10 pages

ROYAL COURT
(Samedi Division) 123

30th June, 1997

Before: Sir Peter Crill, K.B.E., Commissioner,
and Jurats Le Ruez and Jones

Between:	F	Plaintiff
And:	S	Defendant

Advocate M.P.G. Lewis for the Plaintiff.
Advocate D.G. Le Sueur for the Defendant.

JUDGMENT

THE COMMISSIONER: This is an application by a father whom we shall call "F" of an illegitimate child whom we shall call "Z" born on 20th July, 1994, as a result of F's liaison with Z's mother, whom we shall call "S" to be allowed access to that child.

The relationship of F and S was volatile and there were several separations although at one time they appeared to be engaged and S was given a ring as a token of that relationship.

The nub of that relationship was very clearly described in the Children's Officer's report as follows:

> *"It is understandable that these two people, so damaged and insecure as a result of their earlier experiences, found it impossible to meet the needs of each other successfully. Whatever the reason the relationship was certainly not stable and was at times volatile with frequent separations ....".*

F had intermittent access after Z's birth having moved in once again with S sometime previously; it matters not whether it was four weeks or four months. That access was exercised quite successfully apart from one period in mid-summer 1995 until 20th November, 1995. Events on that night convinced S that access must stop and this she did.

Some maintenance continued to be paid for Z by F after access was refused, either by opening a savings account for Z or paying occasional amounts to his lawyer. I shall return later to a fuller narrative of events.

The Order of Justice is unusual in that it asked the Court to order the plaintiff to pay maintenance at the rate of £20 per week. The answer supports that prayer but includes a similar claim for £20 per week maintenance together with arrears and interest. Both counsel, to

whom the Court is indebted for their help in this difficult case, appear to agree as to what the law is governing cases of this sort.

First, it is accepted that the *"welfare of a child is of paramount importance"*. That statement is to be found in the case of Robinson -v- Robinson (1965) JJ 515 and in fact these words are identical to those used in the English statute: section 1 of the Children Act 1989. Secondly, it is a grave step to deprive a father of access to his child. This of course applies equally to a child of illicit liaisons as it does to those of a lawful marriage.

In W -v- H (23rd June, 1987) Jersey Unreported, the Court said this:

> *"And we agree certainly that it is a grave step to deprive a child of access to one parent, and we agree also that a decision should not be taken lightly and it should be taken only in the gravest circumstances. It is indeed a grave step and I cite the case which was referred to by the husband, of M -v- M in 1973 - I am sorry that I do not have the exact reference, but it does not matter.* (In fact it was M -v- M (Child: Access) [1973] 2 All ER 81). *The Judge said (it was Wrangham J) -*
>
> *"The companionship of a parent is in any ordinary circumstances of such immense value to the child that there is a basic right in him to such companionship. I for my part would prefer to call it a basic right in the child rather than a basic right in the parent. That only means this, that no court should deprive a child of access to either parent unless it is wholly satisfied that it is in the interests of that child that access should cease, and that is a conclusion at which (I think it means to which) a court should be extremely slow to arrive"."*

The judgment of the Jersey case of W -v- H continues:

> *"And then there was a comment on that case in a subsequent case in "Family Law and Society Cases and Materials" by Hoggett and Pearl published by Butterworth in 1983, on p.387 where the author says -*
>
> *"It seems to me that the only way (in) which one can really reconcile S -v- S and P with the cases that followed, C -v- C and still more B -v- B, is to say that what Willmer LJ meant was that the companionship of a parent is in any ordinary circumstances of such immense value to the child that there it is a basic right in him to such companionship"."*

However, it follows that for that companionship to weigh with a Court, firstly, the child must be of sufficient age to enjoy that companionship. And, secondly, that companionship would be of positive benefit to the child. Thirdly, the Court may make such Order in the child's best interests as it thinks fit taking into account, of course, the tie between a natural father and the child. The authority for that proposition is to be found in the case of Thomas -v- O'Shea (22nd September, 1988) Jersey Unreported which in turn was confirmed by Harrison -v- Deeming (16th September, 1994) Jersey Unreported.

We were referred to a number of English cases to which we may properly turn because of the wording of section 1 of the Children Act 1989 to which I have already referred. The first case is indeed that of M -v- M to which I have already referred and which was cited in the Jersey case of W -v- H, but contained in M -v- M is also this passage:

> *"I do not believe that in modern times they* (that is to say cases referring to a basic right of access of the non-custodian parent) *were meant to convey any other meaning* than this (my words I interpolate the words "than this"). *They mean and are meant to mean not that a parent has any proprietorial right to access but that save in exceptional circumstances to deprive a parent of access is to deprive a child of an important contribution to his emotional and material growing up in the long term."*

In Re B (Minors: Access) [1992] 1 FLR 140 supports the view that eccentricity *per se* is not a sufficiently cogent reason for refusing access. But in our view untrammelled bad temper may be. In the case of Re H (Minors: Access) [1992] 1 FLR 148 are set out the questions which a Court must ask itself in a matter of this nature. I refer to a passage on p.152 of that judgment where Balcombe LJ is referring to the questions that the Judge whose judgment was appealed should have asked himself:

> *"It seems to me that Miss Morgan is correct in her submission that Judge Heald applied the wrong test in this case and he should have asked himself the question: are there here any cogent reasons why this father should be denied access to his children?; or putting it another way: are there any cogent reasons why these two children should be denied the opportunity of access to their natural father?"*

Furthermore, on the same page there is introduced the concept of risk and I quote from letter G:

> *"If I had been of the view that there would be undue risk in introducing H-y afresh to her father, I would still have thought it right to introduce H-r to him. In fact, I am by no means satisfied it would be an undue risk to reintroduce access for both children, and I propose to deal with that shortly".*

Accordingly, the question of an undue risk is also something that this Court has to bear in mind.

The last case which Mr. Lewis kindly supplied us with, on behalf of the plaintiff, was a very recent one and as he rightly said it was "hot off the press". It was Re M (a Minor) [1997] TLR and in that case an earlier case was referred to in a passage which we have found helpful. The learned Judge is dealing with the Assistant Recorder and goes on:

> *"She approached this question by reminding herself of the test that had recently been suggested by Mr. Justice Wall in Re P (Contact: Supervision) [1996] 2 FLR 314, to the effect that contact is almost always in the interests of a child and should not be prevented unless the order would hinder the welfare of*

> *the child. In other cases in this court, of which there are many, the test has been suggested that contact should not be prevented unless there are cogent reasons for doing so."*

The problem for this Court in considering the case of Re P (Contact: Supervision) [1996] 2 FLR 314 CA and the case of Re O (Contact: Imposition of Conditions) [1995] 2 FLR 124, which I am now going to mention is that although supervised access at this stage might be possible we have to take into account the effect of unsupervised access that might follow fairly soon afterwards. After all, a father entrusted with supervised access after a delay in not seeing the child and having supervised access in order to be re-introduced to him may, if the supervised access goes well, reasonably be expected to look forward to unsupervised access in due course. And it is worth noting, indeed, that F had at least one night of staying access in 1995. The passage in Re O cited in Re M (a Minor) is to be found at the bottom of p.10:

> *"In Re P (Contact: Supervision), to which our attention was drawn, there is quoted an important passage in the judgment of Sir Thomas Bingham MR in Re O (Contact: Imposition of Conditions) [1995] 2 FLR 124, where the Master of the Rolls said this:*
>
> > *"The courts should not at all readily accept that the child's welfare will be injured by direct contact. Judging that question the court should take a medium- term and long-term view of the child's development and not accord excessive weight to what appear likely to be short-term or transient problems"."*

The question for us really is this: is the court satisfied that F's admitted bad and uncontrolled temper (although he has been seeking help as I shall point out in a moment since April, 1997) is in fact merely transient at this stage?

Mr. Le Sueur for the defendant, S, added two cases to those we have been considering. The first was that of Re SM (A Minor) (Natural Father: Access) [1991] 2 FLR 333. In that case a warning was issued to Courts in general - not specifically - not to apply something described as *"the theoretical general principle of access being maintained between a child and natural father"* too rigidly without considering the practical consequences of such access.

The second case is that of Re D (A Minor) (Contact: Mother's Hostility) [1993] 2 FLR 1 and in that case the question of the hostility or implacability of a custodian mother to access by the natural father was considered. The third headnote to that case reads as follows:

> *"The implacable hostility of the mother towards contact was a factor which was capable, according to the circumstances of each particular case, of supplying a cogent reason for departing from the premise that a child should grow up in the knowledge of both his parents. The mother's attitude towards contact put the child at serious risk of major emotional harm if she were compelled to accept a degree of contact with the natural father against her will, and this view was supported by the welfare officer."*

On p.4 of that case, Balcombe LJ, in considering a number of cases, mentioned this one at letter D:

> *"The second of the three cases which I mention is that of Re BC (A Minor) (Access) [1985] FLR 639, which was again where access was refused to a father and the appeal was dismissed). The headnote reads as follows:*
>
> > *"The judge had plainly accepted that, in the generality of cases, it was considered in the best interests of a child to maintain contact with both parents. But, as the judge had recognised, there were exceptions. He had found that this case was an exception, in that the child was not likely to receive any benefits from contact with the father and, indeed, might suffer detriment if further attempts at access were made. There was no ground upon which the order or the way in which the judge approached the case could be criticised"."*

One must add a note of caution there of course. One must not extract from a particular set of facts in a case principles to apply to a different set of facts, if the facts do not tally completely. The second matter in the headnote was this - and this is the more important part of the two extracts from the headnote:

> *"If the effect of the conduct of a non-custodial parent was such as to cause genuine and justified anxiety in the mind of the custodial parent so as to possibly to affect her care of the child, then, although that conduct might have no direct effect on the child in the sense that the child was not being ill-treated, the effect on the custodial parent was something the court would have to take into account."*

The plaintiff is an engineer in steady employment and well thought of by his employer, for whom he has worked for five years. He is equally well thought of by his fellow sportsmen.

It is true he has four convictions, two of which relate to events connected with this case. There was one, however, for smoking cannabis in 1991 before he met S. S says that she found a wad of something in a matchbox when she was asking for matches, on one of the occasions when he was in the house, which she says was a drug.

So far as the plaintiff is concerned he admits he has a temper but tries to control it. He says that his bark is worse than his bite. As he put it, after moving in with S in early 1993, he was kicked out in January, 1994, but returned as I have already mentioned, shortly before Z's birth in July, 1994, and remained until January, 1995. Indeed, the family - if I may put it like that - went on holiday together at Christmas in 1994 and we were shown a number of photographs where quite clearly Z is enjoying herself with her father. Nevertheless, S says that it was not a happy time and that in fact she went along with it in the hope that matters would improve. She herself had had two previous marriages and a young son, B , from one of them lived with her and, when F was there, with him.

In January, 1995, F admitted a relationship he was having with another woman. There was some sort of reconciliation attempted, with intermittent sexual intercourse, up to November, 1995, and, as I have said, some irregular but nevertheless quite persistent access to Z by F.

On 19th November, 1995, S told F that she was seeing someone else and he was very annoyed. No hint had been given by S of what she was proposing to do and indeed she had sent a number of letters and postcards which show on the face of it during 1995 that she had a loving relationship with F and loved him. She says that she did this to help him come to terms with his lack of confidence. However, it is not for us sitting here in this particular case to judge the relationship between F and S except as that may bear on Z's welfare.

On 20th November, 1995, F went back to S's flat. He banged on the door in the course of which some glass was broken. He shouted abuse and frightened those who were inside, including S, a friend of hers who acted as a nanny, Miss G , and Z who was taken upstairs by Miss G , frightened and screaming. Miss G herself was shaken by what had happened. She was not cross-examined and therefore her testimony stands unimpeached. F demanded that S should give him back a telephone which she had given to him for his birthday earlier that year and eventually she passed it through the broken glass to him. There is evidence from S that that night had had a bad effect on Z. She became frightened of noise and of men. Happily she is now a contented child.

A number of results flowed from that outburst of uncontrolled temper by F. The first was that S obtained an Order of Justice containing an injunction on 5th December, 1995. In that Order of Justice there is contained an allegation that on the following day, that is to say the day after 20th November, 1995, F telephoned S using abusive language and threatened to throw acid in her face in order to prevent her from seeing her daughter. It is pertinent to note that that Order of Justice was not answered and the injunctions were imposed which were as follows:

> *"THAT service of this Order of Justice upon the defendant shall operate as an immediate interim injunction restraining the defendant whether by himself, or his servants or agents in any manner whatsoever from:*
>
> *(i) harming, molesting, threatening, harassing or otherwise interfering with the plaintiff;*
>
> *(ii) approaching the plaintiff or her children;*
>
> *(iii) communicating, whether in person, in writing or at the telephone, or in any other way whatsoever, with the plaintiff;*
>
> *(iv) communicating whether in person, in writing or at the telephone, or in any way whatsoever with the plaintiff's known friends, relations, associates and employers;*
>
> *(v) entering the residence from time to time of the plaintiff or approaching within one hundred yards thereof."*

The defendant, F, did not fully observe those conditions and in fact he was before the Court on 21st June, 1996, for a number of breaches, some of which he admitted, some he denied, but he was warned by the Court to observe the injunction which indeed is still in force.

The second matter arising from the events of the night of 20th November was that F was prosecuted by the police and charged with a breach of the peace and bound over for one year. He then decided, not unreasonably the Court finds, that it would be appropriate to have a Children's Officer's Report on Z. But for reasons which we need not go into that was challenged (as to whether the Court indeed had the power, so we understand, to order such a report) until the very last minute which delayed of course the application by F to this Court for access. He remained impatient and pressed the Children's Officer for that report.

On 16th January, 1996, an appointment was made for him to meet the Officers at the Children's Office. The report had been completed and in that report the two Officers, Mrs. Andrews and Mr. Wherry, both Officers of considerable experience, had expressed the view that access should not be granted. But before Mrs. Andrews could explain why they had reached that conclusion F became violent in an uncontrolled manner, grabbed the report, rolled it up, so Mrs. Andrews told us, and banged it on the desk, shouting and swearing. Although Mrs. Andrews had had other difficult parents to deal with in access cases she said that this was the most extreme case she had had. He left shortly afterwards and returned with a knife and threatened to cut his wrists saying that the Officers would have a death on their hands. The police were sent for. He was later charged with having an offensive weapon and with the theft of the papers. These two allegations were dismissed by the Magistrate. In respect of the breach of the peace with which he was also charged he was bound over for three years.

[Break in recording: new tape fitted].

Subsequently F had some eleven to twelve sessions with Mrs. Pauline Dowse, Cert. CSCT in an attempt to receive help to come to terms with his temper. At about the same time he started, together with some other men, an association called "Families need Fathers". S says that was a ruse to get the sympathy of this Court. We are not called upon to adjudicate whether this is so or not.

We were impressed by the evidence of Mrs. M, a close neighbour of the parties - in fact she lived in the flat above. Although she was more cautious in the witness box and less outgoing, according to Mrs. Andrews, who heard all the evidence in the Court, than when she was seen by the Children's Officers, her evidence is clear. As a result of F's activities on 20th November, 1995, S and Z were put in fear of him.

The allegations as to what took place that night (in addition to the question of the acid to which I have already referred) were supported in the Order of Justice and again, as I have pointed out, no answer was filed. The question of whether Mrs. M 's report to the Children's Officers related to observed as opposed to reported facts we do not think important. What is clear is that after F's outburst at the Children's Service Offices in January, 1997, Mrs. M was alerted

by the office to what had been going on. She called for her husband to come back from work; she refused to let her children out to play and got police protection with a panic button and a mobile telephone. We think this is significant: it demonstrates the fear engendered at that time by F's uncontrolled outbursts of temper.

Mrs. Tina Baker, a psychologist of some experience, is helping S to come to terms with her past which includes, sadly, sexual abuse by her brother. She concludes her report as follows:

> *"I am concerned, however, that the potential contact with Z's father may undermine her progress which is a view based on the high degree of stress and even fear S reports at the prospect of such contact, not only in terms of her own safety but also in terms of the emotional and psychological disruption such contact is likely to have on Z as well as her brother B."*

So the question the Court is left with is this: can we be sure that if left alone - and I should point out there is no evidence of physical violence to Z or indeed ill-treatment - he will not lose his temper uncontrollably as before and, if so, what benefit would then accrue to Z? The Children's Officers were asked after the hearing and after listening to all the evidence if they wished to change their recommendations in the report namely that F should not have access and both were adamant that they did not wish to change their opinion as therein expressed. So far as F is concerned, they summed up his demeanour and his temper as follows:

> *"Mr. F can present as a considerate and polite man, however, the evidence suggests that this can quickly change, when he then exhibits a lack of self control in his violent and threatening outbursts. He appears to need to control people and situations and when thwarted, becomes agitated and intimidating even disregarding a court injunction. There is evidence to suggest that his behaviour and language implied a total disregard for the traumatic effect on the children who were present."* (Even though, they might have added, that was not his intention).

We agree that that assessment of F is reasonable. Looking at the authorities which I have reviewed briefly and considering all the evidence and bearing in mind the principles we have to apply this Court finds that there are cogent reasons for not at this time granting F access even supervised access. We say this firstly because of his uncertain temper; secondly, we are not sure if he has learned at this stage to control it; thirdly, the possible effect on access even supervised access on S and, through her, transmitted to Z; and, fourthly, we can see little benefit at this time to Z for such access. There can be little companionship in a very young child at this stage. But we will order that indirect access will be permitted, that is to say letters, presents and so on to keep him in touch. S has suggested that access should be allowed or looked at when Z is sixteen or seventeen. We think that would be far too late. When those who advise the Court on these matters are satisfied that F can control his temper, off-stage so to speak, that will be time enough to look at this matter again. The application, therefore, is refused. We confirm that maintenance will be paid at the rate of £20 per week at such place or by such arrangements

as the parties shall agree between them. We make no order for arrears or interest.

Authorities

P.M. Bromley: Family Law (7th Ed'n): pp.334-336.

Clarke Hall & Morrison: On Children Vol. 1: paras 217-220.

Re P (Contact: Supervision) [1996] 2 FLR 314 CA.

Re O (Contact: Imposition of Conditions) [1995] 2 FLR 124.

Re: R (A Minor) (Contact) [1993] 2 FLR 762.

Re: SM (A Minor) (Natural Father: Access) [1991] 2 FLR 333.

Re: D (A Minor) (Contact: Mother's Hostility) [1993] 2 FLR 1.

D -v- Hereford and Worcester County Council [1991] 2 All ER 177.

J -v- C [1970] AC 668.

Robinson -v- Robinson (1965) JJ 515.

de Jesus -v- de Sousa (17th June, 1985) Jersey Unreported.

W -v- H (23rd June, 1987) Jersey Unreported.

Thomas -v- O'Shea (22nd September, 1988) Jersey Unreported.

Harrison -v- Deeming (16th September, 1994) Jersey Unreported.

Children Act 1989.

M -v- M (Child: Access) [1973] 2 All ER 81.

Re: B (Minors: Access) [1992] 1 FLR 140.

Re: B (Minors) (Access) [1992] 1 FLR 148.

Re: W (A Minor) (Contact) [1994] 2 FLR 441.

Re: M (Contact: Welfare Test) [1995] Family Law (April) 174.

Re: M (a Minor) [1997] TLR.