principle "that contact with both parents is in the best interest of children, unless there are compelling reasons to the contrary". The judge considered that the children had a need for a positive relationship with F, and connection with their paternal family, particularly in view of an element of Indian heritage through the paternal grandmother, and the judge considered that these factors weighed heavily in the welfare balance as did the current position whereby the children were rejecting of F which was "likely to be harmful in the long term".

31. On the other side of the welfare balance M's inability to meet the children's needs in this regard, and her inability to promote and support direct contact with F, together with her likely continued adverse behaviour should any desensitisation plan be implemented, must, the judge held, also be given considerable weight. A further

contraindication was the potential effect on the children if a plan to introduce contact started but then failed.

32. Drawing matters together the judge was unable to endorse the Guardian's recommendation and held that there should be no order for direct contact. Having concluded that there was no purpose to be served in holding the proceedings open for a review in some time to come, the final order was to dismiss F's application for direct contact, but make provision for indirect contact once a month in the form of appropriate cards, letters and gifts which M is to keep for the children.

F's appeal

33. F seeks to appeal the order of HHJ Marshall on the following three grounds:

    a) The trial judge placed undue emphasis on M's momentary distress and the opinion evidence of a lone psychologist when placed in the context of the factual matrix of the case and the facts found by the court.

    b) The trial judge made the order almost exclusively as a result of new opinion proffered by the lone psychologist:

        i) for the first time during the final hearing without assessment of M since June 2010

        ii) that M was suffering from a psychological condition which has no validity in clinical psychology

    c) the trial Judge provided inadequate reasons for her departure from the recommendation of the children's guardian: doing so exclusively in reliance upon the opinion of the psychologist which in turn was open to the criticisms made above.

34. The appeal is supported by the children's guardian but opposed by M who seeks to support the decision of the judge. I granted permission to appeal on 27th April 2012 and the full hearing took place on 28th May. At the conclusion of the hearing we announced our decision which was to allow the appeal and replace the judge's order with an order directing M to make the children available for contact with F, which was to take place at the discretion of the NYAS guardian with the assistance of the children's paternal aunt, HW, as set forth in the guardian's report 12th January 2012. In addition we remitted the matter for directions before Baker J, the FDLJ for the Western circuit, on the basis that the case would in future be heard before him or another High Court judge, or a circuit judge nominated by him, other than HHJ Marshall. The purpose of this written judgment is to set out the reasons for that decision.

The Legal Context

35. In reviewing the legal context within which the issues in this case are to be determined, I will first summarise the well known case law which stresses the benefit children will normally gain from maintaining a meaningful relationship with both of their parents following a split in the family. As will be seen, my conclusion is that, despite the obvious care that she gave to her decision in this case, it is in relation to

the application of the principles as described in the established case law that the learned judge was in error. In addition to describing the established approach to the grant or refusal of contact, I propose to go on to offer a wider perspective by focussing upon the responsibility of parents, rather than the courts, in deciding and implementing arrangements that are in the best interests of their child where, as here, the parents share parental responsibility.

Refusing Parental Contact

36. When a court determines any question with respect to the upbringing of a child, the child's welfare must be the court's paramount consideration (CA 1989, s 1(1)). The paramountcy principle in CA 1989, s 1(1), coloured as it is by the requirement of the court to have regard in particular to the aspects of welfare set out in the welfare checklist in s 1(3), is the sole statutory mandate directing the course that a court is to take in determining issues relating to the welfare of a child. Although the case of each child before a court will be unique and will justify careful scrutiny and a bespoke conclusion tailored to meet the particular welfare requirements of that young individual, the courts have nevertheless developed general approaches which indicate the contours of the landscape within which welfare determinations are likely to be taken when there is a dispute between a child's parents. What follows is a short review of the principal case law describing the approach to be taken in contact cases such as the present.

37. Despite the passage of time, the definitive exposition of the relevant principles which apply in relation to issues of parental contact is to be found in the judgment of Sir Thomas Bingham MR in *Re O (Contact: Imposition of Conditions)* [1995] 2 FLR 124 at pages 128C to 130E. That substantial passage was helpfully and correctly summarised a year later in the Court of Appeal by Wall J (as he then was) in *Re P (Contact: Supervision)* [1996] 2 FLR 314 at page 328. Before turning to quote more fully from Sir Thomas Bingham's judgment in relation to principles (1) and (2) it is useful to set out Wall J's shorter summary:

> "1. Overriding all else, as provided by s 1(1) of the 1989 Act, the welfare of the child is the paramount consideration, and the court is concerned with the interests of the mother and the father only in so far as they bear on the welfare of the child.
>
> 2. It is almost always in the interests of a child whose parents are separated that he or she should have contact with the parent with whom the child is not living.
>
> 3. The court has power to enforce orders for contact, which it should not hesitate to exercise where it judges that it will overall promote the welfare of the child to do so.
>
> 4. Cases do, unhappily and infrequently but occasionally, arise in which a court is compelled to conclude that in existing circumstances an order for immediate direct contact should not be ordered, because so to order would injure the welfare of the child: see *Re D (A Minor) (Contact)* [1993] 1 FCR 964 at pp 971G–972A *per* Waite, LJ.

> 5. In cases in which, for whatever reason, direct contact cannot for the time being be ordered, it is ordinarily highly desirable that there should be indirect contact so that the child grows up knowing of the love and interest of the absent parent with whom, in due course, direct contact should be established."

38. For the purposes of the present appeal it is necessary to re-expand Wall J's summary of principles (1) and (2) by quoting the entirety of Sir Thomas Bingham's judgment in relation to them at page 128 of *Re O.*

> "It may perhaps be worth stating in a reasonably compendious way some very familiar but nonetheless fundamental principles. First of all, and overriding all else as provided in s 1(1) of the 1989 Act, the welfare of the child is the paramount consideration of any court concerned to make an order relating to the upbringing of a child. It cannot be emphasized too strongly that the court is concerned with the interests of the mother and the father only in so far as they bear on the welfare of the child.
>
> Second, where parents of a child are separated and the child is in the day-to-day care of one of them, it is almost always in the interests of the child that he or she should have contact with the other parent. The reason for this scarcely needs spelling out. It is, of course, that the separation of parents involves a loss to the child, and it is desirable that that loss should so far as possible be made good by contact with the non-custodial parent, that is the parent in whose day-to-day care the child is not. This has been said on a very great number of occasions and I cite only two of them. In *Re H (Minors) (Access)* [1992] 1 FCR 70 at p 73 Balcombe, LJ quoted, endorsing as fully as he could, an earlier passage in a judgment of Latey, J in *M v M (Child: Access)* [1973] 2 All ER 81 where that Judge had said at p 89F-H:
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> > "... where the parents have separated and one has the care of the child, access by the other often results in some upset in the child. Those upsets are usually minor and superficial. They are heavily outweighed by the long-term advantages to the child of keeping in touch with the parent concerned so that they do not become strangers, so that the child later in life does not resent the deprivation and turn against the parent who the child thinks, rightly or wrongly, has deprived him, and so that the deprived parent loses interest in the child and therefore does not make the material and emotional contribution to the child's development which that parent, by its companionship and otherwise would make."
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> My second citation is from *Re J (A Minor) (Contact)* [1994] 2 FCR 741 at p 749A, where Balcombe, LJ said:
>
> > "But before concluding this judgment, I would like to make three general points. The first is that Judges should be very reluctant to allow the implacable hostility of one parent (usually the parent who has a residence order in his or her favour), to deter them from making a contact order where they believe the child's welfare requires it. The danger of allowing the implacable hostility of the

> residential parent (usually the mother), to frustrate the court's decision is too obvious to require repetition on my part.""

39. The second principle, that it is almost always in the interests of the child to have contact with the parent with whom the child is not living, has been approached by judges, both before and since the decision in *Re O,* as requiring the presence of "cogent reasons" for departing from that general principle. A classic statement of the need for cogent reasons appears, for example, in the short judgment of Waite LJ, from which Sir Thomas Bingham MR expressly quoted, in the case of *Re D (A Minor)(Contact: Mother's Hostility*) [1993] 2 FLR 1. Waite LJ said "the judge properly directed himself by asking whether there were any cogent reasons why this child should, exceptionally, be denied the opportunity of access to his natural father."

40. In the more recent case of *Re O (A Child) (Contact: Withdrawal of Application)* [2003] EWHC 3031 (Fam), [2004] 1 FLR 1258, Wall J described the general approach of the courts as follows:

> "Disputes between separated parents over contact to their children are amongst the most difficult and sensitive cases which judges and magistrates have to hear. Nobody should pretend that they are easy, or that there is any one-size-fits-all solution … The courts recognise the critical importance of the role of both parents in the lives of their children. The courts are not anti-father and pro-mother or vice versa. The court's task, imposed by Parliament in s 1 of the Children Act 1989, in every case is to treat the welfare of the child or children concerned as paramount, and to safeguard and promote the welfare of every child to the best of its ability … Unless there are cogent reasons against it, the children of separated parents are entitled to know and have the love and society of both their parents. In particular the courts recognise the vital importance of the role of non-resident fathers in the lives of their children, and only make orders terminating contact when there is no alternative."

41. Case law in relation to the European Convention on Human Rights (ECHR) stresses that the Article 8 right to family life includes a right for parents to have measures taken that will permit them to be reunited with their children and an obligation on national authorities to take such action. The authorities are numerous but *Eriksson v Sweden* (1989) 11 EHRR 183 is an early example and *Gluhaković v Croatia* (Application number 21188/09) [2011] 2 FLR 294 is a recent one. The obligation upon authorities, including the court, is not absolute and, whilst authorities must do their utmost to facilitate the co-operation and understanding of all concerned, any obligation to apply coercion in this area must be limited since the interests, as well as the rights and freedoms, of all concerned must be taken into account, and more particularly so must the best interests of the child [*Gluhaković v Croatia* para. 57].

42. In *Re C (A Child) (Suspension of Contact)* [2011] EWCA Civ 521, [2011] 2 FLR 912 Munby LJ summarised the relevant ECHR case law as follows:

> "a) Contact between parent and child is a fundamental element of family life and is almost always in the interests of the child.
>
> b) Contact between parent and child is to be terminated only in exceptional circumstances, where there are cogent reasons for doing so and when there is no alternative. Contact is to be terminated only if it will be detrimental to the child's welfare.
>
> c) There is a positive obligation on the State, and therefore on the judge, to take measures to maintain and to reconstitute the relationship between parent and child, in short, to maintain or restore contact. The judge has a positive duty to attempt to promote contact. The judge must grapple with all the available alternatives before abandoning hope of achieving some contact. He must be careful not to come to a premature decision, for contact is to be stopped only as a last resort and only once it has become clear that the child will not benefit from continuing the attempt.
>
> d) The court should take a medium-term and long-term view and not accord excessive weight to what appear likely to be short-term or transient problems.
>
> e) The key question, which requires 'stricter scrutiny', is whether the judge has taken all necessary steps to facilitate contact as can reasonably be demanded in the circumstances of the particular case.
>
> f) All that said, at the end of the day the welfare of the child is paramount; the child's interest must have precedence over any other consideration."

43. Finally I would refer to the pithy, but nonetheless correct, distillation of this approach in the judgment of Ward LJ in *Re P (Children)* [2008] EWCA Civ 1431, [2009] 1 FLR 1056 at paragraph 38 where it was said that "contact should not be stopped unless it is the last resort for the judge" and (paragraph 36) until "the judge has grappled with all the alternatives that were open to him".

44. In the present appeal it has been necessary to evaluate the strength of the evidence relied upon by the judge in deciding that the current three year suspension of contact should continue on an open-ended basis. The question is whether that evidence is sufficiently cogent to justify such an exceptional outcome.

Shared Parental Responsibility

45. Although the welfare principle in CA 1989 s 1(1) is, as I have said, the sole statutory directive to the court determining questions relating to a child's upbringing, it is not the only statutory provision which bears upon the responsibility for determining and putting into action arrangements to be made for a child's care within his or her own family. The Children Act 1989 does not place the primary responsibility of bringing up children upon judges, magistrates, CAFCASS officers or courts; the responsibility is placed upon the child's parents. In the previous sentence I have deliberately used the plural of parent as it is now very frequently the case that the law provides that parental responsibility for each child will be shared by both parents.

46. In a judgment relating to the court's determination of issues of contact, it is not common to refer to the meaning of "parental responsibility" set out in CA 1989, s 3(1). In my view, there is benefit to be gained from stepping back from a focus upon the court's role and seeing the function of the court in the wider statutory setting within which the primary responsibility for determining the welfare of a child, and then delivering what that child needs, is placed upon both of his parents and, importantly, is shared by them.

47. In CA 1989, s 3(1) "parental responsibility" is defined as meaning "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". When there is a dispute as to the arrangements for a child's care, much emphasis may be put by parents upon the one word "rights" within that all-encompassing definition. Such a narrow focus has no justification when one looks at the plain words of this clearly drafted and important section of the Children Act. The phrase under consideration is not "parental rights" but "parental responsibility". Along with the "rights….powers…and authority" enjoyed by a parent come the "duties" and "responsibilities" which a parent has in relation to a child. The detailed rights and duties of a parent are not defined more precisely in the Act, but, in general terms, it must be the case that where two parents share parental responsibility, it will be the duty of one parent to ensure that the rights of the other parent are respected, and vice versa, for the benefit of the child.

48. These observations, which are founded upon CA 1989, s 3 and relate to the duties that attach to those who have parental responsibility, do not directly impact upon the decision that falls to be made in this appeal which turns upon the cogency of the material relied upon by the judge in deciding to refuse direct contact. I will however return to the topic of parental responsibility, and its importance in cases of this type, in a short 'post-script' at the conclusion of this judgment.

M's ability to support contact

49. It is now necessary to look briefly at the evidence available to the judge relating to her assessment of M (see paragraph 28 above) and the decision, based on that assessment, to refuse contact.

50. I have already summarised the evidence of Dr G (see paragraphs 13-14 and 21-24) and M (see paragraph 26); these two sources are the primary, indeed the only, evidence upon which the judge would have been able to base her assessment. A number of aspects of it are of note:

    a) Dr G met M and the two children on only one occasion, which was in September 2010. The assessment sessions for all three individuals lasted in total for three and a half hours.

    b) M was expected to attend a further appointment with Dr G on 18th May 2011, but failed to attend.

    c) On 20th May 2011 Dr G telephoned M and it was in this conversation that M explained that she just could not face coming to the appointment with Dr G, could see no evidence of any change in F's behaviour and therefore felt unable to proceed. She said that she could not be part of

any desensitisation process and could not be in the same room as F any more.

d) In the light of that response Dr G felt it inappropriate to seek to engage M further in the assessment process.

e) As a result of M's presentation over the telephone, Dr G was unable to recommend contact to F.

f) Dr G's evidence, which was given before that of the parents, was to the effect that she would support contact if M said that she herself felt strong enough to support it (which was M's general position at that stage of the hearing).

g) It follows that Dr G's assessment of M's more entrenched position, refusing to co-operate, was limited to the one telephone call in May 2011. Dr G was unable, because she had left court, to provide any professional assistance to the judge in assessing M's presentation in the witness box;

h) In contrast, the NYAS guardian, Mr C, had met regularly with M and in particular had visited her on 13th January 2012 to discuss the issue of contact. M told him that she "does not believe that she needs therapy and is of the view that the issues in this case lie with F".

Arguments on appeal

51. F's case had been distilled into the three grounds of appeal. The core of Miss Evans' submission was that the judge had an untenable level of reliance upon her own assessment of M's collapse in the witness box and upon the recommendation of Dr G, who had only met M on one occasion some 18 months prior to the hearing and who had not conducted any further assessment of M in the light of her current entrenched position.

52. In submissions on behalf of M, Miss Ong argued that there was no basis to overturn the judge's assessment which was based upon all of the evidence which she had heard. Miss Ong did however confirm that at the start of the hearing M was not seeking a "no contact" order. Counsel said in terms that at that stage of the hearing "neither party wanted that outcome". Her instructions were that M realised the importance for the two children in having a positive relationship with F's family. This description of M's position is of note in that it significantly differs from M's firmly presented stance in the telephone call to Dr G in May 2011.

53. Counsel instructed on behalf of the children's guardian, Miss Hari Kaur, supported F's case on appeal. She stressed that Mr C, who had been in post since July 2009, had met the two children on no less than six occasions, in contrast to Dr G who had met M and the children only once, eighteen months prior to the hearing. Secondly, Miss Kaur stressed that, like the judge, but in contrast to Dr G, Mr C had been in court throughout the evidence and had witnessed M's collapse in the witness box. Nevertheless Mr C continued to favour a plan to reintroduce direct contact for the

children. Thirdly Mr C was able to give first hand evidence of the significant positive changes in F.

54. Further, Miss Kaur drew attention to the detailed psychological assessment of M carried out by Dr G at paragraph 7.4 of the main psychological report. Evidence of any psychological distress or anxiety is referred to on three occasions, but each time only in terms of it being "minimal". In the assessment of psychological functioning at paragraph 7.5 there is no reference to M experiencing trauma as a result of her relationship with F. Miss Kaur therefore questions the basis for Dr G's subsequent analysis based upon the existence of such trauma.

55. Finally, Miss Kaur submitted that for children who are now aged eight and five, an order for "no contact" is in effect the end of the potential for contact with F and an end of any opportunity for them to form a relationship with him during their childhood.

Discussion and conclusion

56. In the present case the judge was correct in summarising the applicable law and stating that "the general principle is that contact with both parents is in the best interests of children, unless there are compelling reasons to the contrary." She also properly structured her judgment by analysing in clear terms the factors in favour of contact and those against. Despite the correctness of her approach, I nevertheless differ from the learned judge with regard to the conclusion to which she came and I do so to the extent that I consider that her determination was plainly wrong in that the evidence in this case lacks a cogency that is sufficient to justify denying direct contact between these two children and F for the indefinite future.

57. By the close of the case there were a number of strong positive features which pointed in favour of the re-establishment of contact between parent and child. They can be summarised as follows:

a) Allegations of abusive behaviour had been made against F, but the only matters of fact that the court was entitled to rely upon in evaluating the possible risk of harm (emotional or physical) related to his outbursts of anger, name-calling and spitting, coupled with his similarly uncontrolled behaviour in relation to the court staff, the psychologist's staff and the NYAS guardian.

b) F had sought appropriate professional intervention aimed at reducing his tendency to resort to anger and increasing his ability to control his behaviour at appropriate levels. The evidence was that this had produced an identifiable and positive change in F's behaviour which had been sustained over a period of time;

c) There were no adverse findings of fact established against the external paternal family;

d) The children had enjoyed beneficial contact with F and would be likely to enjoy contact with him in the future, if that could be achieved;

e) F had shown sustained commitment to achieving contact with the children;

f) The professional view of Dr G and Mr C was that it was now safe for the children to have contact with F and that the children needed to have contact with him.

58. M herself had stated on a number of occasions and in a number of ways her adherence to the principle that the children would benefit from direct contact with their F. Indeed, at the start of the hearing, M had not been opposed to an order for direct contact.

59. The twofold problem in the case arose from M's apparent inability to comply with arrangements for contact actually taking place, coupled with A's well established defensive reaction which is to avoid contemplating contact with F. The position was compounded by M's lack of acceptance of any positive changes in F's presentation, despite the clear professional and other evidence that a real change had taken place.

60. In Dr G's main report she had identified the need for each of these two parents to engage in a professionally supported process designed to improve and correct aspects of their emotional and psychological make up which were having an adverse impact upon the ability of these two young children to have a free and normal relationship with each of their parents. In F's case the need was to address his anger and his dictatorial or otherwise abusive behaviour. In M's case Dr G recommended that she should have assistance in supporting the children in contact together with managing the effects of contact once it takes place. In contrast to F, who accepted this advice and acted on it, M stated that she was emotionally unable to engage with the process of assisting the children to have contact with F or with any other therapeutic process.

61. The judge's approach to the M's position is set out in paragraph 66 of the judgment to which I have already made reference. The judge described it as "unfortunate" that M had not taken up the opportunity of therapy. The judge considered it was "imperative" for that therapy to take place if M is able "to fully meet her children's needs in the future". M's refusal to engage "remains a barrier to contact". M had signalled her decision not to take up therapy in May 2011 and the judge, rightly, considered that it was "unfortunate that through 2011, the focus was on F's need for therapeutic input". The judge, again rightly, concluded that, insufficient consideration was given to M's position once it had become known and that its significance had only become apparent during the hearing.

62. Although the judge had correctly identified M's refusal to engage in therapy as the sole barrier to contact, and that there had been a failure to focus upon and address that issue during the nine months prior to the hearing, and although the judge considered that such therapy was "imperative", her conclusion was to accept M's position and hold that the consequence that inevitably flowed from that acceptance was that the two children should have no direct contact with F for the foreseeable future, thereby extending indefinitely the period of three years that had already elapsed during which no contact had taken place.

63. Having correctly identified the deficits in the case around M's position, it was, in my view, simply not open to the judge then to move to make a final 'no contact' order.

Once the judge had highlighted how 'unfortunate' it was that the focus of the court during 2011 had not been upon this aspect of the case, and how 'imperative' it was that M engaged with therapy, a 'no contact' order could not be considered 'the last resort' and the judge could not be said to have 'grappled with all the alternatives that were open to her' to use the words of Ward LJ in *Re P* (above). In the light of the judge's conclusions, the focus of the court should have been upon identifying and implementing the steps required to achieve the engagement of M in therapy. On that ground alone, the appeal must be allowed.

64. I would, however, go further and hold that the evidence was insufficiently robust to support the conclusion that M's position was an effective barrier to contact. The evidence, as I have summarised it, amounted to the opinion of Dr G based upon one assessment session 18 months earlier (which did not identify M as incapable of engaging in contact) followed by a telephone conversation in May 2011 in addition to the judge's own evaluation of M's collapse in the witness box. That material had to be set alongside M's stated position (in contrast to what she had said to Dr G in May 2011) at the start of the hearing and Mr C's assessment of M, which was based upon the same material available to the judge but was augmented by his knowledge of M over the course of nearly three years.

65. It obviously falls to a judge to assess a parent in the witness box in their capacity as a witness in the case. In a family case a judge will inevitably go on to form a general impression of a parent's personality and presentation as a result of their exposure to the parent in the courtroom, both in the witness box and more generally during the hearing. Beyond that, a judge must be cautious in undertaking a more profound assessment of a parent's psychological or emotional wellbeing on the basis of their presentation in court. Judges are not psychologists and the courtroom is a wholly artificial environment in which to carry out any form of sophisticated evaluation of personality or predictive behaviour.

66. The learned judge's conclusions that M would be 'unable' to avoid acting in a manner that frustrated a programme to reintroduce contact and is 'unable' to meet the children's needs by supporting contact are in the context of the judge also finding that M 'genuinely adheres to' her stated position of supporting the principle of direct contact as being 'in the best interests of her children'. The juxtaposition of those findings in paragraph 65 of the judgment when taken together can only amount to a finding that M is *psychologically* 'unable' to facilitate direct contact. In the light of the content of Dr G's evidence and the structure of the hearing whereby M's collapse occurred after Dr G had withdrawn, and in the light of the priority that the judge gives to M's collapse in the witness box in her own evaluation, it is my view that the learned judge was drawn into conducting her own assessment of M's psychological functioning to a degree that is unsafe when it is providing the central foundation for a conclusion as profound as that in the present case.

67. On my evaluation of the evidence available to the judge, such a finding was not open to her or, at the very least, was of insufficient cogency to support at that time a 'no contact' order. In addition to the obvious difficulties that Dr G had in assessing this aspect (one telephone call and then giving evidence prior to M's going into the witness box and at a time when M's position was not opposed to contact), the only direct source of information on this important matter was M herself. The capacity for M's testimony in this regard to be self-serving is plain. The judge accepted M at her

word (paragraph 57) in stating, as 'an honest answer', that she could not cope with direct contact and found the idea 'exhausting'. The judge is, however, plain that she had a great deal of difficulty with much of M's evidence, which was inconsistent and confused. In at least one important respect (did child A say 'strangling'), M was prepared to make a serious allegation which was just not true, but which she explained as the result of 'thinking off the top of my head'.

68. The judge's finding as to M's inability to meet the children's needs by supporting contact is the primary, if not the sole, reason upon which she based her decision to refuse direct contact. Other factors relating to the ability of the children to be encouraged to take part, the proposed role of HW and the adverse impact of a failed attempt were to a large degree ancillary to this main factor. A proper evaluation of the cogency of the evidence inevitably leads to the conclusion that the material available to the judge could not support a 'no contact' order at this stage. Thus for this reason also the appeal must be allowed.

Contact Order

69. Having determined that the appeal should be allowed, it is necessary to consider the options for the future conduct of the case. No party submitted that there should now be a retrial. M's position remained that she was unavailable (to put it neutrally) to engage in any further assessment or therapy. The option of adjourning the case to allow time for M to improve her ability to meet her children's needs with respect to contact was therefore unlikely to move matters forward. This court has therefore had to contemplate arrangements for the restarting of contact with the paternal family without M's support or positive engagement with the process. The guardian submitted that the best way forward, in an admittedly very difficult situation, was to implement his proposal for a gradual reintroduction using HW as an intermediary under the guardian's close guidance and supervision. Having noted that the learned judge expressly contemplated HW recommencing contact at this stage, but also noting the reservations of M, Dr G and the judge about HW's role being elevated into that of a semi-professional, we concluded that guardian's proposal was the best available option on the basis that the arrangements would proceed under Mr C's control and would be subject to the continuing availability of the court for further determination and direction if required.

70. This process will now move forward without M having undertaken the work that the other parties, Dr G and the judge all consider is necessary to improve the ability of her children to achieve a positive relationship with F and to reduce the potential for these two young girls, her daughters, to be further harmed by the emotional fall out from the adult relationships. In the postscript that follows I offer the clear view that a parent has a responsibility and a duty to do what they can to meet their child's needs in terms of achieving contact with the other parent just as much as they do in any other respect. I do not underestimate what is being asked of M; it will be tough, just as what was required of F will, in similar terms, have been tough. I hope that M can at least see that for her to face up to what is required and, if possible, undertake appropriate therapy is now what she needs to do, not for F's sake, but for the sake of her children. The order that we have made does not depend upon M looking to engage in therapy, but it certainly does not prevent it and it is my earnest hope that she does indeed now face up to her responsibility and do so to the best of her ability.

71. Finally, in the light of our conclusions, we have taken the view that, notwithstanding her likely ability to take on board this ruling and professionally to work with it, from the point of view of the parties and the potential for the case to move forward in the direction that we have set, a different judge should now have the conduct of this case. We are grateful to Baker J for fixing an early hearing at which the identity of the new tribunal can be determined.

Post-script

72. Having determined the issues in this appeal, I return briefly to the concept of parental responsibility and the potential for it to be given greater prominence in the resolution of private law disputes as to the arrangements for the welfare of children.

73. The observations that I now make are part of a wider context in which the family courts seek to encourage parents to see the bigger picture in terms of the harmful impact upon their children of sustained disputes over the contact which is most neatly encapsulated in the words of Black LJ in T v T [2010] EWCA Civ 1366:

> "[The parents] must put aside their differences ... if the adults do not manage to resolve things by communicating with each other, the children inevitably suffer and the adults may also pay the price when the children are old enough to be aware of what has been going on. ... It is a tremendous privilege to be involved in bringing up a child. 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 that way is likely to remain with the children into their own adult lives."

74. In describing the statutory legal context within which decisions as to the private law arrangements for a child are to be made, I have stressed that it is the parents, rather than the court or more generally the state, who are the primary decision makers and actors for determining and delivering the upbringing that the welfare of their child requires. I have stressed that, along with the rights, powers and authority of a parent, come duties and responsibilities which must be discharged in a manner which respects similarly held rights, powers, duties and responsibilities of the other parent where parental responsibility is shared.

75. In all aspects of life, whilst some duties and responsibilities may be a pleasure to discharge, others may well be unwelcome and a burden. Whilst parenting in many respects brings joy, even in families where life is comparatively harmonious, the responsibility of being a parent can be tough. Where parents separate the burden for each and every member of the family group can be, and probably will be, heavy. It is not easy, indeed it is tough, to be a single parent with the care of a child. Equally, it is tough to be the parent of a child for whom you no longer have the day to day care and with whom you no longer enjoy the ordinary stuff of everyday life because you only spend limited time with your child. Where all contact between a parent and a child is

prevented, the burden on that parent will be of the highest order. Equally, for the parent who has the primary care of a child, to send that child off to spend time with the other parent may, in some cases, be itself a significant burden; it may, to use modern parlance, be "a very big ask". Where, however, it is plainly in the best interests of a child to spend time with the other parent then, tough or not, part of the responsibility of the parent with care must be the duty and responsibility to deliver what the child needs, hard though that may be.

76. Where parental responsibility is shared by a child's parents, the statute is plain (CA 1989, s 3) that each of those parents, and both of them, share 'duties' and 'responsibilities' in relation to the child, as well as 'rights … powers … and authority'. Where all are agreed, as in the present case, that it is in the best interests of a child to have a meaningful relationship with both parents, the courts are entitled to look to each parent to use their best endeavours to deliver what their child needs, hard or burdensome or downright tough that may be. The statute places the primary responsibility for delivering a good outcome for a child upon each of his or her parents, rather than upon the courts or some other agency.

77. Where there are significant difficulties in the way of establishing safe and beneficial contact, the parents share the primary responsibility of addressing those difficulties so that, in time, and maybe with outside help, the child can benefit from being in a full relationship with each parent. In the present case the emotional and psychological make up of the two parents, both separately and in combination, prevented easy contact taking place. Dr G advised that both parents needed to access support or therapy to enable them to approach matters in a different way. F engaged in the necessary work, but M declined to. It may have been in F's interests to do so, and M may have taken a contrary view; be that as it may, the only interests that either parent should have had in mind were those of each of their two children.

78. Parents, both those who have primary care and those who seek to spend time with their child, have a responsibility to do their best to meet their child's needs in relation to the provision of contact, just as they do in every other regard. It is not, at face value, acceptable for a parent to shirk that responsibility and simply to say 'no' to reasonable strategies designed to improve the situation in this regard.

79. The observations that I have made will be, I suspect, very familiar thoughts to family judges, lawyers, mediators and others. My intention in setting them out in this judgment is to give them a degree of prominence so that they may be brought to the attention of parents who have separated at an early stage in the discussion of the arrangements for their child.

80. Whether or not a parent has parental responsibility is not simply a matter that achieves the ticking of a box on a form. It is a significant matter of status as between parent and child and, just as important, as between each of the parents. By stressing the 'responsibility' which is so clearly given prominence in CA 1989, s 3 and the likely circumstance that that responsibility is shared with the other parent, it is to be hoped that some parents may be encouraged more readily to engage with the difficulties that undoubtedly arise when contemplating post-separation contact than may have hitherto been the case.

Lord Justice Tomlinson

81. I entirely agree.

Lord Justice Rix

82. I also agree. I would in particular like to underline my agreement with what Lord Justice McFarlane has said about the duties and responsibilities of parents.