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Everybody's Business: Applications for Contact Orders by Consent

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In February 2006, Wall LJ presented a report to the President of the Family Division on 13 cases in which 29 children, from 13 different families, were murdered by their fathers during contact (*Report to the President of the Family Division on the publication by the Women's Aid Federation of England entitled 'Twenty-Nine Child Homicides: Lessons still to be learnt on domestic violence and child protection' with particular reference to the five cases in which there was judicial involvement*). In 5 of the 13 cases contact was ordered by the court, and in 3 of those cases, an order for contact was made by consent. Allegations of domestic violence had been made in all the cases dealt with by the court. The **Family Justice Council** was asked to prepare a report for the President of the Family Division to consider, and make recommendations about, what approach should be adopted by the court when asked to make a contact order by consent, where domestic violence has been an issue in the case. The Council's report is published in January 2007. This article summarises its findings and main recommendations.

Background to the Report

The two 'Twenty-Nine Homicides' cases which gave Wall LJ particular cause for concern were those of the children described as TB, CF and OF.

The Case of TB

TB was strangled by his father during a contact visit on 28 December 2000. During the father's trial for murder, it emerged that he had also intended to kill TB's two brothers, to take revenge on TB's mother for leaving him. There had been contested residence and contact proceedings during the course of 2000. Mrs B made allegations of repeated and serious domestic violence against Mr B. Mr B admitted that he had slapped Mrs B, but claimed that it was in self-defence and that he still loved her. He accused her of taking drugs. He admitted he had taken over-doses of drugs while the children of the family were with him. Mrs B said that the three children had all witnessed assaults on her by Mr B. She also said that Mr B had assaulted TB. Nevertheless, she told the Children and Family Court Advisory and Support Service (CAFCASS) Officer that she was keen for TB to have as much contact as he wanted with his father, believing it to be very important.

In June 2000, a contact order was made, providing for staying contact between TB and his father. TB's staying contact with his father was suspended by the court in August 2000, after TB

telephoned his mother during contact to complain that his father had hit him and was being unkind to him. In September 2000, an order was made by consent that TB should reside with Mrs B. The contact order made in June was suspended pending the final hearing of the residence and contact applications. On 8 November 2000, a different circuit judge made an order by consent requiring Mrs B to take TB to stay with his father from 22 December 2000 to 28 December 2000. On 28 December 2000, Mrs B received a number of telephone calls from Mr B saying 'if I can't have you, you can't have TB'. On 27 or 28 December 2000 Mr B murdered TB. There was no discussion in court on 8 November 2000 about the circumstances in which the court had ordered that staying contact between TB and his father should be suspended earlier that year.

The Case of CF and OF

CF and OF, who were 6 and 9 respectively, were hanged by their father on 17 April 2000. He had been allowed to have unsupervised contact with them, even though he had been charged with assaulting the children's mother and maternal grandfather, and the police were investigating an allegation that the father had raped the mother at knifepoint. The mother alleged that the father had assaulted her on numerous occasions and that CF had witnessed assaults on her. Her divorce petition set out allegations of violence and harassment, but her statement of arrangements for the children said that she would afford the father reasonable contact. A number of injunction orders with a power of arrest attached were made during 1999 and in early 2000. The court welfare officer's report set out the mother's concerns about the father's violence and the safety of the children, if the father should behave in a similar way while caring for them. The father told the court welfare officer that he believed that any potential difficulties were caused by the boys being 'brainwashed' against him. He was angry about the terms of contact being circumscribed by the court, and felt that he should be able to see the children whenever he wished to. He would not acknowledge the significance of the criminal charges against him, which he thought were irrelevant to arrangements concerning the children.

As for the children's expressed wishes and feelings, the court welfare officer reported that CF expressed some reluctance to see his father, but was 'very unwilling to discuss the situation ... he seemed quite anxious and ill at ease during most of interview'. The court welfare officer recommended that the contact and residence proceedings should be adjourned for 3 months to await the outcome of the criminal proceedings, and to test the behaviour of the adults. It was also recommended that contact should be defined in the interim, but should not include overnight contact. On 6 April 2000, the district judge made an order by consent granting residence of the children to the mother and interim contact to the father, including staying contact. The criminal trial was due to begin on 23 May 2000. On the first contact visit after the order was made, the children were murdered by their father, who then killed himself. The district judge, when asked about the case by Wall LJ, commented the mother had a very competent solicitor and I am absolutely sure that he would have given her appropriate advice and would not allow her to be pressurised ... there had never been any suggestion of bad behaviour towards the children'.

Family Justice Council's Report and Recommendations to the President

Professor Judith Masson reported in the December 2006 edition of *Family Law* at [2006] Fam Law 1041 on the survey of the views and experiences of Resolution members in relation to contact, domestic violence and consent orders. The survey had been conducted by the **Family**

Justice Council to assist with the preparation of its report. In the course of preparing the Council's report, members of the Children in Families Committee, who were tasked with preparing the first draft for the Council's approval, also met representatives of the Family Law Bar Association, the Law Society's Family Law Committee, Families Need Fathers, Women's Aid, Refuge, CAFCASS, the Judicial Studies Board and Wall LJ himself. The committee was assisted by members of the Council's Domestic Violence Working Group, which includes representatives from the police and social services. The Council's main recommendations are as follows:

- A cultural change is required, with a move away from 'contact is always the appropriate way forward' to 'contact that is safe and positive for the child is always the appropriate way forward'.
- A Practice Direction embodying the guidelines in *Re L (Contact: Domestic Violence)*; *Re V (Contact: Domestic Violence)*; *Re M (Contact: Domestic Violence)*; *Re H (Contact: Domestic Violence)* [2000] 2 FLR 334 (*Re L*), suitably updated to reflect current best practice, should be issued. The Practice Direction should deal specifically with what should happen in cases where there have been allegations of domestic violence and the court is asked to make a consent order for contact.
- There should be renewed emphasis on the message that ensuring safety should be paramount when considering whether contact is in a child's best interests.
- A process of risk assessment should be undertaken by the court in every case in which domestic violence has been alleged or admitted, before a consent order is made.
- There should be improved multidisciplinary training on domestic violence issues for lawyers and the judiciary.
- Court forms should be amended to make it easier for the court to identify cases in which domestic violence is an issue and to enable more detailed information to be obtained at an earlier stage, to assist CAFCASS with screening for risk.
- The Law Society should strengthen the Family Law Protocol to make it clear that part of a solicitor's duty when acting for either parent in a contact or residence application is consideration of the safety and welfare of the child concerned.
- Consideration should be given to establishing a system of feedback to judges if cases in which orders had been made subsequently resulted in harm to the child.
- Her Majesty's Courts Service (HMCS) and the Department for Education and Skills (DfES) should explore how the family court process should be included within serious case or domestic violence homicide reviews.

Duty to Safeguard Children and the No Order Principle -- the Court's Dilemma

The philosophy of the Children Act 1989 is non-interventionist; it encourages settlement. The principle that the court should not make an order 'unless it considers that doing so would be better for the child than making no order at all', is so imbued in those working in the family

justice system, that if two parents present a court with an agreement about an issue or issues relating to their children, the court's normal reaction is to welcome that agreement. The thinking seems to be that the court should be slow to interfere or challenge the agreement, though in the cases identified as being of particular concern by Wall LJ, clearly the court should have adopted a much more interventionist role.

The Council's assessment of present practice is that the legal advice which is given, and the dynamics that exist within households where there is domestic violence, often lead to an agreement for contact, without the safety of the child or children concerned, or the parent with care, being properly addressed. Research has shown that often the advice given to victims of domestic violence is that they should look to the future and not dwell on the past. There is an assumption that contact will take place in any event, which often means that domestic violence issues are not being given sufficient weight.

The assumption that contact is in a child's best interests and that the court will order it whether or not it is agreed, sometimes results in pressure being put on victims of domestic violence by lawyers, or by the perpetrators of that domestic violence, to agree to an order. However, there is no empirical evidence of the positive benefits of contact per se -- it is the quality of relationships which contact supports that matter for children (J Hunt and C Roberts, *Child Contact with Non-Resident Parents*, Family Policy Briefing Paper No 3 (Oxford University Department of Social Policy and Social Work, 2004)). Put another way, contact with a loving and supportive parent is in the best interests of children; contact with violent and unstable parents may not be.

Guidelines in *Re L*

In *Re L*, the Court of Appeal heard four appeals grouped together to enable them to look at the issue of contact where there had been violence in the home. A joint report by two distinguished child psychiatrists, Dr Claire Sturge and Dr Danya Glazer, was prepared for the assistance of the court. The Court of Appeal also took note of the Children Act Sub[#8209]Committee of the Advisory Board on Family Law's Report on *Contact between Children and Violent Parents: The Question of Parental Contact in Cases where there is Domestic Violence*. One of the most important messages from the judgments was that the courts, family lawyers, the relevant agencies and the public need to be more aware of the issue of domestic violence and the effect on the children of assaults, threats and verbal abuse of one parent by the other. Four points were identified as being of particular significance in an application for contact:

- (1) the extent of the violence;
- (2) the effect upon the primary carer;
- (3) the effect upon the children; and
- (4) the ability of the offender to recognise his behaviour and attempt to change it.

Where violence has been alleged, it is a matter for the court to decide whether, if proved, that violence would be relevant to the issue of contact. If the court decides it would be relevant, the court must decide whether the allegations are proved or not.

The Council found that, in general, the guidelines in *Re L* are more honoured in the breach than the observance. Fact-finding hearings are rare. In the case of applications for consent orders, the *Re L* guidelines seem to be virtually ignored. The pressure on judges to get through full lists, particularly in cases which have been listed for in-court conciliation, is not likely to promote detailed scrutiny of cases where contact has been agreed. Moreover, the existence or extent of domestic violence may not be clear from the papers. Even where it is mentioned, there may be no supporting information.

The Council recommends that in any case where the response to an application for contact makes allegations of domestic violence, the case should not automatically be listed for conciliation, but should instead be listed for directions for consideration of whether there should be a fact-finding hearing to establish the nature and extent of the domestic violence alleged. The fact that the guidelines in *Re L* are just that, guidelines, appears to mean that proper regard is not paid to them. For that reason, the Council recommends that the guidelines in *Re L* should be embodied in a Practice Direction. The Practice Direction should specifically deal with what should happen when the court is asked to make a consent order for contact in a case where there has been an allegation of domestic violence.

Training

It was clear from our discussions with the various bodies referred to above that there is insufficient training for solicitors, barristers, magistrates and judges about domestic violence and its implications. The Bar has now said that compulsory training is needed for dealing with rape cases, but the Family Law Bar Association told us that it is still possible for barristers to undertake cases involving domestic violence without having had any prior training. The Council recommends that multidisciplinary training about domestic violence should become the norm for all lawyers who conduct family law cases. A domestic violence component should be included in both the initial family law training provided to barristers and solicitors and into ongoing professional development training.

Private law training for judges should include more extensive training in domestic violence awareness and risk assessment. Judges' continuation training in private law should regularly revisit domestic violence issues. As it is planned that in future family proceedings courts should hear more of the contact and domestic violence injunction cases currently heard by the county court, it is important that the magistrates and their legal advisers should have effective training in domestic violence issues. Dr Claire Sturge is a member of the Council's Children in Families Committee and has prepared a risk assessment checklist for judges which is appended to the Council's report.

Role of Solicitors and Barristers

The existence of domestic violence in a relationship can be a source of shame and pain to a client, whether the client is a victim or a perpetrator. Solicitors and barristers should encourage their clients to be open with them about any domestic violence which has occurred. There should be a mutual consideration by the lawyer and the client of the potential risk to the children (and the client) posed by any proposed contact agreement. A client who has been a victim of domestic violence may be over-ready to agree contact in the hope of appeasing the perpetrator. One can speculate that TB's mother may have agreed to TB's father having a residence order in respect of TB's brothers, and agreed the contact between TB and his father, because she feared the consequences, in terms of violence and harassment, of not doing so. Solicitors and barristers should be cautious when advising clients to agree arrangements for contact in cases where there are allegations of domestic violence. The safety of any proposed

cases where there are allegations of domestic violence. The safety of any proposed arrangements should be paramount.

Public Education

There is a need for public education to counteract the apparently widespread belief that contact with a non-resident parent must always be good, irrespective of the presence of issues such as domestic violence. The victims of domestic violence themselves may not be aware of the damage to children that can be caused by witnessing domestic violence, or the potential risks of contact with a violent parent. In their report to the court in *Re L, Drs Sturge and Glazer* pointed out that domestic violence involves 'a very serious and significant failure in parenting -- failure to protect the child emotionally (and in some cases physically) -- which meets any definition of child abuse'. That message needs to be repeated again and again, loud and clear, until it gains widespread acceptance.

Voice of the Child

The wishes and feelings of a child who has lived in a violent household have to be given appropriate weight. A child who has lived in a violent household may not want to have contact with a violent parent. How is that child's voice to be heard if there is no CAFCASS report and the parents present the court with an agreement for approval? Clearly, separate representation of children will not be appropriate in every case, but it should be considered in cases where there are highly conflicting accounts relating to domestic violence.

Extending Good Practice

CAFCASS operates effective screening for risk schemes in contact and residence applications in some areas of the country, which should be extended nationally. The information produced by this screening is often of great importance and assistance to the court. There may be a history of police call-outs to 'domestic incidents'. There may be significant previous criminal convictions or background of which one party to the proceedings was unaware and which was therefore not disclosed on Form C1A.

Supervised Contact

Unsafe contact is not acceptable simply because there is no supervised contact available. Nor should it be considered inevitable that contact should move from supervised to unsupervised. For example, where a parent is facing criminal charges for a violent offence against another family member, supervised contact is likely to be necessary for the protection of the child.

Conclusions

A judge making a consent order for contact is making a judicial decision that the order is in the child's best interests (s 1(1) and 1(5) of the Children Act 1989). Responsibility for making an order remains that of the judge and that responsibility is not waived because the order is by consent. Seeking agreement should never take priority over safety in cases involving domestic violence or any other form of child abuse. If agreement is reached, it is important to be sure that the agreed contact is safe. It also needs to be of good quality and the harm already suf-

ferred by children who have witnessed domestic violence has to be taken into account. Where contact raises questions of risk to the child and/or parent with care, these questions must always be addressed in any arrangement for contact. It should never be assumed that safeguards can be abandoned simply because there have been no incidents while they have been in place. Safeguarding children is 'everybody's business'; this means the court, CAFCASS officers, solicitors and counsel.

