Denning Law Journal 2009 Vol 23 pp 192-201

CASE COMMENTARY

FAMILIES NEED FATHERS – THE LIMITS TO LITIGATION

Re S (Transfer of Residence) [2010] 1 FLR 1785
Re S (a child) (transfer of residence: consent order) [2011] 1 FLR 1789

Mary Welstead[*]

In January 2010, a wholly deserving father was granted a residence order. As a consequence S, his twelve-year-old son, would have to leave his mother's home and go to live with him and his new family. Seven months later, in July 2010, the father left the court in tears having accepted that it was futile to continue with his struggle to activate the residence order. S had indulged in such negative behaviour, described in court as indicative of serious and entrenched parental alienation,[1] that the father gave in to the child's demands to remain with his mother, and a consent order was made to that effect. One month later, HHJ Bellamy, somewhat unusually given the

∗ Dr Mary Welstead PhD, MA (Cantab), MEd BSC (Econ) (London), CAP Fellow Harvard Law School, Visiting Professor University of Buckingham.

[11] Dr Weir, the child psychiatrist who was the expert in *Re S* explained parental alienation in this way: "There are children who show an extraordinary degree of animosity towards a parent with whom they once had a loving relationship. Most of these children will show some or all of [a cluster of psychological responses]. Within an individual child (and between children in the same family) the presence of the features can vary rapidly over time and place, but in their full manifestation are so surprising and unique as to be unforgettable. The proposed term 'Alienation' applies only to the cluster of psychological responses in the child with no need to presume a deliberate campaign of denigration by one parent. There is now research data supporting a multifactorial aetiology for 'Alienation' following parental separation, involving contributions from both parents and vulnerabilities within the child." (Re S [2011] 1 FLR 1789 at 1800. Munby J in *Re D (intractable Contact Dispute: Publicity* [2004] 1 FLR 126, preferred Dr Sturge and Dr Glaser's concept of 'implacable hostility' to so-called 'parental alienation syndrome' as discussed by Wall J in *Re O (Contact: Withdrawal of Application)* [2004] 1 FLR 1258.

nature of a consent order, decided to recount in full the history of the father's attempts over a long period of time to have a meaningful relationship with his son. The judge explained his reasons for doing so:

> "This has been an extraordinary case. The two Court of Appeal decisions attracted wide publicity. There has also been significant professional interest. Against that background I was persuaded that it would not be appropriate to end this case simply by the court approving an order agreed between the parties. … Mr Vater, counsel for the local authority, made the point that the story did not end with the last hearing before the Court of Appeal. He submitted that 'before that decision or those preceding it are relied upon in other, similar cases, either by any experts for the purposes of research or lawyers in support of their cases, the full story should be recorded.' I agree. That is the purpose of this judgment."[2]

Although, Bellamy HHJ, in *Re S***,** showed sensitivity and empathy towards the father, his judgments did nothing to further the father's just demands. They reveal the impotency of the law and the court process where a child demonstrates intractable parental alienation.[3] They are judgments which all parents contemplating litigation should read so that they are made aware of the limitations of law should they decide to engage in disputes over a child's residence or contact. All too frequently, these disputes are a form of displacement warfare for the unresolved problems of the adults' relationship, and have little to do with a desire to ensure their children's welfare.

The parents, in *Re S*, were both professional people. Their relationship had ended in 1998, not long before S was born. When S was fifteen months old, the father applied for contact but S was aged four by the time contact actually took place. Progress was made, and the father and his wife succeeded in having S to stay on alternate weekends and took him on holiday with his two half brothers. When S was aged eight, these arrangements fell apart. The mother's attitude to contact, which had never been positive, degenerated still further. Part of the reason for her increased hostility was because the father, perhaps unwisely in the judge's view, had organised DNA testing to make clear to her that he was S's biological father. The father had also applied to the court for an order permitting him to change S's name, had requested that

[2] Re S (Transfer of Residence) [2011] 1 FLR 1789 at 1794.

[3] In *Re D (Intractable Contact Dispute:Publicity)* [2004] 1 FLR 1226, Munby J said: "Unhappily, in my judgment, the court process does not always prove equal to the task of dealing with such cases." See also *Re M (Intractable Contact Dispute: Interim Care Orders)* [2003]2 FLR 636; *Re O (Contact:Withdrawal of Application)* [2004] 1 FLR 1258; *A v A (Shared Residence)* [2004] 1 FLR 1195.

he be allowed to send him to a private school, and had failed to return S to his mother after a visit. The mother reacted in a very negative manner, and by implication fostered a similar reaction in S. She ensured that S had extra curricula activities after school and every weekend; that way, there would be no time for contact between S and his father. She made no effort to encourage S to respond to his father's letters or telephone calls. She acquiesced in his rudeness to his father on the telephone, and gifts to S from the father and his family remained unacknowledged. Numerous court hearings were held but the father was unable to re-establish contact with S whose alienation had became intractable.

In December 2009, the father decided that the only way a meaningful relationship between him and S could be re-established was for S to live with him and his family. He applied for a residence order which HHJ Bellamy granted. It was a difficult decision to make; he had been faced with a difference of opinion between the original guardian ad litem, who had become over emotionally involved with S and had lost her sense of objectivity, and the expert appointed by the court, a consultant child psychiatrist. The guardian believed that S was traumatised by the dispute between his parents and the legal proceedings; that the court proceedings should be brought to an end; that contact between S and his father should cease, and S should remain with his mother and undergo therapy. The psychiatrist disagreed; he believed that therapy would be pointless unless it took place alongside contact between S and his father. He thought that the mother had opposed and undermined contact for too long; the guardian's approach would allow her behaviour and S's alienation to continue. He viewed S's expression of his wishes and feelings as irrational, and that they should not to be taken into account. In his view, the father would have to be very persistent with S in the initial stages of renewed contact and not give in, even if this meant that S might threaten to sabotage the new arrangement by refusing to eat or communicate. In his experience S would cease such behaviour within a day or two.

HHJ Bellamy reiterated the principle that any decision about S's residence must be taken in his best interests under the Children Act 1989 s 1. He accepted that s 1(3) of the Act and the United Nations Convention on the Rights of the Child 1989, did not permit him to disregard S's views about where and with whom he should live. He quoted Butler Sloss LJ's words in *Re S (Minors) (Access: Religious Upbringing)*[4] relating to the views of children aged 13 and 11: "Nobody should dictate to children of this age, because one is dealing with their emotions, their lives and they are not packages to be moved around. They are people to be treated with respect."

However, he believed that S's wishes had to be considered in the light of his age and understanding, and his long-term parental alienation. There was a

[4] [1992] 2 FLR 313 at 321.

suggestion that S's wishes and feelings were not entirely reliable. He had shown some limited signs of warming towards his father, a man whom the judge regarded favourably, if occasionally a little lacking in foresight. The mother was seen as meeting S's general needs to a high standard, but that, on her own admission, she had lost control of S, and was unable (or unwilling) to ensure that he had contact with his father. Balancing all the relevant factors, the judge concluded that S had suffered harm as a consequence of his parental alienation. S had distorted and unreal views of his father and his paternal family; he maintained that he hated him and that he was a monster. Were this alienation to continue, it could damage S's future welfare and lead to academic under achievement and relationship difficulties. The father was more likely to be able to meet the full range of S's needs than the mother. He had recognised where he had gone wrong and the need for change, and had acted on it. He would encourage contact between S and his mother. She was unlikely to do the same for S and his father if S were to remain in her care, therefore, a residence order was the appropriate way forward.

The mother immediately made an application to appeal the decision; it was dismissed by the Court of Appeal,[5] and the case was sent back to HHJ Bellamy to decide the best means of proceeding with the transfer of S to his father's home. The judge's plan was immediately derailed because, not surprisingly, the mother complained of chest pains and was admitted to hospital on the day the handover was due to take place. There was nothing seriously wrong with her and she was discharged from hospital later that day. A further plan was made, and a new guardian ad litem and a solicitor for S were appointed. The local authority allocated a social worker for S who objected strongly to the new plan and stated adamantly that he would rather go into local authority foster care than live with his father. By that time, the case had been before HHJ Bellamy eight times since he had granted the residence order. He was concerned about the uncertainty for S which was likely to be unbearable. To delay the decision any further would be contrary to S's best interests; it was time to act. He ordered the mother to take S to his father's home. If she failed to do so, the Tipstaff would be asked to make the transfer.[6]

S appealed. In giving the leading judgment, Thorpe LJ decided on a stepping stone approach, albeit a rapid one, as a more appropriate way forward than the immediate removal of S to his father's home. S should be moved into foster care for three weeks, after which, he would go to live with his father. During that time, the father would have the opportunity to have direct contact with S, whilst the mother's contact would be limited to short, supervised telephone communications. These calls were to be supportive of

[5] *Re S (A Child)* [2010] EWCA Civ 219.
[6] *Re S (A Child)* [2010] EWCA B2 Fam (unreported).

the ultimate goal of the Court - the transfer of residence to the father. Any negativity, either expressed or implied, on the mother's part would put an end to any further telephone calls with S.[7] S was shocked by the decision. He maintained that " … he would refuse to see his dad and then the Court would see that it was his view."[8]

After a tearful departure between S and his mother, the foster care placement went ahead, as did the contact between S and his father. Throughout the contact periods S sat with his head in his lap and his hands over his ears. He would not engage with his father and made clear that he neither wanted to see him nor live with him. The social worker became concerned about the effect of the meetings on S, as did the guardian ad litem. They thought that he was being put under unacceptable pressure and that the demands on him were extreme. His emotional and mental health was at risk. The father was made aware of these concerns and agreed that S should return to his mother under the auspices of the interim care order. He explained to S that he could not bear to see him so unhappy and therefore wanted him to go back to live with his mother. S was extremely happy at this outcome and returned home. For a while, the local authority remained committed to S's eventual move to live with his father, and further contact sessions were arranged. Yet again S refused to engage. The local authority social worker explained that:

> "Throughout the transfer stepping stone process, S has carried out his expressed intentions of "nil by mouth" and non-engagement, despite significant persuasion, efforts and pressure by professionals, both parents and extended families…The Local Authority is clear that it is S who is refusing to engage and carry out his acts of self harm, as proof and evidence of his intentions if forced to move to live with his father…The Local Authority cannot take any further part in direct contact, which S is not willing to be part of…At this stage an effective and successful transition between the two homes cannot be made without causing S significant harm…"[9]

The guardian agreed with this statement, and it was decided to follow another approach at the suggestion of the father. Assistance was sought from the Director of the Centre for Separated Families, Ms Woodall. She proposed that intensive therapeutic work with the parents and S should take place. Thirteen sessions took place, and in addition, there were three direct contact sessions between S and his father. The Director detected small but significant

[7] *Re S (A Child*) [2010] EWCA Civ 325.
[8] Re S (Transfer of residence) [2011] 1 FLR 1789 at 1795.
[9] Ibid at 1796.

signs of progress. She proposed that the work should continue for several months and that the plan for a change of residence should be abandoned for the present. The expert child psychiatrist forcefully disagreed:

> "I do not share Ms Woodall's optimism that further therapeutic intervention will succeed…This is a serious and entrenched case of alienation…and it has been and remains my opinion that therapy is unlikely to succeed in overcoming S's resistance to any form of relationship with his father's family. … The difficulty I have is that although the local authority is hoping reason will prevail and S will come round to accepting the inevitable, I think it is unlikely. The delay allows a period when attitudes can become entrenched, behaving badly, and further risk of harm occurring…at the end after the work and negotiation there will still be the same situation where we have to force him to live with his father. Even if he is willing to go into foster care, which is a good thing because it avoids a scene at the time, the bad thing is that we are not dealing immediately with what is ultimately necessary, that is, to make him to go live with his father."[10]

The father was dismayed at the possibility of further long-term therapy with no indication of when and if the residence order would take effect. His wife had recently had a miscarriage; he decided to give up any idea of S living with him or even having direct contact with him. HHJ Bellamy welcomed this; he believed that in the light of S and his mother's conduct over the last seven months, it was the right way forward for S. A consent order was made; S would reside with his mother, and there would be a supervision order in favour of the local authority for one year, which the local authority might seek to extend. The father would have indirect contact only, by way of school reports and photographs. Any other contact would take place only if S requested it, and neither parent would be allowed, without the permission of the court, to make any further application in respect of S before his sixteenth birthday. After the final consent order was made, the guardian ad litem and the social worker emailed HHJ Bellamy to give him details of their final meeting with S and his father. At this meeting, the father had read out a letter to his son explaining why he had decided not to pursue the residence order. The meeting had been extremely difficult for him because he realised that there was no further hope of contact with S in the near future. S had told the guardian and social worker that he might consider seeing his father in his own time and on his own terms. The father was heard sobbing as he left the meeting. The failure of the activation of the well thought out residence order, in *Re S*, and its replacement with a consent order raises a number of issues:

[10] Ibid at 1798.

the role of European jurisprudence in determining parental contact disputes; the problematic nature of parental alienation which is a serious stumbling block for the enforcement of parent/child relationships, and how to deal with it; the appropriateness of force for children who are implacably opposed to contact with a non-resident parent, and finally, the limitations of the family justice system in resolving parental contact disputes.

The European Court of Human Rights (ECtHR) has emphasised the importance of Art 8 of the European Convention on Human Rights 1950 (ECHR), the right to family life, and Art 6, the right to a fair trial. Thorpe LJ in *Re T (a child: contact),*[11] suggested that the methods and levels of investigation used in the English courts might not meet the standards required by the ECHR. Munby J in *Re D (intractable Contact Dispute : Publicity)*,[12] took a similar approach and said: "We can no longer simply complacently assume that our conventional domestic approach to such cases meets the standards required by Art 6 and Art 8."[13]

The right under Art 8 includes, unless there are forceful reasons against it, a right for the children of separated parents to know, love, and enjoy the company, of both their parents. The majority of non-resident parents are fathers and it is acknowledged that they have an important role to play in the lives of their children; contact between a non-resident parent, of either gender, and a child should only be abandoned when there is absolutely no alternative.[14] In *Kosmopoulou v Greece,*[15] the ECtHR maintained that "the mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life, even if the relationship between the parents has broken down…"[16] In *Hokkanen v Finland,*[17] the European Court of Human Rights (ECtHR) held that Art 8 provided: "a right for the parent to have measures taken with a view to his or her being reunited with the child and an obligation for the national authorities to take such action."[18] The ECtHR has accepted that the right under Art 6 includes the right to have court orders enforced. In *Hornsby v Greece*,[19] the Court said that:

---

[11] [2003] 1 FLR 531.
[12] Above n 2.
[13] Ibid at 1241.
[14] See http://www.fnf.org.uk/ for details of the interest group Families Need Fathers which campaigns on behalf of parents and children to be allowed to have contact with each other.
[15] [2004]1 FLR 800.
[16] Ibid at para [45].
[17] [1996] 1 FLR 289; see also *Gluhakovic v Croatia* [2011] 2 FLR.
[18] [1996] 1 FLR 289 at para [55].
[19] (1998) 2ELR 365; see also *Immobiliare Saffi v Italy* (1999) 30 EHRR 756.

> " … it would be illusory if a contracting state's domestic legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party. It would be inconceivable that art 6(1) should describe in detail procedural guarantees afforded to litigants—proceedings that are fair, public and expeditious—without protecting the implementation of judicial decisions; to construe art 6 as being concerned exclusively with access to a court and the conduct of proceedings would be likely to lead to situations incompatible with the principle of the rule of law which the contracting states undertook to respect when they ratified the Convention. Execution of a judgment given by any court must therefore be regarded as an integral part of the "trial" for the purposes of art 6…"[20]

The extent to which a child should be forced to have contact with a parent once a court order has been made in that parent's favour was considered in *Ignaccolo-Zenide v Romania.*[21] The ECtHR stated that: " … any obligation to apply coercion can only be limited since the interests, rights and freedoms of all concerned must be taken into account, and more particularly the best interests of the child and [his or her] rights under Article 8 of the Convention." This view was elaborated in *Kosmopoulou v Greece*:[22]

> "…the national authorities' obligation to take measures to facilitate reunion is not absolute, since the reunion of a parent with children who have lived for some time with the other parent may not be able to take place immediately and may require preparatory measures to be taken. The nature and extent of such preparation will depend on the circumstances of each case, but the understanding and co-operation of all concerned is always an important ingredient. Whilst national authorities must do their utmost to facilitate such co-operation, 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 the best interests of the child and his or her rights under art 8 of the Convention. Where contact with the parent might appear to threaten those interests or interfere with those rights, it is for the national authorities to strike a fair balance between them."[23]

[20] (1998) 2 ELR 365 at para 40.
[21] (2000) 31 EHRR 212.
[22] [2004] 1 FLR 800.
[23] Ibid at para [45].

The importance of the rapid conclusion of parental disputes was emphasised in *Hoppe v Germany*,[24] according to the ECtHR: "… in cases concerning a person's relationship with his or her child, there is a duty to exercise exceptional diligence in view of the risk that the passage of time may result in a de facto determination of the matter."[25]

In *Re S*, European jurisprudence was hardly mentioned. Can it be said that the decision conformed with the views expressed by the ECtHR? The answer must be not entirely. With respect to Art 8, the court certainly recognised the right to family life by way of contact and residence for S with his father. However, it failed to carry through the activation of its decision. The disagreement between the guardian and the social worker, with the views of the expert psychiatrist on the best way to proceed with the transfer of residence led to confusion, delay, and, in effect, a revisiting of the decision to grant the order. It is all too easy for professionals to unpick a residence order by the provision of yet more delaying reports. Munby J in *Re D*,[26] drew attention to the correct role of such professionals which is to facilitate orders for residence or contact. Once the court had accepted that the view of the psychiatrist should prevail, should it have been more precipitous in forcing S, against his will, to move to his father's home? The answer must be a resounding yes. Over a four-year period S's determination not to relate to his father, impliedly helped by his mother, had become deep rooted. By the time he had reached the age of twelve, he found himself in a position of power, and able to sabotage a court order made in his best interests by means of totally negative behaviour.[27] This outcome is hardly a good message to give to a young person, or a resident parent; it suggests that conduct, tantamount to blackmail, works. Of course, a child has a right to have his or her views taken into account in accordance with his or her age and emotional competence, but once the court has done so the child must accept the consequences of that decision and be helped to cope with them rather than evade them. S's immediate distress, which was likely to be short lived according to the psychiatrist, would be compensated by the positive benefits on his emotional and social maturation which would endure for the rest of his life. Few twelve year olds, on the verge of adolescence, have the ability to see the long-term consequences of their immediate actions and are not expected to do so.

Implacable parental alienation seems to have been regarded by the court as an implacable problem. As long ago as 1994, Balcombe LJ, in *Re J* (a minor) (contact),[28] maintained that if a child is violently opposed to contact

[24] [2003] 1 FLR 384.
[25] Ibid at para [54].
[26] Above n 2.
[27] See also *M v M [1998] 2 FLR*; *Re J (a minor) (contact)* [1994] 1 FLR 729.
[28] [1994] 1 FLR 729.

with a 'good' non-resident parent, it must be assumed that this stems from the resident parent's negative influence, particularly if the child is very young. By implication, it would certainly seem to have been true in S's case. Parental alienation must not be allowed to fester. It should be identified as rapidly as possible, and swift action must be taken against the resident parent, even to the extent of imposing fines or imprisoning the parent. Munby J, in *Re D,*[29] suggested that short-term imprisonment, if only for a matter of days, might be sufficient to change a recalcitrant parent's approach without damaging the child.

The adversarial nature of the court process is so often not appropriate for the task of dealing with parental contact disputes.[30] The majority of family court judges believe in the need to move to a non-adversarial approach, wherever possible, one which involves mediation and which emphasises cooperation between parents to further the best interests of their children.[31] Deadlines must be set and delays avoided at all costs. If a case has to go to court because greater judicial input is required, there must be judicial continuity, and strict judicial control of the process to ensure a swift resolution of the dispute. It may be that the recommendations in the final report of the Family Justice Review, which is expected in autumn 2011, if acted upon, will redress some of the difficulties inherent in the current system which has failed both children and their non-resident parents. Until there is a major change in the way parental contact and residence disputes are handled, well deserving non-resident parents will remain at risk of remaining reluctant absentees in their children's lives. A meaningful relationship between them will be lost to the long-term detriment of both parent and child.[32]

[29] Above n 2.
[30] Above n 2.
[31] See *Re O (Contact:Withdrawal of Application*) [2004] 1 FLR 1258.
[32] See R Bird "Reflections on the Family Justice Review" [2011] *Family Law* 737.